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Arbitral Freedom and Judicial Restraint: Iura Novit Curia in Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP and Others

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For a judge to know the law may seem as obviously desirable as for a cook to know something of food. What goes for judges ought here to go for arbitrators. After all, overwhelmingly, parties choose lawyers as arbitrators in preference to industry or financial experts, for example. Yet say it in Latin and you will find yourself on far less certain ground. The doctrine of *iura novit curia* continues to raise difficulties in both common and civil law jurisdictions. In deciding an appeal from the Court of Appeal of the Cayman Islands, the British Privy Council addressed the issue authoritatively in *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v Matlin Patterson Global Opportunities Partners (Cayman) II and others (Appellants) [2022] UKPC 21*. The Privy Council dismissed an appeal against a decision recognizing the award of a Sao Paolo-seated arbitral tribunal in a commercial case conducted under the ICC Rules. The important decision is wide-ranging in its analysis of issue estoppel, the proper approach of the English and Cayman Island courts to construing Article V of the New York Convention, and the arbitral tribunal's contested jurisdiction over the Appellants who were not signatories to the main contract. This note is confined to *iura novit curia*.

Although the Latin tag translates as "the court knows the laws", the issue is not straightforwardly one of knowledge – Does an arbitrator know a statute? May an arbitrator check that an authority is still good law? – but of an arbitrator's discretion ascertaining and applying the law independently of the parties' submissions. In the judgment of the Cayman Islands Court of Appeal of 11 August 2020, Sir Bernard Rix JA cites academic commentary tracing the idea to Aristotle's *Rhetorics*:

> "Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has happened or has not happened. As to whether a thing is important or unimportant, just or unjust, the judge must surely refuse to take his instructions from the litigants: he must decide for himself all such points as the law-giver has not already defined for him." (para. 159)

The passage gives an extreme view of a judge responsive to the evidence, fully conversant with the laws, and entirely free to apply the law to the facts as he sees fit. In arbitration, that approach runs into several difficulties. Arbitrators are limited to deciding the issues submitted by the parties, and the parties' right to be heard constrains arbitrators' legal forays. Moreover, *iura novit curia* has its origins in civil law litigation, whereas common lawyers generally expect judges to rule narrowly on the arguments before them. Nonetheless, as the Court of Appeal found, having surveyed leading arbitral jurisdictions, "It is impossible to say in general that the doctrine is not recognised in international arbitration." (para. 170)

In practice, the doctrine plays a limited role. Often, arbitrators will pre-empt difficulties by inviting extra submissions on a point of law, or, occasionally, sidestep difficult legal issues and decide a case very narrowly, for example, on the wording of the contract. Sometimes, international arbitrators cannot realistically make their own enquiries, because they know neither the laws of the relevant jurisdiction nor the language of the legal authorities. There can be no question of the tribunal knowing the law.

Background

The original arbitration arose out of a dispute over a share purchase and sale agreement. In simplified terms, the Respondent, Gol Linhas Aereas SA ("Gol"), is the universal successor to GTI SA, which bought the shares of the company that operated Gol Airlines from two subisidiaries of Volo Logistics LLC, established in turn by the Second and Third Appellants, MatlinPatterson Global Opportunities Partners II LP and MatlinPatterson Global Opportunities Partners II LLC (referred to as "the MP Funds"). Crucially, the MP Funds were not themselves sellers but third parties to the sale. However, as signatories to the addendum, they were party to all the terms of the contract and, as the tribunal found, to the arbitration agreement.

Gol brought a claim against the sellers and the MP Funds under a contractual price adjustment mechanism. Gol claimed a reduction to the initial purchase price because the sellers and MP Funds had fraudulently overstated the company's working capital at the time of the transaction.

The arbitral tribunal found that an officer of the MP Funds, had fraudulently overstated the working capital, and that the sellers and the MP Funds were jointly and severally liable. Accordingly, it granted Gol damages of nearly BRL$ 93 million to compensate it for the discrepancy in the working capital, i.e., current assets less current liabilities.

Since the MP Funds were not straightforwardly sellers under the contract, Gol argued abuse of legal personality under Article 50 of the Brazilian Civil Code, which would enable the tribunal to lift the corporate veil and extend liability to them. The tribunal found Article 50 inapplicable, but, on the same factual findings, found the MP Funds liable for "third-party malice" under Article 148 of the Civil Code. This legal basis appeared in an expert legal opinion that Gol submitted in support of its case, but did

not feature in its briefs.

When GoI sought recognition and enforcement of the award in the Cayman Islands, the MP Funds and their Cayman affiliate argued *inter alia* that the arbitral tribunal's departure in its legal reasoning from the parties' pleaded cases was grounds for refusing recognition under Article V(1)(b) of the New York Convention. GoI failed after a full hearing at first instance but succeeded before the Court of Appeal and Privy Council.

The Analysis of the Privy Council

In its judgment, the Privy Council attached particular weight to five considerations in rejecting the Appellants' defence under Article V(1)(b):

Firstly, the Privy Council noted that the arbitral tribunal had based its decision entirely on facts that had been in issue, including the allegation of malice, and MP Funds had been free to dispute them.

Secondly, internationally, there was a range of opinion as to the extent to which an arbitral tribunal was free to base a decision on a legal principle that the parties had not had the opportunity to address. Legal cultures differed. In relation to the application of Article V(1)(b), a court should be reluctant to find a breach of "a fundamental and generally accepted requirement of procedural fairness". (para. 103)

Thirdly, it was proper to consider the choice of Brazilian law as the law of the seat and the involvement of Brazilian lawyers appearing on both sides. Brazilian legal practice would have informed the parties' expectations of the conduct of the arbitration. Significantly, the Brazilian courts found no violation of due process in the protracted setting aside proceedings.

Fourthly, the key factual issue was fraud and the tribunal's legal reasoning based on that issue could not have come as a "complete surprise". (para. 105)

Fifthly, the Privy Council acknowledged that to establish that a party was unable to present its case required not merely a showing that the procedure was "irregular or undesirable" but a showing of "fundamental unfairness which goes to the essence of the right to be heard". (para. 106) Elsewhere in its judgment, it distinguished a party being unable to present its case from a party being impaired or facing constraints in doing so.

It dealt briefly with the issue of whether the arbitral tribunal had violated public policy under Article V(2)(b), since the Appellants had accepted that they could not succeed in this, if they failed to establish a defence to enforcement under Article V(1)(b). Similarly, the decision was not *ultra petita* under Article V(1)(c). The tribunal had, after all, awarded GoI the damages that it had sought from the arbitral tribunal or petitioned it for.

Conclusions

The analysis of the Privy Council is compelling. It recognizes that, internationally, legitimate procedural practices may differ significantly from those of domestic courts in the place of enforcement and that those practices should not be judged by parochial standards. The Privy Council also set a high standard for a defence to recognition under Article V(1)(b). More than any welcome legal pluralism, this makes it unlikely that arguments such as those of the Appellants will succeed in future cases.

Even so, the proper application of *iura novit curia* in arbitration remains elusive. Parties rarely adopt the sparse style of (the best) pleadings in English litigation. More often, their memorials are discursive, stating the same argument in marginally different ways across numerous documents, including expert reports. How fully and clearly must a party make a legal argument for the party to be said to be relying on it? Moreover, how great is a tribunal's departure from the parties' pleaded legal arguments under the applicable law? Here the judge at first instance held that the arbitral tribunal had decided in tort a claim pleaded in contract. To a lawyer in the English common law tradition that marks a radical departure from the pleaded cause of action, but it should not be assumed that other legal systems would view the departure as equally radical.

Generally, arbitrators have a proper concern to ensure that awards not only meet minimal standards of due process but also to involve the parties fully, giving them ample opportunity to address all relevant issues. However virtuosic, a well-reasoned award should not appear to have been conjured like a rabbit from a hat. Equally, tribunals need the legal toolkit to develop their own solutions if they are to resolve parties' disputes fairly and finally. The fact that "baseball arbitration" is a special case, where an arbitrator must choose between one of the solutions proposed by the parties, reflects this common understanding.

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