

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**Cause No.: FSD 137 of 2016 (IMJ)**

**IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW  
(1997 REVISION)**

**AND IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**VRG LINHAS AEREAS S.A.**

**Plaintiff**

**AND**

**(1) MATLIN PATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II  
L.P.**

**(2) MATLIN PATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P.**

**(3) MATLIN PATTERSON PARTNERS II LLC**

**Defendants**

**IN OPEN COURT, SITTING AS CHAMBERS**

**Appearances:** Mr. Vernon Flynn QC instructed by Mr. Luke Stockdale of Maples and Calder on behalf of the Applicants/Defendants

Mr. Tom Lowe QC instructed by Mr. Ulrich Payne and Mr. Shaun Maloney of Ogier for the Respondent/Plaintiff

**Before:** The Hon. Justice Ingrid Mangatal

**Heard:** 18, 19, 20 and 21 June 2018

**Draft Judgment:** 13 February 2019

**Judgment Delivered:** 19 February 2019



**HEADNOTE**

*The Foreign Arbitral Enforcement Awards (1997 Revision) – Section 22 Arbitration Law (2001 Revision) – Section 72(2) The Arbitration Law, 2012 - Convention Award - New York Convention - Order 73, Part II of the Grand Court Rules (1995 Revision) - ICC Arbitration in Brazil - Arbitration - Enforcement - Whether*

*190219 VRG Linhas Aereas SA v Matlin Patterson Global et al – FSD 137 of 2016 (IMJ) - Judgment*

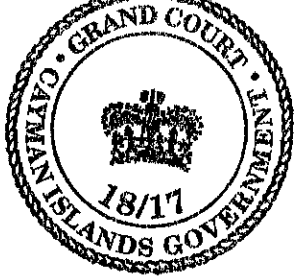
*enforcement of award should be refused on grounds that arbitrators lacked jurisdiction or because of breach of natural justice or on grounds of public policy.*



## JUDGMENT

### **Introduction - The Application**

1. This is an application by the Defendants (“**the MP Funds**”) opposing the attempt by the Plaintiff (“**VRG**”) to enforce an arbitration award VRG’s predecessor obtained against the MP Funds in Brazil on 2 September 2010 (“**the Award**”).
2. The MP Funds say that this application for refusal has a good basis for all three reasons (or any one of them) set out below:
  - (1) First basis for refusal: Arbitration is a consensual process. However, the MP Funds did not consent to arbitration. They were not a party to the arbitration agreement pursuant to which the arbitral Tribunal purported to exercise jurisdiction. The MP funds therefore are not bound by its decision.
  - (2) Second basis for refusal: Arbitration awards that offend against natural justice or the public policy of the enforcing court will not be enforced. The arbitral process in this case was infected by a breach of natural justice of the most fundamental kind: the Tribunal held the MP Funds liable in tort under a particular provision of the Brazilian Civil Code (“**BCC**”), when no tort claim was pleaded or argued and on which the MP Funds were never given the right to be heard. To enforce an award that so manifestly infringes the *audi alteram partem* rule is contrary to the public policy of the Cayman Islands (in common with multiple other jurisdictions).
  - (3) Third basis for refusal: Even if the parties had consented to arbitration, the parties to an arbitration consent only to the Tribunal determining the particular matter submitted to it for decision by the particular reference to arbitration. The Tribunal must not trespass beyond the scope of those matters and purport to decide matters not submitted to it for decision. That is what it is submitted the Tribunal did in this case. It purported to decide a tort claim against the MP Funds that had never



been submitted to it for decision and purported to grant relief that had never been sought from it.

### Background

3. The original proceedings were commenced by way of an *ex parte* Originating Summons filed 1 September 2016 by VRG, seeking the following orders:

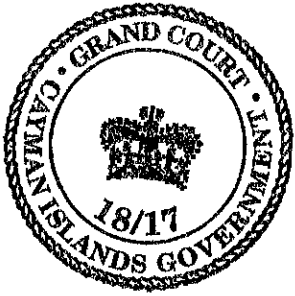
“(1) *granting leave, pursuant to section 5 of the Foreign Arbitral Award Enforcement Law (1997 Revision), to enforce the award dated 2 September 2010, in the above mentioned arbitration, of Juan Fernandez-Armesto, Pedro Antonio Batista Martins and Gustavo Jose Mendes Tepedino, the arbitrators therein, in the same manner as a judgment or order of the court to the same effect;*

(2) *granting leave to serve this Originating Summons and the Order made herein out of the jurisdiction on the Second Defendant at its registered office at....”*

4. These proceedings came before me on 14 October 2016 and I delivered a Ruling on 26 October 2016, in which I expressed satisfaction that the Plaintiff had a “*good prima facie case for enforcement*”. I made an order that:

“1. *pursuant to section 5 of the **Foreign Arbitral Awards Enforcement Law** (1997 Revision), the Plaintiff has leave to enforce in the same manner as a judgment or order of the Court to the same effect the following award made in an arbitration between the Plaintiff and the First and Second Defendants;*

(a) *The award dated 2 September 2010 (the “Award”) in the above mentioned arbitration, of Juan Fernandez-Armesto, Pedro Antonio Batista Martins and Gustavo Jose Mendes Tepedino, the Arbitrators therein.*



2. *Judgment is hereby entered against the Defendants in the terms of the Award, in the sum of R\$92,987,672 in damages, together with interest thereon at the 'SELIC rate' from 31 December 2007 to the date of actual and full payment, plus R\$4,199,421 in costs.*
3. *The Plaintiff has leave to serve this Order and the Ex Parte Originating summons herein out of jurisdiction...*
4. *Within 14 days after service of this Order, the First Defendant and the Third Defendant may apply to set aside this Order, and the Award shall not be enforced until after the expiration of that period, or, if the First Defendant or the Third Defendant applies within the 14 day period to set aside this Order, until after that application is finally disposed of.*
5. *Within 28 days after service of this Order, the Second Defendant may apply to set aside this Order, and the Award shall not be enforced until after the expiration of that period or, if the Second Defendant applies within the 28 day period to set aside this Order, until after that application is finally disposed of..."*
5. On 17 November 2016 and on 1 December 2016, the First and Third Defendants, and the Second Defendant respectively filed summonses seeking orders that:

*"1. The Ex Parte Order dated 14 October 2016 be set aside pursuant to GCR O.73, r. 31(8) and section 7 of the Foreign Arbitral Awards Enforcement Law (1997 Revision)."*

#### **The Witnesses**

6. Mr. Mauricio Gomm Santos, who swore three affidavits in these proceedings filed by the MP Funds, is a founding partner of GST LLP, an international dispute resolution practice with offices in Miami and Washington D.C. He is a citizen of Brazil and of the United States of America, and is a lawyer qualified to practice in Brazil and New York, and a

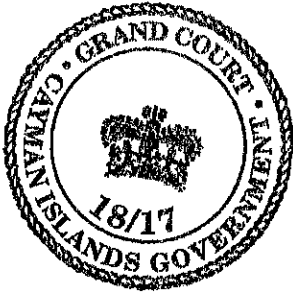


Certified Foreign Legal Consultant in Florida. He has been in private practice for over 30 years, specializing in international arbitration and litigation disputes in Brazil and international arbitration in the United States. The MP Funds also put in evidence three affidavits of Robert Weiss, General Counsel of Matlin Patterson Global Advisers LLC, as well as the affidavit of Pedro Soares Maciel. Mr. Maciel was Lead Counsel to the First and Second Defendants in the Arbitration which resulted in the Award which VRG is seeking to enforce. Mr. Gomm Santos gave live evidence, and was cross-examined by Mr. Lowe QC on behalf of VRG.

7. Two witnesses were called to give live evidence by VRG. They were assisted by Portuguese translators. Although they swore their affidavits in English, Mr. Lowe QC indicated that these witnesses, whilst comfortable with expressing themselves in English in, for example Reports, for the purposes of cross-examination wanted to ensure they understood precisely what the dialogue is and any nuances or technicalities in the questions. The witnesses who gave live evidence were Professor Carlos Alberto Carmona, a Professor at the University of Sao Paulo, Brazil, expert in civil procedure, litigation and arbitration, and who has acted as an arbitrator in domestic arbitrations in Brazil, and Mr. Gilberto Giusti. Mr. Giusti, amongst other qualifications, acts as an arbitrator in complex civil, commercial, corporate, securities and construction disputes. Both Professor Carmona and Mr. Giusti were cross-examined by Mr. Flynn Q.C. on behalf of the MP Funds.

**The legal framework and the grounds on which the enforcing court may refuse recognition and enforcement under the New York Convention**

8. The following aspects of this matter are common ground:
  - (a) that the question of whether the Court should refuse to recognize and enforce the Award is governed by the *Foreign Arbitral Awards Enforcement Law 1975 (1997 Revision)* (the “*Enforcement Law*”). The *Enforcement Law* gives effect to the New York Convention 1958 as a matter of Cayman Islands Law.
  - (b) that Brazil is a party to the Convention.



- (c) that it is an aim of the New York Convention to achieve the effective and speedy enforcement of international arbitration awards falling within its scope. The New York Convention envisages a process by which a party with a Convention award in its favour can enforce it in Convention jurisdictions. This is reflected in the *Enforcement Law* which provides that “*subject to this Law*” a Convention Award shall be enforceable “*in the same manner as an award under section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made.*” (Section 5).

### The MP Funds Submissions

9. However, Mr. Flynn Q.C. places emphasis in the MP Funds’ Skeleton Argument (“SKA”) (at paragraph 4), on the fact that critical to the success of this regime, is that it includes safeguards to protect against fundamental injustice. He submits, (and this is accepted by VRG), that it is the corollary of the ability speedily to enforce a Convention award across the globe, that such an award must not contravene basic principles of fairness. Article 5 of the Convention outlines the circumstances in which the enforcing court can refuse to recognize and enforce the award. These are reflected in terms in the *Enforcement Law*, at section 7. Emphasis was placed by Learned Queen’s Counsel on those terms, relevant to this case, as follows:

*“Art. 5.1 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...proof that:*

- (a) The parties to the [arbitration] agreement 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 was 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 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 or 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.*

Art 5.2 *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 and enforcement of the award would be contrary to the public policy of that country.”*

10. Thus, it was submitted that, if therefore, the arbitral process was not consensual, then the award will not be enforced. So too, if the process by which the award was reached offends against the basic tenets of due process, including the right to be heard, or if it otherwise offends against the public policy of the enforcing court, then the court is under no obligation to enforce it.

11. Mr. Flynn submits that the New York Convention is therefore only “*pro-enforcement*” insofar as it places the burden on the party resisting enforcement to make out one of the grounds under Article V. It was pointed out that the enforcement court is not meant to favour the enforcing party. Learned Counsel submits that the UK Supreme Court has made precisely this point, by analogy to tennis, in its decision in *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1 A.C. 763. Reference was made to paragraph 30 of the judgment, where Lord Mance, in an oft-quoted passage, stated:

*“The scheme of the New York Convention, reflected in sections 101-103 of the 1996 Act [i.e. the English law equivalent of **the Enforcement Law**] may give limited prima facie credit to apparently valid arbitration awards*



*based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and section 103. But that is as far as it goes in law, **Dallah** [the party seeking to enforce the award] starts with the advantage of service, but it does not start 15 or 30 love up.”*

12. VRG has already attempted to enforce this Award in the United States. The United States Courts have refused to recognize it. By this application, MP Funds ask this Court to do the same, on the basis that this is one of those rare cases where recognition and enforcement under the New York Convention should be refused.
13. It was pointed out that the United States Courts, both at first instance and at the appellate level, have held that the Award should not be enforced because the MP Funds had never agreed to arbitration. The MP Funds say that, because they had not agreed to arbitrate the dispute in the first place, there was no need for the United States Courts even to go on to consider the failure of due process. Similarly, it was argued here, if this Court concludes that the MP Funds were not a party to the alleged arbitration agreement, it would not be necessary (though it was stated that the Court may think it desirable), to go on to consider the failure of due process or whether the matters decided were beyond the scope of the submission to arbitration.
14. Learned Counsel emphasized that on his side, it was not being suggested that the Court is *bound* to follow the US Courts’ decision, and that it was for this Court to consider for itself, afresh, whether any of the grounds for refusal of recognition of the Award under the New York Convention is engaged. However, the Court was invited to take the same approach, because it is alleged that the same fundamental breaches arise on this application.

**The First Ground for Refusal of Enforcement: The MP Funds did not consent to arbitration**

15. It was submitted that the arbitration process deprives the parties of their basic right to go to court. Accordingly, it is only if the parties have validly consented to the removal of





that right and agreed that their dispute should be arbitrated, that an arbitration award will be enforceable against them.

16. Reference was made to paragraph 24 of *Dallah*, where Lord Mance puts it this way:

*“Arbitration of the kind with which this appeal is concerned [i.e. under the New York Convention] is consensual - the manifestation of parties’ choice to submit present or future issues between them to arbitration.”*

### **The Arbitration Agreement must be in writing**

17. As Mr. Flynn points out, in order for the *Enforcement Law* to apply at all, the applicant must be the recipient of a “*Convention award*”. Section 2(1) of the *Enforcement Law* defines “*Convention award*” to mean “*an award made in pursuance of an arbitration agreement in the territory of a State, other than the Islands, which is a party to the New York Convention.*” (Learned Counsel’s emphasis).
18. Section 2(1) defines “*arbitration agreement*” to mean “*an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of being settled by arbitration.*” (Learned Counsel’s emphasis)
19. The MP Funds submit that the requirement that the arbitration agreement be in writing is taken from Article II of the Convention.
20. Reference was made to the fact that this requirement for the arbitration agreement to be in writing also appears in the *English Arbitration Act 1996*, section 5. Learned Counsel relied upon the Report of the Department Advisory Committee dated February 1996, chaired by Lord Justice Saville (“**the DAC Report**”), which provides commentary on the provisions of the English Act. At paragraph 33, it is stated that:

*“An arbitration agreement has the important effect of contracting out of the right to go to court, i.e. it deprives the parties of that basic right. To our minds an agreement of such importance should be in some written form. Furthermore the need for such form should help to reduce disputes*



as to whether or not an arbitration agreement was made and as to its terms.” (Learned Counsel’s emphasis)

**The Arbitration Agreement must be valid as between the parties**

21. Under Article V.1 (a) of the New York Convention and section 7(2)(b) of the *Enforcement Law*, the written arbitration agreement must be “*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.*”
22. This means that, under the law of the seat of the arbitration, the written agreement must be valid and binding between the parties to it. The MP Funds submit that there are two important points to note about the application of this provision to this case, as follows:
  - i. it is common ground that the law governing whether the MP Funds are properly construed as having entered into a valid arbitration agreement is Brazilian law, that being the law of the country where the award was made.
  - ii. Secondly, the nature of the exercise that the Court must perform in deciding whether an arbitration agreement existed under such law, is that the Court must decide for itself whether or not the MP Funds actually consented to arbitration. Thus, the Court has to consider that question *de novo* (or afresh) and reach its own independent answer to it. It was submitted that, in that regard, the fact that the Tribunal reached the view that it had jurisdiction over the MP Funds is legally irrelevant.
23. Again, guidance was sought from *Dallah*, where, at paragraph [30], Lord Mance elucidated the proposition at 22(ii) above, as follows:

*“The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal’s own view of its jurisdiction has no legal or*



evidential value, when the issue is whether the tribunal has any legitimate authority in relation to the Government [which was the party objecting to enforcement] at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion."

(My emphasis)

24. Mr. Flynn makes the substantial and important point that if even under Brazilian Law, a Brazilian Court applying the New York Convention considers itself bound by, or restricted to a review of the Tribunal's decision, that is not Cayman Islands Law. Cayman Islands Law is that this Court must make an independent determination of the agreement's validity, albeit applying substantive Brazilian law principles of contractual construction to determine that question.
25. Reference was once again made to *Dallah*, at paragraph 24 where Lord Mance explained that arbitrators may:

*"...from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred on them."*

**Brazilian Law principles as to consent: no different than Cayman Islands/English/US law**

26. Reference was made to the three expert reports before the Court on Brazilian law of contractual interpretation governing whether the MP Funds consented to the arbitration agreement. VRG's expert on this point, and others, is Mr. Giusti. The MP Funds' expert is Mr. Gomm Santos. It is noted that these are the same experts as each party used before the United States Courts, and they both have reaffirmed and resubmitted before this Court, the same expert reports that they made before the United States Courts.
27. Although VRG has adduced a second expert report from Professor Carmona, he does not address the question of consent to an arbitration agreement.



It is recorded in the US Court of Appeals judgment of 3 June 2013, that the parties were in agreement that the standard principles of contractual interpretation are no different under Brazilian Law than under U.S. Law.

29. The principles of contractual interpretation under U.S. Law are the same as those under Cayman Islands law or English law. It was submitted by Mr. Flynn that neither expert gives evidence that suggests in any way that the Court should be approaching the question of whether the MP Funds were a party to the arbitration agreement differently under Brazilian law than it would under Cayman Islands law.
30. It was put forward that another important aspect of the evidence is that the experts appear to be in agreement as to the principles of contractual interpretation under Brazilian law. What they are in disagreement about is as to how these principles should be applied, which is, of course, really a matter for this Court to decide. In particular:
  - i. Brazilian law, like Cayman and English law, requires that an arbitration agreement can only be made in writing: Article 4, paragraph 1 of the Brazilian Arbitration Law.
  - ii. In *Giusti 1*, paragraph 43, VRG's expert expressly confirms that this is because the parties are agreeing to contract out of their constitutional right to go to court.
  - iii. The question of whether the parties have agreed to waive their constitutional right to go to court is a question of the intention of the parties - *Giusti 1*, paragraphs 54-60 (just as it is under English, U.S. or Cayman law).
31. Mr. Flynn submits that the parties' intention to arbitrate must therefore be stated expressly and in writing. It cannot be inferred. The parties can record their agreement to arbitrate by incorporating the arbitration agreement from another agreement into their contract. But that intention must be express, he submits.



Whether the MP Funds entered into an Arbitration Agreement with VRG

The facts as set out by the MP Funds - The business model of the MP Funds

32. The MP Funds describe the business structure that they operate. The First and Second Defendant are the MP Funds. The Third Defendant is their General Partner and is joined in the proceedings as a matter of form. The MP Funds are private investment funds that specialize in what is termed “*distressed investing*”. They are funded by institutional investors, and invest their capital in companies that are in financial difficulty. The MP Funds seek a return on their investment by providing financing and operational expertise to reorganize and structure the companies in their portfolio, with a view to helping these companies recover.

33. It is asserted that, as is common in the private equity industry, where a portfolio company enters into a contract with a third party, the funds themselves do not contract directly with that third party. Mr. Weiss, at paragraph 11 of his affidavit, describes this contractual structure as follows:

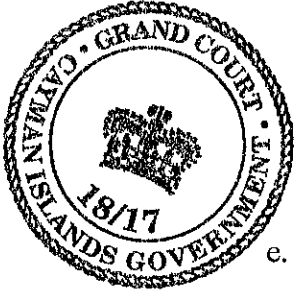
“11. *The MP Funds, as a business matter, undertake to structure their investments so as not to become parties to contracts entered into by portfolio companies. The MP Funds could not sensibly or predictably manage their investment risk if they subjected themselves to the obligations of their portfolio companies ... This is fundamental to the kind of investing in which the MP Funds engage.*”

34. It was submitted that this was the contractual structure adopted in this case:

- a. In 2005, the MP Funds established a Delaware company called Volo Logistics LLC (“**Volo Logistics**”) to serve as an investment vehicle for pursuing an opportunity in the Brazilian aviation industry.



- b. Volo Logistics, together with three Brazilian investors (“**the Brazilian Shareholders**”) formed a Brazilian company called Volo do Brasil SA (“**Volo dB**”). The Brazilian Shareholders owned and controlled 80% of Volo dB’s voting stock and Volo Logistics owned the remaining 20% of the voting stock.
- c. In early 2006, Volo dB purchased Varig Logistica SA (“**Varilog**”), which operated a Brazilian cargo airline.
- d. Later in 2006, Varilog and Volo dB purchased the passenger airline business of Varilog’s former parent. This purchase was made through a Brazilian special purpose vehicle that came to be named VRG Linhas Aereas SA. The stock of VRG was held by Varilog, save for 1% which was held by Volo dB.
35. In March 2007, Volo dB and Varilog sold 100% of their shares in VRG to a Brazilian company, called GTI SA (“**GTP**”). GTI was a subsidiary of Gol Linhas Aeras Inteligentes SA, the Brazilian airline. This sale took place pursuant to a Share Purchase and Sale Agreement dated 28 March 2007 (“**the PSA**”).
36. It is the PSA that is the subject of the parties’ dispute. The English translation is at page 10 of Mr. Weiss’ exhibit. Mr. Flynn submits that there are the following five features to be noted:
- a. The sellers under the PSA were Volo dB and Varilog (“**the Sellers**”).
- b. The buyer under the PSA was GTI.
- c. The MP Funds were not parties to the PSA.
- d. Other than Volo dB and Varilog, the only other signatories to the PSA were VRG (as the target company being sold) and Gol, the parent company of GTI, the buyer. Gol executed the PSA in order to guarantee the performance of GTI’s



obligations under the PSA (Clause 14.11). The MP Funds did not guarantee the obligations of Volo dB or Varilog.

- e. The PSA contained an arbitration agreement at Clause 14, by which the Parties to the PSA agreed to submit all disputes between them to arbitration. The arbitration was to take place in Sao Paulo, Brazil in Portuguese.

37. As pointed out by Learned Counsel, and I accept, it is common for the seller of a business to agree that, for a period of time, it will not compete with the business being sold, because this could damage the value of the business. The Sellers agreed to a non-compete obligation at Clause 11.1 of the PSA.

38. It was submitted that it is also common practice where the seller is a portfolio investment of a private equity investment fund, for the buyer to request the principal shareholders in the seller also to undertake not to compete with the business for a period of time. Therefore the MP Funds and the three Brazilian shareholders undertook to the Buyers that they would not compete with VRG's business.

39. The MP Funds and the three Brazilian Shareholders gave this undertaking by way of a letter from them to GTI ("**the Non-Compete Letter**") undertaking that they would not compete with VRG's business. This was annexed to the PSA.

40. Mr. Flynn advances the following four points about the PSA:

(1) The parties to the Non-Compete Letter are Brazilian Shareholders and the MP Funds on the one hand and GTI and Gol on the other. The Sellers and VRG are not party to the Non-Compete Letter, although they are Parties to the PSA. The parties to the Non-Compete Letter and PSA are therefore different.

(2) The non-compete obligation is the only obligation undertaken by the Brazilian Shareholders and the MP Funds in the letter.



- (3) The letter expressly sets out the terms of the non-compete obligation undertaken by the MP Funds and the Brazilian Shareholders. This mirrors Clause 11.1 of the PSA (i.e. the Seller's non-compete obligation), to which the letter refers.
- (4) The Non-Compete Letter does not contain an arbitration agreement.

41. It was submitted that, for the reasons described by Mr. Weiss in his affidavit, it was absolutely intentional that the MP Funds were not a party to the PSA or any of its terms, including the arbitration agreement in Clause 14. Rather, the MP Funds were providing to GTI the single non-compete obligation specifically set out in the Non-Compete Letter. It was submitted that the PSA was between the parties who had executed it (the Sellers, GTI, Gol and VRG) on 27 March 2007, and the Non-Compete Letter was between the *different* parties who had, on the very *same* day, executed that document (the three Brazilian Shareholders, the MP Funds, GTI and Gol). (Learned Counsel's emphasis)
42. Later in 2007, a dispute arose between the Sellers and GTI as to the operation of a price adjustment mechanism contained within the PSA. There was a provision allowing the purchase price to be adjusted to account for changes in working capital during the period required to complete and close the sale.
43. It was argued that in that way, the purchase price adjustment is not a revaluation of the entire business, it is merely an adjustment made, usually by professional accountants, to reflect fluctuations in working capital. It was suggested that this adjustment would normally only be a fraction of the overall purchase price.
44. Clause 5 of the PSA provides a procedure for calculating a purchase price adjustment to the initial acquisition price to reflect changes in VRG's working capital accounts between the date of the PSA and the date of the necessary regulatory approval. It provided that the Sellers could prepare an adjusted calculation and that GTI would then appoint its own accounting firm to validate PWC's calculation. GTI appointed Ernst & Young. In the event of a divergence between the two firms' views, a third accounting firm was to be appointed to take a final and binding view.



45. PWC and Ernst & Young's views did diverge significantly in various respects, but the Sellers and GTI were unable to agree the appointment of a third firm. GTI therefore referred the purchase price adjustment dispute to arbitration in Sao Paulo under the arbitration agreement in Clause 14 of the PSA. (GTI merged with VRG in 2008 and thereafter became known as VRG. The claimant in the arbitration is therefore VRG.)
46. However, instead of commencing those proceedings against the Sellers only, VRG also commenced those proceedings against Volo Logistics and the MP Funds (but not the Brazilian shareholders), on the basis that they were the alter egos of the Sellers and therefore bound by the arbitration agreement of the Sellers. Learned Counsel asked the Court to note that when it commenced the arbitration and for nearly a year thereafter, VRG did not claim that MP Funds had consented to arbitration by virtue of the Non-Compete Letter. He submits that VRG subsequently introduced this theory, as an additional basis upon which the Tribunal could exercise jurisdiction over the MP Funds, notwithstanding the MP Funds say, that the price adjustment dispute had nothing whatsoever to do with the Non-Compete Letter, which contained the only obligation to GTI that the MP Funds had undertaken.



#### **The MP Funds object to jurisdiction**

47. From the outset, the MP Funds have objected to the Tribunal's jurisdiction. They have maintained that they were not parties to the PSA and therefore not parties to the arbitration agreement contained at Clause 14.
48. The Tribunal dealt with the MP Funds' objection in its partial award dated 7 April 2009. It held, by a 2:1 majority, that it had jurisdiction over the MP Funds on the basis that the MP Funds had entered into the Non-Compete Letter. It was submitted that they so decided even though they recognized that the dispute was unconnected with the non-compete obligation undertaken by the MP Funds in that letter.
49. At a later hearing in September 2009, the Tribunal went on to determine the merits of the price adjustment dispute. The MP Funds have indicated that they participated under protest.

## VRG's Claim

50. VRG's claim against the Sellers was for specific performance of the purchase price adjustment process under Clause 5 of the PSA and relief in the amount of the negative balance that VRG claimed it was owed under the PSA. VRG also claimed against the MP Funds, that although they were not a party to Clause 5 of the PSA, they should be jointly and severally liable with the Sellers for the amount of the purchase price adjustment due under the PSA because they were the "*alter egos*" of the Sellers and therefore the corporate veil should be lifted.



## The Tribunal's Award

51. The Tribunal awarded the amount of the contractual purchase price adjustment which it calculated was owed by the Sellers to VRG. Mr. Flynn however says that, instead of ordering that, the price should be adjusted to reflect the changes in the working capital of the airline during the period between the initial working capital calculation and the date of regulatory approval (which was a period of 11 days), as Clause 5 of the PSA contemplated, the Tribunal wholesale revalued VRG downwards, arriving at a purchase price "*adjustment*" of approximately R\$93 million, reflecting more than 20% of the entire acquisition price.

52. VRG's *alter ego* claim was rejected by the Tribunal. It found that there were no grounds for piercing the corporate veil, as the MP Funds had not abused the doctrine of separate corporate structure and personality and were not to be regarded as liable for the contractual obligations of the Sellers under Clause 5 as VRG had alleged.

53. However, what the Tribunal did was to find the MP Funds liable for the entire purchase price adjustment amount on the basis of a tort under Article 148 of the Brazilian Civil Code known as "*third party malice*". Mr. Flynn characterizes this occurrence as a surprise to the MP Funds, because it fundamentally contradicted the basis upon which the Tribunal had previously determined in its partial award on jurisdiction that the MP Funds were bound by the PSA arbitration clause - as parties to all of the PSA's terms - and the Tribunal also held the MP Funds liable for a contractual remedy on the basis of tort



damages that were never pleaded nor sought by VRG. (The MP Funds' emphasis). The MP Funds maintain that, because tort liability and tort damages had never been pleaded or alleged by VRG, they had never been put by the Tribunal to it and it was never given the opportunity to be heard on them.

### **The Brazilian Proceedings**

54. In 2010, proceedings were issued by the MP Funds in Brazil, under Brazil's domestic arbitration law. It sought "*vacatur*" (vacation) of the Award. Thus far, the Brazilian Courts have upheld the Award under Brazil's arbitration legislation. However, proceedings remain ongoing, with an appeal presently pending before the Special Chamber of the Superior Court of Justice. Mr. Flynn reminded the Court that of course, in upholding the Award, this has taken place under Brazilian legislation, and not applying the New York Convention, which applies only to enforcement and recognition proceedings in respect of foreign awards.

### **The US Proceedings**

55. In January 2011, VRG applied to the United States Courts in New York to have the Award recognized and enforced under the New York Convention. In New York, the MP Funds mounted opposition to recognition on the same three bases that they do here before the Cayman Islands Courts.
56. The US Courts have refused to recognize and enforce the Award at a number of junctures, as follows:
- i. On 19 January 2012, the United States District Court refused to enforce the Award on the basis that even if one assumed in VRG's favour, for the sake of argument, that the MP Funds had agreed to arbitrate in the Non-Compete Letter, they only agreed to arbitrate disputes in connection with their non-compete undertaking and not a dispute under the PSA to which they were not party.



- ii. VRG appealed that decision to the United States Court of Appeals for the Second Circuit, arguing that the US Court should follow the decision of the Brazilian Court of first instance not to vacate the Award. The Court of Appeals rejected that position, and held that it was for the U.S. Court to determine *de novo* whether the MP Funds had agreed to arbitrate. One aspect of the Court's decision was, however, to remit the matter to the District Court to determine whether or not the MP Funds were a party to the arbitration agreement in Clause 14 of the PSA (i.e. that the District Court should determine the issue that had been assumed in VRG's favour).
- iii. When the matter was remitted, the District Court held in a judgment dated 2 October 2014, that it was clear that the MP Funds did not agree to the terms of Clause 14 of the PSA.
- iv. VRG appealed that decision to the Court of Appeals. The appeal was refused. The Court of Appeals held, as had the District Court, that the MP Funds did not agree to the arbitration clause in the PSA and did not agree to arbitrate.
- v. VRG's application for permission to have a re-hearing by the Court of Appeals *en banc*, was refused.

**Whether there was an Arbitration Agreement covering dispute in respect of the price adjustment mechanism under the PSA**

57. The MP Funds argue that, in any event, even if Clause 14 of the PSA were incorporated into the Non-Compete Letter, which they strenuously deny, it could only apply to disputes relating to the subject matter of that letter. That means that it is expressly limited to the undertaking of the MP Funds not to compete with VRG on the terms set out in the letter.
58. They submit that the dispute referred by VRG to arbitration had nothing whatsoever to do with the MP Funds' non-compete undertaking.

**The Second Ground for Refusal: The Tribunal Breached Natural Justice by Finding Liability on a basis neither pleaded nor argued and awarding relief that was never requested**

59. The MP Funds point out that the New York Convention and the *Enforcement Law* provide two alternative routes by which the Court can refuse to recognize and enforce an Award that offends against natural justice in the manner alleged. These bases are found in sub-sections 7(2)(c) and 7(3) of the *Enforcement Law*. Sub-section 7(2)(c) provides that the enforcing court can refuse recognition and enforcement where the party against whom it is invoked can show that “*he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.*” (The MP Funds’ emphasis)
60. Section 7(3) provides that “*Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.*”
61. Reference was made by the MP Funds to a number of authorities, including *Cukurova Holding v Sonera Holding* [2014] UKPC 15, which is a decision of the Judicial Committee of the Privy Council, on appeal from the Court of Appeal of the British Virgin Islands.
62. The Headnote in my view contains an accurate summary of the decision, and for convenience. I set it out here, as follows:



*“The respondent, Sonera, held 47.09% of the shares in a Turkish holding company which held 51% of the shares in Turkey’s largest mobile phone operator. The other 52.91% of shares in the holding company were held by the appellant, Cukorova. The parties entered into a letter agreement regarding the potential purchase by Sonera of the Cukorova shareholding. The letter agreement obliged the parties to execute a final share purchase agreement (SPA) after certain conditions had been satisfied or waived. The letter agreement was governed by Turkish law, but contained an arbitration agreement governed by Swiss law and providing for ICC arbitration. The parties initialed a draft share purchase agreement which, like the letter agreement, was governed by Turkish law but contained an arbitration agreement governed by Swiss law in similar terms to that in*



*the letter agreement. The Final SPA was not executed within the 60 day period set by the letter agreement, and Sonera commenced arbitration proceedings against Cukorova pursuant to the arbitration clause in the letter agreement. Sonera sought an award ordering Cukorova to comply with the obligation in the letter agreement to execute the final SPA and to transfer the shares to Sonera against payment of the purchase price. Cukorova contended that the tribunal had no jurisdiction to entertain Sonera's claims or to grant such relief because (amongst other things) the arbitration had been commenced under the arbitration clause in the letter agreement yet sought relief under the final SPA, which was a separate contract which contained its own arbitration clause. Further, Cukorova argued that the terms of the final SPA had not been agreed during the 60 day period provided for in the letter agreement and that the letter agreement had therefore lapsed and the transaction had been abandoned.*

*The tribunal, in a first partial award, rejected Cukorova's objections to its jurisdiction and found in favour of Sonera on the merits. The tribunal found that the parties had reached agreement on the terms of the final SPA, that the conditions in the letter agreement had been met, that Cukorova owed a contractual obligation to execute the SPA and that, although it had not been executed by Cukurova, under Turkish law the final SPA had been concluded in a valid and binding form. In a second partial award the tribunal ordered Cukorova to deliver the shares to Sonera against payment of the purchase price.*

*Sonera then waived its claim for specific performance and sought damages for non-delivery of the shares. The tribunal issued a final award which found that Cukorova was liable to pay Sonera damages in the sum of US\$932 million.*

*The BVI High Court granted permission to enforce the final award in the same manner as a judgment. Cukorova applied unsuccessfully to set aside the judgment and its appeal was dismissed by the Court of Appeal.*

*Cukorova appealed arguing that as a matter of Swiss law the issue as to whether the final SPA was binding could not be arbitrated under the letter agreement arbitration clause, but only under the SPA arbitration clause. Cukorova further argued that it had not been able to present its case to the tribunal, in breach of the rules of natural justice, so that enforcement should be refused under s.36(2) (c) of the BVI Arbitration Ordinance*

and/or under s. 36(3) on the basis that it would be contrary to public policy.

*Held, dismissing Cukorova's appeal:*

1. *To say that there were two independent contracts each with its own arbitration clause did not fully reflect the unusual circumstances of the case. It was never intended that the parties should be bound by two concurrent sets of differing contractual obligations. The final SPA was prospective until the conditions in the letter agreement were fulfilled; the letter agreement would terminate in accordance with its terms on execution of the final SPA. The contracts were intended to be component parts of a single seamless transaction. Cukorova failed to show that there was any impediment in Swiss law to prevent Sonera from having the whole dispute between the parties dealt with under the letter agreement arbitration. The parties could not have intended that, if the tribunal found, as it did, that the letter agreement had been breached, Sonera would be required to commence a fresh arbitration under the final SPA. The terms of the arbitration clause in the letter agreement were cast in wide terms and were not limited to disputes about rights and obligations specifically created in the letter agreement itself. Sonera's claim, based on Cukorova's failure to execute and deliver the final SPA, was made in respect of 'any dispute, controversy or claim arising out of or in connection with' the letter agreement. The judge was correct to hold that the tribunal had jurisdiction to make the award it did.*
2. *If a particular breach of natural justice did not fall within s.36(2)(c) because it was not one which meant that the party could not present its case, it was in principle open to the court to refuse to enforce the award on the ground of public policy. However, on the facts of the present case the Board was of the view that only if Cukurova succeeded under s.36(2)(c) should the court refuse to enforce the award. There had to be good reasons for refusing to enforce a New York Convention award. The Board could see no basis for refusing to enforce the award if Cukorova failed to show that it was unable to present its case for reasons beyond its control. The Board rejected the submission that there was a fundamental breach of natural justice on the ground that the tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukorova and that Cukorova never had an opportunity to address. Similarly, the tribunal had not ignored or failed to give any reasons for rejecting Cukorova's evidence and submissions on a key point in relation to the quantification of Sonera's alleged loss."*



63. Mr. Flynn made a number of points about the Privy Council's decision, as follows:



- i. That a breach of natural justice taking the form of a party not being able to present its case fell within the exact equivalent under the BVI legislation of section 7(2)(c) of the *Enforcement Law* and that other breaches of natural justice fell within the exact BVI equivalent of section 7(3) - Judgment of Lord Clarke - paragraph 33.
- ii. That in applying these principles the enforcing court must apply its own concept of natural justice. Thus, to the extent that the Brazilian concept of natural justice and the Cayman Islands concept may differ, it is the Cayman Islands concept that this Court must consider and apply.

- iii. Reference was made to paragraph 32 of the judgment, and it was submitted that the following is also true of Cayman Islands public policy:

*“[That] it is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see e.g. Adams v Cape Industries [1990] Ch 433. The same is true of BVI public policy.”*

- iv. On the facts of the case before it, the Privy Council found that the applicant had not been deprived of the opportunity to present its case, nor had there been any other failure of natural justice. There, however, it was submitted that the applicant’s complaint was not that it had been held liable on a basis of liability not pleaded or argued; rather its complaint was that there had been various procedural failures at the hearing, in particular the Tribunal’s alleged failure to hear live evidence from a particular witness.

64. I note that the issue of the witness is discussed at paragraphs 36 – 54 of the Privy Council’s judgment.

65. Reference was also made by Mr. Flynn to the decision of the English Commercial Court in *Malicorp v Government of the Arab Republic of Egypt* [2015] 1 Lloyd’s Report 423, which he submits, by way of contrast with the facts and circumstances in *Cukorova*, is a situation precisely on “*all fours*” with the present case, as follows:





- i. In that case, **Malicorp** had pursued a claim against Egypt for compensation for breach of contract. The Tribunal rejected that claim, but instead held Egypt liable to **Malicorp** under Article 142 of the Egyptian Civil Code.
- ii. Article 142 had not been pleaded or argued by **Malicorp**. Nor had it been raised by the Tribunal until the award.
- iii. The Court held that the failure of the Tribunal to ensure that Egypt had warning that Article 142 was the anticipated basis of proceeding against it constituted a “serious” breach of natural justice “*manifestly repugnant to elementary principles of fairness*” (paragraphs 41 and 42).
- iv. Applying **Cukorova**, the Court refused to recognize the Award under section 103(2)(c) of the English Arbitration Act, which is the English equivalent to section 7(2)(c) of the **Enforcement Law**.
- v. At paragraphs 31 and 32, Walker J stated the legal principles as follows:

“31. *There can in my view be no doubt that a grant of remedies on a basis which was neither pleaded nor argued will be capable of falling within this subsection. Nor can there be any doubt that under principles of English private international law 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: see **Cukorova Holdings AS v Sonera** ...para 32.*

32. **Malicorp** asserts that the “character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates” have to be taken into account when considering if the procedure adopted was fair and in compliance with the requirements of natural justice. I accept that relevant English principles require consideration of these matters. I do not accept, however, that the applicable arbitration procedures in the present case called for any lessening of the essential need for Egypt to have notice of the basis on which the tribunal would grant any remedy and approach the quantification of any monetary award. Nor can I accept that



*there was anything arbitrary in requiring, before permitting enforcement here, that the foreign arbitral procedure respected this essential need.” (My emphasis)*

**Third Ground for Refusal - The Tribunal Purported to Decide Matters beyond the Scope of the Submission to Arbitration**

66. Section 7(2)(d) provides that the Court may refuse enforcement/ recognition where:

*“the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.”*

67. Reference was made to paragraph 19.54 of *Merkin on Arbitration*, where the learned author opines as follows:

*“the proper analysis of this provision is that it may cover both excess of jurisdiction( eg. Invalid or non-existent arbitration agreement) and excess of authority or power (eg. including in the award a remedy not claimed sometimes referred to as ultra petita).”*

68. It was submitted that in this case, both heads of refusal are satisfied: either the MP Funds were not a party to the arbitration agreement at all, which would amount to there being no jurisdiction, or, if they were a party to the arbitration agreement, the Tribunal has exceeded its authority by purporting to include in the Award a remedy not claimed.

69. Reference was made to two cases emanating from Singapore as demonstrating that a two stage test is to be applied: (a) did the parties consent to arbitrate at all; (b) if they did, did they consent to arbitrate the particular matters decided by the arbitrators. The cases are *PT Asuransi Jasa Indonesia v Dexia Bank* [2007] 1 SLR (R) 597 and *Kempinski Hotels v PT Prima International* [2011] SGHC.

70. It was further submitted that the ICC Rules of Arbitration that governed this arbitration (Article 18 of the 1998 Rules), contained a provision designed to facilitate the precise delineation of the matters submitted to the arbitrators for decision (So also does Article



23 of the 2012 Rules). The arbitration Terms of Reference set the outer parameters of the submission to arbitration, and it was submitted that these Terms clearly demonstrate the boundaries of the scope of the matters submitted to the arbitrators, and that it is only to the determination of those matters that the parties had submitted.

71. The Court was asked to refuse enforcement on this third ground also.

#### **The Submissions Advanced on Behalf of VRG**

72. As part of the background recited in its SKA, VRG states that the MP Funds, GTI and Gol signed one of a series of documents called “*Aditivos*”, which included Aditivo No 5 (“**Aditivo No 5**”).

73. In the SKA, the following points are made about Aditivo No 5:

- a. By it, the MP Funds agreed to refrain from competing with VRG for three years.
- b. It was in Portuguese.
- c. Rather than being signed by the Sellers, VLog or Volo DB, it was signed by the principal stakeholder.
- d. Like all but one of the other five *Aditivos*, it was executed on the same day as the PSA.
- e. It referred to the PSA and was expressed to be “*a valid and enforceable agreement between the parties amending the terms of the [PSA].*”

74. Mr. Lowe QC, in VRG's SKA refers to the MP Funds' evidence, as advanced through Mr. Weiss, as to its business practice and the fact that in essence, it was said that the MP Funds do not contract directly with third parties. It was submitted that the implication of Mr. Weiss' evidence is that the MP Funds management deals through a special purpose vehicle in order to “*avoid liabilities of that management being brought back home*”. It was asserted that Mr. Weiss the witness was not, however, (as he himself indicated) involved in the negotiations, and the evidence on this score was characterized as being largely irrelevant argument. I must say by way of passing comment regarding the alleged implication that this seems to me to be not unheard of commercial practice, but in any



event, it does not take the matter of construction any further. What in my judgment need to be scrutinized and construed are the relevant documents, i.e. the Non-Compete Letter and the PSA.

75. It was argued that it was also not relevant to any common law approach for the Court to examine the MP Funds' subjective intention in order to arrive at the correct interpretation of a contract. Reference was made to the oft-cited judgment of Lord Hoffman in *Investment Compensation Scheme Limited v West Bromwich Building Soc* [1998] 1 WLR 896 at 912-3.
76. The submissions describe the Arbitration proceedings, as well as the Brazilian proceedings, and then, having described the various appeals in Brazil, at paragraphs 24 and 25, it is pointed out that, to date, the MP Funds have failed in its challenge to the Award. It was argued as follows:

*"24. The only possible avenue of appeal left after the additional interlocutory appeal is determined is by way of extraordinary appeal to the Supreme Federal Court (the Constitutional Court). However, there is no constitutional point here - and none was raised in the courts below. The Supreme Federal Court would have to give leave for an appeal to be heard.*

*25. The parties in these Brazilian Proceedings are the same as the parties before the Court now. If this were a final ruling then the MP Funds would be bound by these findings by means of an issue estoppel, if not res judicata. The only reason that may not be so now is because the MP Funds have launched appeals - all of which have failed to date, and none of which, VRG submits, have any sensible or reasonable prospect of success in the future."*

### **The US Proceedings**

77. VRG acknowledge that it has not been successful in enforcing the Award in the U.S. However, it was submitted that there is a substantial difference between the value of



Brazilian Court decisions (the seat of the arbitration) and decisions of the US Courts. It was submitted that the US decisions (and their reasoning) are irrelevant because they turn on issues of arbitrability argued from the point of view of US law only.

## Legal Framework in the Cayman Islands

### *(1) Enforcement*

78. It is common ground that the legal burden is on the person against whom the award is made to prove that its recognition or enforcement should be refused on one of the grounds set out in section 7(2) on the balance of probabilities. VRG submit that this is so even when enforcement is resisted on the basis of section 7(2)(b) -i.e., the award debtor was not a party to it. Reference was made to *Dardana Ltd. v Yukos Oil* [2002] EWCA Civ, paragraph [77] of *Dallah*, and *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm); [2011] 2 CLC 691 at [43].
79. It is also common ground that this Court must determine for itself whether the arbitral Tribunal had competence and jurisdiction, including deciding whether there was an arbitration agreement for the purposes of Section 7(2)(b).

### *(2) Issue Estoppel*

80. In my view it is interesting to see how the submissions developed. Mr. Lowe accepts that therefore the decision of the Tribunal itself on competence and jurisdiction is not determinative for this Court. However, he now submits that the decision on the MP Funds' enforcement challenges in the Brazilian Courts does give rise to an issue estoppel, notwithstanding the fact that there is an application for leave to appeal outstanding and notwithstanding the arguments raised at the *ex parte* stage.
81. Learned Counsel makes the argument that the question is one of issue estoppel because the Brazilian Courts have decided issues of fact, and arguments on those facts, which are said to be materially the same as those which arise here. Thus, the argument runs that the findings of the District Court, Court of Appeal and STJ in Brazil are enforceable and are to be recognized by the Cayman Court by way of issue estoppel because they are final

and conclusive on the merits. Reference was made to a number of cases, including *Carl Zeiss Stiftung v Rayner & Keeler* [1967] 1 A.C. 853 and *The Sennar (No. 2)*[1985] 1 WLR 490.

82. It was submitted that the doctrine of issue estoppel must, in principle, be available. Mr. Lowe further stated (at paragraph 6 of further written submissions handed up "Supplemental SKA") that:



*“It has not been suggested that VRG is to be prevented from taking the stance it did at the ex parte hearing, namely that there was no issue estoppel which they relied on at the ex parte hearing. Had they relied on estoppel at an ex parte hearing, the Order would presumably have been immediately challenged.”*

83. It was contended that there is an obvious symmetry between issues arising on enforcement appeals and issues arising before a supervisory court hearing an action to annul an award on grounds in a modern arbitration law.
84. At paragraph 53 of its Supplemental SKA, VRG argues that, because the legal issues are in substance the same, the complaints which MP Funds bring before this Court are almost certain to be precisely the same as the complaints which were before the Sao Paulo Court.
85. At paragraph 54 it was argued that the issues before the Brazilian Courts under Article 32 and the issues before the Cayman Court are completely identical and therefore issue estoppel arises.
86. Thus, it is now clear that VRG are relying on the principle of issue estoppel after all.
87. Reference was made to a long running line of authorities, starting with *Scott v Pilkington* (1862) 2 B&S 11, and *Nouvian v Freeman* (1889) 15 Ap Cas 1, and culminating with *Midtown Acquisitions LP v Essar Global Ltd* [2017] 1 W.L.R. 3083, where *The Sennar (No. 2)* was applied.



In contrast, as the case of *Nouvian* explains and demonstrates, there is no issue estoppel where the foreign judgment is liable to be abrogated or varied by the very Court that pronounced it, so for example, where what is involved is a maintenance order.

89. Learned Counsel advocates that it is irrelevant, if it be the case, that under Brazilian procedural law the judgments of the Courts concerned are not described as being “*res judicata*” whilst a possible appeal is pending. It was argued that here the question arises under Cayman law as an issue of procedure of the *lex fori* applying its own rules to characterize the foreign judgment.

90. It was further or in the alternative, submitted that, even when the issue is one of public policy, as the MP Funds here contend, because enforcement arises in the context of an arbitration, the Court should not refuse to enforce an arbitration award upheld by the supervisory Court because of the strong public policy in enforcing awards upheld by the supervisory court, even if there is no issue estoppel. Reference was made to *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647; *Gao Haiyan v Keeneye Holdings Limited* [2012] 1 HKLRD 627 at [67]-[68]).

### **(3) Procedural Fairness and the Maxim *Iura Novit Curia***

91. During his oral opening, Mr. Lowe referred heavily to the maxim *Iura Novit Curia* (“*I.N.C.*”).

92. It was submitted that when the Court is looking at the question of procedural fairness, it has to apply its own notions of fundamental fairness, but must recall that one is looking at a civil law system. He argued that in civil courts, the Judge has a more fundamental role in formulating the arguments. Reference was made to the maxim of *I.N.C.* as being applied by tribunals throughout the civil world, notably the International Court of Justice, the European Court of Justice, and the European Court of Human Rights.

93. It was submitted that what the Court would hear from the experts, and see from the documents, is that in Brazil, as in many other civil jurisdictions, the Courts expect that



the parties will be bound by the relief they seek, but that they are not bound by their characterization of the law.

### **The Existence of an Arbitration Agreement**

94. Mr. Lowe submits that the question whether the MP Funds were parties to the arbitration agreement and, if so, whether that agreement extended to the dispute, has been decided against the MP Funds by the lower court and the Court of Appeals in Brazil. The highest non-constitutional court has refused to review these decisions. The suggestion is that the MP Funds are now estopped from contending otherwise.
95. As to the matter of contractual intention, it was submitted that under Cayman law that is a matter to be objectively determined by reference to both parties. It was submitted that, whilst certain broad or standard contractual principles are the same between Brazilian and Cayman Islands law, it is evident from the differences between the experts in their evidence and from the decisions of the Brazilian Courts that these broad principles cannot be assumed to be applicable with a common lawyer's approach at the more detailed level.
96. By way of example, reference was made to Mr. Gomm Santos' evidence that it has to be shown that the MP Funds intended to be bound by the PSA, However, under Cayman law, the argument runs, contractual intention is a matter to be determined objectively, by reference to both parties.
97. It was proffered that the evidence of Mr. Giusti offers additional Brazilian contractual law construction principles to guide the court, and which were largely undisputed (Reference was made to Gomm 1 and Giusti 1), and was supported by the decisions of the Brazilian lower court, the Court of Appeals and the STJ.
98. VRG suggests that the question of contractual interpretation involves the following:
  - a. (As was common ground), the person construing the contract should look at the express terms of the agreement, the overall structure of the contractual documentation and the applicable Brazilian law, in particular the doctrine of good faith under Article 422 of the Brazilian Civil Code.





- b. Construing the express terms, involves consideration of factors that tend to bolster a given construction of the express terms of an agreement, such as whether the construction (i) accords with conventional usage in the relevant business environment; (ii) gives effect to a legitimate business objective (e.g., providing for predictability in resolving disputes by choosing the governing law, a forum and/or (iii) confers effect and meaning to a provision that would otherwise not be meaningful. Reference was made to Mr. Giusti's US Declaration.

99. It was suggested by Learned Queen's Counsel for VRG that, the fact that ten arbitrators and judges have ruled on the meaning of Aditivo 5 does not of course bind the court, but is at least suggestive of a firmly held, consensus view of the meaning of the operative language "*an amendment to the contract... amended the original contract, binding the plaintiffs.*"
100. Further, reference was made to Mr. Gomm Santos' First declaration in the New York proceedings, where he conceded that the express terms of Aditivo 5 could be understood, depending on the intention of the parties, to amend the PSA and be bound by its terms. Mr. Gomm Santos, at paragraph [14], stated "*...there can be more than one way to interpret the contractual intent of this phrase*". However, even handedly, Learned Counsel pointed out, that in his Affidavit in these proceedings, Mr. Gomm Santos subsequently retracted that concession, by stating "*Aditamento 5 demonstrates a lack of clear and manifest or unequivocal intent... to be bound to arbitrate*").
101. It was submitted that, this change in view was critical, since Mr. Gomm Santos previously claimed that the same language could have amended the PSA, subject only to an investigation of intent, whereas he now says the language is too equivocal to support that reading. It was argued that, failing that change in opinion, the MP Funds would have had to provide evidence of their subjective intent somehow, which it was submitted they have not done.

102. VRG went on to submit that other factors that should be involved in the consideration are whether the proposed construction: (a) accords with the usage of the same terms in other, related transaction documents; and (b) promotes greater clarity and precision in the use of key terms, including, defined terms.
103. The MP Funds' case is that Aditivo No. 5 is a standalone side letter. It was submitted by VRG that a clear view of it shows that Aditivo No. 5:

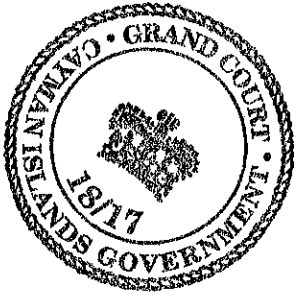


- a. Clearly did reference the PSA as one of a series of Aditivos.
  - b. Expressly refers to the PSA “for shareholding control of [VRG] and other covenants” in its heading.
  - c. It refers to Clause 11 and Clause 9.2 and refers the signatories to the Aditivo to read into the PSA.
  - d. It refers to including for the purpose of “supplementing” (“aditando os termos do Contrato”) the above-captioned Agreement (Queen’s Counsel’s emphasis).
104. Then, in clear demonstration that the MP Funds, and VRG are poles apart when it comes to their views on the correct contractual interpretation, VRG submits as follows (paragraph 57 of its SKA):

*“The six Aditivos all have one thing in common: they bind the contracting parties to specific covenants with the shareholders of parties. Aditivos 1 to 4 relate to the purchasers’ parent GOL. Aditivo No 5 binds the sellers’ parent, the MP Funds. The obvious rationale is to prevent those parties from being parties to the operative duties of seller or buyer (e.g. price and payment Clauses 4 and 5, Warranties in Clauses 6 and 7 or indemnification Clause 8). However, there is in fact no logical reason they would have wanted to exclude the general provisions.”*

105. It was said that the MP Funds concede that Aditivos 1- 4 and 6 constitute amendments (paragraph 56(6) of VRG's SKA).

106. Learned Counsel for VRG also posits that the arbitration clause itself refers to disputes “*arising*” from the PSA which would encompass all the specific obligations under the PSA as well as the Aditivos. According to Mr. Lowe: (paragraph 17 of VRG’s Supplemental SKA):



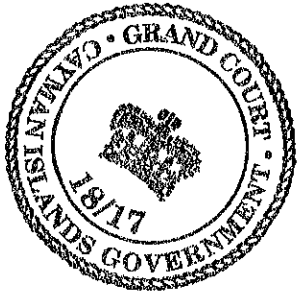
*“It would be bizarre for the parties of the Aditivos (i) to have been aware of that; and (ii) to have decided disputes relating to the Aditivos would be decided by the Brazilian Courts instead. Bifurcating the dispute resolution provisions for a single overarching transaction would self-evidently lead to a risk of contradictory and unworkable decisions with respect to disputes.”*

107. VRG sought to counteract the argument that the MP Funds would not have wanted to submit to Brazilian arbitration. This, it says would be by no means obvious. The Portuguese aditivo in relation to a “*very Brazilian Contract*”, it was submitted, would obviously have been determined under Brazilian law. Therefore, the argument continues, if there was no ICC arbitration clause, the Brazilian Courts would have had jurisdiction.
108. It was next submitted that, in considering applicable Brazilian law and the principle of good faith, the highest value should be placed on the principle of *pacta sunt servanda*, i.e. that agreements must be honoured. Thus, parties cannot be allowed to disavow their own commitments, as expressed by their binding agreements. Reference was made to Article 422 of the BCC and to Mr. Giusti’s US Declaration.

### **Discretionary Factors and Power to Stay**

109. It was acknowledged that the discretion referred to in section 7(2) is not at large. Reference was made to *Dardana* , at paragraphs 8 and 18, where Mance L.J. (as he then was), stated:

*“8...Section 103(2) cannot introduce an open discretion. The use of the word “may” must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances,*



*the right to rely upon them had been lost, by for example, another agreement or estoppel...*

*18.....The word "may" at the start of s.103(2) ... is designed, as I have said in para. 8, to enable the court to consider other circumstances, which might on some recognizable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s. 103(2)."*

110. Mr. Lowe submitted that this is one of those cases for which the discretion was precisely designed, and that, given the comprehensive challenges made before the Brazilian Courts, which have all failed, this Court should exercise discretion in favour of enforcement and dismiss the application.

#### **Stay of Enforcement Proceedings**

111. In the alternative, it was argued that, if the Court considers that the outcome of the application for permission to appeal to the final Court in Brazil should be awaited, then it may stay the further enforcement pending the outcome of that proceeding. Reference was made to a number of cases, including *Scott v Pilkington*, and *The Varna No. 2* [1994] 2 LIR 41.

112. At paragraph 43 of its SKA, VRG makes this point:

*"43. The MP Funds specifically insisted on this trial despite VRG arguing that it would be more cost-effective to await the conclusion of all possible appeals, knowing full well that its applications for leave to appeal had no real prospect of success. But for these more or less hopeless applications for leave to appeal, the MP Funds could not avoid the finality of res judicata. It is wrong to stay enforcement and the Court should instead exercise its discretion against the MP Funds."*

#### **The Defendant's Reply Skeleton**

113. Mr. Flynn kicked off his Reply SKA by focusing on the fact that VRG for the first time in its SKA say that the Brazilian decisions, despite not being final in Brazil, give rise to an issue estoppel binding on this Court.
114. The MP Funds submit that the core requirements that must be established to create an issue estoppel are trite law, and are set out in the judgment of the House of Lords in *The Sennar (No.2)* [1985] 1 W.L.R. 490, where at 499 it is stated:



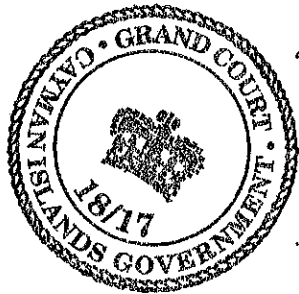
*“The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action.”* (Learned Counsel’s emphasis)

#### **The Brazilian decisions are not final and conclusive**

115. It was submitted that VRG’s suggestion that the Brazilian decisions could be treated as “*final and binding*” for the purposes of issue estoppel is premised on a striking error of law. Mr. Flynn QC submits that VRG appears to be under the fundamental misapprehension that the question of whether the Brazilian decisions are “*final and binding*” is a question of *Cayman* law. Reference was made to VRG’s SKA, at paragraph 36(5) which refers to no authorities, where it is stated as follows:

*“It is irrelevant, if it be the case, that under Brazilian procedural law the judgments of the Courts are not described as being res judicata whilst a possible appeal is pending. Here the question arises under Cayman law as an issue of procedure of the lex fori applying its own rules to characterize the foreign judgment.”*

116. Mr. Flynn asserts that this is not the law, and that in fact the law is exactly the opposite. Further, that decades of authorities, including at the level of the House of Lords, confirm that the question of whether a foreign judgment is “*final and conclusive*” for the purposes of issue estoppel is a question of law of the foreign courts that gave the judgment, and not a question for the law of the forum. Reference was made to the speech of Lord Wilberforce in *Carl Zeiss* [1967] 1 AC 853, where at pages 969 F-970, he expressed the principle thus:



*“The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be res judicata in the country in which it is given... generally, it would seem unacceptable to give a foreign judgment a more conclusive force in this country than it has where it is given... Moreover, I think it is for the defendant, who sets up the bar, to establish the conclusive character of the judgment.”*

117. Reference was also made to the judgment of Sales J in *Seven Arts Entertainment v Content Media* [2013] EWHC 588(Ch), where at [43] he held:

*“It is common ground that in order for an issue estoppel to arise in the courts in England by reference to a judgment of a court in a foreign jurisdiction (here, the Ontario Judgment), it is necessary to show not only that the requirements to establish issue estoppel according to the law of the lex fori (England) are satisfied, but also that the issue in question would be treated as res judicata according to the law of that foreign jurisdiction: see Carl Zeiss.”*

118. Reference was also made to the Cayman decision in *TMSF v Merrill Lynch* [2008] CILR 267, where the Grand Court applied Turkish law to the question of whether a Turkish judgment was final and conclusive.

119. Mr. Flynn also referred to the submissions made at the *ex parte* hearing before this Court. As he says, oddly, at that hearing, those included VRG expressly recognizing that (a) for



a foreign judgment to give rise to an issue estoppel, the decision needed to be *res judicata* under the law of the foreign jurisdiction; and (b) that the Brazilian decisions were not *res judicata* unless and until they were finally determined by the Superior Court of Justice.

### Whether this trial should be stayed

120. The MP Funds contend that this informal late application for a stay should not be countenanced for the following reasons:

- (A) There is no application before the Court for a stay, no summons and no supporting evidence. It was submitted that such an application cannot be made “*in passing in a responsive skeleton argument (served late) days before trial. This is a grave deviation from due process.*”
- (B) The position is made worse by the fact that from as long ago as November 2017, the MP Funds made clear that they would not agree to a stay, and that if VRG wished to seek one, it would have to apply in the usual way.
- (C) It would appear that the sudden *volte face* on this position days before trial is motivated by a belief that VRG is more likely to succeed in Brazil than before this Court.
- (D) Waiting for the Brazilian Courts will not achieve anything, since the Brazilian Courts will not decide (a) *de novo*, whether the arbitration agreement is binding on the MP Funds or whether it covered obligations other than those in the Non-Compete Letter; and (b) whether the Award is contrary to Cayman public policy. Since there will be no issue estoppel, there is no purpose in a stay.
- (E) The wait for the Brazilian Courts to decide anything at all might be very long indeed. According to paragraph 2.6 of Santos 3, it might take years. The Court will not normally grant a stay in such circumstances.
- (F) VRG is seeking to have this Court convert the Award into a judgment of this Court. If it believes that the Award is enforceable here in the Cayman Islands, it should pursue its enforcement here with conviction. It should not be allowed “*to dangle the proceedings over the head of the MP Funds in this jurisdiction for an*



*indeterminate amount of time that it would take to conclude matters in Brazil, in the hope that this will improve its position in this jurisdiction.”*

(G) It is now too late for VRG to seek a stay. If it had wished one, it should have sought this at the earliest opportunity.

## DISCUSSION AND ANALYSIS

### ISSUE ESTOPPEL

121. VRG does not suggest that under Brazilian law the Brazilian law decisions do give rise to *res judicata*. There does not seem to be any doubt about the Brazilian law position on this score.

122. Indeed, Article 502 of the BCCP, provides as follows:

*“Section V- Res Judicata*

*Art. 502. Substantive res judicata is the authority that renders immutable and indisputable a decision on merits that is no longer subject to appeal.”*

123. It is for VRG to establish that the requirements to establish issue estoppel according to the law of the *lex fori* (the Cayman Islands) are satisfied, and also that the issue in question would be treated as *res judicata* according to the law of that foreign jurisdiction: see *Carl Zeiss* and *Seven Arts Entertainment v Content Media*.

124. In my judgment, the Brazilian decisions made thus far are plainly not final and conclusive under Brazilian law.

125. It is also the case that the issues before the Brazilian Court are not identical to the issues before this Court. As stated in *Barnett*, referred to above, the burden of clearing the threshold of showing that the issues are identical is on VRG.

126. VRG variously describes the issues before the Brazilian courts and those now before this Court as “*substantially the same*” (paragraph 16) and “*materially the same*” (paragraph 35(1)). However, that is not enough. What is required is that VRG show the issues are identical. It was common ground that the issue for the Cayman Court is whether,





considering the issue afresh, *de novo*, the MP Funds agreed (i) to arbitrate at all, and (ii) even if they did, whether that arbitration agreement in Clause 14 applied only to the MP Funds' obligations under the Non-Compete Letter that they had signed, or whether it was an agreement to arbitrate in respect of every clause in the body of the PSA, which they had not signed.

127. That is the issue where the award comes before an English Court or a Cayman Court as confirmed by the House of Lords' decision in *Dallah*. I accept that that is not the issue in all jurisdictions. In many other jurisdictions, the issue is a different one, i.e. whether on a *review* of the tribunal's decision on jurisdiction, paying due deference to the decision of the tribunal, the tribunal's decision on jurisdiction should stand. In those jurisdictions, the Courts are not conducting a *de novo* trial on jurisdiction themselves.
128. However, in any event, when in Brazil, an application is made for *vacatur* of an arbitration award on the basis that the tribunal lacked jurisdiction, the courts are not required to reach a decision *de novo* on the question of jurisdiction. The Brazilian Court of Appeal's references to "*competence-competence*", which is the principle that the tribunal has the power to rule on its own jurisdiction, amply assist in demonstrating this point.
129. It is not enough for VRG to say that the Brazilian Courts found that the Tribunal was right. This is because it would have to be established on the evidence that the Brazilian Courts found *de novo* that the arbitration agreement bound the MP Funds and extended to the subject matter of the arbitration. There is therefore no issue estoppel regarding the question of jurisdiction.
130. Further, it is common ground that the question of whether the finding of liability on the basis of Article 148 of the BCC constituted a breach of Cayman public policy and in particular Cayman standards of natural justice, is a question of Cayman law.
131. Therefore, quite obviously, the decision of the Brazilian Court on the issue of whether Brazilian public policy was breached by this finding is not the same as the issue of whether Cayman public policy was breached by it.

132. Reference was made by the MP Funds to the decision of the English Commercial Court in *Stati v Kazakhstan* [2017] 2 Lloyd's Rep. 201. That case specifically involved consideration of the New York Convention, and where *Stati* argued that Kazakhstan was issue estopped by a decision of the Swedish courts. At paragraph [84], the Court held:

*"The New York Convention is addressed, at Article V 2(b), to the public policy of the country of enforcement. Relevant public policy can and does differ from country to country. It is correct to say that the Swedish Court did not decide whether under English law public policy required the application to enforce the award in this jurisdiction to be refused."*

(My emphasis)

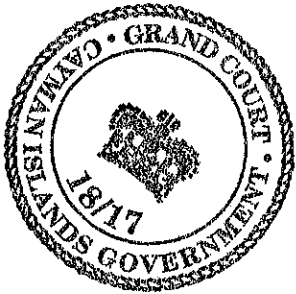
133. That reasoning is also in my judgment applicable here, because the Brazilian Court did not (and indeed, could not) decide as a matter of Cayman public policy whether the application to enforce the Award in this jurisdiction should be refused.

134. It is for those reasons that I find that no issue estoppel exists in this case, either in respect of the question whether the Tribunal had jurisdiction, or in respect of the question of whether the Award complies with Cayman public policy, or standards of natural justice and fairness.

135. In my judgment not only are the issues not identical; but they are not even materially or substantially the same. The Court also cannot act on the basis that if there is no actual issue estoppel, there was potential issue estoppel. It is a defining feature of issue estoppel that the decision giving rise to the estoppel must be final and conclusive.

136. VRG seems to be suggesting that one basis for acting on a potential issue estoppel would be deference, given that the Brazilian courts are the courts of the seat.

137. However, in my judgment, that would be wrong as a matter of international arbitration law. Lord Mance makes this clear at paragraph [29] of *Dallah* where he discussed this precise issue as follows:





*“The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognize the tribunal’s activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought.”*

138. As submitted by Mr. Flynn, what VRG are seeking is for the Court to enforce the Award as if it were a judgment *of this Court*. Therefore, as stated at paragraph [94] of *Stati*:

*“It is relevant to recognize that, on behalf of the Claimants, Mr. Sprange QC asks ultimately that the Award should be recognized ‘as a judgment of this Court’. Sir John Donaldson MR, in **Deutsche Shachtbau v Shell** [1987] 2 Lloyd’s Rep 246, at page 254 col 1, highlighted that enforcement is one of the ‘powers of the state’ and that these powers are exercised on behalf of the public. These points reinforce the seriousness of what is involved.”*

139. Further there is in any event no “*potential*” estoppel at all, since even once the Brazilian Courts have finally and conclusively determined the Brazil proceedings (and regardless of the outcome), the issues before this Court are different from the issues decided, or to be decided, by the Brazilian Courts.

### **The PSA**

140. The PSA defined the parties thereto expressly. Clause 11.1 of the translated version of the PSA, reads as follows:

#### **“Clause 11**

#### **NON-COMPETE**

*I - By VarigLog and Volo*



*Clause 11.1. By means of this Agreement and in full accordance with the law, VarigLog and Volo agree not to engage, for the period of 3 (three) years counted from the granting of the prior approval by ANAC, in any of the following acts: (i) participation, directly or indirectly, whether as partners, shareholders or quotaholders or beneficial owners, through positions as managers, directors or consultants, or, finally, as employees, service providers or independent contractors, in any companies, businesses or undertakings that operate in Brazil in the same field of endeavor of VRG, namely, air transportation of passengers in all its forms; or (ii) to persuade, attract or contract with any person employed and/or contracted with by VRG and/or GTI and/or by their Affiliates, to leave their employ or to terminate that contractual connection, for any reason or any purpose, that results in a breach of the other provisions set forth in this Clause.*

.....”

141. Sub-Clauses 13.1, 13.6 and 13.7 provide as follows:

“*Clause Thirteen*

#### *GENERAL PROVISIONS*

*Clause 13.1. This Agreement is irrevocable and irretrievable and binding on the Parties and their respective successors and assigns authorized in any way. This Agreement (and rights and obligations set forth herein) may not be assigned by any party without the written consent of the other parties to this Agreement.*

....

*Clause 13.6. This Agreement and its Exhibits, signed and initialed on the date hereof, constitute the entire understanding of the Parties with regard to the negotiation hereby performed. This Agreement and its Exhibits will*



*govern the relations among the parties concerning the transaction contracted therein.*

*Clause 13.7. No change, alteration or amendment of this Agreement shall be considered valid or binding on the Parties unless such change, alteration or amendment is made in writing and is duly signed by all the Parties.*

*.....”*

142. Clause 14 deals with the topics of “*Arbitration, Applicable Law and Election of Jurisdiction*” and Sub-Clauses 14.1 - 14.3 and 14.5- 14.7 provide as follows:

**“Clause Fourteen**

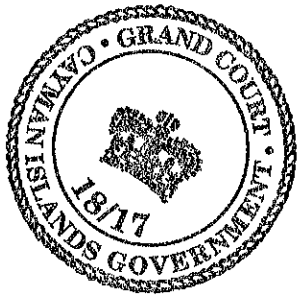
**ARBITRATION, APPLICABLE LAW AND ELECTION OF JURISDICTION**

*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. 9307/96 (“Arbitration Law”), pursuant to the conditions below.*

*Clause 14.2. The dispute will be submitted to the CCI (“CCI”) in accordance with its Regulations (“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.”*

143. “Aditamento No. 5” as translated by the MP Funds, sets out the following terms:

*“Addendum SL/VRG/005*

*To:*

***GTI S.A***

*.....*

*cc: **GOL LINHAS AÉREAS INTELIGENTES, SA***

*.....*

*Ref.: Purchase Agreement for the Shareholding Control of VRG Linhas Aéreas SA and Other Covenants:*

*.....*

*We refer to Clause 11.1 of the above-captioned agreement to mention the following:*

*Further to what was set out in said clause, the undersigned hereto, by means of this instrument, undertake to refrain from performing, for a period of 3 (three) years as from the granting of preliminary approval from the ANAC [Brazilian Civil Aviation Agency], pursuant to Clause 9.2 of the above-captioned Agreement, any of the following acts: (i) participating, whether directly or indirectly, as partners, shareholders or quotaholders or usufruct beneficiaries, whether in the exercise of positions of management, administration or consultancy, lastly, whether as employees, service providers or freelance workers, in any companies,*



*deals or undertakings that take place in Brazil in the line of business of VRG, that is, regular air transport for passengers in either the domestic or international spheres; or (ii) persuading or attracting any employee and/or contractee of VRG and/or GTI and/or their Affiliates, to leave said job or terminate this contractual bond, for any reason whatsoever or for any purpose, that might entail a violation of the other stipulations set out herein.*

*Finally, we mention that with the "AGREED" affixed by you, this instrument shall constitute pursuant to the best terms of the law a firm and valid commitment by and between the parties, including for the purposes of supplementing the terms of the above-captioned Agreement....."*

(My emphasis)

#### **The First Ground for Refusal of Enforcement: The MP Funds did not consent to Arbitration**

144. In my judgment, it is clear that the MP Funds were intentionally, and as a matter of objective construction, not a party to the PSA. They were therefore not parties to the arbitration agreement contained in the PSA at all.
145. It seems obvious on the face of the Non-Compete Letter that it does not contain or incorporate an arbitration agreement. By it, the MP Funds undertake only one obligation, i.e. the obligation not to compete with VRG's business as set out in the Non-Compete Letter. It does not incorporate Clause 14 of the PSA or any other term of that agreement. Indeed, instead, it refers only to Clause 11 of the PSA, which was the Sellers' non-compete obligation. It does seem to me that the MP Funds are correct that the Non-Compete Letter refers to Clause 11 and the PSA only to record that the non-compete obligation undertaken by the MP Funds under the PSA mirrored that undertaken by the Sellers under the PSA, to which the MP Funds were not parties.
146. Indeed, if the parties' intention had been to make the MP Funds parties to the PSA, including the arbitration agreement in Clause 14, then the MP Funds would simply have executed the PSA. I accept the submission that the deliberate intention behind the MP Funds (and the Brazilian Shareholders) not executing the PSA ( in contrast to the Buyer's shareholder, Gol) and only executing the Non-Compete Letter containing its express



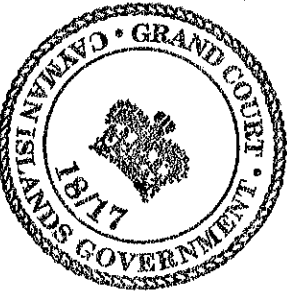
single obligation, was that the MP Funds were bound by this free-standing obligation alone.

147. It is to be noted that the “Parties” to the PSA are expressly defined in it; they are the Sellers and the Buyer. They do not include the MP Funds. Clause 14 expressly applies only to the “Parties”.

### **VRG’s Changing Theories**

148. As Mr. Flynn points out, VRG has itself adopted different theories at different times, and each of those rationales differ from that expressed by the Tribunal. So, for example, before this Court, it has been suggested that all of the terms of the PSA are incorporated into the Non-Compete Letter - see Giusti 1, paragraph 107. Mr Giusti there says that the Non-Compete Letter “*is clear and express in incorporating all the terms of the Purchase Agreement that have not been amended.*”
149. On the other hand, before the U.S. Courts, it was contended that the Non-Compete Letter incorporated not the whole of the PSA, but only the provisions referred to as the PSA’s “*generally applicable provisions*” – see paragraph 11 of Mr. Giusti’s Declaration before the New York Court. Counsel for VRG expressly conceded before the U.S. Courts that - contrary to the view now offered by Mr. Giusti “*in this additivo [i.e. the Non-Compete Letter] Matlin Patterson did not bind itself to all of the obligations of the original document.*”
150. It does seem to me that there are a number of matters on the face of the Non-Compete Letter that belie VRG’s theories.
151. Firstly, the Non-Compete Letter says nothing at all about the arbitration clause. It is therefore difficult to see, how if at all, the arbitration clause could be said to be incorporated by reference.
152. Nor does the Non-Compete Letter refer in any way at all to any other provision of the PSA besides Clause 11.





153. If the parties had intended by the Non-Compete Letter to make the MP Funds a party to any other terms of the PSA, those would have been listed. It would have been fairly facile for the parties to have plainly said so if they intended to make the MP Funds party to any other terms of the PSA, or indeed, the entire PSA. It is, as the MP Funds argue, difficult to see why parties, much less sophisticated, Attorney-advised parties, would have used the Non-Compete Letter to achieve them.

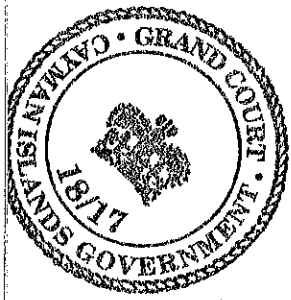
154. I note that in addition, Clause 14 provides for arbitration in Sao Paulo conducted in Portuguese (there was, though, provision allowing for an English translation to be requested). I accept Mr. Flynn's submission that the exclusively Brazilian nature of the proceedings is entirely consistent with a Brazilian arbitration between the two Brazilian parties to the PSA: the Sellers and the Buyer.

155. The Tribunal's theory was also that the Non-Compete Letter had amended the PSA itself, so as to make the parties to it, party to the whole PSA. At paragraphs 49-50 of the Partial Award on Jurisdiction, the Tribunal found that the MP Funds were "*integrated*" into the PSA, with the Tribunal concluding that "*all the terms and conditions contained in the Principal Contract*" were "*reproduced*" in the letter.

156. In my view, the Tribunal's conclusions are not correct, for a number of reasons. It seems plain to me that the Non-Compete Letter supplements the PSA by providing an undertaking by non-parties to the PSA. The Non-Compete Letter is described as "*aditando*", and this in my view should be understood as meaning "*adding*" or "*supplementing*", not "*amending*" or "*changing*".

157. It seems to me in any event, that even if the Non-Compete Letter did purport to change something about the PSA, a non-signatory to an agreement cannot amend an agreement between two different parties. Indeed, this is how the New York Court treated with the matter in an exchange with Counsel for VRG - pages 35-36 of the transcript of hearing before the District Judge.

158. That is so as a matter of logic. Additionally, the express terms of the PSA, in particular Clause 13.7 of the PSA does not permit amendment of the agreement, except in writing



signed by all Parties to the PSA. However, plainly, the Sellers and VRG signed the PSA, but did not sign the Non-Compete Letter. Therefore, the letter could not amend the PSA.

159. The MP Funds make a not insubstantial point to bolster the argument that it is extraordinary to say that these sophisticated, externally advised, commercial parties would not simply have made the MP Funds a signatory to the PSA if this is what they had intended. They say the point is all the more underlined by the fact that both the PSA and the Non-Compete Letter were executed on the same day. They pose the, in my view, logical question : “*why then would the “Parties” to the PSA and the signature blocks not simply have been amended to include the MP Funds if this had truly been the parties’ intention?*”
160. I find, on a proper construction of the relevant documentation, that the MP Funds were not intended by the parties to accept incorporation of the PSA’s terms into the Non-Compete Letter.
161. Accordingly, in all of the circumstances, and considering the issue, as I must, *de novo*, applying Brazilian law which is in my view plainly not different from Cayman law on contractual interpretation and construction issues, I am satisfied that the MP Funds were not parties to the arbitration agreement pursuant to which the Tribunal purported to exercise jurisdiction over them.

**Whether there was Arbitration Agreement covering dispute in respect of the price adjustment mechanism under the PSA**

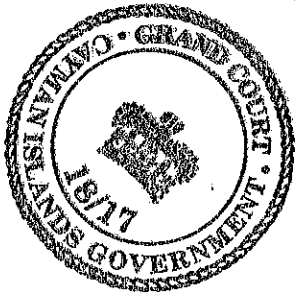
162. In my judgment, again considering the matter *de novo*, there was no arbitration agreement in respect of the matters submitted to arbitration. Even if there was agreement to arbitration, that only extended to the non-compete undertaking, and not to the price adjustment mechanism under the PSA. This offends against Article V.1(a), since there was no valid arbitration agreement. It also offends against Article V.1(c), since there was no jurisdiction to determine the matters outside the scope of the arbitration agreement/tribunal in excess of its powers under the arbitration agreement.

163. In my view, the MP Funds have therefore made out the first ground for refusal, i.e. that the MP Funds were not a party to the arbitration agreement, pursuant to which the arbitral Tribunal purported to exercise jurisdiction.
164. Alternatively, even if the MP Funds did consent to arbitration at all, which I have found that they did not, in my judgment, the Award plainly purports to determine issues that were not within the bounds or scope of any agreement to arbitrate.
165. Based upon my findings on this ground, it is not strictly necessary for me to go on to deal with the other two grounds. However, in light of the in-depth arguments and important issues involved, I have gone on to make findings upon both of the other grounds.

**The Second Ground for Refusal: The Tribunal Breached Natural Justice by Finding Liability on a basis neither Pleaded nor argued and awarding Relief that was never requested**

*INC*

166. In his declaration, given for the purposes of the proceedings before the Southern District Court of New York, Professor Carmona, at paragraphs 16 -19, discusses the *INC* principles and his opinion as to the applicability to the Arbitration as follows:



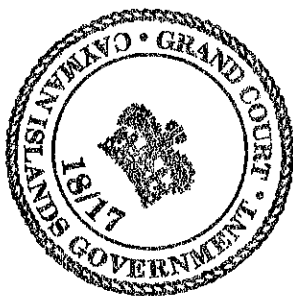
- "16. *Due process, under Brazilian law, subsumes, among other rules and principles, the principle of the contradictory proceedings (principio de contraditorio), which requires each party to be afforded an opportunity to respond to the arguments of the other party and to express its views on any relevant fact, document, or element of evidence placed before a tribunal. However, a party is not automatically entitled under Brazilian arbitration law to be given an opportunity to address legal theories properly raised by the factual allegations of the parties. Under Brazilian arbitration law, an arbitral tribunal is free to fit Brazilian law to the facts before it and to enter an award based on applicable Brazilian law regardless whether or not the specific statutory provision or legal doctrine was expressly cited or relied upon by one of the parties. This is a fundamental and well known aspect of Brazilian practice.*



17. *In fact, the general rule in a Brazilian arbitration is that the parties should assume and expect that a tribunal will apply the relevant law to the facts pleaded by each party. This rule is typically referred to in Brazil and other Civil Law countries by the Latin phrase “iura novit curia”, which means that the court, (as opposed to the parties) is charged with applying the law. The Final Award explicitly applies the law to the facts in Paragraphs 625 to 638, under the title “Fitting the Facts to the concept of malice”. (“Encaixe dos fatos no conceito de dolo”). This aspect of the Final Award is fully consistent with Brazilian practice.*
18. *MP argues that, in doing so, the Tribunal surprised the parties. Under Brazilian arbitration law and procedure, the Tribunal’s imposition of liability under a theory of dolo should have been no surprise, as the facts that were argued in the Terms of Reference and detailed during the Arbitration clearly raised the issue of dolo. It is uncontroversial under Brazilian law that parties bear the burden of identifying and discussing the legal theories that may be raised by the factual allegations of other parties. The failure of a party to consider a legal theory ultimately applied by a court or tribunal does not vitiate the proceedings or violate the rights of any party, so long as the legal theory was properly raised by the limits of the controversy as presented to the court or tribunal.*
19. *In my opinion, as a matter of international arbitration as practiced in Brazil (and setting aside the application of domestic Brazilian arbitration law), MP could not have been unfairly surprised by the Final Award’s application of dolo as a basis for liability, given the context, the matters in dispute, and the procedural rules applicable to the arbitration.”*
167. Mr. Giusti also gave a Declaration in the New York Proceedings, but it is in his First Affidavit for these proceedings that he addresses the principle of *INC* and responds to Mr. Gomm Santos' Declaration in the New York Proceedings so I will now turn to Mr. Gomm Santos' Declaration.

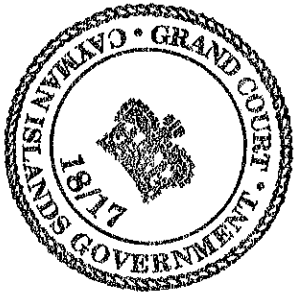
168. At paragraphs 21-25, and 27- 29, Mr. Gomm Santos gave the following evidence:

“21. *It appears to be common ground for the basis of Professor*



*Carmona's opinions that (i) the only legal claim that was raised in the arbitration to hold the MP Funds liable was a contract claim on a veil piercing theory of liability under Article 50 of the Brazilian Civil Code; (ii) the arbitral tribunal rejected the veil piercing theory and instead held the MP Fund liable in its final award under Article 148 of the Brazilian Civil Code ("a CC 148 Claim"); (iii) a CC 148 claim was not included in the TOR; (iv) a CC 148 Claim was never subsequently added as a legal claim to the arbitration under Article 19 of the ICC Rules after the TOR was signed; and (v) the arbitral tribunal applied CC 148 as the basis for the MP Funds' liability in its final award without inviting the parties, prior to issuing its final award, to address the applicability of CC 148 to the facts that had been developed during the arbitration.*

22. *I disagree with Professor Carmona that Brazilian law concerning international arbitration allows a tribunal to fit the facts developed during the arbitration in its final award into any legal theory it may choose to apply, regardless of whether any party has alleged that legal claim, or the tribunal has otherwise raised the new point of law with the parties on its own, with an opportunity for the parties to be heard before the tribunal issues a decision. Professor Carmona does not cite any legal authority to support this view of due process in international arbitration, and I am aware of none. In international arbitration, unlike domestic Brazilian litigation, the scope of the arbitral tribunal's authority both to determine the facts and to apply the law is determined by the parties. Unlike under the principle of *iura novit curia* to which Professor Carmona refers, it is in principle the parties - not the arbitrators - who define the legal issues to be determined by the tribunal.*
23. *I note in this regard, that Professor Carmona suggests there are more than three-dozen different provisions of the Brazilian Civil Code that impose legal consequences for conduct that constitutes *dolo* (malice). [Para] 11. This helps to illustrate why the concept of *iura novit curia* cannot apply in international arbitration in the same way as it may in litigation in some countries. In international arbitration, the arbitrators (and parties) do not necessarily come from the country whose laws apply to the dispute and therefore, in the case of Brazil, cannot be expected to know the Civil Code and*



all of the several dozen provisions potentially applicable to facts that implicate *dolo*, unless the parties, through their Brazilian Counsel, assert the claim and explain the law to the tribunal. In fact, under the ICC Rules of Arbitration, absent express agreement, a sole arbitrator or chairman of the tribunal appointed by the ICC cannot be a national of the same country as any party, and so it is very common that the arbitrator or chairman of the tribunal in ICC international arbitrations will not be familiar with the applicable law when the applicable law (as is the case here, and is commonly true) coincides with the nationality of any one of the parties. See *Arteaga Decl. Ex 37* (ICC Rules, Art 9(5)).

24. Similarly, it would be unreasonable to expect a respondent in international arbitration to “anticipate” every possible legal theory that might apply to hold them liable. Carmona Decl. para. 24. This would put respondents in the unfair position of either arguing the claimant’s case for it, even where the claimant did not raise a particular claim, or otherwise risk having no opportunity to be heard on a claim that was never raised in the arbitration but only imposed by the tribunal in its final award. In my view, such a concept makes no sense, either in Brazil or anywhere else where international arbitrations are conducted. Also, such a concept may impair the ability of a country to be chosen as the seat of international arbitrations. Moreover, the prospect of requiring parties to address every possible legal basis for a claim or defense regardless of whether the other party or tribunal has raised it would tend to defeat the well-recognized goals of international arbitration to provide an efficient, time- and cost-effective dispute resolution mechanism as an alternative to litigation in the courts.
25. Perhaps most importantly, the relevant elements of proof required under the different provisions of the Brazilian Civil Code that apply to conduct that is *dolo*, will vary. As with any “claim” for relief recognized at law, the merits of the claim raise a mixed question of law and fact - an application of the former to the latter. Any party to international arbitration would expect in fairness to have an opportunity to address the “claim” - the application of the law to the facts - not just one ingredient or the other, in isolation. This is why the authority of arbitral tribunals in international arbitration is circumscribed to the claims - fact and law - that are

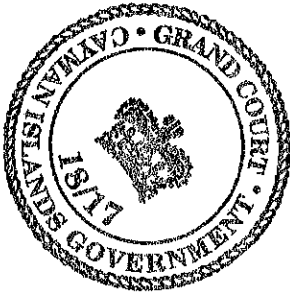
raised during the arbitration and that the parties are afforded an opportunity to address.

**Professor Carmona's Opinions on Due Process in International Arbitration**

...



27. *First, I agree with Professor Carmona, in paragraph 15 of his Declaration, that due process is required under Brazilian law. I further agree with Professor Carmona, in paragraph 16 of his Declaration, that Brazil's notion of due process adheres to the principle of contradictory proceedings, which "requires each party to be afforded an opportunity to respond to the arguments of the other party and to express its views". As noted above, it also appears to be common ground that the arbitral tribunal did not give any forewarning that it was considering deciding the case on the basis of a CC 148 claim that had not been raised, and that the parties were not invited to provide their arguments or views on the applicability of CC 148 prior to the Tribunal rendering its final award.*
28. *Where Professor Carmona and I part ways is on the idea that the principle of contradictory proceedings in international arbitration in Brazil - the right to have one's "arguments" and "views" heard- only applies to the facts of a case and not the applicable law raised by the factual allegations. In international arbitration in Brazil, it applies to both. The resolution of disputes in arbitration, and the opportunity to be heard and influence that – as the principle of contradictory proceedings underlying due process in Brazilian arbitration that Professor Carmona describes in paragraph 16 of his Declaration contemplates- necessarily involves both the law and the facts, and how the former applies to the latter.*
29. *Professor Carmona relies on the principle of iura novit curia to conclude that international arbitrators can decide what legal theory to apply without any input from the parties. Although I agree that this principle may be applicable in purely domestic litigation in Brazil, I disagree that this principle applies in the international arbitration context for the reasons discussed above. But even supposing that the principle did apply, as a matter of due*



*process and fairness in international arbitration, if an arbitral award contemplates deciding the case on a legal basis that has not been raised by any of the parties, the tribunal must at least raise the legal point with the parties and afford them an opportunity to present their “arguments” and “views” prior to deciding the dispute on a different legal basis than has been addressed by the parties’ submissions.” (My emphasis)*

169. In his First Affidavit in these proceedings, Mr. Gomm Santos also referred to Article 10 of the Brazilian Code of Civil Procedure of 2015 (“**the BCCP**”), which came into effect in 2016. Article 10 provides as follows:

*“Art 10. A judge shall not decide, at any level of jurisdiction, based on grounds with respect to which the parties have not been given opportunity to make statements, even if the matter is one which the judge should decide by administrative initiative.”*

170. Said Mr. Gomm Santos at paragraph 5.12 of his Affidavit:

**“Due Process under Brazilian Law**

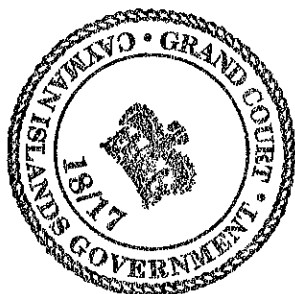
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*5.12. Article 10 of the BCCP codifies the principle of adversary proceedings and prevents the court from issuing unexpected decisions. Article 10 basically states that a court cannot decide at any point in a proceeding an issue before it unless it has given the parties an opportunity to be heard on that issue. The underlying principle of Article 10 of the BCCP is not new to the Brazilian legal system. Even though Article 10 is a recent addition to the BCCP, the codification reflects the state of the law that has developed through scholarly literature and court decisions, as the prohibition against unexpected decisions has long been upheld by the constitutional principles of due process and adversary proceedings and is supported by prior Brazilian case law.”*

171. In his First Affidavit in these proceedings, Mr. Giusti, having stated that he agrees with the contents of Professor Carmona’s Declaration in the New York proceedings, and



having stated that he disagrees with Mr. Gomm Santos' opinion that due process has been violated because the Arbitral Tribunal did not respect the principle of adversarial proceedings, at paragraphs 115- 119, and 121-128 states as follows:



*"115. For the reasons set out below, I disagree with the above statement and Mr. Gomm's suggestion that failure to allow a party to comment on a specific article of the BCC constitutes a violation of due process. I further disagree with Mr. Gomm's inference that, in the case at hand, the Arbitral Tribunal failed to afford a meaningful opportunity for the Respondents to comment on the relevant legal theory on which the Final Award rested.*

*116. First, the principle of adversarial proceedings is not incompatible with the principle of iura novit curia.*

*117. The principle of adversarial proceedings (or "adversary proceedings", as it is described by Mr. Gomm) may be applied differently across different jurisdictions. Under the Brazilian procedural rules in effect at the time of the Final Award (which have been amended in the interim in a manner that would not affect the outcome of the Arbitration, as discussed below) the principle of adversarial proceedings protected the rights of the parties to comment on and dispute the facts as well as argue the legal aspects of the case as they deemed appropriate, but the principle did not constrain the ability of an arbitrator to decide a case on the basis of legal grounds (much less the specific articles), sections or items of a particular piece of legislation) that had not been specifically discussed by the parties.*

*118. Under the principle of iura novit curia, as was in effect at the time of the Final Award, the decision of the arbitrator was not and should not be constrained by the articles of laws referred to by the parties during the proceeding.*

*119. The parties were fully entitled to argue the legal grounds that they submitted were applicable to the facts of the case. However, in making its determination, the Arbitral Tribunal was not limited by the submissions of the parties as to the legal or specific articles of pieces of legislation applicable to the dispute. The Arbitral*



*Tribunal was only constrained in its decision-making by the factual issues raised by the parties, and could have only awarded such relief as had been requested by the parties. The parties, assisted by their Brazilian Counsel, were free to choose the legal arguments that they considered might be most persuasive to the Arbitral Tribunal. However, they did not have any right to be heard on any specific legal grounds, or articles of pieces of legislation, upon which the Arbitral Tribunal may have ultimately made its determination; an arbitral tribunal can decide upon such issues without reference to the parties at all.*

....

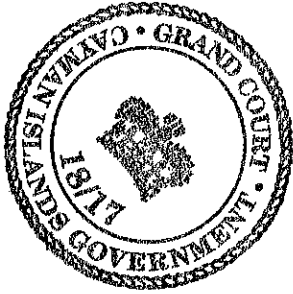
121. *Article 10 of the BCCP (which codifies the principle of adversarial proceedings and which Mr. Gomm relies upon in his Affidavits) is not applicable in this matter because it was not in force until after the Final Award was issued and does not have retrospective effect. The predecessor to the BCCP, which was in effect from 1973 to 2015 (BCCP/1973), did not contain any similar provision.*

122. *Furthermore, contrary to Mr. Gomm's assertions, the vast majority of the STJ's case law prior to the enactment of Article 10 of the BCCP supports the principle that an arbitrator is not bound by the legal grounds presented by the parties, but rather was free to apply the law to the facts of the case (as those facts had been presented by the parties):*

*"The jurisdictional activity is restricted to the limits of the request and cause of action. However, the judge applies the law to the species without binding on the legal grounds inferred in the complaint due to the iura novit curia principle. Indeed, there is no decision outside the scope of the suit, as the relief provided by the Court of origin has the same nature of the one requested (ruling the donation null), but only with different grounds from the one indicated by the petitioners" [Superior Tribunal of Justice, Interlocutory Appeal in Sepcial Appeal (AgRg No AREsp).*

123. *Even if Article 10 of BCCP had been in force when the Final Award was issued (which it was not), Article 10 provides that an arbitrator must not decide a case based on a "ground" which the parties did not have the opportunity to discuss. Mr. Gomm*

*construes the term “ground” to refer to the legal consequences of the facts when it actually refers to the factual basis that supports a party’s requested relief.*



124. *The interpretative statements issued by the National School of Formation and Development of Magistrates (a research and teaching institution run by the Brazilian federal court system under the authority of the Brazilian Constitution) with the approval of the more than 500 judges involved in their issuance offers the following views on the correct interpretation of Article 10 of BCCP:*

*“1) the words ‘Grounds’ mentioned in art. 10 of the Code of Civil Procedure/2015 is understood as the factual reasons guiding the request, and not the legal classification attributed by the parties.*

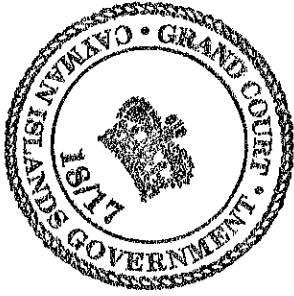
*2) the rule of the adversary proceeding under art. 10 of the Code of Civil Procedure/2015 is not violated by the court decision that invokes a principle, when the legal rule applied previously discussed in the course of action is the emergence of said principle.*

*...*

*6) A judgment supported by legal grounds is not a surprise judgment, even if such grounds differ from those presented by the parties, provided they are based on evidence submitted to adversarial testing.*

125. *Consequently, the same outcome would be reached in the present case, regardless of whether one applies the principles of adversarial proceedings and iura novit curia as set out in the BCCP or as set out in the BCCP/1973. Both procedural codes lead to the conclusion that an arbitrator is constrained exclusively by the factual basis of the case and the limits of the parties’ claims for relief, and not by the legal grounds submitted by the parties in support their respective requests for relief.*

126. *Mr. Gomm appears to imply that the principle of iura novit curia cannot be applied to international arbitrations. ....*

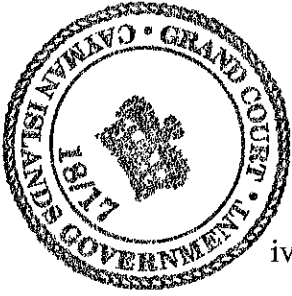


127. *However, the above is not correct: the Brazilian arbitration system is not binary. The BAL makes no distinction between domestic and international arbitrations seated in Brazil with regard to the conduct of the proceedings. Any arbitration seated in Brazil will be conducted under the same procedural principles and rules regardless of whether or not it contains international elements.*

128. *Thus, the principle of iura novit curia applies to the Arbitration, notwithstanding any international aspect to the contrary.” (My emphasis)*

172. However, whilst I bear in mind the fact that this was an arbitration taking place in Brazil, what I am required to do is to apply Cayman Islands standards of fairness. Applying Cayman Islands standards of fairness and due process, it is plain that the MP Funds could not reasonably have foreseen that they would be held liable as third parties in tort, for tort damages, when the claim against them, and relief sought throughout the arbitration, was to hold them responsible for a contractual obligation of their indirect subsidiaries. This is for the following reasons:

- i. Article 148 imposes tortious liability; whereas the liability that VRG alleged against the MP Funds in the arbitration was contractual.
- ii. This finding of liability under Article 148 is completely at odds with the Tribunal’s jurisdictional determination that the MP Funds were made party to the PSA’s terms by virtue of the Non-Compete Letter. On the merits, VRG had only alleged an *alter ego* theory of liability against the MP Funds that depended on the corporate personality of the Sellers and the MP Funds not being taken account of so that they were found to be parties to the purchase price adjustment obligation, not third parties.
- iii. The evidence concerning the alleged misrepresentations by the MP Funds was not directed at establishing or answering an allegation of “*malice*” by the MP Funds for the purposes of a claim in tort; it was directed at an entirely different matter of



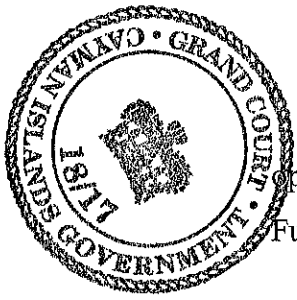
whether there was an abuse of the corporate form such as to warrant the lifting of the corporate veil under Article 50.

iv. Further, Article 148 requires the person relying on it to prove that the third party's intentional conduct actually *caused* the entry into the contract by the alleged innocent party, or otherwise that it caused the damages claimed. The evidence and argument before the Tribunal did not in any way aim at establishing that the requirement under Article 148 was satisfied. The MP Funds therefore maintain that they were given no opportunity to make or develop any argument that this requirement was not made out. It was submitted that, oddly, the Tribunal imposed a contractual liability on the MP Funds, the measure of which was the purchase price adjustment, as if this would equate to tort damages caused by malice.

v. I accept that, where damages are claimed as the remedy for Article 148, the claimant must adduce evidence to establish causation between the third party's malice and any loss allegedly suffered by the claimant as a result thereof. The fact that neither side adduced evidence or made an argument to this effect was put forward as a further demonstration that this was not the relief sought by VRG at all.

173. VRG had suggested that Article 148 was raised by reference to an expert report served by VRG by Professor Azevedo, but that for some "*tactical*" reason, the MP Funds had decided not to address this matter.

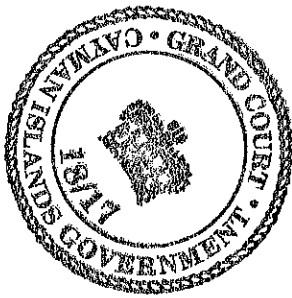
174. In my judgment, such an argument must fail. For one thing, Professor Azevedo's opinion was prepared for the purposes of entirely different proceedings, which were not directed to the Arbitration, and in any event, VRG submitted the report only in support of its alter ego claim contractual claim. Additionally, Professor Azevedo was not tendered by VRG as a witness in the Arbitration to give oral evidence, he was not cross-examined, and did not appear before the Tribunal at all. This sort of "*one-liner*" in Professor Azevedo's



opinion could not possibly have raised a claim for tortious damages against the MP Funds, as strangers to the PSA, under Article 148.

175. Further, to say that the MP Funds did not advance such a defence for “*tactical*” reasons, does itself suggest that the MP Funds’ defence to the *alter ego* claim was not in fact interchangeable with an Article 148 defence and that the MP Funds were not heard by the Tribunal on Article 148.
176. As to the evidence of the experts, there are a number of areas where they agree, and other areas where they disagree, and areas where the lines are blurred. In my judgment, once it is admitted, as Mr Giusti did in paragraphs 119 and 125 of his Affidavit, that the arbitrators are constrained by the factual basis of the parties’ case and the limits of the parties’ claims for relief, it seems to me that the MP Funds have made out their case under the second ground.
177. I found guidance in the case of *Malicorp* and the discussion of the principles in *Cukurova*. This Court, like the Court in *Malicorp*, has to look to see whether liability under Article 148 of the Brazilian Civil Code was (i) pleaded; (ii) argued in written submissions; (iii) argued in oral submissions and (iv) whether the MP Funds were given a fair warning that a case under Article 148 was proceeding against them such that they had a proper opportunity to respond to that case.
178. Even if VRG could show the Court that questions similar to those raised by Article 148 were put to the MP Funds, *Malicorp* is authority for the proposition that similarity is not enough. At paragraph 37 of *Malicorp*, Walker J discussed this matter as follows:

“37. *Malicorp* has relied on a passage in the transcript as indicating that the Chairman was asking Egypt what their view would be if the arbitral tribunal, without seeking to prejudge any issue, were to find there was no proven evidence of fraud or forgery and that what they simply found instead was that there had been a misrepresentation. I am prepared to accept that this question is similar to asking what the position would be if there had been an



error but no fraud. What it does not show, however, is that Egypt had any notice of a proposal to award damages under article 142." (My emphasis)

179. In my view, what was required is express notice to the MP Funds of a proposal to award damages against it under Article 148 and there was none such to be found anywhere in the entire record of the proceedings before the Tribunal. In that regard, I have in any event preferred the evidence of Mr. Gomm Santos to that of Professor Carmona and Mr. Giusti, as being more intrinsically logical and persuasive. I found particularly convincing Mr. Gomm Santos' reasoning at paragraphs 24 and 25 of his Declaration, cited in paragraph 168 above. However, in any event, it is a question of Cayman law as to whether there was procedural fairness.
180. In my judgment the MP Funds have also therefore discharged the burden of showing that there was a breach of natural justice.

### **Third Ground for Refusal - The Tribunal Purported to Decide Matters Beyond the Scope of the Submission to Arbitration**

181. This ground is closely related to the second ground. In my judgment, the specific ground for refusal to enforce an arbitration award, set out in section 7(2)(d) of the *Enforcement Law* is made out i.e. the Award deals with a difference not contemplated nor falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.
182. Thus, at the time of the Award, the MP Funds were entitled to understand the Tribunal to be treating them as a party to the PSA in its own right. It was on that basis that the claim was made that the MP Funds should be treated as responsible for the price adjustment mechanism with the PSA on the basis that it was the *alter ego* of the Sellers.
183. It was therefore not within the scope of the Tribunal's jurisdiction to award as tortious damages a contractual price adjustment amount, which had never been sought by VRG.

## Conclusion and Disposition

184. The matter of the Court's power to refuse to enforce an arbitration award is a matter of discretion but this discretion is not at large. It must be exercised upon a principled basis, in respect of which there is a long line of cases that provide some guidance, and which have been referred to in this judgment. In all of the circumstances it is my view that it is just to refuse to enforce the Award, as it offends against the underlying principle of arbitration, that it must be consensual. That this Award does so is made out on two bases: (a) the purported exercise of jurisdiction pursuant to an arbitration agreement to which the MP Funds were not parties; and (b) by the purported exercise of jurisdiction whereby the Tribunal found the MP Funds liable for a particular provision of the Brazilian Code that had never been pleaded or set out, and therefore falling outside of the boundaries of the submission. The Award also offends against the cardinal principle of natural justice that enshrines a party's right to be heard and is contrary to the public policy of the Cayman Islands. This is contrary to the express provisions of the New York Convention, and the *Enforcement Law*.

## Issue of Stay

185. For all of the reasons advanced by the MP Funds, and referred to at paragraph 120 above, it is in my judgment inappropriate to stay or adjourn the proceedings.

## ORDER

186. In the circumstances, for the reasons previously discussed, I set aside the *ex parte* order dated 14 October 2016 pursuant to G.C.R, O.73, r.31(8) and section 7 of the *Enforcement Law*, as sought by the MP Funds. Costs are awarded to the MP Funds against VRG, to be taxed if not agreed.

  
\_\_\_\_\_  
THE HON. JUSTICE INGRID MANGATAL  
JUDGE OF THE GRAND COURT

