

Important Privy Council Ruling on Enforcement of An Arbitration Award and Article V Of the New York Convention

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The Privy Council has delivered a decision on issues that arise where enforcement is sought of an arbitration award which has already been the subject of a challenge before the courts of the seat of arbitration. Most significantly, the Privy Council addressed the topics of issue estoppel and of due process especially in the context of awards obtained in civil law jurisdictions.

As different decision-makers become involved in the recognition and enforcement of an arbitration award, the question arises: how reasonable is it for a procedural fairness challenge, that has already been determined by the court of the seat of arbitration, to be re-argued and decided afresh before different decision-makers?

In *Gol Linhas*¹, the Privy Council (on appeal from the Cayman Islands Court of Appeal) evaluated the New York Convention² (the Convention) and upheld an order for the enforcement of an arbitration award made by an ICC arbitration tribunal seated in Brazil.

THE FACTS

A dispute between the parties arose concerning a share purchase agreement (SPA). The SPA contained an arbitration agreement providing for ICC arbitration in Brazil. The governing law of the SPA and of the arbitration agreement was Brazilian law.

Gol Linhas, a Brazilian airline company, commenced an arbitration against three private equity fund entities (the Funds). In the Brazilian ICC arbitration, *Gol Linhas* alleged that the Funds committed fraud, constituting “abuse of legal personality”, justifying lifting the corporate veil under Brazilian law. Although the tribunal found in *Gol Linhas*’ favour, it did so on a different legal basis to that argued by *Gol Linhas*, namely “third party malice” under article 148 of the Brazilian Civil Code.

The Funds challenged the arbitration award before the courts in Brazil, as the seat of arbitration, on a number of grounds including that there was no arbitration agreement and that there was a lack of due process as a result of the tribunal’s reliance on the un-argued concept of “third party malice”. However, the Funds unsuccessfully exhausted all rights of recourse and appeal in Brazil.

Gol Linhas originally sought and obtained permission to enforce the arbitration award against the Funds in the Cayman Islands. That order was subsequently set aside. The Cayman Islands Court of Appeal allowed Gol Linhas' appeal, finding (amongst other things) that the Funds were estopped from challenging the Brazilian court decisions. The Funds further appealed to the Privy Council.

APPEAL BEFORE THE PRIVY COUNCIL AND THE DECISION

1. Validity of the arbitration agreement and the doctrine of issue estoppel

The Funds challenged enforcement of the arbitration award on the basis that they never agreed to arbitration of the dispute because they were not party to the arbitration agreement. Gol Linhas argued that this issue had already been decided by the courts of Brazil, which found against the Funds. The Privy Council agreed and found that the requirements of an issue estoppel had been established. The court explained that the doctrine of issue estoppel supports the vital public policy of finality and ensures that the same parties should not have to argue the same issue twice.

Importantly, the court noted that a foreign judgment which satisfies the requirements for recognition at common law "cannot be impeached for any error either of fact or law... It is therefore irrelevant whether the domestic court would regard the reasoning of the foreign judgment as open to criticism or even as "manifestly wrong". On this issue, the Privy Council also concluded that it was not relevant that a foreign court system (here, that of Brazil) applies different rules of evidence or has a different procedure, unless this deprives the judicial process of the quality of substantial justice.

2. Due process

The Funds next sought to challenge enforcement on the basis that the tribunal's decision to adopt a legal basis for the arbitration award which was not raised by Gol Linhas throughout the arbitration amounted to a serious breach of natural justice or lack of due process, such that the Funds were "unable to present [their] case" under Article V(1)(b) of the Convention. The Funds argued that, in these circumstances, enforcement would be contrary to public policy of the Cayman Islands.

The Privy Council decided that the failure of the Brazil-seated ICC tribunal to invite the Funds to make submissions on "third party malice" did not amount to a serious denial of procedural fairness which justified refusal to enforce the arbitration award:

- Applicable law - although the law which the court must apply when a party attempts to challenge enforcement of an arbitration award made in the territory of another state under the local equivalent of Article V(1)(b) of the Convention is a question of the local law (here, that of the Cayman Islands) that is not the end of the issue.
- The issue is not simply answered by applying local standards of what constitutes a fair procedure. In evaluating Article V(1)(b) of the Convention, the court should consider the domestic position as imposing a standard of due process capable of application to any international arbitration whatever the applicable procedural law and the nationality of the participants.
- The court should be seeking to identify and apply 'basic minimum requirements' which would generally, even if not universally, be considered throughout the international legal order as "essential to a fair hearing" (i.e., a serious violation of fundamental and generally accepted requirements of due process).

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- There are good reasons, such as the pro-enforcement object and purpose of the Convention, for treating Article V(1)(b) as infringed only if there has been a serious violation of fundamental and generally accepted requirements of due process.
 - The requirement in Article V(1)(b) that the party was “unable” to present its case (rather than just impeded or curtailed in doing so) signifies that the test is a difficult one.
 - The court accepted that to decide a case on the basis of a significant factual allegation or evidence of which a party has not been informed and given an opportunity to answer is fundamentally unfair. Whether the same approach should be applied to the legal basis on which a tribunal based its decision had to be looked at in context.
 - Brazil was a civil law jurisdiction where the courts/tribunals take a more proactive approach in applying the law, reflected in the doctrines of “iura novit curia” (the court knows the law) and “da mihi facta, dabo tibi ius” (give me the facts and I will give you the law). Although under the Brazilian approach, courts/tribunals could not go beyond the factual allegations made and relief claimed, they were entitled to adopt a different legal basis from those argued by the parties.

Applying these principles, the Privy Council reasoned:

- The factual basis on which tribunal reached its decision had been notified to the defendant and the defendant had been able to address it.
- The extent to which a court or tribunal is expected to give parties an opportunity to comment on a different legal basis which the tribunal plans to adopt, is a topic on which there is a range of views across the globe.
- Brazilian law was the procedural law of the arbitration and the parties were represented by Brazilian counsel. As such, the arbitration and award would be influenced by Brazilian procedural law and practice.
- The Brazilian courts had found that there was no violation of due process. It would be a very strong thing for an English or Cayman Islands court to find it contrary to the public policy of the law of the seat of arbitration to enforce an arbitration award which has been upheld by the courts of the seat: the courts with primary responsibility for ensuring the integrity of the arbitral process.

3. Scope of the Submission to Arbitration

Finally, the Funds sought to challenge enforcement on the basis of two arguments under Article V(1)(c) of the New York Convention: Firstly, that the subject matter of the arbitration award was beyond the scope of the submission to arbitration, which was limited to a non-compete covenant. In respect of this argument, the Privy Council held that as this issue had already been determined by the courts of Brazil, an issue estoppel had been created and, therefore, it was not open to the Funds to reargue this point. Secondly, that the arbitration award was outside the scope of the submission to arbitration as defined by the terms of reference for the arbitration. This argument was rejected by the Privy Council which held that the terms of reference should be given a liberal construction in keeping

with the purpose of arbitration to provide a flexible and effective means of resolving disputes and providing redress.

COMMENTARY

One of the messages arising from Gol Linhas is finality and pro-arbitration sentiment. Similar support for finality was expressed in the recent decision of the Privy Council in *Betamax* (see our alert [here](#)), which addressed the degree to which allegations of corruption argued in the local courts may impede the enforcement of arbitration awards.

The Gol Linhas case provides an excellent illustration of differences in legal systems across the globe, but also of the reconciliation of those differences through the recognition of the satisfaction of minimum requirements of fairness.

FOOTNOTES

¹ *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others (Appellants) (Cayman Islands)* [2022] UKPC 21.

² The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) provides a regime for the international recognition and enforcement of arbitration awards, and it is widely recognized to be the cornerstone of effective international arbitration (some 160 countries have implemented it).

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