Resisting enforcement of foreign arbitral awards: issue estoppel, procedural unfairness and scope of terms of reference (VRG v MP Funds)

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Arbitration analysis: VRG attempted to enforce a Brazilian arbitral award against the MP Funds in the Cayman Islands. The MP Funds resisted enforcement, contending: (1) that they were not a party to the arbitration agreement and were not estopped by reason of the decision of the Brazilian courts from disputing the arbitrators' jurisdiction; (2) the arbitration was procedurally unfair because the arbitral award was made on a legal foundation (ie Article 148 of the Brazilian Civil Code (BCC)) that the parties had not contended for; and (3) the dispute was outside of the terms of reference of the arbitration agreement on the grounds that it contemplated liability only pursuant to the contract between the parties, and not pursuant to Article 148 of the BCC. VRG sought to enforce the Brazilian arbitral award in the Cayman Islands. At first instance, the Grand Court refused enforcement. The Cayman Islands Court of Appeal allowed VRG's appeal. The MP Funds appealed the Judicial Committee of the Privy Council. The Privy Council rejected the MP Funds' appeal, allowing enforcement of the arbitral award against the MP Funds in the Cayman Islands. Written by Anna Peccarino, Dispute Resolution partner at Travers Thorp Alberga and Bryan W Little, senior associate at Travers Thorp Alberga.

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

What are the practical implications of this case?

This case is the first example of estoppel being applied by an appellate court based on unsuccessful challenges before the courts supervising the arbitration. It provides helpful guidance when assessing whether a foreign arbitral award may be subject to challenge at the enforcement stage based on alleged deficiencies in the foreign arbitrators' treatment of the issues in dispute. It gives an excellent overview of the nature and purpose of Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') dealing with refusal of recognition of foreign arbitral awards.

It also clarifies that liability may arise pursuant to a legal theory which was neither identified nor argued by the parties, provided that all of the facts necessary to support the legal conclusion were properly argued.

Note: Although decisions of the Judicial Committee of the Privy Council are not binding on English courts, they are of persuasive authority, as the Board of the Privy Council consists of leading justices of the UK Supreme Court applying English common law principles.

What was the background?

The first and second appellants (the 'MP Funds') are, respectively, a Cayman Islands exempted limited partnership and a Delaware limited partnership which together conduct business as a private equity investment fund with its headquarters in New York. The third appellant is the general partner of the two limited partnerships. The respondent is a Brazilian corporation which has been referred to in these proceedings by its former name of VRG Linhas Aereas SA ('VRG'). VRG is a company in a Brazilian airline group that conducts business under the name of Gol Airlines.

VRG's award against the MP Funds arose from the acquisition of Gol Airlines by VRG's legal predecessor from subsidiaries of the MP Funds. The acquisition took place pursuant to a Share Purchase and Sale Agreement governed by Brazilian law (the 'PSA'), which contained the arbitration agreement. The MP Funds were not parties to the PSA but had signed an addendum ('Addendum') to the PSA. The PSA provided a procedure for adjusting the purchase price after the purchase in order to reflect changes in the working capital shown in the accounts of the airline company. It was alleged that a director of the MP Funds had fraudulently manipulated the working capital figures. VRG brought a claim against the MP Funds pursuant to the arbitration agreement.

The MP Funds challenged the jurisdiction of the Brazilian arbitral tribunal claiming that they were not parties to the PSA. The tribunal found against them on this on the basis that it had jurisdiction over the MP Funds because they were parties to the Addendum, which was an integral part of the PSA. It then proceeded to make the award against them, amongst others. The MP Funds sought to set aside the award through the Brazilian courts but were unsuccessful, having exhausted their rights of appeal.

VRG obtained permission ex parte to enforce the award against the MP Funds in the Cayman Islands. That permission was set aside on the MP Funds' application. That order was itself set aside on appeal by the Cayman Islands Court of Appeal (CICA). The MP Funds appealed to the Privy Council as of right on the following grounds:

- first, the MP Funds maintained that there was no arbitration agreement so that the arbitral tribunal had no jurisdiction over the MP Funds

- second, they said that there had been a breach of natural justice and a fundamental unfairness in the arbitration because the Brazilian arbitrators had decided against the MP Funds on a legal basis (namely, application of a prohibition on 'third party malice' contained in Article 148 of the BCC) which was not in fact argued by the parties, and

- third, the MP Funds said that the award of tortious damages pursuant to Article 148 of the Brazilian Civil code was outside the ICC terms of the reference of the arbitration agreement, which was limited to loss flowing from breach of the contractual obligations between the parties

What did the Privy Council decide?

In relation to whether the MP Funds were parties to an arbitration agreement, the Privy Council found that the judgment of the Brazilian court met the common law requirements for issue estoppel. It had been argued that this issue had not in fact been decided by the Brazilian court in upholding the award because the Brazilian Courts, it was said, carried out no more than a superficial review of the arbitral tribunal's decision. Since the issue in the Cayman Islands was whether there was an arbitration agreement and not simply whether the arbitral tribunal had properly decided that question, no issue estoppel arose. The MP Funds argued that this question would only bind the Cayman Island Court if the Brazilian court decided the issue de novo. The Privy Council found on an analysis of Brazilian law (evident on the face of the Brazilian statutes and the expert evidence before the Board) that the Brazilian court had in fact decided de novo the question of jurisdiction as a legal issue. The CICA was correct, therefore, to hold that the MP Funds were estopped from arguing that they were not parties to any arbitration agreement.

In relation to procedural fairness, the Privy Council said that, although the question whether a foreign arbitral decision was procedurally unfair for the purposes of resisting enforcement was prima facie a matter of Cayman Islands law, the standard of fairness should be construed by reference to internationally accepted, broad principles of fairness. That is, the court should seek to identify and apply basic minimum requirements which would generally, even if not universally, be regarded throughout the international legal orders as essential to a fair hearing. In the present case, the parties had presented and argued the facts upon which the award was based, even if the legal reasoning underpinning the decision was not argued. Specifically, the primary factual allegation of fraud against the MP Funds' director was fully ventilated during the arbitration. There was a distinction between decisions based on factual allegations to which a party has not been given an opportunity to respond, which would be manifestly unfair, and decisions based on the legal consequences of those factual allegations. In general, a tribunal is entitled to develop its own legal reasoning which may lead it to adopt a different legal analysis from the arguments advanced by the parties. There was therefore no unfairness resulting from deciding the MP Funds' liability arose pursuant to the Brazilian Civil Code, rather than in contract.

Similarly, it was not offensive to Cayman Islands' public policy to allow recognition or enforcement of the award. Again, the argument about public policy was largely the same as the argument in relation to procedural fairness, which the Board had decided against the MP Funds. The Board was also persuaded by the fact that the highest court in Brazil was presented with and rejected the MP Funds' argument on procedural fairness.

In relation to the scope of the terms of reference, the Privy Council dismissed arguments that the parties' agreement to arbitrate was limited to claims for damages for breach of contract, and could not extend to an award of damages under Section 148 of the BCC for 'third party malice'. Given the Board's earlier finding that the MP Funds were estopped from disputing jurisdiction, and that the award was not procedurally unfair, this argument was given short shrift. Critically, in enforcement actions, the parties' terms of reference are generally to be construed broadly. Here, whether the award was for breach of contract, or for damages in tort (both quantified in the same amount), was a mere technicality. This type of technical discrepancy between the terms of reference and the Award made did not justify the application of article V(1)(c) of the New York Convention to refuse enforcement.

Case details

- Court: Judicial Committee of the Privy Council on appeal from the Court of Appeal of the Cayman Islands
- Judges: Lord Kitchin, Lord Hamblen, Lord Leggatt, Lord Lloyd-Jones and Sir Julian Flaux (Lord Hamblen and Lord Leggatt gave judgment for the court, with whom the other justices agreed)
- Date of judgment: 19 May 2022

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