The Privy Council clarifies principles relating to the enforcement of foreign arbitral awards

Insights - 10/06/2022

The Privy Council has handed down its much anticipated decision in *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 on the interpretation of Article V of the New York Convention. The Privy Council confirmed that an ICC arbitration award obtained in favour of Gol Linhas Aereas SA (**Gol**) for R$92,987,672 (the **Award**) was enforceable in the Cayman Islands and that the grounds upon which the appellants (the **MP Funds**) sought to challenge the Award had already been raised (and dismissed) before the courts in Brazil giving rise to an issue estoppel.

Ogier successfully acted for Gol with Leading Counsel, Tom Lowe QC of Wilberforce Chambers, and Gol's Brazilian counsel, Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados.

The decision addresses important questions with respect to enforcement of foreign arbitral awards which are the subject of robust challenge before the courts of a supervisory jurisdiction and will be of interest to all practitioners, especially those in common law jurisdictions who seek to enforce arbitral awards obtained in civil law jurisdictions.

Background facts

A detailed summary of the background to these proceedings is set out in our briefing summarising the Court of Appeal decision. [1] In short, the first and second appellants (the **MP Funds**) are a Cayman Islands exempted limited partnership and a Delaware limited partnership respectively, which together conduct business as a private equity investment fund, specialising in "distressed investing". The third appellant is the general partner (**General Partner**) of the two limited partnerships. Gol is a company in a Brazilian airline group that conducts business under the name of Gol Airlines.

A dispute arose between GoI and the MP Funds under a Share Purchase and Sale Agreement dated 28 March 2007 (**PSA**) for the sale of shares in the company which operated GoI Airlines. The MP Funds were not named as parties and did not sign the PSA but were signatories to an addendum which supplemented its terms. The PSA contained an arbitration agreement which provided that all disputes arising from or related to the PSA were to be resolved by arbitration, that the language of the arbitration shall be in Portuguese and that the place of arbitration will be the city of São Paulo. The arbitration agreement was also governed by the laws of Brazil.

GoI commenced an arbitration against not only the sellers under the PSA but also against the MP Funds, premised on inter alia a fraudulent manipulation of figures for working capital on which the purchase price under the PSA was based.

The MP Funds disputed the jurisdiction of the arbitral tribunal over them in circumstances where they were not parties to the PSA itself. This was rejected by the tribunal who in a preliminary decision held that the MP Funds had in effect added themselves as parties by agreeing to a non-compete covenant. The MP Funds contended that any submission to the arbitration could only relate to the non-compete covenant. GoI had argued that the MP Funds were liable for misusing the corporate veil.

In September 2010 the tribunal issued its final Award and in doing so found the MP Funds liable on the basis of the tort of third party malice pursuant to Article 148 of the Brazilian Civil Code. Neither the parties nor the tribunal had mentioned third party malice. The tribunal nevertheless made the finding under the civil law doctrine of "iura novit curia", a fundamental and well-known doctrine of Brazilian practice, which means that a court (as opposed to the parties) is charged with characterising the facts and applying the law to the facts.

The MP Funds challenged the Award before the supervisory court in Brazil on a number of grounds under the Brazilian Arbitration Act, arguing that there was no arbitration agreement, the Award was outside the scope of the arbitration agreement to which they were parties (the non-compete clause) and the terms of reference. They also argued that there was a lack of due process as a result of the tribunal's reliance on Article 148. These grounds were equivalent to those which were later used under Article V of the New York Convention, as the Privy Council observed. The MP Funds were unsuccessful at first instance and in their appeal to the São Paulo Court of Appeals. Their subsequent applications for leave to appeal to the Brazilian Supreme Court and Constitutional Courts were finally dismissed after 10 years.

First Instance and Cayman Islands Court of Appeal proceedings

GoI sought and obtained, on an ex-parte basis, leave to enforce the Award against the MP Funds and the General Partner in the Cayman Islands. However, the order was subsequently set aside by Justice Mangatal at the inter-partes stage.

The MP Funds challenged the enforcement of the Award before Justice Mangatal on various grounds, including that they were not parties to the arbitration agreement under the PSA and that the arbitral tribunal had decided the case on a legal basis (Article 148) that had never been pleaded or argued, such that it offends the principle of natural justice. GoI argued that the MP Funds were bound by issue estoppel based on the Brazilian court decisions. At first instance the judge upheld all the grounds of challenge and refused enforcement of the Award, setting aside the ex parte order. The Cayman Court of Appeal (**CICA**) allowed GoI's appeal on all grounds, finding among other things that the MP Funds were estopped from challenging the Brazilian court decisions handed down on the arbitrators' jurisdiction.

Decision of the Privy Council

The MP Funds filed an appeal to the Privy Council seeking again to challenge the enforcement of the Award. The issues considered by the Privy Council on the appeal were: (i) whether the CICA was wrong to find that the MP Funds were precluded by issue estoppel from resisting enforcement pursuant to Article V(1)(a) of the New York Convention on the ground that there was no arbitration agreement; (ii) whether the CICA was wrong to reject the natural justice argument under Article V(1)(b) and/or Article V(2)(b); (iii) whether the CICA was wrong to find that the award was not outside the terms of reference under Article V(1)(c) of the New York Convention.

First issue: validity of the arbitration agreement and the doctrine of issue estoppel

As referred to above, the MP Funds resisted enforcement of the Award on the basis that they purportedly never agreed to arbitration of the dispute because they were not party to the arbitration agreement. GoI submitted that this issue had already been decided adversely to the MP Funds by the Brazilian courts and that the decisions of the Brazilian courts were conclusive for the purposes of these proceedings as it falls within the doctrine of issue estoppel.

The Privy Council noted that the doctrine of issue estoppel supports the important public policy of finality in litigation and ensures that the same parties should not have to litigate the same issue twice, relying on *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No 2) [1967] 1 AC 853 for the proposition that issue estoppel can arise on the basis of a foreign judgment. To give rise to such an issue estoppel, three requirements must be satisfied with respect to the judgment: Firstly, the judgment must be (a) given by a court of a foreign country with jurisdiction to give it, and (b) final and conclusive on the merits. Second, the parties in the two actions must be the same. Third, the issue decided by the foreign court must be the same as the issue in the domestic proceedings.

The Privy Council 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".

With respect to the above requirements, the Privy Council concluded that:

1. the Brazilian Courts had jurisdiction to rule on the matter (consistent with the parties' agreement under the arbitration agreement). Whether the domestic court would regard the reasoning of the foreign judgment as open to criticism is irrelevant. Nor is it relevant that a foreign court system applies different rules of evidence or has a different procedure from the Cayman courts, unless this deprives the judicial process of the quality of substantial justice
2. the decision of the Brazilian Court was 'final and conclusive' given that the MP Funds' appeal was dismissed by the Supreme Federal Court in August 2020 and the MP Funds have had no further right of appeal in the Brazilian courts against the refusal of their application to set aside the Award
3. the parties were the same; and
4. it is clear that the grounds under the Brazilian Arbitration Act invoked by the MP Funds before the Brazilian court were the same as those under Article V even though expressed slightly differently. The issue in Brazil as under Article V(a) was whether or not the MP Funds were parties to an arbitration agreement. The Privy Council also held that this issue had been determined independently or de novo by the Brazilian court rather than as a form of review of the Tribunal's preliminary decision. Since this was a question of law there was no reason to leave out of account the reasoning of the Arbitrators in the preliminary award and it was not a question of undue deference

Second issue: due process

The second ground on which enforcement of the Award was resisted was on the basis that the tribunal's decision to adopt a legal basis for the Award which was not raised by GoI throughout the arbitration amounted to a serious breach of natural justice or lack of due process, such that MP Funds were "unable to present [their] case" under Article V(1)(b) of the New York Convention and section 7(2)(c) of the Foreign Arbitral Awards Enforcement Act 1975 (1997 Revision) (1975 Act) on the ground that it would be contrary to the public policy of the Cayman Islands to enforce the Award in such circumstances. Although Mangatal J agreed, the Court of Appeal rejected the challenge.

The Privy Council essentially devised an international standard of due process which could be developed and applied by any jurisdiction. It noted that before determining this issue, it was necessary to identify the system of law and the standard which the court should apply in answering this question. The Privy Council undertook an analysis and comparison of the standards of procedural due process to which foreign arbitral awards are subject in various

jurisdictions (noting that there was little authority on the question in England and Wales). It reasoned that:

1. although the law which the court must apply when a party seeks to challenge enforcement of an arbitral award made in the territory of another state under the local equivalent of Article V(1)(b) is a question of the local law (as decided in Cukurova Holding AS v Sonera Holding BV [2014] UKPC 15), here that of the Cayman Islands, that is not the end of the matter
2. the question is not to be answered by applying local standards (Cayman standards) of what constitutes a fair procedure. In interpreting and applying Article V(1)(b) of the New York Convention, as transposed into English or Cayman law, the court should regard the domestic statutory provision as imposing a standard of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants
3. this does not mean that the court should be seeking to identify the lowest common denominator of standards required by different national systems. But it does mean that the court should be seeking to identify and apply basic minimum requirements which would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing (to treat Article V(1)(b) as infringed only if there has been a serious violation of fundamental and generally accepted requirements of due process)

In the context of the proceedings, the Privy Council 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. However, whether the same approach should be applied to the legal basis on which a tribunal based its decision was not straightforward. The question had to be looked at in context. Here the case was commenced in Brazil, a civil law jurisdiction where the courts and 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 and arbitrators could not go beyond the allegations of fact made and relief claimed by the parties they were entitled to adopt a different legal basis from those argued by the parties.

The Privy Council was not persuaded that the failure of the tribunal to invite the MP Funds to comment on whether the facts alleged by GoI fell within Article 148 of the Civil Code amounted to so serious a denial of procedural fairness as to justify refusal to enforce the Award:

1. this is not a case where the tribunal reached its decision on a factual as well as legal basis which either had not been asserted at all or of which the defendant was never notified and which the defendant was therefore never able to address
2. the extent to which a court or tribunal is expected to inform the parties if it proposes to

adopt legal reasoning and apply legal sources different from those invoked by the parties, so as to give them an opportunity to comment, is a subject on which internationally there is a range of views

3. Brazilian law was chosen as the procedural law of the arbitration and the parties were represented by Brazilian counsel. In these circumstances expectations of how the arbitration would be conducted and of the latitude afforded to the tribunal to develop its own independent legal reasoning would reasonably be influenced by Brazilian procedural law and practice. It was also significant that the Brazilian court found that there was no violation of due process in a decision upheld at the highest level of the Brazilian court system

4. the central factual allegation made and proved in this case was one of fraud and, more specifically, fraudulent manipulation and misrepresentation of the key accounting information on which the purchase price of the airline company's shares was based. Therefore, even if the particular legal reasoning adopted by the tribunal was not anticipated, it can hardly have come as a complete surprise to the MP Funds that, in the event that the tribunal found the allegations of fraud proved, they were held liable to pay the amount of the adjustment to the price required as a result

With respect to whether enforcement of the Award was contrary to Cayman Islands public policy, the Privy Council held that it would be a very strong thing for an English or Cayman court to find it contrary to the public policy of the forum to enforce an award which has been upheld by the courts with primary responsibility for ensuring the integrity of the arbitral process.

Third issue: scope of the submission to arbitration

The MP Funds also made two arguments under Article V(1)(c) of the New York Convention. First, they argued that the subject matter of the Award was necessarily beyond the scope of the submission to arbitration which was limited to the non-compete covenant. The Privy Council held that this issue had already been determined by the Brazilian courts, creating an issue estoppel. Second, they also argued that the award was outside the scope of the submission to arbitration as defined by the terms of reference for the arbitration. This was a matter which had not been decided by the Brazilian Courts, but the Privy Council found that the terms of reference drawn up at the outset of the arbitration cannot properly be read as tying either the parties or the tribunal to particular legal arguments, let alone limiting them to the legal sources on which they could rely. The terms of reference were therefore given a liberal construction in keeping with the purpose of arbitration to provide a flexible and effective means of resolving disputes and providing redress.

Conclusion

In conclusion, the Privy Council found that the CICA was correct to conclude that none of the grounds relied on by the MP Funds justifies refusal to enforce the Award under section 7 of the

1975 Act.

Ogier has a leading offshore dispute resolution team which is increasingly involved in domestic arbitrations and regularly deals with enforcement actions in the Cayman Islands and the British Virgin Islands in particular. For further information on this decision or assistance with the enforcement of arbitral awards, please reach out to your usual Ogier contact or one of the authors of this briefing.

[1] Cayman Islands Court of Appeal enforces foreign arbitral award in favour of Brazilian airline

Written together with Tom Lowe QC of Wilberforce Chambers

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Key Contacts

Nour Khaleq

Senior Associate

Cayman Islands

E: nour.khaleq@ogier.com

T: +1 345 815 1857

Marc Kish

Partner

Cayman Islands

E: marc.kish@ogier.com

T: +1 345 815 1790

Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: +852 3656 6044

Anna Snead

Counsel

London

E: anna.snead@ogier.com

T: +44 203 835 9478

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