Easter Term
[2022] UKPC 21
Privy Council Appeal No 0086 of 2020

JUDGMENT

Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) *v* MatlinPatterson Global Opportunities Partners (Cayman) II LP and others (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Kitchin
Lord Hamblen
Lord Leggatt
Lord Lloyd-Jones
Sir Julian Flaux

JUDGMENT GIVEN ON
19 May 2022

Heard on 8 and 9 March 2022

Appellants
Vernon Flynn QC
Emily Wood
(Instructed by Myers Fletcher & Gordon (London))

Respondent
Thomas Lowe QC
William Jones
Nour Khaleq
(Instructed by Sharpe Pritchard LLP)

Appellants:-

(1) MatlinPatterson Global Opportunities Partners (Cayman) II LP
(2) MatlinPatterson Global Opportunities Partners II LP
(3) MatlinPatterson Global Opportunities Partners II LLC

LORD HAMBLEN AND LORD LEGGATT: (with whom Lord Kitchin, Lord Lloyd-Jones and Sir Julian Flaux agree)

1. INTRODUCTION

1. The question on this appeal is whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 (the "New York Convention"), as implemented in the Cayman Islands by the Foreign Arbitral Awards Enforcement Act 1975 (1997 Revision) ("the 1975 Act"), requires the enforcement in the Cayman Islands of an arbitral award in favour of the respondent.

2. The arbitration in which the award was made took place in Brazil and was decided in accordance with Brazilian law. Proceedings brought by the appellants in the Brazilian courts seeking to have the award set aside were unsuccessful and all rights of appeal in Brazil have now been exhausted. Insofar as the grounds on which the appellants resist enforcement of the award in the Cayman Islands are similar to grounds of challenge rejected by the Brazilian courts, questions arise as to whether the decisions of the Brazilian courts create an issue estoppel which prevents the appellants from relying on those grounds in this action.

3. The grounds on which the appellants have opposed the respondent's application to enforce the award are, in summary, that: (i) they were not party to the arbitration agreement; (ii) there was a violation of due process as the arbitral tribunal held them liable on a legal basis which they were not given an opportunity to address; and (iii) the legal ground on which the arbitral tribunal held them liable was outside the scope of the submission to arbitration. The same or very similar arguments were all made in support of the unsuccessful application to set aside the award in Brazil.

4. At first instance the judge upheld all the grounds of challenge and therefore refused enforcement of the award. The Cayman Court of Appeal allowed the respondent's appeal on all grounds. From that decision, this appeal lies as of right to the Board.

2. FACTUAL BACKGROUND

The parties

5. 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.

6. 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.

The Agreement

7. The dispute submitted to arbitration arose under a share purchase and sale agreement dated 28 March 2007 ("the Agreement") for the sale of the shares in the company which operated Gol Airlines ("the airline company"). The Agreement is in the Portuguese language and is governed by Brazilian law. The purchaser of the shares was GTI SA which was merged into VRG which became its universal successor under Brazilian law. The sellers were two subsidiaries of a Delaware company, Volo Logistics LLC, established by the MP Funds as a vehicle to invest in the Brazilian airline industry. The first of these subsidiaries, Volo do Brasil SA, was a Brazilian corporation, in which Volo Logistics LLC owned 20% of the voting shares with the remaining 80% owned by three Brazilian individuals. In 2006 Volo do Brasil SA purchased Varig Logistica SA, which operated a Brazilian cargo airline. Those two companies ("the Sellers") then established a wholly owned subsidiary which acquired the associated passenger airline business and was the airline company whose shares were sold under the Agreement.

8. The MP Funds were not named as parties and were not signatories of the Agreement. However, they signed an addendum to it giving an undertaking to VRG not to compete with the airline business 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".

9. Clause 5 of the Agreement provided a procedure for adjusting the purchase price after it was paid to reflect changes in the working capital shown in the accounts of the airline company between the date of the Agreement and the date of regulatory

approval for the sale. Under this procedure the Sellers put forward adjusted figures for working capital confirmed by their accountants, PwC, and VRG appointed its own accounting firm, Ernst & Young, to validate the calculation. In the event, the amount of the adjustment was not agreed and VRG referred the dispute to arbitration.

10. Clause 14 of the Agreement is an arbitration agreement which (translated into English) included the following terms:

> "ARBITRATION, APPLICABLE LAW AND ELECTION OF JURISDICTION
>
> **Clause 14.1**. All disputes arising from or related to this Agreement, including those concerning its validity, effectiveness, breach, interpretation, termination, rescission and their corollaries, will be resolved by arbitration, in accordance with the provisions of Law No 9.307/96 ("Arbitration Law"), pursuant to the conditions below.
>
> **Clause 14.2**. The dispute will be submitted to the CCI … in accordance with its Regulations … in effect as of the date of the request for arbitration.
>
> **Clause 14.3**. The hearings, petitions and documents of the arbitration will be conducted in the Portuguese language and, if requested by any of the Parties or the arbitrator, will be translated simultaneously into the English language. The place of the arbitration will be the city of São Paulo.
>
> …
>
> **Clause 14.5**. The arbitrators selected must know the English language, regardless of their nationality.
>
> **Clause 14.6**. This Agreement will be interpreted and governed by the laws of Brazil and the Arbitration Panel will decide on disputes and disagreements in accordance with the laws of Brazil, ignoring any other rule of international private law that may cause the laws of any other country or jurisdiction other than Brazil to be applicable.

> **Clause 14.7**. The Arbitration Panel shall decide the matters submitted to it only in accordance with provisions of law, and must base their decision on the laws of Brazil. ..."

The "Arbitration Law" referred to in clause 14.1 is the Brazilian Arbitration Law No 9.307/96. The "CCI" referred to in clause 14.2 is the International Chamber of Commerce ("ICC").

The arbitration proceedings

11. The arbitration proceedings were brought by VRG against both the Sellers and the MP Funds. VRG, the Sellers and the MP Funds were each represented by Brazilian lawyers. The members of the arbitral tribunal were all distinguished lawyers and arbitrators. The chairman, Dr Juan Fernández-Armesto, is a Spanish lawyer and arbitrator, who has been President of the Spanish Securities Commission and a Professor of commercial law and is currently a vice-president of the International Council for Commercial Arbitration. The two co-arbitrators were both Brazilian lawyers. One, Pedro Batista Martins, is (among other things) an officer of the Commercial Committee of the Latin American Arbitration Association and the other, Gustavo Tepedino, is a Professor of civil law at the State University of Rio de Janeiro.

12. In the arbitration, VRG claimed a sum from the Sellers said to be payable under the price adjustment clause. The same sum was claimed from the MP Funds. VRG alleged that Mr Lap Chan, a director of the MP Funds who negotiated the Agreement with VRG, had fraudulently manipulated the figures for working capital provided to VRG on which the purchase price was based. VRG argued that this fraud constituted an abuse of legal personality which justified piercing the corporate veil and holding the MP Funds jointly and severally liable with the Sellers under article 50 of the Brazilian Civil Code for the amount of the required price adjustment.

13. The MP Funds disputed the jurisdiction of the tribunal over them, arguing that they were not parties to the Agreement or the arbitration agreement contained within it. The arbitrators considered the question of jurisdiction as a preliminary issue and made a partial award in which they ruled, by a majority, that they did have jurisdiction over the MP Funds. This was on the basis that the MP Funds had signed the addendum which was an integral part of the Agreement such that the MP Funds were party to all the terms of the Agreement, including the arbitration agreement. The MP Funds continued to take part in the arbitration under protest and without prejudice to their position that they were not parties to the arbitration agreement.

14. On 2 September 2010, the tribunal issued the award which VRG is seeking to enforce. The tribunal found the Sellers and the MP Funds jointly and severally liable for the amount of the purchase price adjustment in the sum of BRL$92,987,672, together with interest and costs. The tribunal rejected VRG's legal argument for holding the MP Funds liable, which involved piercing the corporate veil, but found that the facts alleged and proved gave rise to liability on the part of the MP Funds for "third party malice" under article 148 of the Brazilian Civil Code. A core allegation made by the MP Funds in these proceedings is that the tribunal found them liable on a legal basis which had not been advanced by VRG and on which they had no proper opportunity to present their case.

The Brazilian court proceedings

15. In December 2010, the MP Funds issued proceedings in a court in São Paulo, Brazil, under article 33 of the Arbitration Law seeking to set aside the award ("the annulment action").

16. On 1 July 2011 the São Paulo court gave a judgment dismissing the MP Funds' application. The MP Funds appealed to the São Paulo Court of Appeal, which on 16 October 2012 dismissed the appeal. An application for permission to appeal to the Superior Tribunal de Justiça ("the Superior Court of Justice") was refused by the Chief Justice of the São Paulo Court of Appeal. The MP Funds successfully appealed to the Superior Court of Justice against the refusal of permission to appeal, but the appeal itself was dismissed on 12 December 2017.

17. In 2018, the MP Funds pursued further appeals to the Superior Court of Justice and a constitutional appeal to the Brazilian Supreme Federal Court. The last of these appeals was dismissed by the Supreme Federal Court on 4 August 2020. It is common ground that, with effect from 29 August 2020 when that decision became final, 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.

The enforcement proceedings in the Cayman Islands

18. On 1 September 2016, VRG applied to the Grand Court of the Cayman Islands for leave to enforce the award against the MP Funds under section 5 of the 1975 Act. The application was made ex parte and was granted by Mangatal J. The MP Funds then applied to set aside the ex parte order. The hearing of that application took place before Mangatal J over four days and included oral evidence from experts on Brazilian law. On 19 February 2019, Mangatal J delivered a judgment setting aside the ex parte

order. An application by VRG for leave to appeal was refused by the judge and, on the papers, by the President of the Cayman Court of Appeal.

19. VRG renewed its application for leave to appeal at an oral hearing. That application together with argument on the appeal itself was heard in November 2019. On 11 August 2020, the Cayman Court of Appeal delivered judgment granting VRG leave to appeal, allowing the appeal and restoring the ex parte order giving VRG leave to enforce the award in the same manner as a judgment of the Cayman court. The order has been stayed pending the determination of this appeal to the Board.

20. The lead judgment of the Cayman Court of Appeal was given by Sir Bernard Rix JA, with whom the President, Sir John Goldring, and John Martin QC JA agreed. The court held, in summary, that:

(i) The decisions of the Brazilian courts give rise to an issue estoppel which precludes the MP Funds from disputing in these proceedings that the arbitral tribunal had jurisdiction to decide the claim against them;

(ii) It was not contrary to substantial justice or Cayman Islands public policy for the arbitrators to determine the legal consequences of the facts which they found proved without giving the MP Funds an opportunity to comment on the legal basis which they adopted for their decision;

(iii) The legal basis for the tribunal's decision was not beyond the scope of the submission to arbitration.

3. THE LEGAL FRAMEWORK

The New York Convention

21. As we stated in our judgment in *Enka Insaat ve Sanayi AS v 000 "Insurance Company Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117, para 126:

> "The New York Convention, to which the United Kingdom became a party in 1975 and which more than 160 states have now signed, has been described as 'the single most important pillar on which the edifice of international arbitration rests', and as 'perhaps … the most effective instance of

> international legislation in the entire history of commercial law' … The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

22. One of the most important provisions of the New York Convention is article V, which sets out the grounds upon which recognition and enforcement of an arbitral award made in the territory of another state may be refused. It contains two sections. Article V(1) sets out the grounds upon which recognition and enforcement may be refused at the request of the party resisting enforcement. Article V(2) sets out additional grounds upon which the enforcing court may refuse recognition and enforcement of its own motion. Although the MP Funds are not relying on all its provisions, it is worth quoting article V in full:

> "*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
>
> (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) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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

23. It is well established that the grounds for refusing recognition and enforcement set out in article V should be construed narrowly in the light of the New York Convention's object and purpose of facilitating the recognition and enforcement of foreign arbitral awards: see eg *Cukurova Holdings AS v Sonera Holdings BV* [2014] UKPC 15; [2015] 2 All ER 1061, para 34.

24. The provisions of article V on which the MP Funds are relying to resist enforcement of the award are article V(1)(a), (b) and (c) and article V(2)(b).

The 1975 Act

25. In the Cayman Islands, article V has been implemented through section 7 of the 1975 Act which, save for some re-ordering, is in materially the same terms as article V.

The Brazilian Arbitration Law

26. The annulment action in Brazil was brought under article 33 of the Arbitration Law, which provides:

> "The interested party may request the competent judicial authority to declare the arbitral award null in the cases set forth in this law. …"

It further provides that such a request is to comply with the rules of the Code of Civil Procedure.

27. Article 32 provides:

> "An arbitral award is null and void if:
>
> (i) The arbitration agreement is null;
>
> (ii) It is made by an individual who could not serve as an arbitrator;
>
> (iii) It does not comply with the [formal] requirements of article 26 of this Law;
>
> (iv) It has exceeded the limits of the arbitration agreement;
>
> (v) (Revoked);

(vi) It has been duly proved that it was made through unfaithfulness, extortion or corruption;

(vii) It is rendered after the time limit has expired, in compliance with article 12, item III of this Law; and

(viii) It violates the principles set forth in article 21, paragraph 2 of this Law."

28. Article 21, paragraph 2, of the Arbitration Law provides:

> "The principles of due process of law, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected."

29. As the MP Funds' Brazilian law expert, Mr Gomm Santos, accepted in evidence before the Cayman Grand Court, the grounds for annulment of an arbitral award set out in article 32 of the Arbitration Law are very similar to the grounds upon which recognition and enforcement may be refused under article V of the New York Convention. Specifically, article 32.1 of the Brazilian Arbitration Law corresponds to article V(1)(a) of the New York Convention (section 7(2)(b) of the 1975 Act); article 32.4 corresponds to article V(1)(c) (section 7(2)(d)); and the due process requirement under article 32.8 and article 21, paragraph 2, corresponds to article V(1)(b) (section 7(2)(c)).

4. THE ISSUES

30. The issues on this appeal are as follows:

(i) Issue (1) - *Validity of the arbitration agreement* - Whether the Cayman Court of Appeal 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 they did not agree to arbitration.

(ii) Issue (2) - *Due process/public policy* - Whether the Cayman Court of Appeal was wrong to find that the award did not fall within article V(1)(b) and/or V(2)(b) of the New York Convention on the basis that the MP Funds were denied a proper opportunity to present their case.

(iii) Issue (3) - *Scope of the submission to arbitration* - Whether the Cayman Court of Appeal was wrong to find that article V(1)(c) of the New York Convention did not apply.

31. In relation to all three issues, it is common ground that the law of the Cayman Islands is the same as English law.

5. ISSUE (1) - *VALIDITY OF THE ARBITRATION AGREEMENT*

32. The first ground on which the MP Funds resist enforcement of the award is that they never agreed to arbitration of the dispute because they were not party to the arbitration agreement. The response of VRG is that this issue has already been decided adversely to the MP Funds by the Brazilian courts in the annulment action and that the decision of the Brazilian court is conclusive for the purposes of these proceedings.

33. If the annulment action had succeeded, with the result that the award had been set aside by a competent court of the country in which (and under the law of which) the award was made, this would have been a ground for refusing to enforce the award in the Cayman Islands in accordance with article V(1)(e) of the New York Convention (section 7(2)(f) of the 1975 Act). The fact that the annulment action failed does not necessarily prevent the MP Funds from relying on other provisions of article V to resist enforcement. In principle, an argument that a person against whom the award is invoked never became a party to an arbitration agreement with the person seeking to enforce the award gives rise to a potential defence that the agreement is not valid under article V(1)(a): see *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48; [2021] Bus LR 1717, paras 23-25. This is subject, however, to the question of whether the decision of the Brazilian court has created an issue estoppel.

The doctrine of issue estoppel

34. 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.

35. It represents an extension of the public policy underlying cause of action estoppel and “may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue”: per Lord Keith of Kinkel in

Arnold v National Westminster Bank plc [1991] 2 AC 93 at p 105; see also *Thoday v Thoday* [1964] P 181, 197-198; *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 642; *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160, paras 17-22; *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs* [2020] UKSC 47; [2022] AC 1, paras 64-69.

36. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 the House of Lords held that issue estoppel can be based on a foreign judgment. To give rise to such an issue estoppel, three requirements must be satisfied: see *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar (The Sennar) (No 2)* [1985] 1 WLR 490, 499 (Lord Brandon); *Good Challenger Navegante SA v Metalexportimport SA (The "Good Challenger")* [2003] EWCA Civ 1668; [2004] 1 Lloyd's Rep 67, para 50. First, 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 (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.

37. A foreign judgment which satisfies the requirements for recognition at common law cannot be impeached for any error either of fact or law: see *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed (2012), para 14R-118 (rule 48). 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": see *Adams v Cape Industries plc* [1990] Ch 433, 569; *The Sennar (No 2)*, p 493, per Lord Diplock; *The Good Challenger*, paras 55-57. Nor is it relevant that a foreign court system applies different rules of evidence or has a different procedure from the English courts, unless this deprives the judicial process of the quality of substantial justice: see *Dicey, Morris & Collins*, paras 14-163 to 14-165 (and the cases cited).

38. The point has been made that there may be a need for caution before finding an issue estoppel based on a foreign judgment: see *Carl Zeiss* at p 918 (Lord Reid) and p 967 (Lord Wilberforce); *The Good Challenger*, para 54(ii). The main potential reason for such caution, in the words of Lord Reid in *Carl Zeiss* at p 918, is that:

> "we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral …"

This should not, however, be regarded as a reason to decline to treat a foreign judgment as conclusive where the domestic court is able to reach a clear view on those matters. As observed in *Yukos Capital Sarl (JSC) v Rosneft Oil Co (No 2)* [2011] EWHC 1461 (Comm); [2012] 1 All ER (Comm) 479, para 49:

> "… the [need] for caution … is most likely to be relevant when considering the precise identity of the issue determined, whether it was necessary for the decision and whether there has been a decision 'on the merits'. Where differences in procedure make these issues difficult to determine then the court needs to exercise caution. However, if these matters are clear then the need for caution does not arise."

Is the issue the same?

39. In relation to the first issue raised on this appeal, the MP Funds accept that all the requirements of issue estoppel are satisfied subject only to one narrow point. Before the Cayman Court of Appeal, the MP Funds argued that there was no final and conclusive decision of the Brazilian court on the basis that there was then an outstanding appeal to the Supreme Federal Court. But that appeal has since been dismissed (see para 17 above) and the MP Funds now accept that the decision of the São Paulo court in the annulment action satisfies the domestic requirements for the recognition of a foreign judgment. The parties to the two actions are the same. The only question is whether the issue about the validity of the arbitration agreement raised in this action is an issue which has already been decided.

40. It is clear that one of the grounds on which the MP Funds sought to have the award set aside by the Brazilian court was that they were not parties to an arbitration agreement with VRG - the very same argument as is made in these proceedings. Article V(1)(a) requires the question whether there is a valid arbitration agreement to be decided by applying "the law to which the parties have subjected it …". That means the law which would govern the agreement if it exists or is valid: see *Kabab-Ji SAL*, para 27. It is common ground that the applicable law is therefore Brazilian law, which is the system of law which the Brazilian courts applied.

41. The MP Funds do not suggest that, for the purpose of issue estoppel, it makes any difference that the decision of the Brazilian court was reached under the applicable Brazilian statute and not under article V of the New York Convention or the 1975 Act: what matters is whether the issue is the same. What is said is that the issue is not the same, or has not been shown to be the same, because it has not been shown that the Brazilian court actually decided the question whether the MP Funds were

parties to an arbitration agreement with VRG, as opposed to carrying out a limited review of the tribunal's decision on that question.

The MP Funds' argument

42. It is not in doubt that, in the absence of an issue estoppel, the Cayman court would be required to make its own independent or de novo determination of whether there was a valid arbitration agreement and that, in this determination, the tribunal's decision on its own jurisdiction would have no legal or evidential value: see eg *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). The MP Funds do not, however, accept that the same was true for the Brazilian court in the annulment action. In their written case counsel for the MP Funds referred to a statement in *Born, International Commercial Arbitration*, 3rd ed (2021), at p 3476, that:

> "Despite a general standard of de novo review, and the refusal of many national courts to grant formal preclusive effect to arbitrators' jurisdictional rulings, courts in a number of jurisdictions have accorded a substantial degree of deference to arbitrators' factual determinations and legal conclusions regarding the existence or validity of [the] arbitration agreement in annulment proceedings."

It does not seem to us that "deference" - if, for example, this involves according weight to findings of foreign law or assessments of evidence made by the arbitral tribunal - is necessarily inconsistent with making a de novo decision; and it is clear that the discussion in *Born* does not treat it as such. 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.

43. Mr Vernon Flynn QC for the MP Funds submits that, as the burden lies on the party who asserts an issue estoppel to prove all the constituent elements, it follows that the burden rests on VRG to show what standard of review was applied by the Brazilian court. He further submits that, to discharge this burden, it was incumbent on VRG to adduce evidence from an expert on Brazilian law as to what exercise the Brazilian court was performing. As it was, the only such evidence was given by the MP Funds' expert, Mr Gomm Santos. In his expert report in these proceedings Mr Gomm Santos stated that:

> "… neither the [Arbitration Law], nor the [Code of Civil Procedure], nor any relevant court rules, expressly set out what standard of review a Brazilian court is required to apply in an annulment action under article 33 of the [Arbitration Law], whether on questions relating to the jurisdiction of the arbitral tribunal, or otherwise.
>
> In the Annulment Proceedings, the Brazilian courts therefore were not required to consider the matters before them de novo from the arbitration tribunal's Award. In my opinion, it is very difficult in fact to identify what standard of review or consideration the Brazilian courts applied, but it appears they primarily reviewed the correctness of the tribunal's decision on jurisdiction rather than considering that question de novo."

44. In these circumstances Mr Flynn submits that there was no proper evidential basis for the Cayman Court of Appeal to overturn the judge's finding of fact, at para 128, that under Brazilian law/procedure "the courts are not required to reach a decision de novo on the question of jurisdiction".

Ascertaining the relevant Brazilian law

45. We reject the MP Funds' case on this issue for the following reasons.

46. First, it is not necessary in every case to adduce expert evidence of foreign law. As was recently stated in the Supreme Court's decision in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45; [2021] 3 WLR 1011, para 148:

> "The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says."

47. In the present case it was entirely appropriate for the Cayman Court of Appeal to start by considering the text of the Arbitration Law and of the Brazilian court decisions, matters which the judge did not even address.

The text of the legislation

48. Under article 32 of the Arbitration Law the issues in the annulment action were: (i) whether the arbitration agreement "is null"; (ii) whether the arbitral award "has exceeded the limits of the arbitration agreement"; and (iii) whether it violates the principle of due process set out in article 21.2. These are binary questions to which the answer would be expected to be either affirmative or negative. No reference is made in article 32 to the arbitral tribunal's decision on these issues (if there is one), nor to any review of the correctness of any such decision or to the standard of any such review.

49. This is hardly surprising as it is apparent that a number of the grounds set out in article 32 which make an arbitral award null are unlikely to have been the subject of any decision by the arbitral tribunal and therefore could not be subject to only a limited review. This is illustrated in the present case by the challenge advanced that the tribunal's decision involved a violation of the principle of due process. Self-evidently, this ground for seeking annulment could not be and was not the subject of any prior determination by the tribunal.

50. In fact, the only grounds upon which it is likely, but by no means inevitable, that there will have been a decision by the arbitral tribunal are whether the arbitration agreement is null and whether the limits of the arbitration agreement have been exceeded. If these have been raised as jurisdictional issues before the tribunal, and the tribunal has chosen to rule on its own jurisdiction in accordance with the competence-competence principle, there will be a decision on these issues, but not one that is capable of binding a court (unless there has been a clear agreement that jurisdiction is a matter for the arbitral tribunal alone).

The Brazilian court decisions

51. The substantive nature of the decision called for under article 32 is further borne out in this case by the approach taken by the Brazilian courts and the terms in which their judgments were expressed.

52. As to the approach taken, the first instance judge explained that he was examining the claim under article 330.1 of the Code of Civil Procedure, "as this is primarily a matter of law, and the record is duly complete with respect to the facts". As explained in the judgment of the São Paulo Court of Appeal, article 330.1 permits a judge to decide that no further evidence is required and to adjudicate on the case summarily.

53. It is thus apparent that the Brazilian court regarded the issues raised to be primarily matters of law and, as such, matters for the court to decide. As Sir Bernard Rix observed at para 129 of the Cayman Court of Appeal judgment: "apart from some incontrovertible facts relating to the contractual documents in issue, the questions for the Brazilian courts were pure points of their own law, points of contract interpretation". In such circumstances, it is difficult to understand how the Brazilian court was "doing other than expressing its own consideration of the matter".

54. Whether it was appropriate for the court to make a summary adjudication in accordance with article 330.1 was an unsuccessful ground of appeal to the São Paulo Court of Appeal. In rejecting this ground of appeal, the São Paulo Court of Appeal made it clear that the determination of the application to set aside the award was one which would ordinarily involve evidence but that it was appropriate in this case for the judge to make a summary adjudication on the basis of the documentation before him. This clearly indicates that what is involved is an independent or de novo determination rather than a limited review of the tribunal's decision.

55. Further, the terms of the courts' decisions are expressed as determinations of the merits of the annulment grounds raised. There is no suggestion that the courts are applying a limited standard of review, such as unreasonableness or perversity. Nor is there any suggestion that a different type of decision is being made in relation to grounds which relate to matters on which the arbitral tribunal made a decision and grounds which do not.

The expert evidence

56. The evidence of Mr Gomm Santos did not support the judge's finding that the Brazilian courts "are not required to reach a decision de novo on the question of jurisdiction". In the passage quoted from his report at para 43 above, he inferred from the absence of any express statement in the Arbitration Law or other laws of what standard of review a Brazilian court is required to apply in an annulment action that "the Brazilian courts <u>therefore</u> were not required to consider the matters before them de novo" (our emphasis). We cannot accept that this is a proper inference. The question framed by article 32.1 is whether the arbitration agreement is null, not

whether no reasonable tribunal could hold otherwise. In the absence of some rule of law which says otherwise, article 32.1 seems to us to require the court to make its own determination of the question.

57. Mr Gomm Santos did not give any reason for supposing that annulment proceedings involve anything less than a de novo consideration, whether by referring to the terms of any legislation, the practice of the Brazilian courts or any other legal source. No supporting commentary, treatise or court decision is referenced in his report. As to his own experience, in cross-examination it emerged that he had only ever been involved in two annulment actions, neither of which was cited as an example supporting his evidence.

58. The unsupported opinion expressed in his report was in any event undermined in cross-examination. First, Mr Gomm Santos accepted that he had left out of account article 33, paragraph 1, of the Arbitration Law, which - as he acknowledged - requires an annulment action to follow the procedure of an ordinary court action and to be decided in the same way as any other action. Secondly, he accepted that in an annulment action whether there has been a violation of due process has to be decided as a matter of fact in the same way as any other action. He did not explain how or why a different approach was appropriate for other article 32 grounds, or what that would involve. Thirdly, he accepted that it was open to the parties to seek to adduce whatever evidence they wanted in support of an annulment claim and that it was for the court to decide what evidence to consider. In the annulment action the court had been provided with 14 volumes of supporting material. Fourthly, he accepted that the 70 page pleading produced in support of the application was such as would be used in an ordinary action. Fifthly, as Sir Bernard Rix JA observed at para 133 of the Cayman Court of Appeal judgment, his evidence "in no way explains what, in a matter which entirely depended on contract interpretation and where there were no facts in dispute, is the difference between reviewing the correctness of a decision of law and considering that question of law afresh".

The basis for the Cayman judge's finding

59. The only reason given by Mangatal J for her conclusion that the Brazilian courts are not required to reach a decision de novo on questions of jurisdiction was the São Paulo Court of Appeal's reference to competence-competence. This is the principle that the tribunal has the power to rule on its own jurisdiction, which she said, at para 128, "amply assist[s] in demonstrating this point". However, as Sir Bernard Rix JA pointed out at para 124 of the judgment of the Cayman Court of Appeal:

> "The principle of competence-competence says nothing about the test which a court brings to bear when the issue of an arbitrator's jurisdiction is challenged. It is merely the doctrine which says that it is thought in general to be better and more efficient if the arbitrator takes the first, or initial, look at the issue, before it comes before a court for its definitive judgment …"

Conclusion on issue estoppel

60. For all these reasons, we are satisfied that the Cayman Court of Appeal was both justified and correct in overturning the judge's conclusion on this issue. The annulment action 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, as the Court of Appeal held.

6. ISSUE (2) – *DUE PROCESS*

61. The second ground on which enforcement of the award is resisted is that the arbitral tribunal allegedly committed a serious breach of natural justice or due process by finding the MP Funds liable on a legal basis not raised by VRG without giving the MP Funds an opportunity to be heard on the point. It is said that this gives rise to a defence under article V(1)(b) of the New York Convention (section 7(2)(c) of the 1975 Act) that the MP Funds were "unable to present [their] case". The MP Funds also argue that enforcement may be refused under article V(2)(b) on the basis that, by reason of the alleged breach of natural justice, it would be contrary to the public policy of the Cayman Islands to enforce the award.

62. As noted earlier, one of the grounds on which the MP Funds sought to have the award set aside in the annulment action was that the award violated the principle of due process set out in article 21.2 of the Brazilian Arbitration Law. It is accepted by VRG and was in the courts below, however, that that issue was not identical to the issue whether there was a violation of due process for the purpose of article V(1)(b) of the New York Convention, so that the decision of the Brazilian court does not create an issue estoppel.

The applicable law

63. Before it is possible to decide whether the person against whom the award is invoked was "unable to present his case" within the meaning of article V(1)(b), it is first necessary to identify the system of law and the standard which the court should apply in answering this question.

64. *Born, International Commercial Arbitration*, 3rd ed (2021), p 3828 proposes that the two most convincing candidates are either the law of the recognition forum or uniform international standards prescribed by article V(1)(b) itself. As between these alternatives, Professor Born advocates the latter. On the other hand, Professor van den Berg in *The New York Arbitration Convention of 1958* (1981), at p 298, observes that, while it has been argued by commentators that article V(1)(b) "constitutes a truly international rule not linked to any national law":

> "The courts proceed the other way around: whilst no court has held that article V(1)(b) constitutes an international rule, many have affirmed that the standards of due process are basically to be judged under their own law. However, as noted, they hold either expressly or implicitly that what may be a violation of due process under their own law is not necessarily a violation of due process under the Convention. This judicial attitude belies the fears of parochialism of the authors."

The approach of national courts

65. The case law from a variety of different jurisdictions cited by Born and surveyed in George A Bermann (ed), Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (2017) broadly bears out the statement by van den Berg of the approach adopted by national courts.

66. Thus, in the United States courts have held that article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," and therefore US standards of due process: *Parsons & Whittemore Overseas Co, Inc v Société Générale de L'Industrie du Papier (RAKTA)*, 508 F 2d 969, 975 (2d Cir, 1974); *Iran Aircraft Industries v Avco Corpn*, 980 F 2d 141, 146 (2d Cir, 1992). However, this does not require compliance with US court procedure. The relevant standards are the "minimum requirements of fairness" that are fundamental to a fair adjudication,

comprising "adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator": see eg *Sunshine Mining Co v United Steelworkers of America*, 823 F 2d 1289, 1295 (9th Cir, 1987); *Generica Ltd v Pharmaceutical Basics Inc*, 125 F 3d 1123, 1129-1130 (7th Cir, 1997); *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F 3d 274, 298-99 (5th Cir, 2004). Courts often cite the seminal decision of the US Supreme Court in *Mathews v Eldridge*, 424 US 319, 333 (1976) for the proposition that the "fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner".

67. As expressed in the proposed final draft of the new Restatement of the US Law of International Commercial and Investor-State Arbitration, approved in May 2019, at p 602:

> "In the United States, the relevant principles are generally referred to as 'due process' standards, but use of this term does not imply that domestic constitutional due process protections directly apply in arbitration. The procedural protections that assure fundamental fairness in a consensual arbitral process, particularly ones involving parties from different legal cultures and procedural traditions, are distinct from those that would be required in judicial proceedings in which the Due Process Clauses of the Fifth and Fourteenth Amendments of the US Constitution apply."

68. In France, the standards of procedural due process to which foreign arbitral awards are subjected under article V(1)(b) are not domestic law standards. They are drawn from general principles of law that are in turn influenced by a variety of standards, most notably article 6(1) of the European Human Rights Convention. In other words, the standards are "denationalised" and reflect l'ordre public international procedural: see *George A Bermann (ed)*, para 4.2.2; and also *Jean-Louis Delvolvé, Gerald H Pointon and Jean Rouche, French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed (2009), p 254.

69. In Germany, the prevailing view is that enforcement may be refused under article V(1)(b) of the New York Convention when the decision so deviates from the basic principles of German procedural law that it cannot be deemed, according to the German legal system, to have been rendered in proper legal proceedings. Not all procedural defects are relevant; rather, there must be a violation of minimum standards of procedural justice and the award must be based on that violation: see Judgment of 23 April 2004, Yearbook of Commercial Arbitration 2005, 557

(Oberlandesgericht Köln); Judgment of 30 October 2008, 2009 SchiedsVZ 66 (Bundesgerichtschof).

70. Commenting on the interpretation and application of the New York Convention in Switzerland, Andrea Bonomi and Elza Raymond-Eniaeva in *Bermann (ed)*, para 3.2.2, refer to the controversy over whether the due process concept is an autonomous notion or should be interpreted according to the law of the country in which enforcement is sought, and state:

> "While avoiding a clear answer, the Swiss Federal Court seems to take an intermediate stance (domestic standards adapted to the different context of international arbitration and to the transnational standards), although there are scholars supporting an autonomous notion."

71. Sweden adopts the position, in common with a number of other jurisdictions, of being guided by national law but applying a standard of due process adapted to meet the context of international arbitration and the application of an international treaty. Ulf Franke and Annette Magnusson et al (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law 2013) says at pp 284-285, para 44 that:

> "The provision [article V(1)(b)] aims to safeguard that the parties to the arbitration have had a reasonable opportunity to participate in the arbitral proceedings and to state their case, ie to maintain the adversarial principle. It has been argued that the rule of due process is an international provision. However, national courts have on occasion looked at national law for guidance, although noting that a transgression of national law may not necessarily be a transgression of the New York Convention. The provision will in any case be interpreted restrictively."

72. There is little authority on the question in England and Wales. In *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm); [2015] 1 Lloyd's Rep 423, which involved a claim to enforce an Egyptian arbitration award in England, Walker J, at para 31, had no doubt that "the test as to ability of the party to present its case involves an application of relevant English principles as opposed to those of Egypt or anywhere else" (citing *Cukurova Holdings*, para 32, where on an appeal to the Privy Council from the British Virgin Islands the proposition that the enforcing court must apply its own concept of natural justice was not in dispute).

The position in principle

73. In considering the correct approach as a matter of legal principle, we think it necessary to distinguish between the system of law that is to be applied when a party against whom an award is invoked relies on article V(1)(b) in an English or Cayman court - which in our view is the law of the forum - and the nature and content of the relevant test of due process under English or Cayman law.

74. In accordance with British constitutional principle, the New York Convention does not have direct legal force in the Cayman Islands. The law which the court must apply when a party seeks to enforce an arbitral award made in the territory of another state which is a party to the New York Convention is the 1975 Act. The text of the 1975 Act closely mirrors that of the Convention. But this does not alter the fact that it is the domestic statute and not the Convention which imposes the relevant legal obligations. In the absence of any rule which requires a different system of law to be applied, the meaning and effect of the statute is a matter of domestic law. In contrast to several of the other provisions of article V, article V(1)(b) does not contain, either expressly or by necessary implication, any choice of law rule directing the court to apply a designated system of national law, such as the law to which the parties subjected the arbitration agreement or the law of the country where the arbitration took place or where the award was made. The meaning and effect of article V(1)(b) is therefore a question to be decided by applying the law of the Cayman Islands.

75. It by no means follows, however, that the question is to be answered by applying local standards of what constitutes a fair procedure. As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called “domestic precedents of antecedent date”, but rather should be construed “on broad principles of general acceptation”; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning.

76. It follows that 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.

77. There are further reasons for treating article V(1)(b) as infringed only if there has been a serious violation of fundamental and generally accepted requirements of due process. These include, first of all, the pro-enforcement object and purpose of the Convention with the corollary, referred to at para 23 above, that the grounds for refusing recognition and enforcement of an award should be narrowly construed. Second, such an approach is also consistent with the parties' procedural autonomy and the fact that proof that the arbitral procedure was not in accordance with the agreement of the parties (or, failing such agreement, with the law of the country where the arbitration took place) is itself a separate basis for refusing recognition and enforcement of the award under article V(1)(d). This indicates that the regulation of arbitral procedure is predominantly a matter for the parties themselves and the law of the seat of arbitration. Third, the language of article V(1)(b), requiring as it does that the party was "unable" to present its case (and not merely impeded or curtailed in doing so) signifies that the test is a demanding one. Fourth, a common thread running through all the national approaches surveyed in *George A Bermann (ed)* is the narrowness of the article V(1)(b) exception and the rarity of refusals to recognise or enforce awards on this ground.

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 of *van den Berg*, at pp 301-302, 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.

Inability to address a basis for the decision

79. It is not necessary for the purpose of deciding this appeal, nor would it be desirable, to attempt a full exegesis of the essential minimum requirements of a fundamentally fair hearing protected by article V(1)(b). There can, however, be no

doubt that they include a requirement that the tribunal must give both parties an opportunity to adduce evidence and put forward arguments on the matters in dispute. A corollary of this is that the tribunal should not reach its decision on a basis which the party adversely affected by the decision has had no opportunity to address.

80. A good example of a serious violation of this requirement is provided by the decision of the English Commercial Court in *Malicorp v Republic of Egypt*. In that case Malicorp, an English company, had entered into a contract with the Republic of Egypt to design and construct a new airport. After the Republic cancelled the contract, Malicorp made a claim in arbitration proceedings for damages for breach of the contract. The Republic denied liability on the ground that it was entitled to avoid the contract for fraud (consisting in alleged deceit about whether Malicorp satisfied the capital requirements for the project). In its award, the arbitral tribunal held that the Republic was entitled to avoid the contract. However, the tribunal did not rule on the allegation of fraud and instead held that the contract was void because the Republic had entered into it under an essential mistake about the amount of Malicorp's capital. The tribunal then proceeded to award damages to Malicorp under article 142 of the Egyptian Civil Code, which allows damages to be awarded where a contract is void and reinstatement of the parties' pre-contractual position is impossible. The tribunal apportioned 10% of the responsibility for the mistake to the Republic and treated that as a justification for awarding Malicorp substantial damages for loss of profit on the contract.

81. In setting aside an order obtained by Malicorp ex parte for leave to enforce the award in England, Walker J observed, at para 41, that the award of damages under article 142 "must have been a complete surprise" to the Republic. There was no evidence to suggest that Malicorp had ever claimed damages under article 142 during the proceedings or that any notice was given to the Republic that the tribunal was contemplating making an award under that provision. Nor did the tribunal give any indication of its intention not to rule on the Republic's case of fraud and instead to find the contract void for mistake. Had any warning of what the tribunal had in mind been given, the Republic would undoubtedly have protested both that the tribunal ought to make a finding on its case of fraud and that, even if the basis for avoidance were mistake, an award of damages instead of rescission could not include loss of profits (which could only have been recovered for breach of the contract if the contract had been valid). In the judge's view, the notion that the Republic could and should have anticipated the basis of the award was "manifestly repugnant to elementary principles of fairness" and the failure to inform the Republic of the proposed basis was a serious breach of natural justice which justified refusal to enforce the award under article V(1)(b).

82. It is apparent that in the *Malicorp* case the unfairness and surprise resulting from the arbitrators' conduct went far beyond applying a legal provision (article 142 of the Egyptian Civil Code) without notifying the parties of their intention to do so. That provision was only relevant at all because the tribunal did not rule on the Republic's case of fraud and instead decided the claim on a factual and legal basis (that the Republic made an essential mistake) which had not been argued. This was itself fundamentally unfair.

83. Another case in which arbitrators found a defendant liable on a factual and legal basis of which no notice had been given and which the defendant could not possibly have foreseen is *Kanoria v Guinness* [2006] EWCA Civ 222; [2006] 1 Lloyd's Rep 701. In that case a claim was made in arbitration proceedings in India against Mr Guinness for a debt allegedly owing under a contract made, not with him, but with a company of which he was a major shareholder. Mr Guinness, who was seriously ill, did not attend the arbitration hearing but wrote a letter pointing out that the contract was with the company and not with him personally. An award was made against him on the basis of oral submissions made at the hearing that the arbitrator should lift the corporate veil as Mr Guinness had used the company as a vehicle for fraud. No notice of this allegation of fraud had been given to him. The Court of Appeal upheld a decision refusing to enforce the award under article V(1)(b) on the ground that the defendant had been unable to present his case.

84. By contrast, in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 arbitrators awarded damages to the claimant which were quantified by reference to an award which they had already made in a related arbitration involving the claimant but which the defendant had not seen. The defendant applied to the court of the seat (in China) to set aside the award. The court remitted the case to the arbitrators for a further hearing. At this hearing the arbitrators invited the defendant to explain the basis of its application to set aside the award but its lawyer declined to do so. The tribunal then affirmed its original award. On a claim to enforce the award in England, Colman J rejected a defence based on article V(1)(b) on the ground that the defendant had been given an opportunity to present its case at the resumed hearing, but had failed to do so.

Iura novit curia

85. 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).

86. In civil law jurisdictions a more proactive approach on the part of the court or tribunal in applying the law is generally recognised, reflected in the Latin maxims "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). On this approach it is expected that the judge will bring his or her own knowledge of the law to bear in deciding a case, independently and in addition to the legal arguments and materials adduced by the parties.

87. The judgment of Sir Bernard Rix JA in the Cayman Court of Appeal, at paras 156-170, considers the doctrine of iura novit curia at some length, drawing on *Ferrari & Cordero-Moss (eds), Iura Novit Curia in International Arbitration* (2018), a comparative study of this subject which has been made available to the Board. The book comprises 15 chapters contributed by practitioners and scholars from 15 separate countries about the approach taken in each country to whether arbitral tribunals may develop their own legal reasoning independently of the agreement and pleadings of the parties. There is a further chapter on the doctrine of iura novit curia in international law, and a concluding "general report" by one of the editors, Dr Cordero-Moss, which seeks to make some comparisons between the approaches of different jurisdictions described in the earlier chapters.

88. Dr Cordero-Moss concludes that all the reports seem to converge on some basic principles - one of which is that "the tribunal must give both parties the possibility to be heard and to comment on the basis for the tribunal's decision." This is said to be particularly true in relation to factual findings which constitute the basis for the award and to a large extent also in relation to remedies granted by the tribunal. The position is more complex in relation to legal reasoning. It is generally accepted that the tribunal is not bound simply to choose between the parties' legal reasons and is entitled to develop its own legal reasoning which may lead the tribunal to adopt a different legal analysis from the arguments advanced by the parties. According to the report, in some jurisdictions - among which is included Brazil - subject to certain qualifications, the tribunal is not generally obliged to inform the parties that a particular legal theory or legal rule will be applied as a basis for the tribunal's decisions.

89. According to the chapter of the book on Brazilian law, under Brazilian law as a general rule arbitrators should not go beyond the allegations of fact made and relief claimed by the parties but may adopt a different legal basis for its decision from those argued by the parties. This is subject to the "adversary principle" that the parties should have the possibility of making submissions on any issue and that the tribunal's decision should not take the parties by surprise. This account of Brazilian law is consistent with the approach taken by the Brazilian courts in the annulment action in this case. The complaint of the MP Funds that there had been a violation of the principle of due process was rejected on the basis that the tribunal did not go beyond the facts established or the relief claimed and that it was the duty of the tribunal to apply the relevant law even though this involved adopting a different legal classification of the facts established from that put forward by the claimant.

The circumstances of this case

90. Turning in more detail to the circumstances of this case, VRG's claim was based on an alleged discrepancy between (a) the amount of working capital shown in a balance sheet provided to VRG at the time of the sale and attached to the Agreement (the "initial balance sheet") and (b) what VRG claimed was the true amount of the airline company's working capital. VRG claimed this difference as a price adjustment provided for in the Agreement. 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 had "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. In addition, a warranty was included in the Agreement that PwC had prepared and validated the balance sheet attached to the Agreement when, as Mr Lap Chan must have known, this was untrue.

91. 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.

92. 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 the 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.

93. 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.

94. The tribunal then went on to consider 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 channelled through the corporate structure that was created, nevertheless gave rise to legal liability. The tribunal stated, at para 613 of the award:

> "As charges of malicious conduct have been made, it is up to the arbitration tribunal, in accordance with the general principles of Brazilian procedural law, to analyse and rule on this issue; and to do so the tribunal (a) shall look into the concept and regulation of malice under Brazilian law, and then (b) shall analyse whether such actions fit into the legal concept of malice."

95. The tribunal proceeded to do this and examined the concept of "third party malice" regulated by article 148 of the Civil Code. The tribunal identified the necessary elements of this concept as being 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.

96. We do not understand the MP Funds to suggest that the tribunal based its conclusion on any facts which were not either admitted or in issue in the arbitration. The complaints made are that the tribunal held them liable on a legal basis (third party malice under article 148) which was not advanced by VRG or raised with them by the tribunal at any point during the proceedings and which, so it is submitted, the MP Funds could not reasonably have anticipated because it is inconsistent with the case advanced by VRG.

Alleged inconsistency

97. To take the latter point first, counsel for the MP Funds say that VRG's claim - and the assertion that the tribunal had jurisdiction over the MP Funds - was based on the premise that the MP Funds were parties to the Agreement or otherwise alter egos of the Sellers and therefore liable to comply with the price adjustment provisions in clause 5 of the Agreement. They submit that this is inconsistent with the tribunal's finding of liability under article 148, which was premised on the MP Funds not being parties to the Agreement but being liable as third parties for fraud giving rise to a claim in tort for damages.

98. We do not accept that there is any such inconsistency. First, the jurisdiction of the tribunal over the MP Funds was not based on piercing the corporate veil but on construing the addendum to which the MP Funds were admittedly parties as an integral part of the Agreement, such that by entering into the addendum the MP Funds became parties to the Agreement, including the arbitration agreement. Second, there is no inconsistency between the finding that the MP Funds were parties to the Agreement, including the arbitration agreement, and the tribunal's finding of liability under article 148. The tribunal expressly stated in identifying the elements of liability under article 148 that the "malicious party" could be another contracting party. The MP Funds were "third parties" for the purpose of article 148 because, although parties to the Agreement, they were not the party to whom the purchase price was payable and that directly benefited from the transaction. Third, the amount for which the MP Funds were held liable was the amount of the price adjustment which VRG was claiming. There is accordingly no inconsistency between the sum claimed by VRG and the sum awarded (a point which we discuss further below in addressing the third issue).

99. The MP Funds are nevertheless plainly right in saying that the legal theory on which the tribunal found them liable was different from the legal theory on which VRG had relied in argument. VRG had alleged "malice" on the part of the MP Funds and, more specifically, had alleged that the bad faith actions of the MP Funds had ended up "maliciously misleading [VRG] into believing that the company was in a financial position which was very different from reality" (see para 573 of the award). But they did not in their submissions in the arbitration analyse the legal concept of malice in the way the tribunal did or make any reference to article 148 of the Civil Code (except for a reference in a legal opinion prepared for the purpose of another case on which VRG relied). The MP Funds submit that in these circumstances it was fundamentally unfair to find them liable under article 148 without warning them that the tribunal had in mind to do so and giving them an opportunity to make submissions on the point.

Conclusion on due process

100. Like the Cayman Court of Appeal, we have found this a difficult issue to decide. There is wisdom in the guidance given in the ICC Secretariat's Guide to ICC Arbitration, which states, at para 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."

It would at the very least have been prudent for the tribunal to have followed this guidance in the present case before making its award.

101. Ultimately, however, we have not been persuaded that the failure of the tribunal to invite the MP Funds to comment on whether the facts alleged by VRG 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 under article V(1)(b). We attach weight, in particular, to the following matters.

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 (as in *Malicorp v Republic of Egypt*) or of which the defendant was never notified (as in *Kanoria v Guinness*) and which the defendant was therefore never able to address. All the factual allegations which the tribunal found proved and on which it based its decision in this case were in issue and the MP Funds had a full and fair opportunity to contest them. The legal concept of "malice" was also invoked by the claimant. The only matter of which the MP Funds did not have notice was the legal provision (article 148) imposing liability for third party malice which the tribunal applied to the facts proved.

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.

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.

105. 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.

106. Fifth, we remind ourselves that to justify the conclusion that the party against whom the award is invoked was unable to present its case, what is required is proof, not merely that a procedure was adopted which was irregular or undesirable, but of fundamental unfairness which goes to the essence of the right to be heard. We do not consider that this has been demonstrated in the present case.

107. For these reasons, the Cayman Court of Appeal was in our view right to conclude that the MP Funds have not established a defence to enforcement under article V(1)(b) of the New York Convention (and section 7(2)(c) of the 1975 Act).

Public policy

108. The MP Funds also rely on their complaint of a breach of natural justice as a reason to refuse to enforce the award under article V(2)(b) of the New York Convention (and section 7(3) of the 1975 Act) on the ground that enforcement would be contrary to the public policy of the Cayman Islands. In argument Mr Flynn QC accepted that the MP Funds could not succeed on this ground if they do not succeed in establishing a defence to enforcement under article V(1)(b). That concession was clearly correct. It is difficult to envisage circumstances in which a violation of due process that is not sufficiently serious to engage article V(1)(b) could be said to render enforcement of an award contrary to public policy. The principal relevance of article V(2)(b) where a breach of natural justice is alleged would seem to us to be in the unlikely event that article V(1)(b) is not raised by the respondent - perhaps because the respondent has not participated in the enforcement proceedings - but it appears to the court that a fundamentally unfair procedure had been adopted (for example, failing to give the respondent proper notice of the arbitration proceedings). The court could in such a case refuse to enforce the award under article V(2)(b) of its own motion.

109. There is an additional reason why in this case the argument based on public policy cannot succeed. We agree with the reasoning of Colman J in *Minmetals* [1999] 1 All ER 315, 330-331, that, where an argument is made that it would be contrary to public policy to enforce an award because it has been arrived at through a fundamentally unfair procedure, it is relevant to consider not only the nature of the procedural unfairness complained of but also the availability of redress from the courts of the supervisory jurisdiction. Where, as in this case, the party against whom the award is invoked has had the opportunity to raise the complaint of procedural unfairness before those courts, countervailing policy considerations come into play. As stated by Colman J at p 331:

> "Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction."

110. 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. There is no sufficient basis on which to reach such a conclusion in this case.

7. ISSUE (3) – *SCOPE OF THE SUBMISSION TO ARBITRATION*

111. The final issue is whether enforcement may be refused under article V(1)(c) of the New York Convention (section 7(2)(d) of the 1975 Act). Comparatively little argument was addressed to this issue both before the Board and, it appears, in the courts below (see para 195 of the judgment of the Cayman Court of Appeal). That may be explained by the fact that the arguments advanced substantially overlap with those already considered in relation to the first and second issues.

112. Article V(1)(c) applies where:

> "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, …"

This provision, like other defences to enforcement, is to be construed narrowly in keeping with the Convention's object and purpose of facilitating the enforcement of foreign arbitral awards: see *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F 2d 969, 976 (2d Cir, 1974); *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; [2006] 1 AC 221, para 30.

Scope of the arbitration agreement

113. In resisting enforcement, the MP Funds rely on article V(1)(c) in two ways. First, they argue that the subject matter of the award is necessarily beyond the scope of the submission to arbitration because, even if the MP Funds were parties to an arbitration agreement with VRG, the scope of that agreement was limited to the non-compete

obligation contained in the addendum and therefore did not extend to a dispute relating to the purchase price of the shares.

114. It is common ground that this argument stands or falls with the MP Funds' case on the first issue. As we observed in *Enka v Chubb*, para 138, although article V does not expressly specify what law governs questions about the scope or interpretation of the arbitration agreement, it is logical to apply the law prescribed by article V(1)(a). This accords with the general approach in the conflict of laws that the validity and scope of a contract are governed by the same law and the fact that there is no clear boundary between such questions. Indeed, the argument made by the MP Funds could be analysed in terms of validity as an argument that there was no valid arbitration agreement in relation to any dispute other than one arising out of the non-compete obligation. The law to be applied is therefore Brazilian law.

115. The argument that the dispute was not within the scope of the arbitration agreement was advanced in the annulment action and was rejected by the Brazilian courts. For the reasons already given, that decision creates an issue estoppel. It is therefore not open to the MP Funds to reargue this question.

Scope of the terms of reference

116. The second argument made by the MP Funds relying on article V(1)(c) is that the basis on which the arbitral tribunal held them liable to VRG was outside the scope of the submission to arbitration as defined by the terms of reference for the arbitration. Clause 14.2 of the Agreement (quoted at para 10 above) provides for disputes to be submitted to the ICC in accordance with its Rules in effect at the date of the request for arbitration. Article 18 of the 1998 ICC Rules, which were in effect at the relevant time, made provision for terms of reference to be drawn up and signed by the parties and the tribunal. Article 19 stipulated that "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 assert 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 submit 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.

117. Once again, the preliminary question is which system of law governs this issue. Counsel for VRG submit that the terms of reference were drawn up pursuant to the arbitration agreement and form part of the contractual framework, and that it is

logical in these circumstances that their scope should be determined by the law governing the arbitration agreement, ie Brazilian law. If this is correct, then as the argument that the dispute was outside the scope of the terms of reference was also made in the annulment action and rejected by the Brazilian courts, it is also the subject of issue estoppel.

118. Counsel for the MP Funds, adopting the view of *Born*, at pp 3892-3893, contend that the scope of the terms of reference is essentially a question of fact, which depends on identifying the claims and issues that the parties have submitted to the arbitrators during the arbitral proceedings. In Professor Born's view, the nature of this exercise does not lend itself to the application of a particular national law: "It makes very little sense to attempt to force these various issues into the law chosen by article V(1)(a) - especially when the text of article V(1)(c) makes no similar choice." Professor Born also argues that "importing a national law standard into article V(1)(c)'s text ill-serves the Convention's fundamental purposes - of establishing uniform international standards encouraging the recognition of arbitral awards". We see force in these arguments. Whether, if this analysis is correct, an issue estoppel may nevertheless arise is not a question that we need pursue, however, as we are not ourselves satisfied that the tribunal went beyond the scope of the terms of reference in this case.

119. 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.

120. In any event, any arguable technical discrepancy between the formulation of the terms of reference and the characterisation of the remedy granted by the tribunal in this case comes nowhere close to the kind of excess of authority which would justify refusal to enforce the award. That is particularly so given that the narrow construction to be given to article V(1)(c) of the New York Convention (see para 112 above) requires the court to regard the scope of the submission to arbitration with corresponding latitude and be slow to find that the arbitrators have exceeded their powers.

8. CONCLUSION

121. For the above reasons, we consider that the Cayman Court of Appeal 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. The Board will therefore humbly advise Her Majesty to dismiss the appeal.