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Moving the *GoI* posts: is being able to present your case just a matter of 'culture'?

By Robert Blackett

GoI Linhas Aereas SA v *MatlinPatterson Global Opportunities Partners (Cayman) & Ors (Cayman Islands)* [2022] UKPC 21 concerns an arbitral award made in favour of Brazilian budget airline GoI on a legal basis which GoI had never argued for, and on which the losing party never had any opportunity to make submissions. The Privy Council were asked to refuse enforcement under Article V(1)(b) New York Convention on the ground that "*the party against whom the award is invoked … was … unable to present his case*".

Their Lordships allowed the award to be enforced. No doubt the decision will be welcomed as another example of the distinctly pro-arbitration theme which runs through decision making in this area, characterised by aversion to challenging or resisting enforcement of awards, skepticism with respect to such challenges, relative deference to arbitral tribunals and an emphasis on certainty and finality.

The decision seems problematic, however, because it does seem to render Article V(1)(b) something of a moveable feast. Rather than a single, clear, uniform rule there is a strong suggestion in the judgment that tribunals can base decisions on legal rules not raised by or with the parties provided that is normal for the legal culture to which the tribunal and the lawyers representing the parties belonged, but not otherwise. And there is even a suggestion that, where a party has acted dishonestly, it is less important that they be given a chance to comment on the legal basis for a decision against them.

The New York Convention

The New York Convention seeks to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. More than 160 states, including the Cayman Islands, are parties to the New York Convention. Article V of the New York Convention sets out grounds on which recognition and enforcement of an arbitral award made in the territory of another state may be refused. So far as is relevant, it provides:

> *"***Article V**
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

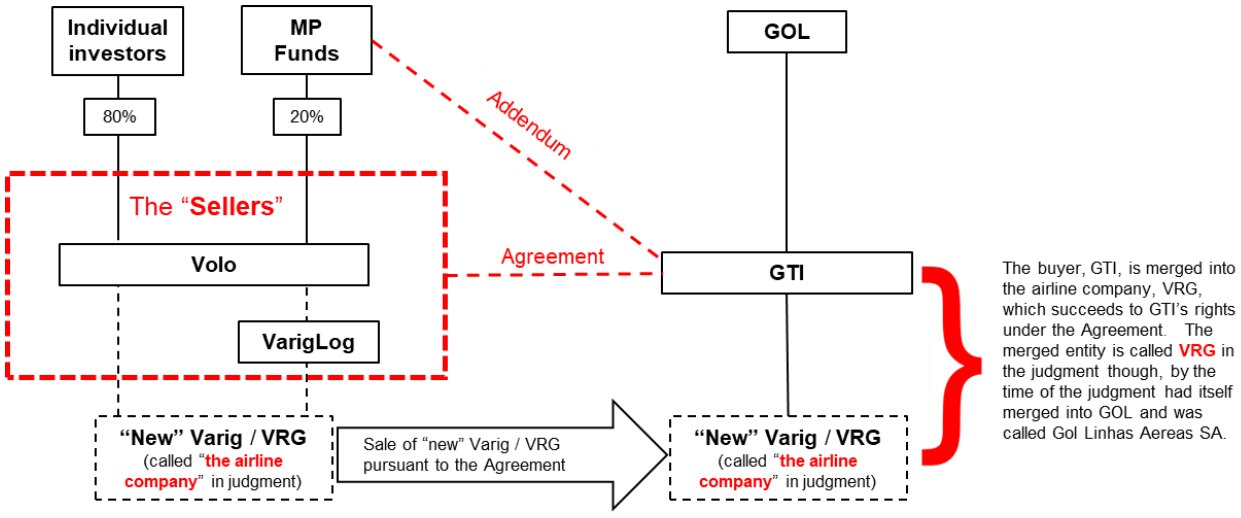
(d) …

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: …

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"*

Background

The dispute arose out of the sale of a Brazilian airline. Because of name changes effected following the sale, and an apparent error in the Privy Council's description of one party, the identity of the parties might not be obvious from the judgment, and the following diagram might assist.



MatlinPatterson is a hedge fund, headquartered in New York, which invests in distressed businesses. In around 2005 MatlinPatterson, together with three Brazilian individuals (Marco Antonio Audi, Marco Hapfel and Luiz Gallo) established a Brazilian company called Volo Do Brasil SA ('Brazil Flight') ("**Volo**") to invest in the Brazilian airline industry. Two funds managed by MatlinPatterson (called the "**MP Funds**" in the Privy Council Judgment) owned (indirectly, through a subsidiary) 20% of Volo's voting shares. The individual investors owned the other 80%.

The first airline founded in Brazil, in 1927, was known as Varig (*Viação Aérea RIo-Grandense* 'Rio Grandean Airways') and, for several decades, was Brazil's leading airline. The early 21st Century, however, saw a decline in Varig's fortunes, precipitated by 9/11 and competition from low-cost rivals, particularly another Brazilian airline called Gol (Brazilian-Portuguese for a "*Goal*" in football). In 2005 Varig applied to bankruptcy court in Brazil for "*judicial reorganisation*".

The Brazilian court directed that some of Varig's subsidiaries be sold. Varig Logistica SA ("**VarigLog**"), a Varig subsidiary which had operated Varig's air cargo business, was sold to Volo.

What remained of Varig was split into two entities, known informally as "Old" and "New" Varig. "Old" Varig retained Varig's debts and one aircraft and, for a time, operated some irregular flights under the brand name "*Flex*", but is apparently now defunct. Varig's brand, route rights and all but one of its aircraft were assigned to New Varig, which was properly called VRG Linhas Aéreas SA. In the diagram above, I have referred to this new company as **"New" Varig / VRG**.

Volo and Variglog together, bought New Varig / VRG. Volo and Variglog then set about rationalising and reorganising VRG's business, reportedly cutting 60% of its staff.

In 2007 Volo and Variglog (called the "**Sellers**" in the Privy Council judgment) entered into a contract (the "**Agreement**") with a company called GTI. GTI was part of Varig's former rival, GOL. Under the Agreement, the Sellers agreed to sell New Varig / VRG to GTI. In the judgment, the company which was sold (New Varig / VRG) is referred to as the "**airline company**". There appears to be an error in the judgment because it describes this airline company as "*the company which operated Gol Airlines*". My best understanding, as set out above, is that the airline company sold under the Agreement in fact operated the Varig and Gol was the buyer.

After that transaction completed and GTI acquired New Varig / VRG, GTI was merged into New Varig / VRG. New Varig / VRG thus became the successor, under Brazilian law, to GTI's rights under the Agreement. The merged version of the airline company, which succeeded to GTI's rights as buyer, is called "**VRG**" in the judgment.

Later, in 2009, GOL was apparently merged into New Varig / VRG, and the merged entity changed its name to "*GOL Linhas Aereas SA*". The headnote to the case, therefore reflects this new name.

The Agreement

The Agreement was in Portuguese and governed by Brazilian law. It contained an arbitration agreement which provided for "[a]*ll disputes arising from or related to this Agreement*" to be resolved by ICC Arbitration seated in Brazil.

Attached to the Agreement was a balance sheet which purported to show what the airline company's working capital had been at the date of the Agreement. The Agreement included a warranty that this initial balance sheet had been prepared and validated by PwC.

When the sale completed, VRG was to pay a price calculated using values in that initial balance sheet. The parties anticipated, however, that because of the need to obtain regulatory approval there would be some delay between the date of the Agreement and the completion of the sale and that the airline company's working capital might change in that time. Clause 5 therefore provided a procedure for the purchase price to be adjusted later, and a balancing payment made, to reflect the airline company's working capital on the date that regulatory approval was given for the sale.

The addendum

The MP Funds were not named as parties and were not signatories of the Agreement. They did, however, sign an addendum to the Agreement giving an undertaking to the buyer not to compete with the airline company for a

period of time. The addendum (as translated) stated that it constituted "*a firm and valid commitment by and between the parties, including for the purposes of supplementing the terms of the above-captioned Agreement*".

The arbitration

The amount of the adjustment required under Clause 5 was not agreed, and VRG referred the dispute to arbitration. VRG's case was that, rather than the working capital changing between the date of the agreement and the date of the regulatory approval, the initial balance sheet had been inaccurate, and had greatly overstated the airline company's working capital, increasing the price VRG had paid.

If the Sellers had had the funds needed to pay the adjustment this would presumably have been unproblematic, and could just have been resolved under the adjustment mechanism. It appears, however, that the MP Funds had extracted the relevant monies from the Sellers (the judgment only refers to the MP Funds having extracted these monies – the individual investors, who owned 80% of the Sellers, are never mentioned). VRG thus had to find some way to claim against the MP Funds.

VRG alleged that the discrepancy had arisen because Mr Lap Chan, a director of the MP Funds who was the person primarily responsible for negotiating the Agreement with VRG, had deliberately falsified figures in the initial balance sheet and "*maliciously misled*" VRG. Specifically, VRG alleged that two significant changes to the figures were made on Mr Lap Chan's instructions. First, a liability of R$40m for "*Commercial leasing payable*" was reduced to R$20m and, second, a figure of R$10m for fees, taxes and contributions was reduced to zero. It was VRG's case that both these changes were not only entirely unjustified but were made by Mr Lap Chan dishonestly in order knowingly to overstate the value of the company's assets. The warranty that PwC had prepared and validated the initial balance sheet was, and Mr Lap Chan knew it to be, untrue.

Mr Lap Chan gave evidence at the hearing of the arbitration seeking to defend his actions. However, the tribunal found his evidence wholly unconvincing and concluded that the factual allegations made by VRG had been proved. The tribunal also inferred that, had it not been for the untruthful assurance that the balance sheet had been prepared and validated by PwC, VRG would have insisted on its own accountant verifying the amount of the company's working capital - in which case they would have discovered that, instead of having working capital of R$40.7m as represented in the balance sheet presented, the company in reality at the time of completion of the Agreement had a working capital deficit of R$52.2m. Quite how understating the airline company's liabilities by $30 million reduced working capital by $92.9 million is unclear.

The legal argument advanced by VRG was that the fraud for which the MP Funds were responsible was an abuse of legal personality which justified lifting the corporate veil and holding the MP Funds liable under Article 60 of Brazil's Civil Code for the sum which VRG was entitled to recover from the Sellers. That sum was the adjustment to the purchase price required by clause 5 of the Agreement to reflect the difference of R$92.9m between the amount of working capital shown in the initial balance sheet and the true figure as determined by the tribunal. VRG alleged that the MP Funds had abused the separate personality of the Sellers by extracting from them the money paid by VRG for the shares, including the amount overpaid as a result of the fraud, leaving the Sellers without any assets to make the required repayment.

The tribunal rejected this argument on the ground that Article 60 applies only where there is abuse of legal personality characterised either by using a company for a purpose different from the purpose for which it was organised or by commingling of assets. Neither requirement was present and so liability could not be founded on lifting the corporate veil.

The tribunal then went on, however, to consider, without consulting the parties, whether the factual allegations proved, including the allegations of "*malice*" (a concept of Brazilian law broadly equivalent to fraud or deceit) on the part of the MP Funds, nevertheless gave rise to legal liability on some other ground and, specifically liability for the tort of "*third party malice*" described in Article 148 of the Civil Code. This required: fraudulent means (i) used by a third party (here, the MP Funds), (ii) with the intention of misleading another person (VRG) into entering into a transaction (the share purchase), (iii) which had a material effect on a fundamental element of the transaction, and (iv) of which the party that benefited from the transaction (the Sellers) knew or should have known. The tribunal analysed each element separately and concluded that malice was established on the facts proved by VRG. Under Article 148 proof of such malice may lead to annulment of the transaction or, alternatively, renders the third party liable "*for all the deceived party's loss and damage*". The tribunal identified the damage sustained by VRG as the amount of money required to repair the deficit in the airline company's working capital and bring it into line with the amount which the MP Funds and the Sellers had jointly represented it to be. This was the same as the price adjustment amount. On this basis the tribunal held the MP Funds jointly liable with the Sellers for the sum of R$92.9m.

Brazilian court proceedings

The MP Funds brought proceedings in Brazil, seeking to have the award set aside. The Brazilian courts dismissed this application, and the MP Funds exhausted all their rights of appeal against that decision.

Enforcement proceedings in the Cayman Islands

VRG sought to enforce the award against the MP Funds in the Cayman Islands. VRG was granted leave to enforce at an initial *ex parte* hearing. The MP Funds succeeded in having that order set aside. VRG appealed. The Cayman Court of Appeal allowed the appeal and restored the order giving VRG leave to enforce the award. The MP Funds appealed that decision to the Privy Council.

The MP Funds sought to resist enforcement of the awards on three bases:

Validity of the arbitration agreement. The MP Funds resisted enforcement pursuant to Article V(1)(a) arguing that they had not been party to the arbitration agreement. VRG argued that the MP Funds were blocked from raising this argument, because of an issue estoppel arising from the Brazilian court decisions.

Due process / public policy. The MP Funds resisted enforcement pursuant to Article V(1)(b) arguing that the MP funds had been "*unable to present* [their] *case*" because the tribunal found the MP Funds liable on a legal basis (Article 148) which had not been raised by VRG and without giving the MP Funds an opportunity to be heard on the point. The MP Funds argued that this also meant enforcement was contrary to public policy under Article V(2)(b).

Scope of the arbitration. The MP Funds argued that, even if the MP Funds were party to the arbitration agreement, the award, contrary to Article V(1)(c) "*deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration*" because: (i) the scope of the arbitration agreement was limited to the MP Funds' non-compete obligations; and (ii) the award of damages in tort, under Article 148, fell outside the scope of the terms of reference which had been settled at the start of the arbitration pursuant to the ICC Rules. These terms of reference referred only to claims based on piercing the corporate veil and for a price adjustment.

Privy council decision

The Privy Council dismissed the appeal, holding that none of the grounds put forward by the MP Funds justified refusing to enforce the award.

Validity of the arbitration agreement

The doctrine of issue estoppel supports the public policy of finality in litigation and seeks to ensure that the same parties should not have to litigate the same issue twice. For a foreign judgment to give rise to an issue estoppel, three requirements must be satisfied:

(a) The judgment must be entitled to recognition in accordance with the domestic rules on the recognition of foreign judgments. At common law, these rules require the judgment to be (i) given by a court of a foreign country with jurisdiction to give it and (ii) final and conclusive on the merits. A foreign judgment which satisfies the requirements for recognition at common law cannot be impeached for any error either of fact or law.

(b) The parties in the two actions must be the same.

(c) The issue decided by the foreign court must be the same as the issue in the domestic proceedings.

It was common ground that the first two requirements were met. The MP Funds argued that the third requirement was not, with the issue which the Cayman court was being asked to decide was different to that which had been decided by the Brazilian court.

English (and thus Cayman) law requires that a court make an independent or *de novo* decision about whether there was a valid arbitration agreement (e.g. *Dallah Real Estate and Tourism Holding Co* v *Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, para 30 (Lord Mance) and para 160 (Lord Saville)). In making this determination, the tribunal's decision has no legal or evidential value.

The MP Funds sought to argue that the same was not true in Brazil and that, under Brazilian law the courts are not required to reach a decision *de novo* but had deferred to the arbitrators' decision. The Privy Council found, on the evidence, that the Brazilian judgment did involve an independent or *de novo* determination of the question whether the MP Funds were party to a valid arbitration agreement. It therefore gave rise to an issue estoppel on that question.

Their Lordships left open the question of whether, if the Brazilian court had not decided the matter de novo, that would have prevented an issue estoppel arising: "*42 … We will, however, assume without deciding, that, if the Brazilian court did not consider de novo the question of validity of the arbitration agreement, this would prevent an issue estoppel from arising*".

Due process / public policy

The real heart of the case is the due process issue: whether the fact that the tribunal based its decision on Article 148 of the Civil Code when that had not been raised by or with the parties meant the MP Funds had been "*unable to present* [their] *case*" within the meaning of Article V(1)(b) of the New York Convention.

Their Lordships said:

> "76. … 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. 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.
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> 78 … That said, where a sufficiently serious violation of due process is shown, we see no justification for reading into article V(1)(b) an additional requirement of demonstrating a causal link between the violation and the decision of the arbitral tribunal. Such an approach would seriously dilute the right to a fair hearing. It would also require the court to engage in an evaluation of the merits of the dispute which is contrary to the principle that this is exclusively the province of the tribunal. The only qualification that we would make is that we see pragmatic sense in the standpoint … that a court might properly exercise its discretion not to refuse enforcement if it is clear beyond doubt that the arbitral decision could not have been different if the violation had not occurred."

So, is it "*a basic minimum requirement, generally accepted throughout the international legal order*", that if a tribunal intends to rely on some point of law in deciding a case, the parties should be told that and allowed to address it? Apparently not:

> "It would, we believe, command broad international acceptance 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. The position in relation to legal reasoning is, however, less straightforward. Broadly speaking, there is a difference of approach between common law jurisdictions and civil law jurisdictions with regard to the role of the court or tribunal in ascertaining and applying the law. In common law jurisdictions it is primarily a matter for the parties to decide what arguments of law to advance and those arguments frame the issues for the court to decide. In England it is not uncommon, and certainly more frequent than it once was, for judges to undertake some legal research of their own and to raise points of law which have not been raised by the parties. If the court proposes to rely on such a point in deciding the case, however, it is expected that the court will give the parties an opportunity to address the point (if necessary, by inviting further written submissions after the conclusion of the hearing)."

Their Lordships were not persuaded that the failure of the tribunal to invite the MP Funds to comment on whether the facts alleged by VRG amounted to the tort of "*third party malice*" was so serious a denial of procedural fairness as to justify refusal to enforce the award under article V(1)(b).

In reaching that conclusion, their Lordships assigned weight to five factors. The first is unproblematic:

> "102. First, 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 …"

Does culture move the goalposts?

The other four factors raise some questions (emphasis added):

> *"*103. Second, although there is no doubt that from an English or Cayman perspective basing a decision on a legal rule not raised by or with the parties would be contrary to the parties' expectations, it appears that this is not so in some other legal systems. 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. Indeed, there are differences of view even among English lawyers and judges. On any view a tribunal has greater leeway in relation to matters of law than matters of fact. The extent of this leeway is an area in which legal culture plays an important role. In the context of article V(1)(b) a court should be cautious in these circumstances about finding that a fundamental and generally accepted requirement of procedural fairness has been infringed.
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> 104. Third, although the standard reflects requirements generally accepted internationally, it would in our view be unrealistic in fact and incorrect in principle to ignore the fact that in this case Brazilian law was chosen as the procedural law of the arbitration and the parties were represented throughout by Brazilian lawyers. 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 is 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.*"*

A few paragraphs earlier we were told that Article V(1)(b) should be regarded as imposing "*a standard capable of application to any international arbitrations whatever the procedural law and the nationality of the participants*" and that the relevant question was whether the arbitration met "*a basic minimum requirement, generally accepted*". But here it seems that – on the question of whether a tribunal can base a decision on a legal rule not raised by or with the parties – "*legal culture plays an important role*" in determining how much "*leeway*" the tribunal is to be given, and the procedural law of the arbitration, and the legal background of the lawyers representing the parties serve to move the goalposts. This begs the question whether their Lordships would have been so amenable to uphold this award if the same decision had been made by a tribunal seated in a common law jurisdiction, with the tribunal and the parties' lawyers all coming from a common law background.

Does dishonesty move the goalposts?

Their Lordships' fourth and fifth reasons suggest that perhaps this particular award might have been upheld irrespective of the legal culture from which it originated:

> *"*Fourth, we also think it relevant that the central factual allegation made and found 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. 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. Indeed, it might be thought surprising if such a finding did not give rise to such liability on the part of the entities whose director and representative in the negotiations perpetrated the fraud.*"*

In other words, if you act dishonestly, you should not be surprised when the tribunal, on its own initiative, comes up with some way of holding you to account, even if the claimant's lawyers don't think of it.

That might be true as a practical matter, and the sentiment that the MP Funds 'got what they deserved' is understandable. But it is odd to read a judgment (apparently) suggesting that less virtuous parties are entitled to some lesser degree of procedural fairness / due process protection. Is it really the case that, if a decision imposes liability for dishonest conduct, the legal basis for the decision need not be put to the parties, but if the case had involved no dishonesty, and had instead turned on a particular interpretation of a statute or contract, then a failure to put that interpretation to the parties would have impugned this award? And, if that is not what their Lordships meant, then why even mention "*the central factual allegation made and found proved in this case was one of fraud*" as something to which "*we attach weight*" in deciding whether there has been a sufficiently serious denial of procedural fairness as to justify refusing enforcement?

This aspect of the reasoning also sits uneasily with the assertion, a few paragraphs earlier that, in deciding whether to refuse enforcement of an award, it is "*contrary to principle*" to "*engage in an evaluation of the merits of the dispute*". In saying that MP Funds should not have been surprised by the outcome, their Lordships stray from whether the *procedure* was fair and seem to ask whether, at the end of the day, the tribunal reached the right *result*.

ICC Guidance appears irrelevant

This was an arbitration governed by the ICC Rules. The ICC Secretariat's Guide to ICC Arbitration (which is non-binding and does not form part of the rules) states, at paragraph 3-770:

> "An arbitral tribunal should be very cautious about applying any provision of law on which the parties have not had an opportunity to comment or make submissions. Unlike judges in some civil law jurisdictions, arbitral tribunals that decide a case on the basis of legal concepts not raised by any of the parties will risk breaching due process requirements, rendering the award vulnerable to being set aside or difficult to enforce. If an arbitral tribunal is contemplating the application of legal concepts not argued by the parties, it should seek to uphold due process by presenting those concepts to the parties and inviting their comments."

Parties who sign to up to ICC Arbitration though, apparently have no legitimate expectation that their tribunals will actually do this. Their Lordships said there was "*wisdom*" in this guidance and that it would have been "*prudent*" for the tribunal to have followed it but, in the end, such guidance evidently counts for nothing, and what matters is the domestic legal culture in which the arbitration takes place. If Brazilian judges in Brazilian courts don't put legal points to the parties for comment, then Brazilian arbitrators need not do so either.

While deference to local legal culture might have produced the right outcome in the *GoI* case, it will not make the job of future tribunals, and those reviewing their decisions, any easier. Rather than have a single, clear, universal rule for all ICC arbitrations (due process requires that you present legal concepts to the parties for comment) it is instead necessary to ask what legal culture the arbitrators and the lawyers on each side come from, and find out what the practice is in their domestic court system.

Domestic decisions downplayed

The *GoI* decision is concerned with an award given in a foreign seat, so that its enforcement was governed by the New York Convention. In reading the case, it is helpful to have in mind what has been the attitude of the English

courts to arbitrators who make decisions based on legal points not raised with or by the parties. Per Ackner LJ in *The Vimeira* [1984] 2 Lloyd's Rep 66, 76) stated:

> *"*If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it …*"*

Per Bingham LJ in *Zermalt Holdings SA* v *Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at 15:

> *"*If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance …*"*

In *ABB AG* v *Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 70 it was said that the tribunal must give the parties "*a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion*". In *OAO Northern Shipping Company* v *Remolcadores De Marin SL (Remmar)* [2007] EWHC 1821 (Comm) it was said that: "*These principles apply to unargued points of law or construction as they do to unargued questions of fact*".

English law provides a system whereby domestic construction contracts are subject to a compulsory dispute resolution regime called adjudication, with adjudicators bound to render an award within a very short timeframe, with the awards only to be provisionally binding, while the issues are dealt with in more detail in an arbitration or litigation. Even in that rough and ready forum, this same principle seems to apply:

Roe Brickwork Ltd v *Wates Construction Ltd* [2013] EWHC 3417 (TCC):

> *"*there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator.*"*

ABB Ltd v *Bam Nuttall Ltd* [2013] EWHC 1983 (TCC):

> *"*I … have no doubt that there was a serious breach of the rules of natural justice by the adjudicator who decided a key issue in the adjudication by reference to and in reliance upon a clause, 11.1A, which neither party had referred to or relied upon and which the adjudicator did not give the parties the opportunity to address him on.*"*

These cases were not referred to in *GoI* and their Lordships described the attitude to English courts to the conduct complained of in more muted terms (emphasis added):

> "85. In common law jurisdictions it is primarily a matter for the parties to decide what arguments of law to advance and those arguments frame the issues for the court to decide. In England it is not uncommon, and certainly more frequent than it once was, for judges to undertake some legal research of their own and to raise points of law which have not been raised by the parties. If the court proposes to rely on such a point in deciding the case, however, it is expected that the court will give the parties an opportunity to address the point (if necessary, by inviting further written submissions after the conclusion of the hearing)."
>
> "103. … from an English or Cayman perspective basing a decision on a legal rule not raised by or with the parties would be contrary to the parties' expectations."

It would be going too far to seize on this as indicating a shift attitude, with an increased tolerance for tribunals making decisions in this way. It remains to be seen whether *GoI* foreshadows any change in the approach which courts take to domestic awards.

Scope

The MP Funds' remaining arguments concerned the scope of the arbitration. The MP Funds argued that the subject matter of the award was beyond the scope of the submission to arbitration. Even if the MG Funds were party to the arbitration agreement, it was only an agreement to submit to arbitration disputes about the non-compete obligation contained in the addendum, not disputes about the price of the shares.

This argument was rejected because it had been raised before the Brazilian courts and rejected, so was subject to an issue estoppel.

The MP Funds other argument was that the basis on which the tribunal had held them liable (the tort of third party malice contrary to Article 148) was outside the scope of the submission to arbitration as defined by the terms of reference. The ICC Rules provide for tribunals and parties to produce and sign terms of reference ("**ToR**"). Article 19 of the ICC Rules says: "*no party shall make new claims or counterclaims which fall outside the limits of the terms of reference unless it has been authorised to do so by the arbitral tribunal*". The MP Funds asserted that the terms of reference drawn up in this case limited VRG's claims against the MP Funds to claims based on a theory of piercing the corporate veil and for relief consisting of an order for payment of the price adjustment provided for in clause 5 of the Agreement. They submitted that an award of damages in tort under article 148 of the Civil Code was outside the limits of the terms of reference and hence beyond the scope of the submission to arbitration.

Their Lordships said of this:

> "We do not think that the terms of reference drawn up at the outset of the arbitration can properly be read as tying either the parties or the tribunal to particular legal arguments, let alone limiting the legal sources on which they could rely. Nor do we accept that the remedy awarded by the tribunal was beyond their scope. The MP Funds argue that the relief requested by VRG was limited to an order for payment of the price adjustment provided for in clause 5 of the Agreement and that this did not encompass an order to pay damages in tort quantified in the same amount. In our view, this is too technical an approach. 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. A claim for the amount of the contractual price adjustment cannot reasonably be read as precluding the arbitrators from awarding damages in this amount for the loss caused by

> the failure to pay this sum or, which comes to the same thing, by VRG's payment of this sum to the Sellers in circumstances where the Sellers have no means of paying it back.*"*

Again, the pro-arbitration attitude of the English courts is evident, stressing that arbitration needs to be an "*effective means of resolving disputes*" (i.e. awards need to be upheld and enforced). But, it does raise the question of what Terms of Reference are really for, or achieve. Most arbitration claims, and so most terms of reference, are drafted in broad terms (e.g. "… *or such further or other relief as the tribunal shall determine"*, "… *or on such other basis as the tribunal shall determine*") so it will rarely be that case that any relief or legal basis would be outside the Terms of Reference.

Conclusions

It is hard to know what practical lessons to draw from *GoI*. "*Don't make fraudulent misrepresentations*" is perhaps the most obvious. With the benefit of hindsight, how might the MP Funds have ensured that they would be given an opportunity to comment on the legal reasoning adopted by the tribunal? It seems the answer is that they should either have made an agreement which provided for arbitration in a common law seat, with a common law tribunal, and used a legal team from a common law background, or they should have agreed to Brazilian arbitration, but included an express provision in their arbitration clause, something to the effect that "*If the tribunal is contemplating the application of legal concepts not argued by the parties, it shall present those concepts to the parties and inviting their comments*."

It is unclear whether the MP Funds would have been in any better position if they had refrained from seeking to challenge the award in Brazil. In that case, there would have been no issue estoppel and the MP Funds would have been free to argue that the tribunal lacked jurisdiction or that the subject matter / basis of the award were outside the scope of the arbitration agreement, because the MP Funds had only consented to arbitration in respect of a narrow range of disputes about the non-compete agreement, and disputes about misrepresentations they made in connection with the same Agreement were outside the scope of the agreement. One suspects the outcome would have been the same, given the approach to arbitration agreements *exemplified* in Fiona Trust:

> *"*… the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.*"*

As discussed, it does seem unsatisfactory to use 'culture' as the metric for deciding whether a tribunal must put legal points to the parties for comment. But, at the same time, it is hard to see what else their Lordships might reasonably have decided. Any attempt to insist that the English, common law approach is the minimum standard and should apply universally risks being seen as provincialism, jeopardising the enforceability of awards made in civil law cultures contrary to the aims of the New York Convention. On the other hand, if one does genuinely think there is merit in the common law approach, and that justice does require people to know the legal case against them, then one cannot forego that altogether, and so one applies it so far as one can, at least to awards which originate from jurisdictions where parties are entitled to expect such treatment. The result is the approach taken in *GoI*. The only way to avoid that Procrustean bed, whereby the conduct one is entitled to expect from a tribunal varies according to their, and your, cultural background, is to have some uniform approach set out in binding institutional rules, rather than just having the ICC's "*Guidance*" which, as *GoI* illustrates, counts for naught.