Moving the Gol Posts: Is being able to present your case just a matter of 'culture'?

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PRACTICES International Arbitration

Gol 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 Gol on a legal basis which Gol 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.

Read the full article here.

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