[2019] SC (Bda) 56 Com (3 September 2019)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 099

BETWEEN:

CAT.SA

Plaintiff

-and-

PRIOSMA LIMITED

Defendant

Before:	**Hon. Chief Justice Hargun**
<u>Appearances</u>:	**Mr Mark Chudleigh and Mr Lewis Preston, Kennedys Chudleigh Ltd., for the Plaintiffs** **Mr Jan Woloniecki and Mr Nathaniel Turner, ASW Law Limited, for the Defendants**

Date of Hearing:	**14 August 2019**
Date of Ruling:	**3 September 2019**

RULING

Enforcement of New York Convention Arbitration Award; effect of challenge in the courts of the seat of arbitration; whether foreign court possessing "competent jurisdiction"; whether judgment of the foreign court gave rise to issue estoppel; whether enforcement should be stayed.

Introduction

1. On 28 March 2019, the Court made an ex parte Order that, pursuant to section 40 of the Bermuda International Conciliation and Arbitration Act 1993 (the" 1993 Act"), CAT. SA ("CAT"), the Plaintiff, be at liberty to enforce the arbitration award rendered by the arbitration tribunal comprised of Eric Evian, Alexandre Job and Bernard Mettetal, with its seat in Paris, France and dated 10 May 2016 (the "Award"), in the same manner as a Judgment or Order to the same effect.

2. There are two applications before the Court. The first is an application by Priosma Limited ("Priosma"), the Defendant, to set aside the ex parte Order dated 28 March 2019. Alternatively, Priosma seeks that the Order of 28 March 2019, be stayed pending either the determination of the appeal to the Cour de Cassation in the French arbitration proceedings and/or the determination of the proceedings in the Supreme Court of Bermuda captioned Civil Jurisdiction 2019: No 105. The basis for setting aside the enforcement of the Award is that there was no valid and binding arbitration agreement between the parties. The second application is brought by CAT for security in the event that the Court stays enforcement pending the determination of the appeal to the Cour de Cassation.

Background

3. CAT is a member of a group of French insurance and reinsurance companies, the Covea Group. Priosma is a Bermudian reinsurance broker.

4. On 16 February 2011, Mr Mark Terrey, acting as executive vice president of Kitson Brokerage Services Limited ("Kitson"), his previous employer, executed, on Kitson's behalf, a brokerage agreement with an arbitration clause with CAT relating to the reinsurance of Covea Group policies (the "Kitson Agreement"). The Kitson Agreement was in French and executed by Mr Terrey in Paris, France.

5. The Kitson Agreement expressly dealt with the issue of governing law and dispute resolution and provided as follows:

"4.6. Applicable law and arbitration
The contracting parties understand that any misunderstandings or disputes which should arise between them as to the validity, application or interpretation of reinsurance operations governed by this Agreement be resolved preferably by amicable resolution and by virtue of professional customs rather than by legal channels.

As a side note, they do however agree to refer to French law, in substance and in proceedings, with it being indicated that both provisions concerning reinsurance brokering activities as well as concerning lease of works may be applied, depending on the nature of services concerned.

In all instances, the parties expressly confirm to submit such dispute to arbitration, by virtue of the arbitration clause annexed herewith"

6. The arbitration clause annexed to the Kitson Agreement provided, inter-alia, as follows:

"1. Any dispute that might arise between the parties with regard to the Agreement to which this arbitration clause is appended, whether it concerns its formation, validity, interpretation, performance or termination, or whether the dispute arises during or after its period of validity, shall be referred to an arbitration court subject to the conditions set out below.

5. Unless otherwise agreed between the Parties, the Arbitration Court shall be composed of persons whose experience in insurance or reinsurance shall be not less than ten (10) years.

8. (a) The arbitrators shall judge in equity and according to the customs in the reinsurance rather than in strict and rigorous application of the law, it being specified that the provisions of French law, on substance and in procedure, shall apply on a suppletive basis.

7. At the time of signing the Kitson Agreement, Mr Terrey had maintained a professional relationship with the Covea Group for around 6 years.

8. Prior to September 2013, Mr Terrey left Kitson and set up his own company in Bermuda by the name of KBS International Limited, which later changed its name to Priosma.

9. Between September 2013 and November 2013, CAT gave notice to Kitson that Kitson would no longer provide brokerage services to CAT. Instead, it was agreed that Priosma would provide these services to CAT.

10. In three "brokerage of record" letters, dated 30 September 2013, 14 October 2013 and 19 November 2013, Mr Thierry Baron, a reinsurance manager in the Covea Group, provided "To Whom it may Concern" instructions, which were given to Priosma to assist them in taking over the services provided by Kitson, in the following terms:

> *"Attention: To Whom it may Concern*
>
> *Dear Sirs,*
>
> *RE: Reinsurance of COVEA (including the business of MMA/MAAF and GMF)*
>
> *With immediate effect, this letter confirms the appointment of KBS International Ltd as the broker of record for the placements of the TGN programs of the COVEA Group (to include the business of MMA, MAAF and GMF). This letter supersedes any similar authority that may have been previously issued to any other party or parties.*
>
> *In the interests of the Covea Group, we ask that all files and responsibilities pertaining to the above, held by Kitson Brokerage Services*

Limited be made available and transferred to KBS International Ltd from said date.

Kitson Brokerage Services Limited, will in turn be relieved of its responsibilities to service Covea and the associated companies on these programs.

This authority is granted from the above date and is valid until notified otherwise in writing by the COVEA Group."

11. On 30 September 2013, Mr Baron also sent an email to Mr Terrey headed *"Transition of the business"* which stated:

"As already discussed

The economical consequences of the transitioning of business are beared [sic] *by KBS INTL* [Priosma]

The economical conditions on the business transitioned and on the renewal programme as at 1/10/2013 remains equivalent in its financial aspects with the former contracts (ie 5% rebate to CAT as acting as co-broker)"

12. On 12 October 2013, Mr Terrey sent an email to Mr Baron in which he stated:

"it would be helpful to have copies of the CAT SA Agreements that have been signed by both parties (CAT SA and Kitson's) for our records as we process this smooth transition accordingly…

We recognise your wish for us to enter into a more simplified agreement with CAT SA based on the short email we received from you when acknowledging our appointment to and have no objection to such based on the principles arising."

13. Priosma proceeded to provide services without further negotiation. On 17 November 2014, CAT sent an itemised statement of sums due from Priosma for the attention of Mr Terrey in the sum of €604, 855.

14. On 24 December 2014 Mr James Cullen, a director of Priosma replied:

> *"Thank you so much for your kind assistance in providing necessary paper work and signatures to facilitate the payment to CAT SA. We are very nearly there, you will recall that the gentleman responsible for our compliance matters… has for some time made the point that there existed no formal agreement between KBS and CAT SA and further that it was under the direct instruction from the COVEA Group, that there should be a relationship.*
>
> *… In order to be proactive and ease your undoubted frustration, as well as satisfying our own CFO…and Boards desired to be compliant, would you be so good as to review the attached document which I believe addresses the necessary agreements between all 3 companies (COVEA, CAT SA and KBS)"*

15. The attached agreement drafted by Kitson dealt with issue of governing Law and dispute resolution and provided as follows:

> *"5. Governing Law And Jurisdiction*
>
> *This Agreement shall be governed by and interpreted according to French law. Any dispute relative to the validity, interpretation or execution of this Agreement shall be referred to the exclusive competence of the French Courts".*

16. CAT refused to sign the draft agreement. In reply by email, dated 20 January 2015, Mr Elbilia of Covea's legal department stated:

"You will find enclosed the brokerage agreement between CAT SA and Kitson (signed by Mr Mark Terrey) and Mr Terrey's email acting the change of intermediary (KITSON/KBS International [Priosma] *regarding the application of the broker agreement (with KITSON) still in force. We also remind you that the 8th December 2014 we sent you the "Business Entity Information" filled as required it in order to obtain the payment that we still have not received yet…*

Consequently, unless we obtaining the payment of the amount due to CAT SA 616,012,78 EUR before 8 days (enclosed detail of amount due), we inform you that we appoint our Lawyer on this matter"

17. On 21 January 2015, Mr Terrey replied by email to Mr Elbilia, referring again to compliance and internal audit requirements and stated that *"may we express our entire dismay that you expressed the belief that the dispute exists".*

18. On 13 February 2015, Mr Maksymetz, Priosma's 's CFO, stated in an email to Mr Elbilia:

"We are unable to execute the contract as presented as it does not reflect the terms of the agreement made. In light of this, we look forward to make payment of €606, 958 in good faith recognising the simple terms of the agreement between Mr Mark Terrey and Thierry Baron via 30-09-13 email, where brokerage of 5% (50% share of total brokerage) payable to CAT SA acting as a co-broker was agreed to"

19. On 23 February 2015, Mr Maksymetz further explained the position on behalf of Priosma as follows:

"We can confirm that we have had the amount of €606, 958 placed into escrow on behalf of the client, SA, and we are working with a compliance

team to ensure all outstanding matters are attended to thus protecting all parties to the transaction"

20. On 11 March 2015, Mr Terrey stated in an email to CAT SA's French legal counsel:

> *"We are and have always been happy to make payment of what we calculate is due to CAT SA, we do not however feel we should make any payment until the formal agreement that backs up the payment has been finalised and agreed by both parties…"*

The arbitration proceedings and the Award

21. CAT commenced arbitration proceedings against Priosma on 1 September 2015, and those proceedings were fully contested. In particular, Priosma, who were represented by French legal counsel, contested the existence of the arbitration clause binding it to CAT and the jurisdiction of the arbitral tribunal which was constituted pursuant to it. Priosma took the position that the Kitson Agreement, which contained the arbitration clause, was not binding upon Priosma. Priosma argued that its contractual relations with CAT were separate and independent from the agreement which existed between CAT and Kitson.

22. On 10 May 2016, the arbitration tribunal published its Award. It considered Priosma's jurisdictional arguments and rejected them. The tribunal found that having regard to the evidence adduced that Priosma had taken over Kitson's obligations towards CAT, and that, as a matter of French law, Priosma was bound by the arbitration clause. The tribunal stated:

> *"The Arbitral Tribunal points out that Priosma does not contest (i) having succeeded to KBS Ltd as broker - as this follows from the Respondents exhibits…(ii) that it became reference broker, and (iii) consequently represented the COVEA Group companies, of which CAT SA is the captive*

broker, for the placing of reinsurance programs initially entrusted to KBS Ltd.

Well-established French case law considers that in the case of the assignment of an agreement, the assignee is bound by the arbitration clause…

In this respect, the "whereas" of the Court of Cassation [French Supreme Court for civil and criminal matters] in a decision of the 1st civil chamber of 8 February 2000 (appeal no.95-14330) must be quoted:

> *"But whereas the international arbitration clause is binding on any party succeeding to the rights of one of the co-contracting parties; the Court of Appeal [Cour d'Appel], after having held that by the agreement of 20 December 1979 the Omnia company was substituted for the Taurus and Beta companies in its function as agent, accurately deduced therefrom that the arbitration agreement stipulated in the agency of 9 February 1965 was to apply with respect to the substituted agents"*

It follows from the aforementioned case law that the arbitration clause stipulated in an international agreement is binding with respect to the assignee of the agreement without it being necessary to determine whether the assignee gave special consent to such clause."

23. Having made the jurisdictional finding, the arbitration tribunal reduced CAT's Award by €50,000 utilising its *amiable compositeur* powers to take into account various communication complaints Priosma had levelled against CAT and ordered Priosma to pay CAT the sum of €556, 958 with interest from the date of the Award, making no order as to costs and dismissing all other complaints.

Judgment of the Paris Court of Appeal

24. On 10 June 2016, Priosma appealed the Award to the Paris Court of Appeal. Once again Priosma contended that it was not a party to any relevant arbitration agreement. Priosma argued that the brokerage of record letters make no reference to the arbitration clause stipulated in the appendix to the brokerage agreement between CAT SA and Kitson dated 16 February 2011. Accordingly, Priosma contended that it did not consent to that clause and there has been no demonstration of any contract assignment involving transmission of the arbitration clause between the former broker Kitson and itself which was contained in the co-brokerage contracts concluded between CAT SA and Kitson.

25. The Paris Court of Appeal rejected Priosma's core contention and held that it was indeed bound by the arbitration clause appearing in the appendix to the Kitson Agreement:

> *"Considering that on 16 February 2011, CAT SA, the captive reinsurance brokerage company of the COVEA Group concluded a co-brokerage agreement with Kitson Brokerage Services Ltd (KBS Ltd), a reinsurance brokerage company subject to Bermuda law, for the placement of certain reinsurance programs on the Bermuda market; that this agreement contained an arbitration clause;*
>
> *That, in 2013, an employee of KBS Ltd, Mr Mark Terrey, defected in order to create a new reinsurance brokerage company registered in Bermuda, named KBS International Ltd, then renamed Priosma Ltd;*
>
> *That in a letter dated 30 September 2013, the COVEA Group appointed this new company as a replacement for the KBS company, specifying that the financial terms remained identical, namely the retro session of 5% of the commissions to CAT (namely one half of the 10% commission earned by Priosma); that this appointment, accepted on the same day by KBS International, did not contain any clause for the settlement of disputes;*

Considering that Priosma maintains that the contract which it concluded with the COVEA Group results exclusively from the terms of the letter dated 30 September 2013, which only refers to the financial terms in the agreement dated 16 February 2011, and therefore did not have the effect of incorporating into the new contract the other stipulations of this agreement and, in particular, arbitration clause;

But considering that the letter dated 30 September 2013 insists on confirming the appointment of KBS International Ltd in the capacity of broker for the placement of the COVEA Group's TGN programs and on ordering the transfer of the company of all the files and responsibilities held by KBS Ltd, the company email specifying that the financial terms remained those which had been agreed with the previous co-contractor;

Considering that the letter and the email do not define the very purpose of the contract, namely the content of the assignment entrusted to KBS International, nor the rights and obligations of the parties, other than the amount of the commission; that the 2013 contract is deprived of substance without its reference to all stipulations of the 2011 contract, the content of KBS International therefore necessarily related to this ensemble, including the arbitration clause;

Considering that the argument based on the lack of competence of the arbitration tribunal must therefore be set aside an appeal for cancellation dismissed".

Further appeal to the Cour de Cassation

26. On 24 September 2018, Priosma issued its appeal to the French Cour de Cassation. This further appeal is based upon the same contention that Priosma is not a party to any relevant arbitration agreement and that arbitration clause appearing in the annex to the Kitson Agreement has not been legally transferred to

the contractual relationship evidenced by the three brokerage of record letters. This appeal is presently pending.

Application to set aside the recognition Order dated 28 March 2019

27. Priosma's grounds for resisting the enforcement of the Award are set out in Mr Terrey's affidavit dated 8 April 2019. Once again, Mr Terrey argues that there was no written agreement between Priosma and CAT in 2013 or any time thereafter. He says that Priosma was not a party to the co-brokerage agreement between Kitson and CAT; accordingly, Priosma was not bound by the arbitration clause in that co-brokerage agreement. It will be seen that this is the identical argument which Priosma unsuccessfully pursued before the arbitration tribunal and the Paris Court of Appeal. The same argument is being pursued in the final appeal presently pending before the Cour de Cassation.

28. CAT's primary submission to this Court is that the issue whether the arbitration clause appearing in the Kitson Agreement is incorporated in the contractual relationship between CAT and Priosma has already been determined by the Paris Court of Appeal. As noted above (paragraph 25) the Paris Court of Appeal has held that the 2013 contract (between CAT and Priosma) is deprived of substance without reference to all stipulations of the 2011 contract (between CAT and Kitson) including the arbitration clause.

29. CAT submits that having regard to the binding decision of the Paris Court of Appeal it is no longer open to Priosma to seek to reopen the very same issue in the present enforcement proceedings in this Court. CAT argues that the decision of the Paris Court of Appeal constitutes an *issue estoppel* with the legal consequence that Priosma is not able to reopen the very same issue in these enforcement proceedings.

30. In *The Sennar (No.2*) [1985] 1 WLR 490, the House of Lords confirmed that a decision of a foreign court relating to the issue whether an arbitration agreement existed could properly be the subject matter of an *issue estoppel* and the English

Courts would not allow a party to reopen that issue in the subsequent English proceedings between the same parties. Lord Diplock explained at 493F:

> "*It is far too late, at this stage of the development of the doctrine, to question that issue estoppel can be created by the judgment of a foreign court if that court is recognised in English private international law as being a court of competent Jurisdiction. Issue estoppel operates regardless of whether or not an English court would regard the reasoning of the foreign judgment as open to criticism. Although in the instant case some 15 days were taken up by oral argument in the courts below, together with voluminous citation of authorities, nevertheless the facts appear to me to present a case to which the now well-established doctrine of issue estoppel resulting from a foreign judgment incontestably applies.*
>
> *To make available an issue estoppel to a defendant to an action brought against him in an English court upon a cause of action to which the plaintiff alleges a particular set of facts give rise, the defendant must be able to show: (1) that the same set of facts has previously been relied upon as constituting a cause of action in proceedings brought by that plaintiff against that defendant in a foreign court of competent Jurisdiction; and (2) that a final judgment has been given by that foreign court in those proceedings.*
>
> *It is often said that the final judgment of the foreign court must be "on the merits." The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction."*

31. Counsel for Priosma challenges the application of *issue estoppel* resulting from the decision of the Paris Court of Appeal on the sole ground that the Paris Court of Appeal was not a court possessing "competent jurisdiction".

32. For purposes of enforcing a foreign judgment in this Court (constituting either *res judicata* or *issue estoppel*), it is an essential condition that the foreign court exercises jurisdiction over the defendant in the international sense. The Bermuda Court would recognise a foreign court to be a court of competent jurisdiction over the defendant if the defendant was present or submitted to the jurisdiction of that foreign court.

33. Priosma has no relevant connection with France for purposes of considering whether the French Courts possessed "competent" jurisdiction over it other than the fact that Priosma invoked the jurisdiction of the Paris Court of Appeal by seeking to set aside the Award. Ordinarily commencing voluntary court proceedings in a foreign court would constitute voluntary submission to the jurisdiction of that court. Counsel for Priosma submits that in this case there was no such voluntary submission because Priosma was merely seeking to vindicate its position that the arbitration tribunal had no jurisdiction. Counsel argues that Priosma's appearance before the Paris Court of Appeal is akin to a party appearing in a foreign court to protest that the foreign court does not possess jurisdiction and such an appearance does not constitute voluntary submission. Counsel relies upon certain observations of Ground CJ in *Arabian American Insurance Company (Bahrain) EC v Al Amana Insurance and Reinsurance Company Limited* (Supreme Court of Bermuda Civ. Jur. 1993, No. 38). In particular, Counsel relies upon the following passage:

> *"The common law, as established by the English Court of Appeal's decision in Henry v Geoprosco International Ltd [1976] QB 726, was that an appearance to contest jurisdiction on the basis that a discretion should be exercised against claiming jurisdiction constituted submission. That decision left open the question whether an appearance to contest the exercise of the jurisdiction constituted submission. That decision has been*

much criticised, and I frankly have doubts as to whether it would, or should, now be followed. Certainly I consider that, if it is to be followed, it should be limited strict ratio decidendi."

34. In my judgment there are material differences between a defendant appearing in a foreign jurisdiction to contest the jurisdiction foreign court and a party invoking the jurisdiction of the foreign court for the purposes of obtaining a judgment in its favour that the arbitration tribunal had no jurisdiction on the ground that there was no valid arbitration agreement between the parties.

35. First, to make the obvious point, the Paris Court of Appeal, the foreign court, had not asserted jurisdiction over Priosma and, in the circumstances, this was not a case where it can reasonably be suggested that Priosma was appearing in that court to contest that court's jurisdiction.

36. Secondly, whilst the arbitration tribunal had made an Award adverse to the commercial interests of Priosma, there was no legal necessity requiring Priosma to commence proceedings challenging the Award in the French courts, the supervisory courts of the seat of the arbitration. Neither the New York Convention nor the 1993 Act imposes any obligation on a party resisting the enforcement of an award to apply to set aside the Award in the courts of the seat of arbitration. Priosma could have challenged the Award in the Bermuda courts, the enforcing jurisdiction, on the basis that Priosma was not a party to the arbitration agreement. As observed by Lord Mance in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, at [23]:

> *"In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the Government's deliberate decision not to institute proceedings in France to challenge the tribunal's jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the*

Government's recent application to set aside the tribunal's awards in France. But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

Lord Collins made the same point at [131]:

> *"The power to enforce notwithstanding that the award has been set aside in the country of origin does not, of course, arise in this case. The only basis which Dallah puts forward for the exercise of discretion in its favour is the Government's failure to resort to the French court to set aside the award. But Moore-Bick LJ was plainly right in the present case (at para 61) to say that the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction. There is certainly no basis for exercising the discretion in this case."*

37. In the circumstances the actions of Priosma in commencing court proceedings in the Paris Court of Appeal were purely voluntary and optional. There was no legal obligation upon Priosma to seek to challenge the Award in the courts of the supervisory jurisdiction. In the ordinary case a person who begins proceedings in a foreign court necessarily submits to the jurisdiction of that foreign court. The act of commencing proceedings in the foreign court is equated with voluntary submission by that party to the jurisdiction of that court (See: Paragraph 11-126 of Dicey, Morris & Collins: The Conflict of Laws, 15th edition).

38. In *Dallah* the Court of Appeal and the Supreme Court recognised that the proceedings to challenge the award taken in the courts of the supervisory jurisdiction may give rise to *issue estoppel* when subsequent enforcement proceedings are commenced in the courts of another jurisdiction. In this regard Moore-Bick LJ said at [56]:

> *"It is in my view clear that the purpose of article V(I) of the Convention was to preserve the right of the party to a foreign arbitration award to challenge enforcement on grounds that impugn its fundamental validity and integrity. The fact that it has not been challenged or that its challenge has failed in the supervisory court does not affect that principle, although a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record"* (emphasis added).

In the Supreme Court Lord Mance made the same point at [29]:

> *"Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see The Sennar (No. 2) [1985] 1 WLR 490). But that is a matter for the French courts to decide.*

To the same effect is Lord Collins at [98]:

> *"Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat*

may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought.

39. In the circumstances the conclusion I have come to is that the decision of Priosma to challenge the Award in the Paris Court of Appeal amounts to voluntary submission to the jurisdiction of that court and as a consequence the Paris Court of Appeal was a court of competent jurisdiction. It follows therefore that any judgment given by that Court is capable of constituting *issue estoppel* in any subsequent proceedings to enforce the Award in another jurisdiction.

40. The Paris Court of Appeal held that the 2013 contract between CAT and Priosma is deprived of substance without its reference to all the terms of the 2011 contract between CAT and Kitson, the consent of Priosma necessarily related to all the terms of the 2013 contract including the arbitration clause.

41. The issue raised in the Bermuda enforcement proceeding is identical to the issue which has already been determined by the Paris Court of Appeal. In the circumstances the judgment of the Paris Court of Appeal gives rise to an *issue estoppel* and I hold that this Court is bound by the decision of the Paris Court of Appeal on this issue. As this is the only ground for seeking to set aside the Award it necessarily follows that the challenge by Priosma to the enforcement of the Award fails and I so order.

42. The decision I have arrived at is, I believe, consistent with the pro-enforcement policy underlying the New York Convention and the 1993 Act generally. The 1993 Act embodies *"a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself"* (Gross J in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 723, [11]). This policy favours finality of the arbitration awards. To allow the unsuccessful party to litigate the same issue in the courts of the supervisory jurisdiction and also in the courts of the enforcing jurisdiction would appear to be contrary to this underlying policy. This underlying policy of finality and speedy enforcement is not advanced if Priosma is allowed to

challenge the Award on the ground that there was no relevant arbitration agreement in the Paris Court of Appeal and the Cour de Cassation (in the supervisory jurisdiction), followed by identical challenge on the same ground in the Supreme Court of Bermuda, the Court of Appeal for Bermuda and the Privy Council (in the enforcing jurisdiction).

Conclusion on the setting aside

43. For the reasons given above I have come to the view that it is not open to Priosma to reopen the issue, whether Priosma is a party to a relevant arbitration agreement, on the basis that this issue has already been determined by a court of competent jurisdiction, namely, the Paris Court of Appeal. Accordingly, Priosma's application to set aside the Order made by this Court on 28 March 2019 is hereby dismissed.

Alternative basis

44. Counsel for CAT invites the Court to conclude that, irrespective of the application of the doctrine of *issue estoppel*, the arbitration agreement is binding upon Priosma and CAT.

45. In light of the Court's decision that the decision of the Paris Court of Appeal constitutes an *issue estoppel* and that the decision is binding on this Court, this issue does not strictly speaking arise. However, as the issue has been argued I set out my views briefly.

46. On behalf of Priosma it is said that the factual and legal position is very simple: Priosma was not a party to the Kitson Agreement dated 15 February 2011 between Kitson and CAT SA and there was no written agreement between Priosma and CAT SA signed in 2013, or at any time thereafter, and no agreement to arbitrate in France.

47. Counsel for Priosma submits that the relevant contractual documents are three broker of record letters dated 30 September 2013, 14 October 2013 and 19 October 2013, and he submits that they are governed by Bermudian law as the legal system with which they have the closest and most real connection. In support of the latter submission, he relies upon the fact that the three letters are written in English giving instructions to Priosma to replace Kitson Brokerage Services Limited as broker of record in Bermuda on behalf of the Covea Group and place reinsurance contracts with the Bermuda market. Counsel submits that as a matter of Bermuda law, it is difficult to see how the arbitration clause annexed to the Kitson Agreement becomes binding upon Priosma in relation to its contract with CAT.

48. On behalf of CAT it is said that the three broker of record letters do not set out the entirety of the contractual relationship between Priosma and CAT. Indeed, it is said that the broker of record letters are really for the benefit of third parties who can be assured that Priosma has the necessary legal authority to act on behalf of the Covea Group. The contractual relationship is to be gathered from the entirety of the correspondence exchanged between the parties.

49. In the email dated 30 September 2013 Mr Baron, on behalf of CAT, advised Mr Terrey in relation to the "*transition of business*" and stated that the economic terms will remain equivalent in its financial aspects *"with the former contract (i.e. 5% rebate CAT SA as co-broker)".* It is reasonably clear that the commercial terms of the succeeding contractual relationship between Priosma and CAT were exactly the same as the contractual relationship between Kitson and CAT under the *"former contract"*

50. Indeed, by his email of 12 October 2013, Mr Terry asked for "*copies of the CAT SA Agreements that have been signed by both parties (CAT SA and Kitson's) for our records".* The former agreement provided for French law as the governing law of the agreement and any disputes to be resolved by way of arbitration.

51. With the email dated 24 December 2014 Mr James Cullen, a director of Priosma, offered a draft contract to formalise the position which he stated *"satisfies our [Priosma's] own CFO...and the Board's desire to be compliant"* It is to be noted that under this draft agreement, which apparently complied with the wishes of Priosma's CFO and the Board, it was provided that "*This Agreement shall be governed by and interpreted according to French law. Any disputes relative to the validity, interpretation or execution of this Agreement shall be referred to the exclusive competence of the French Courts"*.

52. CAT refused to sign the draft agreement and by email, dated 20 January 2015, Mr Elbilia enclosed the Kitson Agreement which, according to CAT, was "*still in force"*.

53. Accordingly, it appears that by 24 December 2014, CAT had provided Priosma with a copy of the Kitson Agreement (which was acceptable to CAT and provided for French law and arbitration in France) and a draft agreement had been provided by Priosma to CAT (which was acceptable to Priosma and provided for French law and French courts). By 24 December 2014, both parties appear to agree that the agreement should be governed by French law. It is not surprising that both parties opted for the express choice of French law as the governing law given the obvious connection of the underlying transaction with the French jurisdiction. The Covea Group is based in France; CAT SA, the co-broker is based in France; the currency of the brokerage commissions appears to be Euro; and the previous relationship between CAT SA and Kitson was governed by French law.

54. It is to be noted that during this period neither CAT nor Priosma suggested that their contractual relationship should be governed by Bermuda law.

55. In the circumstances, the contractual relationship between CAT SA and Priosma, in my judgment, is to be governed by French law and not by the laws of Bermuda. On the basis that French law is the governing law of the parties' contractual relationship the Court has the benefit of the decision by the Paris Court of Appeal as to the appropriate result under French law. Accordingly, I would hold that

applying French law, following the reasoning and decision of the Paris Court of Appeal, the arbitration clause appearing in the annex to the Kitson Agreement is part of the contractual terms binding CAT and Priosma to provide the services outlined in the three letters of brokerage of record. On this basis again I would refuse to set aside the enforcement Order dated 28 March 2019.

Stay and Security

56. Counsel for Priosma submits that if the Court is not minded to set aside the Order dated 28 March 2019 then, as a matter of fairness, the Court should stay the enforcement proceedings pending the outcome of the final appeal to the Cour de Cassation challenging the validity of the Award.

57. Counsel for CAT submits that if this Court is minded to grant a stay of the enforcement proceedings pending the outcome of the appeal to the Cour de Cassation, then Priosma should be required to provide security for the sum ordered to be paid under the Award.

58. In *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005] EWHC 726, Gross J considered the general approach of the court to staying enforcement proceedings in relation to Convention awards and said at [15];

> *"In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a*

sliding scale, in any event embodied in the decision of the Court of Appeal in Soleh Boneh v Uganda Govt. *[1993] 2 Lloyd's Rep. 208 in the context of the question of security:*

"....two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult...if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened. "
Per Staughton LJ, at p.212

59. In his affidavit dated 8 April 2019 and sworn on behalf of Priosma, Mr Terrey, referring to the fact that Priosma has now appealed to the final Court of Appeal, Cour de Cassation, confirms that he is advised by French counsel that there are good arguable grounds of appeal as a matter of French law. In all the circumstances, I consider it appropriate and just that enforcement proceedings in Bermuda should be stayed pending the determination of the existing appeal to Cour de Cassation or until further order.

60. However, I do not consider that it would be appropriate to grant such a stay without the provision of any security for the amount payable under the Award. I consider that as a condition for the grant of the stay pending the outcome of final appeal in France, Priosma should provide security, acceptable to the attorneys acting for CAT, for the sum of €556, 958 ordered to be paid by Priosma to CAT under the Award. This security may be provided by a suitable undertaking given by the attorneys acting for Priosma or by the establishment of a suitable escrow account.

61. I consider that it is appropriate to order security to be provided for the following reasons. First, the pre-arbitration correspondence clearly shows that there was no real dispute that Priosma accepted that the amount claimed by CAT by way of commission was payable by Priosma to CAT.

62. Second, Priosma itself offered to provide security whilst the issue of regulatory compliance was sorted out. In his email of 25 February 2015 to Mr Elbilia, Mr Maksymetz, CFO of Priosma, advised CAT that "*we have had the amount of €606, 958 placed into escrow on behalf of the client, CAT SA, and we are working with our compliance team to ensure all outstanding matters are attended to that protecting all parties to the transaction*"

63. Third, it was a matter of surprise and concern to be advised by counsel for Priosma during this hearing that despite the terms of the email of 25 February 2015, referred to above, no escrow account was in fact established.

64. Fourth, in proceedings commenced by Renaissance Reinsurance Ltd ("Renaissance Re") against Priosma in this Court (Civil Jurisdiction, 2019 No. 245) it is alleged that Priosma, in breach of its fiduciary duties, executed 20 separate bank transactions to transfer approximately $2 million from the Fiduciary Account and placed those funds into its general account and the whereabouts of the $2 million are unknown. In those proceedings Renaissance Re has obtained a freezing injunction restraining Priosma from removing from Bermuda any of its assets in Bermuda up to the value of $10 million or in any way dispose of, deal

with or diminish the value of any of the assets whether they are in or outside Bermuda up to the same value.

65. Having regard to these considerations I consider that it is appropriate that Priosma should provide security, to the reasonable satisfaction of attorneys for CAT, in the amount of €556, 958.

Conclusion

66. For the reasons set out in this Ruling I refuse to set aside the enforcement Order dated 28 March 2019. However, the Court is prepared to stay the enforcement proceedings in this Court including the Order of 28 March 2019, conditional upon Priosma providing satisfactory security in the amount of €556, 958 by or before 11 October 2019.

67. I will hear counsel in relation to the issue of costs, if necessary.

Dated 3 September 2019

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NARINDER K HARGUN

CHIEF JUSTICE