# Cayman Islands Court of Appeal decides novel jurisprudence issues concerning the enforcement of foreign arbitral awards

by *Jordan McErlean* ,Conyers Dill & Pearman

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In *Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and others* (Unreported) (CICA No: 12 of 2019) (11 August 2020), the Cayman Islands Court of Appeal enforced a multi-million dollar ICC award in favour of a Brazilian airline, despite the fact that the tribunal had decided the case on a ground not pleaded by the parties.

## Speedread

The Cayman Islands Court of Appeal has enforced an ICC award made in favour of a Brazilian airline and upheld by the Brazilian courts in annulment proceedings in Brazil brought by the award debtors, subject to a stay pending the conclusion of the Brazilian proceedings. At first instance, Mangatal J had refused to enforce the award.

Rix JA (with whom Goldring P and Martin JA agreed) dismissed the respondents' argument that enforcement should be refused on grounds of public policy or lack of due process as a result of the tribunal basing its decision on arguments that the parties had not pleaded. He instead found that, in order to prevent the enforcement of a foreign arbitration award on the basis of public policy, due to the doctrine of *iura novit curia* ("the court knows the law"), application of the doctrine must have resulted, among other things, in a "serious irregularity". That civil law doctrine holds that after an arbitral tribunal has ascertained the facts, it will provide its own view of the law, which is a principle that the Court of Appeal acknowledged does not sit comfortably with common law practitioners, who usually expect to be heard on new points of law.

In this case, there was no serious irregularity justifying a refusal to enforce and the court took into account that the doctrine was well-recognised in various civil law jurisdictions, including by the Brazilian Court of Appeal, which had upheld the award. (*Gol Linhas Aéreas SA (formerly VRG Linhas Aéreas SA) v MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and others (Unreported) (CICA No: 12 of 2019) (11 August 2020) (Goldring P, Rix JA, Martin JA).*)

## Background

### Enforcement of foreign awards in the Cayman Islands

 

The Cayman Islands' Foreign Arbitral Awards Enforcement Law (1997 Revision) (CI Enforcement Law) permits the enforcement of foreign arbitral awards made in countries which are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Enforcement options in the Cayman Islands are not limited to arbitration awards made in states that are parties to the New York Convention. Pursuant to the Arbitration Law (2012 Revision), that jurisdiction was significantly extended so that arbitral awards from any foreign state may be enforced in the Cayman Islands, regardless of whether the New York Convention is engaged.

The basis of the *iura novit curia* ("the court knows the law") principle is that after an arbitral tribunal has ascertained the facts, it will provide its own view of the law.

### Challenges under section 68 of the English Arbitration Act 1996

An award can be challenged under section 68 of the English Arbitration Act 1996 (AA 1996) if there has been a serious irregularity that has caused or will cause substantial injustice to the applicant. The irregularity can relate to the tribunal, the proceedings or the award. For further discussion, see *Practice note, Challenging the award under section 68 of the English Arbitration Act 1996: serious irregularity.*

## Facts

In March 2007, GTI SA (GTI) purchased a 100% share interest in a Brazilian airline, VRG Linhas Aéreas SA (VRG), from Brazilian companies (Sellers). The purchase price was USD275 million, but clause 5 of the sale and purchase agreement (SPA) permitted a post-completion price adjustment if the working capital was lower than warranted.

Subsequently, GTI merged into VRG and changed its name to Gol Linhas Aéreas SA, the appellant in the Cayman Islands proceedings (Gol).

The Sellers were special purpose companies set up to perform the sale of the airline to GTI by private equity funds based in Delaware and the Cayman Islands (MP Funds). These entities are the respondents in the Cayman Islands enforcement proceedings. The MP Funds were not signatories to the SPA, but one of the funds had signed an addendum to the SPA joining it to a non-compete provision in the SPA.

In December 2007, VRG brought ICC arbitration proceedings against the Sellers, and the MP Funds, on the basis that it had been fraudulently misled as to the warrantied working capital of the airline. VRG argued that it was entitled to pierce the corporate veil as the MP Funds had acted as the alter egos of the Sellers.

In 2010, the ICC tribunal awarded R$ 92,987,672 (approximately USD55 million) to VRG against the MP Funds and the Sellers, finding the Sellers liable under clause 5 of the SPA and the MP Funds liable for third party malice under the Brazilian Civil Code. However, the tribunal rejected VRG's claim against the MP Funds based on the doctrines of alter ego and piercing the corporate veil.

Subsequently the MP Funds sought to annul the ICC award on the basis, among other things, that the arbitral tribunal lacked jurisdiction over the MP Funds and that, in applying the doctrine of *iura novit curia* ("the court knows the law") to ground its decision on third party malice as a distinct legal ground of liability, without warning the MP Funds before issuing its decision, it had violated due process.

The annulment application was dismissed at first instance and on appeal.

 

The Brazilian Court of Appeals refused to set aside the award finding, among other things, that:

- The ICC tribunal had jurisdiction since one of the MP Funds had signed the non-compete clause and the broadly drafted arbitration clause in the SPA applied to the MP Funds. The MP Funds, as international investment funds, could not have reasonably contemplated that they might not be bound by it.
- Whilst the arbitrators were bound by the facts provided to them, due to *iura novit curia* they were permitted to analyse the facts in whatever manner they saw fit.

The MP Funds appealed to the Brazilian Supreme Court and the proceedings are pending there.

Meanwhile, the MP Funds sought to challenge enforcement of the award in the Cayman Islands on the following four grounds, all of which were previously raised before the Brazilian courts:

- The respondents were not party to the arbitration agreement relied on.
- The claims raised in arbitration were outside the scope of the arbitration agreement.
- The arbitral tribunal decided the case on a legal ground not advanced by VRG and without warning to the MP Funds before rendering the award, contrary to Cayman Islands public policy.
- The legal ground relied on by the arbitral tribunal was not within the terms of reference of the arbitration and therefore had never been referred or submitted to the arbitral tribunal for decision.

At first instance, Mangatal J agreed with all four grounds and therefore, refused to enforce the award pursuant to section 7 of the CI Enforcement Law. She held that the Brazilian Court of Appeals judgment did not give rise to issue estoppel as to the interpretation of the SPA because:

- There was no *res judicata* in the Brazilian proceedings since there were outstanding appeals and article 502 of the Brazilian Code of Civil Procedure 2015 provides that a decision is only subject to *res judicata* if it is immutable and no longer subject to any appeal(s) on the merits.
- The issues before the Brazilian Court were not identical and there could therefore be no issue estoppel. Mangtal J's view was based on the controversial finding that the Brazilian courts' decision was not a decision de novo on Brazilian law as it should have been, but merely deferred to the tribunal's decision under its power to rule on its own jurisdiction (the doctrine of competence-competence).
- Whether the tribunal's finding of third party malice was contrary to public policy (the standards of natural justice) was a matter for Cayman law and not Brazilian law, and therefore was a different issue to any considerations of public policy undertaken by the Brazilian courts.
- The MP Funds were not parties to the arbitration agreement pursuant to which the tribunal purported to exercise jurisdiction over them and the arbitration clause did not cover a price adjustment dispute.
- In relation to public policy and, applying Cayman Islands standards of fairness, it was plain that the MP Funds could not reasonably have foreseen that they would be held liable as third parties in tort, for tort damages, when the claim against them, and relief sought throughout the arbitration, was to hold them responsible for a contractual obligation of their indirect subsidiaries.
- The tribunal had dealt with matters beyond the scope of the submission to arbitration. Since VRG's claim was made on the basis that the MP Funds were the alter ego of the Sellers, it was not within the scope of the

 

tribunal's jurisdiction to award as tortious damages a contractual price adjustment amount, which had never been sought by VRG.

VRG (now re-named to Gol) then appealed to the Cayman Islands Court of Appeal.

## Decision

The Cayman Islands Court of Appeal unanimously decided to overturn Mangatal J's first instance decision and enforce the award in favour of the appellant Brazilian airline, subject to a stay pending the conclusion of the Brazilian proceedings.

First, Rix JA (with whom Goldring P and Martin JA agreed) held that the Brazilian Court of Appeals judgment refusing to set aside the award gave rise to issue estoppel(s).

Relying on *Nouvion v Freeman* (1889) App Cas 1 and *Carl Zeiss Stiflung v Rayner & Keeler Ltd* [1967] I AC 853 (HL), he considered that the Brazilian judgment was "final and conclusive" and could give rise to issue estoppel, despite the fact that the MP Funds had made further appeals to the Brazilian Supreme Court. Where there is a conflict as to the proper law of estoppel, the law applicable to the estoppel should be determined by the *lex fori* (that is, Cayman Islands law) and that, above all, the law of estoppel is meant to do justice between the parties rather than injustice.

Rix JA disagreed with Mangatal J that the issues decided by the Brazilian courts were not identical to those before the Cayman Court. While the tribunal had considered the issue in the first instance, the Brazilian Court of Appeal had fully and properly considered the issues before it.

It was not disputed on appeal that the question of whether enforcement was contrary to public policy must be determined in accordance with Cayman Islands public policy.

Although Rix JA acknowledged that the civil law principle of *iura novit curia* (the court knows the law) does not sit comfortably with common law practitioners, who usually expect to be heard on new points of law, he held that enforcement of the award was not contrary to Cayman Islands public policy and due process. He reasoned, among other things, that:

- With comity in mind, it would not be permissible to simply ignore the *iura novit curia* doctrine given the number of civil law jurisdictions that utilise it.
- By analogy with section 68 of the AA 1996, a "serious irregularity" was required to establish a public policy defence and therefore, the Cayman Islands position must be the same.

Given that Brazil is a civil law jurisdiction that recognises the *iura novit curia* doctrine and that there had been no serious irregularity by the tribunal in applying that doctrine, after careful and deliberate consideration of this "difficult and challenging" issue, the Court of Appeal found no impediment to enforcing the ICC award.

Given that Rix JA had found for the appellant on both the estoppel issue and the public policy issue, he saw no need to engage substantively with the other ancillary issues decided by Mangatal J as they were rendered largely academic.

## Comment

 

This decision is significant, among other things, because the Court of Appeal dealt with the novel question of the significance of the civil law doctrine of *iura novit curia* as part of a due process or public policy challenge to recognition or enforcement of a foreign arbitral award.

## Case

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