IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal 12 of 2019
(Formerly FSD 137 of 2016)

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

AND IN THE MATTER OF AN ARBITRATION BETWEEN
VRG LINHAS AÉREAS SA (Claimant) and
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II LP and
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP (Respondents)

BETWEEN:

GOL LINHAS AÉREAS SA
(formerly VRG LINHAS AÉREAS SA)

Plaintiff/Appellant

and

1) MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II LP

2) MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP

3) MATLINPATTERSON GLOBAL PARTNERS II LLC

Defendants/Respondents

BEFORE:	**The Rt Hon Sir John Goldring, President** **The Rt Hon Sir Bernard Rix, Justice of Appeal** **The Hon John Martin QC, Justice of Appeal**
Appearances:	**Mr Tom Lowe QC instructed by Mr. Marc Kish and Mr. William Jones of Ogier, Attorneys for the proposed Appellant** **Mr. Vernon Flynn QC instructed by Mr. Luke Stockdale of Maples and Calder for the proposed Respondents**
Heard:	**20 – 21 November 2019**
Draft judgment Circulated:	**29 July 2020**
Judgment Delivered:	**11 August 2020**

JUDGMENT

Sir Bernard Rix JA

Introduction

1. This appeal (it began life and came before the Court as an application for permission to appeal) concerns a claim to enforce a Brazilian arbitration award, decided under Brazilian substantive and curial law, and upheld by the Brazilian courts in annulment proceedings in Brazil brought by the award debtors. I would grant permission to appeal. The case raises important and difficult issues. Permission to appeal was refused by the Judge, Justice Mangatal, and was strenuously challenged by the Respondents in this Court. This judgment will demonstrate, however, that permission ought to be granted.

2. The award was challenged before Mangatal J on four grounds, all of which had previously been raised before the Brazilian courts. The four grounds were and are: (i) the Respondents were not party to the arbitration agreement relied on; (ii) if they were, the claims raised in arbitration were outside the scope of the arbitration agreement; (iii) the arbitral tribunal decided the case on a legal ground (article 148 of the Brazilian Civil Code) not promoted by the claimant, which was contrary to Cayman Islands public policy; and (iv) the legal ground relied on by the arbitral tribunal was not within the Terms of Reference of the arbitration and therefore had never been referred or submitted to the arbitral tribunal for decision. Mangatal J agreed with all four grounds and therefore refused to enforce the award in the Cayman Islands.

3. It is common ground that grounds (i) and (ii) are matters for Brazilian law, and that ground (iii) is ultimately a matter for Cayman Islands law (although the appellant submitted that Brazilian law played an important role in providing the material on which these courts, applying Cayman Islands law and public policy, had to make a judgment). There was no clarity about the law which governed ground (iv), but in my judgment it too is a matter for Brazilian law as the law of the seat.

4. The parties deployed expert witnesses on Brazilian law to assist in the presentation of Brazilian law to these courts. It might be said, however, that the best evidence of Brazilian law lay in the decisions of the Brazilian courts in the instant case.

5. Before Mangatal J the appellant relied both on Brazilian law (as reflected in the Brazilian courts' decisions in this case and in the evidence of the Brazilian law experts) and on a submission of estoppel by reason of the Brazilian courts' decisions in this case. In essence, there is not much to choose between these approaches. In this appeal, the appellant concentrated exclusively on its argument of estoppel. In doing so, it might be said that it took upon itself a burden (the proof of estoppel) which prima facie (subject to the decisions of the Judge) lay on

the Respondents (the proof of Brazilian law). Be that as it may, if the argument on estoppel were to succeed, it would follow (in the absence of proof that the Brazilian courts had somehow got Brazilian law wrong) that Brazilian law was as stated by the Brazilian courts.

The underlying dispute

6. The arbitration arose out of an Agreement for the Sale and Purchase of Equity Control in VRG Linhas Aéreas SA, dated 28 March 2007 (the **Agreement**).

7. VRG Linhas Aéreas SA (**VRG** or the **airline**), the then, but now former, name of Gol Linhas Aéreas SA, the appellant in this appeal and the plaintiff before Mangatal J (**Gol**), is the universal successor under Brazilian law of GTI SA (**GTI**), which was merged into VRG. GTI has therefore become VRG and then Gol. It was as GTI that the company acted as purchaser under the Agreement and commenced the arbitration proceedings in Brazil. The annulment proceedings, however, were named against VRG. It will be convenient to refer to the appellant throughout as VRG, as the judge did below.

8. GTI then was the purchaser under the Agreement from Varig Logistica SA and Volo do Brasil SA as sellers (the **Sellers**). The Agreement provided for the sale of 100% of the issued shares of VRG, a Brazilian airline. The dispute which subsequently arose concerned the overstatement of the airline's working capital and a demand therefore for an adjustment to the price paid under the Agreement.

9. The defendant respondents are aspects of the ultimately US based funds which promoted the sale of VRG. The first respondent, MatlinPatterson Global Opportunities Partners (Cayman) II LP (**MP Cayman**), is a Cayman Islands exempted limited partnership. The second respondent, MatlinPatterson Global Opportunities Partners II LP (**MP USA**), is a Delaware registered partnership. The third respondent, MatlinPatterson Global Partners II LLC (the **GP**), is the general partner of MP Cayman, and is a Delaware incorporated limited liability company. Mangatal J described the three defendants as the **MP Funds**. I shall also use that expression when convenient to describe any of the respondents or any combination of them.

10. The Sellers were special purpose companies set up by the MP Funds to perform the sale of the airline to GTI. The price under the Agreement was USD 275 million, but clause 5 of the Agreement provided for a price adjustment in case the working capital of GTI was less than warranted. Once paid, the price of USD 275 million had been removed by the MP Funds from the Sellers, and the Sellers were left essentially without means.

11. Neither MP Cayman nor MP USA were signatories of the Agreement itself. However, MP USA signed an addendum to the Agreement which joined MP USA to a non-compete provision in the Agreement. My understanding is that it is essentially MP Cayman and MP USA against whom VRG seeks enforcement, for it was against them (and the Sellers) that the award sought to be enforced was made.

12. A dispute subsequently arose concerning the working capital of GTI, or VRG as it had become. VRG complained that it had been fraudulently misled by both the Sellers and the MP Funds as to the working capital of the airline. A price adjustment clause, clause 5 of the Agreement, provided for an adjustment to the price to the extent that the working capital of the airline as of the date of the Agreement was overstated in the accounts. The working capital as of the date of the Agreement had been warranted, and was supposed to have been confirmed by PwC.

13. Accordingly, on or about 27 December 2007 VRG brought ICC arbitration proceedings against both the Sellers and the MP Funds in the form of MP Cayman and MP USA. The claim against the MP Funds was premised on the MP Funds' fraudulent misuse of the Sellers in the sale of the airline. It was said that this entitled VRG to pierce the corporate veil. The Sellers and the MP Funds were therefore said to be alter egos. The MP Funds (MP USA and MP Cayman) were described, together, as fourth respondents to the arbitration.

14. The arbitrators constituting the arbitral tribunal were: Juan Fernández-Armesto (chairman), Pedro Antônio Batista Martins and Gustavo José Mendes Tepedino (co-arbitrators). Dr Fernández-Armesto is a distinguished Spanish lawyer and arbitrator, who has been President of the Spanish Securities Commission and a professor of commercial law and is currently a vice-president of ICCA (the International Council for Commercial Arbitration). Messrs Martins and Tepedino are distinguished Brazilian lawyers and arbitrators, the former being inter alia an officer of the commercial committee of the Latin-American Arbitration Association and the latter being a professor of civil law and former Director of the Faculty of Law of the State University of Rio de Janeiro.

15. The MP Funds disputed the arbitrators' jurisdiction over them. They submitted both that they were not parties to the arbitration agreement contained in the Agreement, and that in any event, even if they were, the scope of any such arbitration agreement in their case could not extend beyond the non-compete obligation contained in the addendum.

16. The arbitrators, exercising their *compétence compétence* rights, subject to review by the Brazilian courts, to adjudicate on the challenge to their jurisdiction, issued a Partial Award (by a majority) dated 7 April 2009 rejecting that challenge.

17. The arbitration thereafter proceeded to the merits stage, with the MP Funds reserving their right to have the question of the arbitrators' jurisdiction reviewed by the courts.

18. In their Final Award dated 2 September 2010, the arbitrators found fraud proven, and awarded R$ 92,987,672 to VRG against the Sellers and the MP Funds jointly. They found that the airline, instead of having a working capital, as VRG had been assured, in the sum of R$ 40,750,874 (referred to frequently as R$ 40 million), in reality had a negative working capital of R$ 52,236,786 (referred to frequently as R$ 52 million).

19. The arbitrators found the Sellers liable under the price adjustment clause of the Agreement and the MP Funds liable for third party malice under article 148 of the Brazilian Civil Code for damages in the same amount. However, they rejected VRG's claim against the MP Funds based on the doctrines of *alter ego* and piercing the corporate veil.

20. The respondents submit in these proceedings that the arbitrators' reliance on article 148, as a distinct legal ground of liability, without warning to the MP Funds in advance of issue of the Award, deprived the MP Funds of the opportunity to present their case and was against public policy.

The Agreement

21. As stated above the Agreement was between GTI (subsequently VRG and now Gol) and the Sellers. The MP Funds were not parties or signatories. Gol, at that time the parent of GTI, guaranteed GTI's obligations. There was no guarantee by the MP Funds of the Sellers' obligations.

22. Clause 14 contained an arbitration agreement, as well as an express choice of Brazilian law. Any dispute was to be submitted to the ICC in accordance with its Rules. Relevant parts of clause 14 are as follows:

> **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 provisions below…
>
> **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…

23. There were a number of addenda of the same date as the Agreement. This Court is concerned with what has been referred to as Addendum 5 ("Addendum SL/VRG/005"), dated São Paulo, March 28, 2007. The MP Funds signed Addendum 5 in order to join themselves to the non-compete obligations of the Sellers contained in clause 11.1 of the Agreement. The Addendum took the form of a letter to GTI and its then parent Gol, countersigned by the addressees. The Addendum was annexed to the Agreement.

24. Addendum 5 provided in relevant part as follows:

> We refer to Clause 11.1 of the above-captioned agreement to mention the following:
>
> > Further to what was set out in the 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 Authority], pursuant to Clause 9.2 of the above-captioned Agreement, any of the following acts:…
> >
> > 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.

The Partial Award

25. The Partial Award dealt with the MP Funds' challenge to the arbitrators' jurisdiction. By a majority the arbitrators dismissed that challenge. They found that by attaching themselves to the Agreement by means of Addendum 5, the MP Funds had joined in the Agreement's arbitration clause 14. They also found that, even though the Addendum was concerned only with the Agreement's non-compete obligation, nevertheless the wide terms of clause 14.1 ("All disputes arising from or related to this Agreement") and the absence of any evidence that the MP Funds intended to limit the scope of arbitration to disputes related to the non-compete

clause, meant that the issues raised between GTI and the MP Funds were within the parties' arbitration agreement. In coming to that conclusion the arbitrators, as civil lawyers, considered both the "subjective" and the "objective" limits of contractual documents (paras 52 and 60).

The Final Award

26. Towards the end of their lengthy and careful Final Award, the three arbitrators found as matters of fact that VRG's explicit case of fraud had been wholly proven. Relevant passages are as follows:

> **1. CLAIMANT'S POSITION**
>
> 568. Claimant seeks to hold Respondents 2 and 4 [the latter being the MP Funds] liable for their allegedly fraudulent conduct during the course of the negotiations of the Agreement and its performance.
>
> Allegation of fraud by Respondent 4
>
> 569. According to Claimant, Respondent 4 manipulated the numbers that were provided to Claimant upon setting the price for the agreed deal. Respondent 4 thereby (albeit indirectly) received an amount greater than reasonable for the VRG shares than if the numbers had been provided in a proper manner.
>
> 570. The doctored numbers were provided to KPMG, the Purchaser's financial adviser, which was unable to detect such fraud because it was not given the opportunity to conduct a complete preliminary financial audit in VRG.
>
> 571. The fraud was perpetrated by Mr Lap Chan Respondent 4's executive officer [*director*], since the definition of the purchase price, the inclusion of the price adjustment clause, and the specification of Appendix III to the Agreement were devised and carried out by Mr Lap Chan, as Respondent 4's direct representative.
>
> 572. The existence of a commingling of assets and abuse of control between Respondent 4, as controlling party, and the Sellers, as subsidiaries [*filais*], contributed to such fraud.
>
> 573. Consequently, Respondent 4's bad faith actions ended up "*maliciously misleading Claimant, its counsel and consultants into believing that the company was in a financial position which was very different from reality.*"
>
> Qualifying Respondents' Actions
>
> 574. Claimant qualified Respondent 4's actions as follows:
>
> - "The conduct…illegal;"
> - "*Clear case of abuse of right and a violation of objective good faith*;"
> - "*Truly a wrongful act*;"
> - "*A contradictory behavior on Claimant's good faith noted in both the pre-contractual and post-contractual phases;*"

- "[which] *is repulsive to everyone who had access to the facts being discussed*;"
- "*Respondent 4 admittedly manipulated, doctored, defrauded*;"
- "*a falsification of numbers*;"
- "*repeated omissions and falsehoods*;"
- "*a clear accounting fraud*;"
- "*an omission of* [...] *adjustments caused a purposeful and highly detrimental distortion to the final result*;"
- "*unequivocally shows bad faith*;"
- "*changes that ended up maliciously misleading Claimant*;"
- "*Deliberately adulterated such numbers with the sole purpose of deceiving Claimant*;"
- "*A manifestly malicious omission of information and facts.*"

575. Claimant attributes such conduct directly to Respondent 4, and extends it to all other Respondents; Claimant argues that bad faith and fraudulent misconduct was only made possible through Respondents' joint actions and the corporate structure created.

2. RESPONDENTS' POSITION

576. The Arbitration Tribunal, before describing Respondents' position, wants to state for the record that the allegations of bad faith and the attribution of such conduct to all Respondents are, as evidenced from previous paragraphs, continuously contained in Claimant's writings, ever since the beginning of this arbitration. Therefore, Respondents had ample opportunity to respond to such allegations.

...

Allegations by Respondent 4:

578. On its part, Respondent 4 begins its defense by alleging that it "*never used the legal personality of either Respondent 1 or 2 to defraud any third party. What has been proven is that Respondent 4 indirectly invested US$400 million in VRG, and in Respondents 1 and 2* [the Sellers], *and nothing has been recovered. Such corporate entities at all times had their own equity, management, employees, ultimately a separate existence as between each other. Nor could their existence be intermingled with that of* [Volo Logistics], *already excluded from this arbitration, or that of Respondent 4.*"

579. Subsequently, Respondent 4 analyzes in detail how the negotiations of the Agreement developed. It acknowledges that Mr Lap Chan, Respondent 4's representative, "*has been the main intermediary in negotiations with the Gol Group,*" but that "*such negotiations, conducted primarily by Mr Lap Chan, were never conducted by him alone.*" In addition, it alleges that Mr Lap Chan had been travelling since March 17 and did not take part in the execution of the Agreement on March 28, 2007.

580. As regards the Initial Balance Sheet included in Appendix III to the Agreement, Respondent – supported by Mr Lap Chan's own assertions – believes it was prepared by Mr Márcia Nobre with PwC's assistance and checked by KPMG, the Purchaser's advisor, note by note. No number pertaining to the Agreement was imposed upon the Gol Group. The Gol

Group's top management received and analyzed the reports before making the decision to move forward with the deal.

581. KPMG exerted – as described by Respondent 4 – some extensive work checking on VRG's accounts and even issued three reports, a first one on February 24, a second one on March 16, and a third one in April, all of them in 2007. KPMG and Gol held at least one meeting to discuss the final draft and KPMG's impressions regarding the analysed documents. Gol was aware of the conditions for the deal upon receiving the reports issued by KPMG, and went on to close the deal.

3. ANALYSIS BY THE ARBITRATION TRIBUNAL

...

586. Claimant seeks in this arbitration to have the characterization of fraud in the negotiation and performance of the Agreement cause Respondent 4 to be held liable for the Respondent I's obligation to pay Claimant the price adjustment provided for in the Agreement. The dispute is therefore an issue related to the main Agreement, which falls fully under the scope of the Arbitration Tribunal's jurisdiction as affirmed in the Partial Award.

587. The Tribunal next shall proceed to analyse the claim made by the Claimant.

3.1 THE PROVEN FACTS

Mr Lap Chan's Person

588. Mr Lap Chan was an executive officer of and partner in the MatlinPatterson Fund. Such fund controlled Vlog, the company owning VRG, and which acted as Seller in the Sale and Purchase Agreement. Mr Lap Chan, acting as the MatlinPatterson Fund's representative, was the main intermediary with the Gol Group during the negotiations prior to the execution of the Agreement.

589. Mr Lap Chan was the person who prepared and/or ordered the preparation of the Initial Balance sheet. Such preparation used as its basis a balance sheet, i.e. a complete balance sheet, drawn from VRG's official books of account on the very day of March 15, 2007.

Manipulation of VRG's Bookkeeping

590. Upon preparing the Initial Balance Sheet, Mr Lap Chan ordered two significant changes introduced, arbitrarily altering the figures of two bookkeeping entries that appeared in VRG's official books of account.

591. (i) According to VRG's official bookkeeping, the amount of R$ 40,783,150 appeared in the balance sheet item "Commercial leasing payable." However, Mr Lap Chan ordered the figure reduced to R$ 20,737,278 in the Initial Balance Sheet. The only reason for rejecting the original figure was that Mr Lap Chan understood that the original figure was not reliable, and therefore he made an approximate calculation, taking as its basis the fleet of nineteen 737 and three MD-11 aircraft that the company then had to estimate the amount that should be inserted in the Initial Balance Sheet.

592. (ii) The balance sheet item "Fees, taxes and contributions – INFRAERO" had, as of March 15, 2007, an amount of R$ 10,512,166. However, Mr Lap Chan ordered the figure in the Initial Balance Sheet reduced to zero R$. Mr Lap Chan explained that he "*imagined it had to be zero, INFRAERO won't let you fly if you don't pay on time.*" With this simple argument he decided to reduce an account balance, which in the bookkeeping as of March 15 was more than R$ 10 million, to zero R$.

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593. During the Evidentiary Hearing, Mr Lap Chan sought to justify his actions with the supposedly low quality of VRG's accounting information (at the Evidentiary Hearing Mr Lap Chan used the expression "*garbage in, garbage out*"). Mr Lap Chan's explanations could not be more unconvincing, and his actions have to be qualified as sheer manipulation.

594. VRG was a major airline which had sophisticated accounting systems based on the SAP program – one of the most complex in the market – controlled by experienced professionals. In spite of this, Mr Lap Chan in the first case reduced the figure, which was the result of official bookkeeping, to half, using as his basis a crude and unempirical calculation of what the balance of such an account should be, based on the number of leased aircraft, and in the second case, he reduced the balance completely to zero.

...

596. In short, even assuming that the quality of VRG's accounting information for the month of March was less than optimal, low quality absolutely does not justify the two interventions Mr Lap Chan made in the official bookkeeping numbers upon preparing the Initial Balance Sheet: by reducing two major liabilities accounts, that of "Commercial leasing payable," amounting to R$ 40 million, to exactly half, R$ 20 million, and that of "Fees, taxes and contributions – INFRAERO," amounting to R$ 10 million, to zero. This is why such conducts are deemed a conscious and voluntary falsification of VRG's bookkeeping in order for the Initial Balance Sheet to show a working capital higher than as stated in the official bookkeeping.

Misrepresentation that the Initial Balance Sheet was revised by PwC

597. The Agreement includes an express warranty that PwC had prepared and validated the figures of the Initial Balance Sheet (Sections 5.1 and 5.1.1). Mr Lap Chan himself (with no knowledge of Mr Humberto Tognelli's written statements) stated at the hearing that the Initial Balance sheet was revised by PwC. Such statements are most plainly untrue, because PwC itself stated that it never either prepared or revised the figures shown in the Initial Balance Sheet. GTI was, thus, led into believing that the figures shown in the Initial Balance Sheet had the approval of a prestigious audit firm. And this caused GTI to be unable to cast any doubt on the truthfulness of the Initial Balance Sheet.

The Misinformation facilitated to GTI

598. The Sellers also warranted in the Agreement that "*no information provided by* [the Sellers] *and VRG contains any misrepresentation or omission*

of any fact that might lead [the Purchaser] *into any misjudgment in connection with the information provided*" (Section 7.14 of the Agreement).

599. It has been proven that the information contained in Appendix III to the Agreement (Initial Balance Sheet) did not reflect a true and proper image of VRG's accounting. From the Initial Balance Sheet attached to the Agreement, it could be deduced that VRG's working capital, as of March 15, amounted to R$ 40,750,874. In reality, it was inflated by the two item changes ordered by Mr Lap Chan – by more than R$ 30 million. And with VRG's accounting duly revised, the Tribunal has come to the conclusion that the true working capital, as of the Consummation Date, amounted to R$ (52,236,798). Which is to say: instead of a positive working capital of R$ 40 million, the company in reality had, as of the Consummation Date, a working capital deficit of R$ 52 million.

Effects of the Sellers

600. Mr Lap Chan's and Sellers' joint actions, described in detail above, engendered in Claimant an error about VRG's working capital. GTI signed the Agreement convinced that such working capital amounted to R$ 40 million, uninformed that it was artificially inflated by more than R$ 30 million.

601. But there is more: the assertion that a company as renowned as PwC had revised and, consequently, supported the figures of the Initial Balance Sheet, created in Claimant the confidence that such figures were accurate, and that they reflected a true image of the equity position. It is to be presumed that, without PwC's warranty, Claimant would not have accepted the Initial Balance Sheet, but would have submitted it to a careful review by its own financial advisors. Consequently, the Purchaser could not realize that the Initial Balance Sheet gave a totally distorted image of VRG's working capital.

602. The misinformation facilitated to GTI is directly attributable to Respondent 4, as it was its representative, Mr Lap Chan, who ordered figures manipulated and current liabilities artificially [increased, *sc* decreased]. Respondents 1 and 2, as the main interested parties in the deal and controlled by Respondent 4, were aware of or at least should be acquainted with the financial statements which were the basis for the deal, and therefore were aware of the information erroneously provided to Claimant.

27. The arbitrators then proceeded to determine the consequences in law of the facts that they had found proven. They began with the doctrine of piercing the corporate veil, which VRG had put in the forefront of its submissions, and then turned to deal with the malice which VRG had also alleged, and had proved, and to its legal consequences. They did so by a process known to civil law as *iura novit curia* ("the court knows the law"), a doctrine which is also described by the expression *da mihi factum et dabo tibi legem* ("give me the facts and I will give you the law").

3.2 FITTING THE FACTS INTO BRAZILIAN LAW

603. Once the proven facts are established, it is necessary to determine how they fit into Brazilian law.

CC Article 50: Lifting the Corporate Veil

604. Claimant has repeatedly indicated throughout its briefs that this is a case of fraud. In its opinion, the manipulation of the balance sheets and commingling of assets between Respondent 4 and Respondent 1 reflect, in the first place, an abuse of legal personality under CC article 50.

605. CC article 50 provides:

> "*In the event of abuse of legal personality characterised by a diversion of purpose, or commingling of assets, the judge may, upon a motion by the party or the Attorney General, whenever the latter is authorized to intervene in the case, rule to extend the effects of certain and determined obligational relations to the personal assets of a legal entity's officers or partners.*"

606. This provision in fact regulates a presumed lifting of the corporate veil: CC article 50 describes a situation where the independent corporate entities of a controlling party and a controlled entity may be disregarded, with their independent equity liabilities not being acknowledged, and the liability for the controlled entity's debts being consequently extended to the controlling party. In order for such effects to be produced, the CC requires the existence of an "*abuse of legal personality*" characterized by a "*diversion of purpose*" or a "*commingling of assets*". As affirmed in Brazilian case law, in order for lifting the corporate veil to be authorized, "*an actual manipulation of the company's independent equity in favor of third parties must be present.*"

607. None of these requirements are present in our case: the MatlinPaterson Fund has not used Respondents 1 and 2 for any purpose other than the corporate purpose for which they were organized, their assets have not been commingled, and they have not caused the controlled companies' independent equities to be manipulated.

608. In the Tribunal's opinion, CC article 50 and the lifting the corporate veil doctrine regulated therein do not constitute the appropriate legal basis for grounding Respondent 4's liability as sought. Let the record show that the companies' personalities and their resulting independence are of great value in the Brazilian legal system, and are therefore a rule of Brazilian law.

CC articles 45 et seq: Malice

609. Having ruled out the application of CC article 50, the Tribunal has to rule on any liability by Respondent 4 regarding Claimant's allegations of the former's presumably malicious actions.

610. Claimant effectively argued that in the "*manipulation of numbers*" "*there was a manifestly malicious omission of information and facts,*" that Respondent 4's conduct presumed a violation of good faith, and that such malicious behavior was channelled through the corporate structure which was created.

611. In that respect, Prof Alvaro de Villaça de Azevedo concluded in his opinion, that such malicious actions by Respondent 4 fit into the breach of objective good faith doctrine (CC article 422), and into the third party's malice doctrine (CC article 148).

612. Respondents had ample opportunity to defend themselves from Claimant's allegations, but they focused their defense on allegations of a factual nature, and chose not to analyze the specific legal aspects of the allegations of malice made by the Claimant against them.

613. As charges of malicious conduct have been made, it is up to the Arbitration Tribunal, in accordance with the general provisions of Brazilian Procedural Law, to analyze and rule on this issue; and to do so the Tribunal (A) shall look into the concept and regulation of malice under Brazilian law, and then (B) shall analyze whether such actions fit into the legal concept of malice.

A. Regulation of Malice under Brazilian Law

614. Brazilian Law does not contain a definition of malice. But there is a unanimous opinion that it consists of:

> "*any suggestion or ruse anyone employs with the intention or awareness of misleading the maker of a statement* [of will], *or of keeping the latter misled, as well as any disguising by the recipient of a statement or by a third party, of an error by the maker of such statement.*"

615. Or using Clóvis' classic definition:

> "*Malice is a crafty ruse or device employed to mislead someone into performing a transaction harmful to the latter, to the benefit of the one engaging in malice or of a third party.*"

Causal malice and incidental malice

616. The CC makes a differentiation between two major categories in the concept of malice:

Causal malice, which is the equivalent of a serious mistake, and allows for the annulment of any transaction the cause of which is for this reason flawed, or compensation for losses and damage sustained (CC article 145: "*Transactions may be annulled or malice whenever the latter was the cause of the former*"); Incidental malice, representing a less transcendental mistake, which does not cause the transaction to be annulled, and only requires a satisfaction of losses and damages (CC article 146: "*Incidental malice only requires the payment of losses and damages.*").

...

619. In the case at hand, an allegedly malicious conduct is attributed to Respondent 4. But the latter does not participate in the Agreement either as Purchaser or Seller. Can its conduct, albeit originating from a third party, be qualified as malicious? The answer is yes.

Third-Party Malice

620. There is a second distinction that is greatly important to this arbitration: malice is usually committed by someone seeking to be counterparty to the transaction. Such counterparty makes a mistake precisely to mislead the lawful

party into accepting the deal. But it is also possible to have a third party break such pre-contractual relationship, make the mistake, and mislead the parties into closing on the contract. In that case, we are talking about third-party malice.

621. Brazilian Law, which on this point is more developed than other legal systems surrounding it, contains the following regulation under CC article 148:

> "*A transaction may also be annulled upon a third party's malice if the party benefitting from the transaction knew or should have known about such malice; otherwise, even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages.*"

622. Which is to say: Brazilian Law expressly provides that deception characterizing malice can be engaged in not only by the counterparty, but also by a third party. And the effects of deception again depend on whether malice is causal or incidental: in the first case, they cause the transaction to be annulled; in the second, "*even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages.*" Which is to say: "*if A, because of malice by C – which B, another party, knew about – signed the contract, it may not file an action for annulment against B, but instead, only an action for damages*" against C.

623. Silvio de Salvo Venosa gives the following example of a third-party malice situation:

> "*Imagine hypothetically that someone intends to acquire some jewellery, imagining it to be gold, when in reality it is not. The fact that it is not gold is not discussed by the seller, much less by the buyer. A third party, who has nothing to do with the deal, gives his opinion exalting the object as made out of gold. Thereupon the buyer is misled into making the purchase. There is clear* third-party malice *therein.*"

624. In the above example, the third party engaged in ploy to convince the buyer that the product was made out of gold. Third-party malice is characterized by a fraudulent collusion between the contracting party and a third party with the intent of maliciously misleading the other contracting party into closing the deal. In our case, Respondent engaged in a ploy to convince the Purchaser that the working capital in the Initial Balance Sheet was right and much higher than actual. And Respondents 1 and 2, aware of such ploy, stated that the working capital had been proved by PwC – thus covering up such a ploy.

B. How the Facts fit into the Concept of Malice

625. Brazilian case law finds the necessary elements for the existence of malice to be the following:

(i) The malicious party's intention to mislead the contracting party into performing a legal act;
(ii) Usage of seriously misleading resources;
(iii) That such ruses be the determinant cause of a fundamental element to the transaction;
(iv) That they originate from another contracting party or from a third party.

626. Let us analyze each element separately.

(i) Intention to mislead into the performance of a legal act

627. The MatlinPatterson Fund was no doubt greatly interested in getting GoI to acquire VRG. That coincides precisely with Respondent 4's corporate purpose, because the fund's purpose is to acquire distressed companies, and to resell them after their recovery. MatlinPatterson had acquired VRG in 2006, and obtained the company's control on December 15 of that year. It paid the price of US$24 million and, furthermore, has made maximum investments of US$75 million into the company itself. Only three months after the purchase was consummated the possibility arose of VRG being resold to the GoI Group for the amount of US$ 275 million (as stated in Section 4.1 of the Agreement). VRG's sale to GoI promised to be a transaction that would bring great benefits to the MatlinPatterson Fund, and therefore the latter was highly interested in having the transaction concluded successfully.

628. In its interest of obtaining a successful transaction, MatlinPatterson authorized a top-level executive, Mr Lap Chan, to play a major role in the negotiation process and in the preparation of the Initial Balance Sheet attached to the Agreement.

(ii) Usage of Seriously Fraudulent Resources

629. The Arbitration Tribunal has already ruled that Respondent 4 meddled in the preparation of the Initial Balance Sheet and maliciously manipulated VRG's bookkeeping.

630. Additionally, the Sellers, controlled by Respondent 4, warranted to GTI that the Initial Balance Sheet had been revised by PwC. – which is untrue, since PwC itself denies having done such work. That falsehood is an aggravating factor to a conduct already malicious in itself.

(iii) A Determinant Cause of a Fundamental Element to the Transaction

631. Upon signing the Agreement, GTI undertook to pay US$ 275 million for a company that seemingly had a positive working capital of R$ 40 million, such as stated on the Initial Balance Sheet, which purportedly had been revised by PwC. In the reality of the facts, its working capital had not been revised by the audit firm and, duly calculated as of the Consummation date, turned out to be negative by an amount of R$ 52 million.

632. Existence of a positive and sufficient working capital constitutes an essential element of the transaction. Good evidence of that is that the parties agreed on a price adjustment, R$ by R$, in case the actual working capital as of the Consummation Date were higher or lower than the figure of R$ 40,750,874 warranted in Appendix III.

633. If GTI had known upon signing the Agreement that VRG's working capital was not surplus, positive by R$ 40 million, but instead deficit by R$ 52 million, such knowledge would undoubtedly have impacted the agreed price; and such impact would be to lower the price by the capital it would have to inject into VRG to reinstate its working capital of (R$ 52 million) to R$ 40 million.

(iv) Knowledge of the Manipulation by the Sellers

634. The bookkeeping manipulation was not done directly by the Sellers but by its controlling party MatlinPattterson.

635. The Sellers in the Agreement had (or should have had) a perfect knowledge of MatlinPatterson's actions. Respondents 1 and 2 were companies controlled by MatlinPatterson, which directly benefited from VRG's sale. Engaged in air transportation, the Sellers were industry professionals, and therefore it must be assumed that they knew perfectly well what its controlled company VRG's equity position was. When they signed the Agreement, they were or should have been aware that the working capital being warranted was unreal, and that PwC had never validated the figures.

636. All necessary requirements, therefore, have been met for the third-party malice doctrine to occur; Respondent 4's actions allowed Vlog and Volo DB to sell VRG to GTI for a much higher price than would have been agreed if such conduct had not taken place.

637. Under CC article 148, third-party malice, if essential, constitutes defective consent, and can lead to the annulment of the transaction. In the case at hand, because the parties' interest is circumscribed to a price adjustment, this is incidental malice, which does not imply contract annulment. If incidental malice occurs, it gives rise to tort [*ilicito extracontractual* – extracontractual wrongdoing], for which the legal consequence is contained in CC article 146. Such conduct leads to the obligation to repair any losses and damage caused.

638. The Arbitration Tribunal has already determined that Respondent 4's malicious behaviour made the contract more onerous for Claimant. And the Tribunal shall dedicate the following section to determining the damage sustained by Claimant.

3.3 THE LEGAL CONSEQUENCE OF RESPONDENTS' BEHAVIOR

...

640. And what was the damage sustained?

641. Claimant alleges that the deceptions it suffered "*impl*[ied] *a much greater initial outlay by VRG.*"

642. The Tribunal agrees with the Claimant. The damage sustained by the Purchaser is clear: because of the Respondents' anti-legal conduct, Claimant acquired a company convinced that the latter's working capital was R$ 40,750874 and, in reality, it encountered a negative working capital of (R$ 52,236,786). To be able to take the company to the position Claimant thought it had acquired such company in, Claimant had to inject into the latter capital in an amount equal to R$ 92,987,672. This figure quantifies the damage incurred by it.

643. The damage coincides in its quantification with the price adjustment amount. This was not by chance: the compensatory principle is common and consists of repairing the deficit created in VRG's working capital.

28. In sum, the arbitral tribunal found as matters of fact (i) that the MP Funds, through Mr Lap Chan, whose evidence it had heard and rejected, had intentionally deceived GTI by manipulating the figures for the airline's working capital; (ii) that the difference between the working capital of the airline as represented and warranted and the truth was some R$ 92 million; and (iii) that Mr Lap Chan's fraud had induced VRG to enter into the Agreement. The tribunal had then gone on to conclude as a matter of law (iv) that although the MP Funds could not be regarded as alter egos of the Sellers, nevertheless they had jointly with the Sellers deceived GTI into buying the airline on a false financial basis; and (v) that the appropriate legal ground in Brazilian law for such a situation was article 148 dealing with third party malice. Furthermore, the tribunal pointed out that article 148 had been relied on in Professor de Azevedo's opinion (which had been presented by VRG as its Exhibit 4, see footnote 308 to the Final Award's para 611), and that the MP Funds had had ample opportunity to defend themselves but had concentrated on the factual issues rather than on the consequences in law of VRG's factual case. The consequence, given the R$ for R$ operation of clause 5 of the Agreement, was that VRG was entitled to be compensated by the difference between the working capital of the airline as represented and in truth, whether that was under clause 5 or as damages in deceit, viz some R$ 92 million.

Brazilian arbitration law

29. The MP Funds were entitled under Brazilian law to commence an action before the Brazilian courts to review the arbitral tribunal's decision in its Partial Award as to its jurisdiction; and were also entitled to challenge the Final Award on grounds of lack of due process. Both of which the MP Funds proceeded to do.

30. The relevant Brazilian law is found in Brazil's Arbitration Law, viz Lei 9.307/96. As translated into English it provides inter alia as follows:

> Article 8. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract…
>
> The arbitrator has jurisdiction to decide ex officio or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement.
>
> Article 20. The party wishing to raise issues related to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first opportunity, after the commencement of the arbitration.

20.1 When the challenge of suspicion or impediment is accepted, the arbitrator shall be replaced in accordance with Article 16 of this Law; and if the lack of jurisdiction of the arbitrator or arbitral tribunal, as well as the nullity, invalidity or ineffectiveness of the arbitration agreement is confirmed, the parties shall revert to the Judicial Authority competent to rule on the matter.

20.2 When the challenge is not accepted, the arbitration shall proceed normally, subject however to review of that decision by the competent Judicial Authority if a lawsuit referred to in Article 33 of this Law is filed.

Article 21. The sole arbitrator or the arbitral tribunal shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitration institution or specialised entity, it being possible for the parties to empower the sole arbitrator or arbitral tribunal to regulate the procedure.

21.1 In the absence of any provisions on the procedure, the sole arbitrator or arbitral tribunal shall conduct the arbitration in such manner it considers appropriate.

21.2 The principles of due process, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected…

Article 32. An arbitral award is null and void if:
1. The arbitration agreement is null;…
4. It has exceeded the limits of the arbitration agreement;…
8. It violates the principles set forth by Article 21.2 of this Law.

Article 33. The interested party may request to the competent Judicial Authority to declare the arbitral award null in the cases set forth in this law.

33.1 A request for the declaratory nullity of the arbitral award, whether partial or final, will comply with the rules of cognisance procedure set up in the Law No 5869 of January 11, 1973 (Code of Civil Procedure), and it must be filed within 90 (ninety) days…

33.2 If the request is granted, it will set the arbitral award aside…

33.3 A declaration of nullity may also be raised by means of a debtor's defence, according to Article 475-L et seq. of Law No 5869 of January 11, 1973 (Code of Civil Procedure), in case court enforcement proceedings are filed.

Article 34. A foreign arbitral award shall be recognised or enforced in Brazil in accordance with international treaties effective in the internal legal system, or, in its absence, in strict accordance with the terms of this Law…

Article 39. Recognition of a foreign arbitral award will also be refused if the Superior Court of Justice finds that:

…
2. The decision violates national public policy.

Cayman Islands law regarding the enforcement of a foreign award

31. The Cayman Islands are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**). The essence of the New York Convention for present purposes is to be found in the Cayman Islands' Foreign Arbitral Awards Enforcement Law (1997 Revision) (the **CI Enforcement Law**). Reflecting article V of the New York Convention, section 7 of the CI Enforcement Law provides as follows:

> 7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves:
>
> (a) ...
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where it was made;
> (c) 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;
> (d) subject to subsection (4), that 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;
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
> (f) that 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, it was made.
>
> (3) 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...
>
> (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in paragraph (f) of subsection (2), the court, before which enforcement of the award is sought, may, if it thinks fit, adjourn proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

The Dallah Case

32. *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 (*Dallah*) is the leading modern authority in English jurisprudence on the issues arising out of an attempt to enforce a foreign arbitral award

in England in circumstances where there has been a challenge to the arbitrators' jurisdiction on the basis that the award debtor never agreed to arbitration in the first place.

33. The *Dallah* award was made in France, and therefore the issue in the English courts of whether or not the Government of Pakistan had been a party to the arbitration agreement and contract in that case was governed by French law (see article V(1)(a) of the New York Convention and section 103(2)(b) of the English Arbitration Act 1996). In that case there had been no express choice of law for the arbitration agreement or the contract in which it had been contained, and therefore the arbitrators had applied "those transnational principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business". It followed that at the enforcement stage, the fall-back provision of article V(1)(a) and section 103(2)(b) – "under the law of the country where the award was made" – applied.

34. The Government of Pakistan had not been a signatory to the *Dallah* contract (although it had been to an earlier Memorandum of Agreement). Instead, a special Trust had been formed to make the contract with Dallah. Unfortunately, under Pakistani law the Trust had ceased after three months to continue in existence in the absence of its renewal. That is what had caused Dallah to pursue the Government of Pakistan. The arbitrators found nevertheless in its initial award on jurisdiction that the Government of Pakistan was a party to the contract and its arbitration agreement, and went on in a final award to render a monetary award against it. It was that award which Dallah was seeking to enforce.

35. The commercial court, the court of appeal and the Supreme Court, applying French law with the assistance of experts in French law on both sides, all held that the Government of Pakistan had never been a party to the contract or arbitration agreement and therefore refused enforcement of the award. There was no essential dispute between the experts as to what French law was, but they differed as to its application.

36. To the English courts' embarrassment, however, a subsequent attempt to enforce the award in France, challenged on the same ground of lack of agreement, succeeded, first in the tribunal de commerce of Paris and then in the Paris cour d'appel.[1] There was no further appeal to the cour de cassation. The English courts had got French law wrong. That should perhaps not come as a great surprise, since it can be very difficult for a foreign court to apply a different law correctly, shaking off the attitudes of domestic law and taking on the mantle of a foreign law. This is particularly true of some differences between the common and the civil law. There are

[1] Judgment of 17 February 2011, *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate & Tourism Holding Co, Case No 09/28533 (Paris Cour d'appel)*

important differences (as well as some important similarities) between common and civil law principles of contract interpretation: they have been authoritatively discussed in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, see Lord Hoffmann at para [39], where he explained why the French philosophy of contract interpretation – which has been so influential in civil law jurisdictions throughout the world – "is altogether different from that of English law". It is also well known that the civil law has shown itself to be much better disposed to finding that non-signatories have bound themselves to arbitration agreements than is the common law: and the *Dallah* case, in its English and French ramifications, has illustrated that well.[2]

37. If the successful French enforcement proceedings had preceded the English proceedings, or if the Government of Pakistan had previously unsuccessfully challenged the jurisdiction of the arbitrators in that case in France, it is impossible to think that the English courts would have erred in its findings of French law. They would have had before them the French courts' own decisions on the instant case. Whether as a matter of French law as found in the English courts, or as a matter of estoppel, it is wholly improbable to think that the English courts would have professed to know and apply French law better than the French courts.

38. In the present case, however, unlike *Dallah*, the challenge in the country of the express choice of law, of the seat of the arbitration, and where the award was made, namely Brazil, has preceded the enforcement proceedings in the Cayman Islands. It is intuitively surprising therefore to find that the Cayman Islands judge has differed from the Brazilian courts in its findings about Brazilian law, at any rate on the issues concerning the arbitration agreement (admittedly the issue concerning public policy is a matter ultimately for Cayman Islands law, although even there Brazilian law and procedure very arguably enter in an important way into the analysis).

39. In my judgment, therefore, it is necessary to be cautious about the findings below, and to enquire carefully into the process by which Mangatal J arrived at her conclusions.

40. One of the matters discussed in this appeal, as it was before the judge, was the nature of the forensic examination which is required when there is a challenge in court to jurisdiction disputed before but upheld by arbitrators under their rights of *compétence compétence*.

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[2] The English and French decisions are discussed by Prof Gary Born in his *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 3477-3479, where he comments on the danger of "national courts rejecting the expertise of foreign tribunals, including on matters of foreign law; in many instances, these decisions also appear to reflect an unstated preference for applying local law (of the recognition forum) rather than that of the arbitral seat to the arbitration agreement." The English and French decisions are also discussed in an interesting article by Jacob Grierson and Dr Mireille Taok "*Dallah*: Conflicting Judgments from the UK Supreme Court and the Paris Cour d'Appel" in (2011) 28 J Int Arb 4 at 407.

41. As the Supreme Court explains in *Dallah*, the arbitral tribunal's rights of *compétence compétence* always remain subject to challenge in the courts. The doctrine of *compétence compétence* does not mean the exclusion of the courts, or that the courts are prima facie bound by the arbitrators' solution, or that the party challenging jurisdiction in the courts bears the burden of displacing the arbitrators' solution, or that the arbitrators' solution survives unless the courts find it irrational. It is not as though the arbitrators were the primary decision makers and the courts' role was only that of judicial review as that is practised in public and administrative law.

42. It is because the absence of jurisdiction in the arbitral tribunal is totally destructive of their powers – and also because of the terms of the New York Convention itself – that English law requires that the court challenge to a tribunal's preliminary *compétence compétence* view as to its jurisdiction has to be conducted from the bottom up, or, as it has been said, *de novo*. That was affirmed in *Dallah*, approving the decision in *Azov Shipping Co v. Baltic Shipping Co* [1999] 1 All ER 476. I refer to Lord Mance's judgment at paras [25] to [29], to Lord Collins' judgment at paras [86] to [96]. The essence of the matter can be found in Lord Mance's statements that "a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court" (at para [26]), and that what is required is "ordinary judicial determination of that issue" (at para [28]); or in Lord Collins' statement that the English courts "will examine or re-examine for themselves the jurisdiction of arbitrators" so that they "should not be in a worse position than the arbitrator for the purpose of determining the challenge" (at para [96]). The position is the same in France and the United States (see at paras [20], [22], [24], [25] and [92], citing *République arabe d'Egypte v. Southern Pacific Properties Ltd* [1986] Rev Arb 75, [1987] Rev Arb 469 (12 July 1984, Paris cour d'appel and 6 January 1987, cour de cassation), and *First Options of Chicago Inc v. Kaplan* (1995) 514 US 938, 943 and *China Minmetals Materials Import and Export Co Ltd v. Chi Mei Corpn* (2003) 334 F 3d 274, 288. Indeed, it is not clear that the position is different anywhere (although there are differences as to the time at which the courts review arbitrators' jurisdiction).

43. However, the position alters or may alter once an award has already been subjected to review in the court with supervisory jurisdiction or has been subject to enforcement proceedings either in that court or even that of another country. At that stage, one is not dealing merely with the preliminary *compétence compétence* views of the arbitral tribunal, but with the judgment of a court, whose jurisdiction is not in question. The court's judgment will have particular significance when that court is applying as its own law the law which governed the arbitral decision. That was recognised by Lord Mance, when he said (at para [29]):

> ...Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

It was also recognised in what Lord Collins said at para [98]:

> Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought.

And in the court of appeal in *Dallah*, the relevance of a decision in the supervisory court for another court later asked to enforce an award was also discussed in my judgment (at paras [89] and [90]), where I said:

> 89...It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor van den Berg's view, see *The New York Arbitration Convention 1958*, at p 265)...
>
> 90. As for the case of a successful or unsuccessful (or waived) challenge in the courts of the country of origin, that is a more controversial area. My own view is that a successful challenge is not only in itself a potential defence under the Convention or our statute but likely also to raise an issue estoppel. As for an unsuccessful challenge, that may also set up an issue estoppel...

The Brazilian proceedings

44. In December 2010, the MP Funds brought proceedings against VRG under Brazil's Arbitration Law for annulment of the final award. They complained both about the arbitral tribunal's lack of jurisdiction and about the tribunal's application of the doctrine of *iura novit curia* in order to ground its decision on third party malice. The MP Funds' action was brought under article 33 of the Law.

45. The first instance judgment, dated 1 July 2011, was that of Judge Helmer Augusto Toqueton Amaral. He first rejected VRG's defence that the MP Funds' action was out of time. He then turned to the MP Funds' complaints and divided them into four points. His judgment reads in relevant part as follows (I have numbered the paragraphs, and the sentences within para [3] below, for the sake of convenience):

[1] I examine directly the claim, pursuant to Art 330, I of the Code of Civil Procedure, as this is primarily a matter of law, and the record is duly complete with respect to the facts...The discussion revolves around whether it is possible or not to nullify the arbitral sentence, which claim was based, primarily, on four points.

[2] The first point relates to whether it was possible for the plaintiffs to be bound by the arbitration clause. This, because the plaintiffs believe that the contract...would not be capable of extending its effects to the plaintiffs who are not parties to the agreement. However, such was not the case...It is even noted that the plaintiffs, in their own complaint, unequivocally confirm their participation in the creation of the referenced contract, stating that they even rejected the request by the respondent to include them expressly...Such an extension of responsibility occurred also by force of an amendment to the contract...an uncontested fact, and which, by express provision, amended the original contract, binding the plaintiffs. The explication of the responsibilities in the referenced amendment does not exclude the extension of the effects of the contract, including in relation to the possibility of arbitration. In this regard the first claim of the plaintiff is rejected.

[3] [i] The second aspect is related to the alleged decision with grounds different from what was argued, resulting in a nullity. This also did not occur. From what may be gleaned from the analysis of the documentation, there was given a different legal qualification to the conduct of the plaintiffs. That is, nothing was changed or altered about the facts of the discussion, but only the correct (in the opinion of the judge) legal definition of the facts established, applying the pertinent normative consequence, which was entirely natural, including in light of the old Latin maxim "*Da mihi factum, dabo tibi ius.*" ["Give me the facts, and I shall give you the law"], i.e. the facts are what must be described, with the judge applying the relevant law. [ii] Remember, even, that pursuant to Clause 14.6, the contract would be construed and governed by the laws of Brazil, and the arbitration court must apply them in the event of a dispute (p.262). [iii] It is also observed that the clause of the contract itself, as it was drafted, did not limit the scope of jurisdiction over disputes of the arbitral tribunal, thus there is not verified any violation of Art 32, Clause IV of the Arbitration Act. The clause was express in submitting to arbitration "all disputes arising from or related to this instrument." [iv] It is important to also remember that in relation to the requested relief, the arbitration panel did not rule beyond it or outside it, respecting it, regardless of the grounds it adopted, this being the reason for which also in this aspect there was no vitiating overreach. In this manner no decision is observed that is unjustified or that violates the governing law in this matter.

[4] The third aspect is related to defects of a procedural nature, in the violation of the principle of due process of law (Art 21, Paragraph 2 of Law 9307/96). Such an allegation is also fragile, and does not support itself. The documentation offered by the parties unequivocally proves the broad possibility for argument, discussion and challenges...There is extensive documentation that accompanied the answer and that shows the entire path through the arbitration proceedings, from the initial filing until the conclusion by means of the sentence under discussion now. In truth, and indirectly, what the appellants in this instance question is, once again, the

grounds that led to the decision. And dissatisfaction with the grounds cannot be argued as an unlawful constraint on the defense.

[5] And lastly, the final aspect cited is one of the most fragile, or the absence of reasoned grounds for the decision. Now, we cannot confuse dissatisfaction as to grounds with the absence of reasoned grounds...

46. In our appeal, we are not concerned with the fourth, final, point there addressed, namely the absence of reasons. As to the other three points, it may be noted that what may be termed the due process and public policy arguments before this court are addressed both in paras [3] and [4] above; and that para [3] also covers, at sub-paras [iii] and [iv], the arguments addressed to this court that the issues before the arbitration were in any event beyond the scope of the arbitration agreement, and/or of the submission to arbitration, as found in the Terms of Reference.

47. The first instance judgment of Judge Amaral was appealed by the MP Funds to the Court of Appeals of the State of São Paulo. Their grounds of appeal specified four matters, viz –

> ...on four main fundamentals: (a) the Arbitral Tribunal did not have jurisdiction over MatlinPatterson Funds; (b) the subject matter of the adverse judgment was not a matter submitted to arbitration; (c) the arbitration award violated due process and the right to adversary proceeding; and (d) the arbitration award is groundless.

48. The decision of the Court of Appeals was given on 16 October 2012. The appeal was dismissed. There was an initial objection to the effect that the first instance decision had been given by summary adjudication, that is to say on the documents, without further evidence. That objection was rejected. The court of appeals said:

> In the case in question, the issue, to be effectively elucidated, needed only documentary evidence, which was produced in full. One need only analyze the documents submitted in fourteen (14) volumes that make up the record of this case.
>
> It is the judge's duty, at his or her discretion, to analyze the record and the actions taken, including a verification of the evidence produced, and if applicable, as a result of his or her own convictions, to order other evidence to be produced as he or she deems fit in order to elucidate the case in question or to adjudicate the case summarily.
>
> The honorable lower-court judge had in hand all of the items needed to analyze the arguments made in this case. The documents submitted into the record were sufficient for the judge to form an opinion and allowed for adequate examination of the issues being disputed. Therefore, additional evidence did not need to be produced...
>
> It should be noted, because it is normally the case, as article 14, item IV, of the Civil Procedure Code stipulates...the participants in the proceeding, in particular

the judge, are not allowed to produce unnecessary evidence for elucidating the case.

49. The Court of Appeals then turned to the merits of the appeal. It began with some general comments on the role of arbitration (for instance, that "it cannot be forgotten that arbitration is an institution that is an exception to the principle of free access to justice" at page 7 of the translation). It then turned to the doctrine of compétence-compétence, and by means of citations from treatise and precedent elucidated the explanation that although, for sound reasons, arbitrators are given the "initial" analysis of a jurisdictional challenge, the public courts "are not excluded, nor could they be, from examining the existence, validity and efficacy of the clause" (at page 11).

50. On the first issue of whether the MP Funds were party to the Agreement's arbitration clause, the court of appeals cited the judge's reasoning and continued, with particular reference to the Funds' execution of Addendum 5, as follows:

> Now, with all due respect, the appellants, constituting an international fund, after having signed a document that clearly and unquestionably stipulates their adherence to the contract unequivocably described in the aforementioned amendment, cannot now claim, even though skilfully made allegations, that they were not aware of or did not know that their participation in the deal in question would not be affected by the arbitration expressly agreed upon in the agreement to which they adhered.
>
> One also finds that, as stated, by signing the document on page 468 of the record, with an express provision regarding being bound to the agreement on pages 232-263 of the record, which stipulated arbitration as a form of conflict resolution, the appellants cannot try to allege absence of intention to participate in and submit to the arbitration court, under penalty of undeniable violation of the principle of "*venire contra factum proprium*", that is, the prohibition of contradictory behavior, since, as stated, having signed the amendment to the contract that called for arbitration, it is not reasonable later on for them to try to distance themselves from the extent of the effects resulting from the arbitral award.

51. The court went on to cite extensive material on the principle of *venire contra factum proprium.* It therefore rejected the MP Funds' contention that they were not bound by the arbitration clause in the Agreement.

52. The court then went on to consider what Judge Amaral had described as the second point, and again began by citing the judge's reasoning (at para [3] of his judgment). It continued, on the subject of *iura novit curia* or *da mihi factum, dabo tibi ius* as follows (at page 21):

> ...the arbitrator, a private judge chosen by the parties, has the freedom to analyze the facts, arguments and theories that surround the dispute regarding alienable

> rights, which is why he is constrained by the facts provided, reflected in alienable rights that led to arbitration being initiated, and not the law that the party wants to see applied to the specific case. This is why one must also recognize that the theory of substantiation is applicable to arbitration, rather than the theory of individuation, which is the reason the judgment under appeal correctly and accurately specified application of the maxim "*mihi factum, dabo tibi ius*."

53. The court then cited from a jurist's Commentary on Code of Civil Procedure which emphasised the unity of the two Latin expressions, and continued (at page 22):

> As such, given that the party has the duty of stating the facts that affect the conflict of interests, the claim is unjustified that there was a violation of due process and adversarial proceedings, based on the argument that the arbitral award was based on legal grounds other than those that were argued or raised by the parties...
>
> Furthermore, the vast documentary evidence produced demonstrates that the petitioners had, consistent with the principle of equality of treatment, sufficient opportunity to demonstrate their allegations, and as duly noted in the appealed sentence...

and the court went on to cite what Judge Amaral had said in para [4] of his judgment.

54. The court concluded (at page 23):

> The arbitration clause was correctly agreed, the arbitration was duly instituted, and it produced its effects within the proper limits and for those who were actually involved in the dispute. It respected the right to an adversarial proceeding and to a fair defense, by meeting the requirements in article 26 of the aforementioned law, including adherence to the facts stated, which is why it is correct to uphold the judgment under appeal...

55. Since the judgment of the São Paulo court of appeals, the MP Funds have been fruitlessly petitioning the Brazilian Supreme Court (the Superior Court of Justice). The court of appeals denied permission to appeal on 7 November 2013. The Superior Court of Justice granted permission for a "special appeal" on 16 February 2017, but dismissed that appeal by a decision of 12 December 2017, on the ground that such a special appeal was impossible in matters of contractual interpretation (or reanalysis of factual evidence). There was then a so-called "interlocutory appeal", against that refusal of permission, again to the Superior Court of Justice, made on 15 February 2018, followed by a "full-panel decision" of that Court denying the appeal and upholding the decision of 12 December 2017. There was yet again an "additional interlocutory appeal" to the Superior Court of Justice made on 26 April 2018, said to be based on "jurisprudential divergence", and there the documentary material before us runs out. The MP Funds rely in these proceedings on the fact that the Brazilian proceedings had not yet

reached a final conclusion, for the purpose of meeting Gol's reliance on those proceedings as creating an estoppel in these courts.

The US proceedings

56. In the meantime, there were enforcement proceedings brought by VRG against the MP Funds in the United States, which failed. The MP Funds have previously sought to derive assistance from the failure of those proceedings, and even in their skeleton argument to this court have submitted that, if anything, it is the US proceedings, rather than the Brazilian proceedings, which would provide an estoppel in these proceedings, as being the first in time. By the end of the hearing before this court, however, the US proceedings had receded into the background, in part because they considered the matter under US rather than Brazilian law.

57. In the circumstances, I can be brief about them. VRG filed its petition for confirmation of the award pursuant to the New York Convention in January 2011. The MP Funds argued lack of jurisdiction. Cedarbaum J, sitting in the district court for the Southern District of New York, upheld the argument of lack of jurisdiction, saying that even if the MP Funds had agreed to arbitrate disputes over its non-compete agreement, it had not agreed to arbitrate an entirely different issue "[arising] under an agreement that it did not sign". In other words, the judge had decided the case on the basis of the scope, rather than the existence, of an agreement to arbitrate. There was an appeal by VRG to the US Court of Appeals for the Second Circuit. By its judgment, the Second Circuit considered the matter afresh, or as it said, "*de novo*". It held that the district court had failed to ask the initial question of who is to decide the scope of the parties' arbitration agreement. It held that if the MP Funds had agreed on arbitration, then, under US jurisprudence, the *scope* of such an agreement was for the arbitral tribunal, not for the court. The case was therefore remitted back to the district court. On this second occasion, on 2 October 2013, Cederbaum J held that the MP Funds had not agreed to the arbitration clause in the Agreement (*VRG Linhas Aéreas SA v. MatlinPatterson Global Opportunities Partners II LP* 2014 WL 4928929 (SDNY)). The matter was decided as a matter of US law and jurisprudence. There was no reference to Brazilian law. By that time the MP Funds' action to annul the final award in Brazil had already passed through the São Paulo court of appeals and its judgment.

58. It follows that the US proceedings are of no assistance.

The Cayman Islands proceedings

59. These enforcement proceedings in the Cayman Islands were commenced on 1 September 2016. VRG obtained an *ex parte* order granting leave to enforce on 26 October 2016. The MP Funds applied to set aside the *ex parte* order by summonses dated 17 November 2016 and 1 December 2016. An *inter partes* hearing took place over four days in June 2018, and Mangatal J delivered her judgment, setting aside the *ex parte* order, on 19 February 2019.

60. The judge had before her all the material referred to above, but also expert reports on Brazilian law, as well as cross-examination of the experts, or at least some of them.

61. The expert reports appear to have commenced their appearance for the purpose of the US proceedings. Thus, the first of them is dated 31 March 2011 and titled as having been produced for the district court. This was *before* the first instance judgment from Judge Amaral in Brazil. Mr Gilberto Giusti, an experienced arbitration lawyer in Brazil, gave a statement in support of VRG, expressing his agreement with the arbitrators' conclusion that the MP Funds had bound themselves to the arbitration clause in the Agreement. Also in support of VRG, Professor Carlos Alberto Carmona, a jurist of procedural law and a member of the commission responsible for drafting Brazil's Arbitration Law, gave a statement opposing the MP Funds' submissions that the arbitrators' reliance on article 148 of the Brazilian Civil Code was outside the scope of the arbitration as defined by its Terms of Reference or was in breach of Brazilian due process.

62. Professor Carmona's statement included this passage:

> 16. Due process, under Brazilian law, subsumes, among other rules and principles, the principle of the contradictory proceedings (*principio do contraditório*), 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 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 specifically 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.

63. As stated above, this account of the doctrine of *iura novit curia* in Brazilian law, as applicable in arbitration, was given before the judgment of Judge Amaral. Professor Carmona's views turned out to be fully justified by the decisions of Judge Amaral and of the São Paulo Court of Appeals.

64. In response, also in the US proceedings, the MP Funds filed an expert opinion of Mr Mauricio Gomm Santos (Mr Gomm), an experienced practitioner of international arbitration in Latin America, dated 22 April 2011. In his opinion report, he stated his view of Brazilian law, but did not seek to apply it to the Agreement or to the facts of the case ("It is my understanding that it is for the Court to apply the applicable law to the facts of the case"). As for Professor Carmona's opinion on the doctrine of *iura novit curia*, he said this:

> 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 arbitration, the scope of the arbitral tribunal's authority 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…
>
> 28 …the principle of contradictory proceedings underlying due process in Brazilian arbitration that Professor Carmona describes in paragraph 16 of his Declaration…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 tribunal 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.

65. In sum, Mr Gomm accepted the principle of *iura novit curia* in domestic Brazilian proceedings, but said that it did not apply in international arbitration. He appears to have the view that international arbitration is governed either entirely by the parties or by a form of international

arbitration law, or that in this context Brazilian law is directed and mandated by international arbitration law.

66. It will be appreciated that Mr Gomm's report of 22 April 2011 was also *before* Judge Amaral's judgment. It cannot be said that Mr Gomm's views, unlike those of Professor Carmona, are consistent with the judgments of the Brazilian courts.

67. In that context, I cite paragraphs 24 and 25 of Mr Gomm's report because they were relied on expressly by Mangatal J:

> 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. § 24. This would put respondents in an 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-recognised 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 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 a 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.

68. Those opinions were not used by the US courts in the US proceedings. There the matter rested until these proceedings commenced in the Cayman Islands. At that point, evidence was placed before the court as to the course of the annulment proceedings in Brazil (and as to the enforcement proceedings in the US). And on 28 February 2017, Mr Gomm gave, by affidavit, an "expert report for the Court's assistance concerning Brazilian law issues relevant to this proceeding" (at para 1.8), on the instructions of the MP Funds. He also referred to and exhibited his earlier report made in the US proceedings. On the subject of *res judicata,* he explained that under article 502 of the Brazilian Code of Civil Procedure (the **BCCP**)

> Substantive *res judicata* is the authority that renders immutable and indisputable a decision on [the] merits that is no longer subject to appeal.

69. Therefore, he observed, the Brazilian court decisions were not *res judicata* in Brazil. At that stage, the MP Funds had just been given permission for their "special appeal" to the Superior Court of Justice. On the subject of contract interpretation, he opined that Addendum 5 "demonstrates a lack of clear and manifest or unequivocal intent by its signatories to be bound to arbitrate any issues at all let alone issues under the [Agreement]". On the subject of article 148, he opined that the allegations and pleadings submitted by VRG throughout the arbitration did not encompass a claim under article 148. And on the subject of due process, he referred to a new provision of the BCCP which came into effect in 2016, but which he said codified developing law (article 10: "A judge shall not decide, at any level of jurisdiction, based on grounds with respect to which the parties have not been given the opportunity to make statements, even if the matter is one on which the judge should decide by administrative initiative"), which he opined required a judge to give the parties an opportunity to be heard on any issue which the court proposed to decide. He also continued to distinguish between Brazilian law and international arbitration law.

70. Mr Gomm's second report called forth a response from Professor Carmona, dated 19 April 2017, in which he simply referred to and annexed his report dated 31 March 2011 in the US proceedings.

71. In May 2017, Mr Giusti made a second report, in which he adopted his earlier report in the US proceedings and proceeded to respond to Mr Gomm's report in the Cayman proceedings. On the subject of *res judicata*, he accepted that there was still a possibility of the award being annulled, because of the outstanding appeal to the Superior Court of Justice. On contract interpretation, he said that that was subject to the exclusive jurisdiction of the arbitral tribunal, but that in any event in his opinion the MP Funds had agreed to arbitrate under the Agreement's arbitration clause. On the question of the submission to arbitration and the Terms of Reference, he opined that the claim or relief claimed by VRG had not altered and that reference to piercing the corporate veil was not a claim but a legal argument to make use of the illegal conduct of the MP Funds complained of. And on the subject of *iura novit curia* and due process, he disagreed with Mr Gomm, explaining that the principles of adversarial proceedings and *iura novit curia* required a tribunal to give the parties every opportunity to present and discuss the facts of the case, but not every potential legal theory. As for article 10 of the BCCP, that was not applicable as it only came into force without retrospective effect in 2016: and in any event by referring to "grounds" it was only speaking of the factual basis of the relief claimed, but not of the legal consequences of those facts. In support of that last opinion, he cited the statement

of 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, which spoke with the authority of 500 judges involved in the publication:

> 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.

72. As for Mr Gomm's view as to the dichotomy between domestic Brazilian law and international arbitration law, Mr Giusti said that there was no such distinction between domestic and international arbitrations seated in Brazil and that the principle of *iura novit curia* applied throughout. He observed as follows about ICC practice:

> Furthermore, it should be noted that the Awards were submitted to the scrutiny of the International Arbitration Court of the ICC, which includes experienced Brazilian lawyers and arbitrators as members of its Board. The scrutiny of the International Arbitration Court of the ICC is intended to correct mistakes, including minor issues of presentation and major issues of validity, and to evaluate whether the award is flawed because of any violation of due process. It is well-known for its excellence. The fact that the Awards underwent this level of scrutiny demonstrates that one of the most renowned arbitration chambers in the world concluded that the Arbitration was conducted in accordance with due process.

73. As for the arbitrators' reliance on article 148, Mr Giusti pointed out (at paras 141 and 163 of his report), as had the arbitrators, that it had been referred to earlier in the arbitration. I seek to precis briefly the 165 paragraphs of Mr Giusti's report.

74. On 13 July 2017, Mr Gomm responded with his third report (his "Second Affidavit"), which was not referred to in the hearing before us, and takes the disagreement between the Brazilian law experts no further.

75. On 3 May 2018, Mr Giusti filed a third report (his "Second Affidavit") in which he brought the position in the Brazilian proceedings up to date. He said that the prospects of the annulment proceedings succeeding are "now even more remote" (at para 32).

76. On 18 May 2018, Mr Gomm filed a fourth report (his "Third Affidavit") in which for the first time he raised an issue about the "standard of review a Brazilian court is required to apply in an annulment action under Article 33 of the BAA, whether on questions relating to the jurisdiction of the arbitral tribunal, or otherwise". He continued:

> 2.11 In the Annulment Proceedings, the Brazilian courts therefore were not required to consider the matters before them *de novo* from the arbitration

> tribunal's Award. In my opinion, it is very difficult in fact to identify what standard of review or consideration the Brazilian courts applied, but it appears they primarily reviewed the correctness of the tribunal's decision on jurisdiction rather than considering that question *de novo*.

That is all Mr Gomm said on that matter. There were no further reports.

77. There was cross-examination before Mangatal J. We have been referred to passages in the cross-examination of Mr Gomm (by Mr Lowe QC on behalf of VRG) at pages 62-71 and 144-149 of the transcript for Day 1 of the hearing. In those passages, Mr Gomm accepted that an annulment action under article 33 of the Arbitration Law was like any other action, and it was for the judge, and only the judge, before whom such action was heard to make up his or her own mind on questions such as whether there was due process in the arbitration, applying the ordinary procedural rules in the same way as any other action would be decided. Mr Gomm also accepted, in relation to the doctrine of *iura novit curia*, that the Brazilian courts' decisions in this case had stood as judicial precedent in relation to the application of the doctrine to international ICC arbitrations in Brazil, was referred to in relevant textbooks, and had not been questioned in any other authority.

The judgment below

78. The judge's discussion, analysis and decisions commence at para 121 of her judgment.

79. The judge began with issue estoppel arising out of the Brazilian proceedings. She rejected any estoppel for three reasons: (i) because by reason of article 502 of the BCCP, there can be no *res judicata* while the Brazilian annulment proceedings remain under appeal (citing *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) and *Seven Arts Entertainment v. Content Corporation plc* [2013] EWHC 588; (ii) because the issues in the Brazilian courts and in the Cayman Islands are in any event not identical; and (iii) because the issue of public policy (the standards of natural justice) is in any event a matter for Cayman law. Reason (i) raises an issue of law discussed by English jurisprudence as to what is meant by "final and conclusive", which will have to be considered below. Reason (ii) is controversial and depends on the judge's finding that the Brazilian courts' decision was not a decision "*de novo*" on Brazilian law, but some kind of mere deference to the arbitrators' decision under their power to rule on their own jurisdiction (the doctrine of *compétence-compétence*). Thus, the judge, founding herself on the fact that in English law a court's consideration of an arbitrator's ruling on his own jurisdiction requires its independent consideration (and using the Latin tag *de novo*), concluded that that was not the case in Brazil. The judge's reasoning on this point was contained in the following two paragraphs of her judgment:

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 making this point.

129. It is not enough to say for VRG 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.

Reason (iii) is common ground. VRG's estoppel arguments are only directed at the issues of contract interpretation.

80. The judge next turned (at paras 140ff) to form her own views of contract interpretation under Brazilian law, for which purpose she seems to have paid no regard to the Brazilian courts' views, presumably on the ground already expressed that they merely reflected deference to those of the arbitral tribunal. Indeed, she had already expressed the view that the São Paulo court of appeals had, by referring to *compétence-compétence*, recognised the tribunal's "power to rule on its own jurisdiction". Instead, the judge adopted her own reasoning, essentially as a matter of Cayman law, albeit without reference to any Cayman or English jurisprudence and without reference, for instance, to the leading case of *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40, [2007] Bus LR 1719, to which she appears not to have been referred. She concluded:

161. Accordingly, in all 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.

81. The judge went on to consider separately but briefly, and on the same basis, the further question of contract interpretation as to whether the arbitration clause in any event covered a price adjustment dispute (at paras 162ff). She stated that it did not, again without any reference to Brazilian law or the Brazilian proceedings.

82. Thirdly, the judge turned to the question of public policy (at paras 166ff). She framed this in the following terms: "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." She cited extensively from Professor Carmona's and Mr Gomm's reports on the

subject of *iura novit curia.* She also referred to Mr Gomm's reliance on the new article 10 of the BCCP and to what the experts had said about that. She then reasoned as follows:

> 172. However, whilst I bear in mind 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, 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 VRG alleged against the MP Funds 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 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 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 price adjustment, as if this would equate 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 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.

83. The judge went on to dismiss Professor Azevedo's "one-liner" reference to article 148 (to which it will be recalled that the final award referred, albeit not as a "one-liner", which I assume to be a piece of advocacy) as being an inadequate basis for the application of article 148 (at para 174).

84. As for the evidence of the experts, which she had cited at length, her sole recourse to that on this issue was in the following paragraph:

> 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' claim for relief, it seems to me that the MP Funds have made out their case under the second ground.

85. The judge also found assistance in *Malicorp Ltd v. Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423 (Walker J) at para [37] ("What it does not show, however, is that Egypt had any notice of a proposal to award damages under article 142").

86. She then concluded:

> 179. In my view, what was required was 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. I have in any event preferred the evidence of Mr Gomm Santos to that of Professor Carmona, 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.

87. Mr Gomm's paragraphs 24-25 there referred to are cited herein at para 67 above. Mr Gomm there expressed (as he did elsewhere) his views of international arbitration as being something apart from Brazilian law, and as departing from the doctrine of *iura novit curia* inter alia because the application of law to facts is to be regarded as "a mixed question of law and fact".

88. It is not clear whether the judge in this section of her judgment was dealing with this ground as being founded in Cayman public policy (under section 7(3) of the CI Enforcement Law, reflecting article V(2)(b) of the New York Convention) or as being founded on the MP Funds "being otherwise unable to present [their] case" (under section 7(2)(b) of the CI Enforcement Law, reflecting article V(1)(b) of the Convention). Perhaps she had both in mind, as appears to be the case from her para 184 referred to below.

89. Mangatal J proceeded to the "Third Ground for Refusal – The Tribunal Purported to Decide Matters Beyond the Scope of the Submission to Arbitration" (at paras 181ff). The judge dealt with this very briefly. She did not refer to the Terms of Reference, but simply said that VRG's claim having been made on the basis that the MP Funds were 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.

90. Finally, the judge rejected VRG's submission that even with a New York Convention defence proved, the court still had a discretion, which it ought to exercise, in favour of enforcement. In that connection she said this, by way of "Conclusion and Disposition":

> 184 ...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 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.

The parties' submissions

91. On behalf of VRG, Mr Lowe QC submits as follows.

92. As to the estoppel issue, he submits first, that the judge was mistaken to say that the Brazilian annulment proceedings had not fundamentally put in issue, in the form of an ordinary action, both the jurisdiction of the arbitrators and the substantial justice of the arbitral proceedings. He complains that the passage in which the judge rejected the *de novo* nature of such an action and concluded that the Brazilian courts merely deferred to the power of the arbitrators to rule on their own jurisdiction (paras 128-129 of the judgment) was a flimsy and false basis for the judge's conclusion and betrayed a fundamental misunderstanding of the nature of the doctrine of *compétence-compétence*. He also complained of the judge's failure to engage with the terms of the Brazilian judgments, or Mr Gomm's evidence as tested in cross-examination, which he submits make it plain that the Brazilian courts were deciding the issues for themselves. Secondly, he submits that the judge was wrong to found herself on article 502 of the BCCP, rather than on the English jurisprudence that makes clear that, for the purposes of the

application of issue estoppel arising from foreign proceedings as a matter of English and thus Cayman law, the presence of an appeal does not affect the final and conclusive status of the foreign judgment: see *Nouvion v. Freeman* (1889) App Cas 1 and *The Sennar (No 2)* [1985] 1 WLR 490 (HL) among other cases, including the *Zeiss* case, which he submits the judge misunderstood.

93. In the circumstances, a proper understanding of the Brazilian proceedings proves estoppel, and incidentally Brazilian law, as to the issues of contract interpretation concerning the MP Funds agreement to arbitrate, the scope of the arbitration agreement, and the scope of the reference.

94. Turning to the question of natural justice and public policy, Mr Lowe accepts that ultimately such matters are to be judged by Cayman standards, but he submits that that judgment cannot be made in the abstract but can be arrived at only after a proper understanding and appreciation of Brazilian procedure and in particular the doctrine of *iura novit curia*. In that respect, he is critical of the judge's preference for Mr Gomm's view that the doctrine does not apply under Brazilian law in international arbitration, a view which he submits is wholly inconsistent both with the Brazilian judgments in this case and with academic treatises found in *Iura Novit Curia in International Arbitration*, 2018, published by NYU's Center for Transnational Litigation, Arbitration and Commercial Law. In the circumstances, he submits that the judge ought to have adopted the reasoning expressed by Colman J in *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, where he held that there would be no substantial injustice in enforcement of the award there under consideration.

95. Finally, and for much the same reasons, Mr Lowe repeats the submission which he made to the judge, which is that this court should be prepared to exercise the discretion it retains to enforce an award, even where a New York Convention defence has been prima facie made out, in the circumstances of this case.

96. On behalf of the MP Funds, on the other hand, Mr Flynn QC submits that the judge was right for the reasons she gave. Indeed, he had strongly pressed the court that no permission to appeal should be granted. He observes that there is no appeal against the judge's findings on contract interpretation under Brazilian law, only on estoppel; and no appeal on the issue of the scope of the submission to arbitration.

97. As to estoppel, he submits that even when attention is paid to the terms of the Brazilian judgments, it is apparent that there was only a form of "review" which fell short of *de novo* re-examination of the issues. In particular he draws attention to the use of the word "possible" in the forefront of Judge Amaral's judgment. There was no evidence from VRG to the contrary,

only Mr Giusti's evidence that the arbitrators' award was final and conclusive. Therefore, the judge was right to say that the issues before her and before the Brazilian courts were not the same, so that no estoppel could run. In any event, the judge was right to found herself on the absence of *res judicata* in Brazilian law as long as a judgment was under appeal (article 502 of the BCCP): a foreign judgment could not have greater effect in Cayman law by way of the doctrine of estoppel than it could have where it was made, citing, as had the judge, *Carl Zeiss* and *Seven Arts Entertainment.*

98. As to substantial justice and public policy, Mr Flynn submitted that that was entirely a matter for Cayman law and Cayman standards (citing *Cukorova Holding AS v. Sonera Holding BV* [2014] UKPC 15, [2015] 2 All ER 1061, and *Malicorp* (which the judge had relied on), a case said to be close to our facts. The judge's treatment of this, and her rejection of the doctrine of *iura novit curia*, was impeccable.

99. In all these circumstances, any discretion to enforce an award subject to such proven New York Convention defences was impossible, as *Dallah* broadly recognised.

Estoppel

100. I turn first to the issues arising out of the principles of estoppel. It will be recalled that the judge held, first, that estoppel was impossible where Brazil did not recognise *res judicata* pending the end of the appeal process; and secondly, that the issues in the Brazilian proceedings were not identical to those which arose in the Cayman Islands. I will address those two points in turn, and first the point about a pending appeal.

101. The leading case on the subject is *Nouvion v. Freeman*, which the judge did not mention. The plea of estoppel failed there because the foreign (Spanish) judgment in question was only a "remate" judgment, which could be entirely reopened in "plenary" proceedings. It was for that reason not "final and conclusive" for the purposes of the English doctrine, as distinct from a judgment which could only be questioned on appeal. Lord Herschell famously said this (at 9-10):

> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter be disputed, and can only be questioned in an appeal to a higher tribunal…But where, as in the present case, the adjudication is consistent with the nonexistence of the debt or obligation which it

> is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails.

102. In *Carl Zeiss*, the issue was whether the defendant solicitors were estopped from contending that they had authority to bring an action in the name of the Carl-Zeiss Stiftung (or "foundation"). It was alleged that the West German courts had decided that issue against that contention. It was held however that the defendant solicitors were not estopped. A variety of reasons were given. However, among them was that the decision of the West German courts did not fulfil the requirements of the doctrine. The first requirement which was missing was identity of parties. The next question was whether the earlier judgment had been a "final judgment on the merits". There was no reason why a foreign judgment could not be such a final judgment, even if caution needed to be taken because of unfamiliarity with foreign law, albeit the grounds for that caution did not apply in that case (at 918, per Lord Reid). Lord Reid went on to say this (at 918-919):

> It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does this mean in connection with issue estoppel? When we are dealing with cause of action estoppel it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country. In this connection the case of *Nouvion v. Freeman* is important. There had been in Spain a final judgment in a summary form of procedure. But that was not necessarily the end of the matter, because it was possible to reopen the whole question by commencing a different kind of action: so the summary judgment was not res judicata in Spain. I do not find it surprising that the House unanimously refused to give effect in England to that summary judgment.
>
> When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense.

103. Ultimately Lord Reid rested his judgment on the absence of identity of parties (at 919). There is nothing in what I have cited above that goes beyond the *Nouvion v. Freeman* approach.

104. Lord Hodson said this (at 926-7):

> In order to comply with rule 183 as stated in Dicey's Conflict of Laws, 7th ed. (1958), p. 992, the judgment must be conclusive in order to create an estoppel. In section 1 (2) (a) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, the expression "final and conclusive" is to be found, but these words are repetitive and "conclusive" in the sense of the rule must mean that it cannot, although it may be subject to appeal, be varied by the court which made it, as are, for example, some maintenance or alimony orders. *Nouvion v. Freeman* is an example of an action which had been tried in Spain under a summary form of procedure leading to a "remate" judgment but held by this House not to amount to res judicata, since it was possible to reopen the matter which had been tried and obtain a "plenary" judgment rendering the "remate" judgment inoperative. One asks, about what is the judgment to be final and conclusive? The answer is that it must be on the merits and not only as to some interlocutory matter not affecting the merits. The question here, may, I think, properly be described as "on the merits," the issue being whether or not there was authority to proceed in an action representing the foundation.

There is nothing there which goes beyond the approach of *Nouvion v. Freeman*. Lord Hodson was satisfied that the West German decision was final and conclusive (at 927).

105. Lord Guest dealt with this issue at 935-936, where he said this:

> I turn, therefore, at once to the question of finality. This is understood to mean "final and conclusive on the merits" of the cause (Dicey, Conflict of Laws, 7th ed., r.196, p. 1052)...In other words, the cause of action must be extinguished by the decision which is said to create the estoppel (see *Nouvion v. Freeman*, Lord Herschell: It puts an end to and absolutely concludes that particular action.") The West German judgment was not a judgment on the merits, but on a preliminary point relating to the capacity of the Carl-Zeiss-Stiftung to sue...I have difficulty in seeing how a decision on capacity to sue can ever be final and conclusive...
>
> Another aspect of finality relates to the requirement that the decision relied upon as estoppel must itself be res judicata in the country in which it is made. This is made clear in *Nouvion v. Freeman*...It would indeed be illogical if the decision were to be res judicata in England, if it were not also res judicata in the foreign jurisdiction.

It is difficult to see that this goes beyond the approach of *Nouvion v. Freeman*.

106. Lord Upjohn took a somewhat different position, in that he considered that the concept of authority to sue depended so much on matters of procedure in each court that he would deny any foreign judgment on that concept of the status of *res judicata* on the basis of the interests of justice (at 949). However, he too cited *Nouvion v. Freeman* (*ibid*).

107. Finally, Lord Wilberforce said this (at 969-970):

> 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...The chief authority cited for this is *Nouvion v. Freeman*, in which both Lindley L.J. in the Court of Appeal and Lord Herschell in this House expressed themselves strongly in this sense. No doubt that was rather a special case since the

> remate judgment was no more than provisional, but, generally, it would seem unacceptable to give a foreign judgment more conclusive force in this country than it has where it was given. This must be so on principle and there is support for it in *Behrens v. Sieveking*. Unfortunately, there is no clear evidence whether the judgment of the Federal High Court is res judicata (in the sense I have mentioned) in Germany or not…

That is the one passage relied on by Mr Flynn which the judge cited as part of his submissions (at para [116] of her judgment). Unfortunately, she passed over the last sentence cited above in her citation, with its important qualification "in the sense I have mentioned". In holding, as Lord Wilberforce did (at 971) that he was not satisfied that the West German judgment was "conclusive in West Germany as regards other proceedings", I think that he was using both the expressions "res judicata" and "conclusive" in the sense used in *Nouvion v. Freeman*, namely as distinguishing between a judgment which could be revisited in other proceedings, and a judgment which was merely susceptible to appeal.

108. In the end their Lordships split on the question whether the West German judgment could be regarded as conclusive on the merits, and their division of opinion was centred on the peculiarity of the issue, under examination in that case, of authority to sue. However, I do not detect any falling away from the distinction drawn by *Nouvion v. Freeman* (frequently cited by their Lordships) between a judgment which could be re-opened in other proceedings, and a judgment which was merely susceptible to appeal.

109. Applying that distinction to the present appeal, the question becomes whether the judge, supported by Mr Flynn's submissions, is correct to say that article 502 is conclusive evidence derived from Brazilian law that any judgment under appeal is not "final and conclusive" which is the English law test, or whether Mr Lowe is correct to submit that the expression "res judicata" is merely a label used to describe the situation of a judgment which is not subject to appeal and does not render a Brazilian judgment other than "final and conclusive" in the sense defined in *Nouvion v. Freeman.*

110. Of course, the possibilities of appeal and of a reversal on appeal are universal (until one has received the judgment of the highest court). How then are such possibilities to be dealt with under the doctrine of estoppel and the authority of *Nouvion v. Freeman*? That was discussed by Lord Denning MR in *Colt Industries Inc v. Sarlie (No 2)* [1966] 1 WLR 1287 (CA), a decision rendered just a few weeks after *Carl Zeiss*. Reliance there rested on a decision of a New York court, which had been upheld on appeal to the Appellate Division. Permission to appeal further to the New York Court of Appeals (New York's highest court) had been refused, but that latter court had its own power to grant permission to appeal, and the English court was told that an

application for such permission was being made. The judgment (as converted into sterling) was for nearly £0.9 million, a large sum of money in those days.

111. Lord Denning, with whom Davies and Russell LJJ agreed, held that the New York judgment was final and conclusive and would be enforced, albeit a stay of execution might be appropriate where an appeal was in prospect. Lord Denning said as follows (at 1291B/C):

> At the present moment the appellate process in the State of New York is not exhausted. It is possible that the Court of Appeals may give Mr Sarlie leave to appeal and afterwards allow his appeal. But this is not sufficient of itself to show that the judgment is not final and conclusive. It is well established that, even though a judgment is under appeal, it is still final and conclusive so as to enable an action to be brought upon it. That was clearly stated in *Nouvion v. Freeman*.

Moreover, Lord Denning went on to say this (at 1291F-H):

> It may be that the courts of the other states would not enforce the judgment or would grant a stay of execution until the whole of the appellate process had been exhausted: but the judgment itself is available throughout the states of the United States. Even if this were not so, I am quite clearly of opinion that we in this court should give full faith and credit to this judgment in the State of New York. There has been an appeal to the Appellate Division which has been dismissed. The only outstanding possibility is the grant of leave to appeal by the Court of Appeals. The appeal itself does not render it not final and conclusive. Nor should the possibility of leave to appeal. It seems to me that the proper test is this: Is the judgment a final and conclusive judgment of a court of competent jurisdiction in the territory in which it was pronounced?

112. As it is, international arbitration being what it is, and the importance of foreign enforcement of awards being so vital to the system of international arbitration, the New York Convention, brief as it is, makes express provision for the problem of an arbitral award which is under challenge in the courts of its seat. Article VI, which is reflected in section 7(5) of the CI Enforcement Law (cited at para 31 above), provides that a court asked to enforce an arbitral award which is under challenge in the courts of the country where it was made may adjourn the enforcement proceedings, and may even, if requested, order the award debtor to give security. That has not arisen in this case: but it is entirely consistent with the situation where a court asked to enforce a foreign award under challenge in the courts of its seat would stay execution until all appeal possibilities of those challenge proceedings had been exhausted.

113. Some twenty years later, the subject matter of issue estoppel arising from a foreign judgment returned to the House of Lords in the shape of *The Sennar (No 2)* [1985] 1 WLR 490. The particular issue there was whether it could be said that a decision of a Dutch court, that, by reason of an exclusive jurisdiction clause in a bill of lading contract in favour of the courts of Sudan, the claimant could not found jurisdiction in Holland, estopped the claimant from a

similar attempt to found jurisdiction in England. It was submitted that this was not a judgment "on the merits" and merely procedural, but that submission failed. *Carl Zeiss* was relied on by their Lordships. *Nouvion v. Freeman* was not expressly mentioned, but its principle was expressed. Thus Lord Diplock said (at 494B):

> It is often said that the final judgment of the foreign court must be "on the merits". The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in a cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.

And Lord Brandon said, citing *Carl Zeiss*, that the three requirements for the application of estoppel were, that there must be (i) a judgment of (a) a court of competent jurisdiction, which was (b) final and conclusive and (c) on the merits; (ii) identity of parties, and (iii) the same issue in both actions (at 499A/B).

114. *Seven Arts Entertainment Limited v. Content Media Corporation plc* [2013] EWHC 588 (Ch) (Sales J) concerns an application for summary judgment which failed. The application was based on an Ontario judgment between different claimants and respondents. Sales J held that there was no identity of parties and no identity of issue. As for the requirement of a final and conclusive judgment on the merits, Sales J held that the respondents had raised a triable issue that an Ontario court would not find the Ontario judgment final, both because of lack of privity (relied on by the claimant to get around lack of identity of parties) and also because it would consider the issue of the title to disputed copyrights afresh (at para [44]). In other words, it was a *Nouvion v. Freeman* situation. In the circumstances, the only passage relied on by Mr Flynn, and adopted by Mangatal J, namely para [43] in my view takes the matter no further. Sales J there said this:

> 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 an 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* [1967] 1 AC 853, 919A-C (Lord Reid), 927C-D (Lord Hodson), 936A-B (Lord Guest), 949C-D (Lord Upjohn) and 969G-970A (Lord Wilberforce).

In my judgment, *Seven Arts* demonstrates that what is looked for as a matter of fact in the foreign jurisdiction is a final and conclusive judgment as that is understood in English law, applying the *Nouvion v. Freeman* distinction.

115. That is again what was emphasised by the English court of appeal in *Aeroflot v. Berezovsky* [2014] EWCA Civ 20, [2014] 1 CLC 53. There a first Russian judgment had been amended by a second Russian judgment (not on appeal), which had granted indexation of Aeroflot's loss as awarded by the first Russian judgment. Berezovsky had sought and obtained summary judgment dismissing Aeroflot's claim, which was based on the second Russian judgment. The reason for the dismissal of the claim was that the English judge at first instance (Floyd J) had held that the reopening of the claim was against public policy as being contrary to the "finality principle". The court of appeal allowed Aeroflot's appeal and said that its claim ought to go to trial, since "the English courts will not hold that a later foreign judgment infringes the finality principle when it interferes with a prior judgment if under the foreign law the prior judgment was not final and binding" (at para [29]). Therefore what had to be examined was whether the first Russian judgment was, under Russian law, liable to be re-opened by a subsequent judgment, a typical *Nouvion v. Freeman* situation; and that could not be ascertained and decided on summary judgment.

116. It was in this context that Arden LJ referred to *Carl Zeiss*. She pointed out that all members of the House of Lords had applied *Nouvion*. She summed the matter up as follows:

> 36. *Nouvion* is authority of the House of Lords for the proposition that, when the issue in English recognition and enforcement proceedings is whether a foreign judgment was final and binding, the choice of law rules are as follows: English law lays down the requirements for a final and binding judgment but the incidents in fact of the foreign judgment must be determined by the foreign law. As Lords Bramwell and Ashbourne held in the House of Lords, the English courts could not ascribe a higher status to a judgment governed by foreign law than that foreign law would ascribe to it.

117. The last and most recent authority to which I should refer under this issue is *Midtown Acquisitions LP v. Essar Global Fund Ltd* [2017] EWHC 519 (Comm), [2017] 1 WLR 3083 (Teare J). There, the claimant had obtained in New York a so-called "confession judgment" and then sued on it in England. The respondent opposed the claim, but summary judgment was granted, albeit subject to a stay, since there was currently an application in New York to vacate the judgment. The issue was whether the New York judgment was "final and conclusive" or was like the "remate" judgment in *Nouvion v. Freeman*. Teare J held that it was unlike the "remate" judgment since it could only be challenged on appeal or on grounds such as error, fraud, misrepresentation or other misconduct. As Teare J said (at para [32]):

> The judgment can be challenged on appeal (which challenge, it is common ground, is irrelevant to the question whether the judgment is final and binding) or on such grounds as error…

118. It is in the light of these authorities that I must revisit the issue before me of whether the Brazilian judgment is "final and conclusive" for the purposes of the English law of estoppel. It seems plain to me that "final and conclusive" is given by English law a special meaning. In one sense, any judgment subject to appeal is not final and conclusive. It may be set aside on appeal. However, it is clear on the authorities that the prospect of appeal is irrelevant to a judgment being final and conclusive. There is therefore no instance in English law that has been brought to our attention of any foreign judgment being refused enforcement on the ground that it is under appeal.

119. What then is to be made of article 502 of the Brazilian Civil Code? Mr Gomm's evidence (his first affidavit made in the Cayman proceedings) cites article 502 and states that the Brazilian doctrine of *res judicata* "is confirmed by the Brazilian Constitution [*footnoted*: Art 5, XXXVI *"The law shall not impair a vested right, a perfected juridical act, or a matter adjudged* [res judicata]"]. Under Brazilian procedural law, the *res judicata* doctrine applies when a decision is considered immutable and indisputable and it is no longer subject to change or appeal" (at para 3.1). It looks therefore as though in Brazil the doctrine of *res judicata* is tied up with a prohibition against impairing vested rights, a form of finality principle. It is possible therefore that the English doctrine of estoppel does not fit happily with the Brazilian doctrine of *res judicata*. However, there is no assistance on this matter from either Professor Carmona or Mr Giusti on the side of VRG. It is Mr Giusti, who in his second report of May 2017 responds to Mr Gomm on the subject of *res judicata* (at paras 15ff), but chooses to do so by emphasising the *res judicata* of the awards, not of the Brazilian judgments. Thus he says:

> 15. I agree with the general opinion expressed in paragraphs 3.1 and 3.2 of Mr Gomm's Affidavit on the doctrine of *res judicata*. However, for the reasons set out below, Mr Gomm is incorrect insofar as he suggests in his Affidavit that the fact that there is an appeal pending in a superior court in the annulment action…impairs or negates the res judicata of the Awards.

The trouble with that, however, is that reference to the awards as being *res judicata* is a fundamental *petitio principii*. The awards are certainly final and conclusive if they are valid, but their validity is the issue in question.

120. Even so, it would appear to be highly probable that the Brazilian courts' rejection of the MP Funds' annulment challenge, while still subject to an appeal process, cannot be altered or re-opened in any other way than by appeal. Therefore, this is a unique case in which there is a clash between what English law regards as final and conclusive and what Brazilian law regards as final and conclusive, with the difference between the two views being expressly covered in a series of English law decisions for well over a century which emphasise that the possibility

of appeal is not relevant to the test of estoppel. Ultimately the doctrine of estoppel is a matter of the *lex fori*, ie in this case Cayman law, which is no different in this respect from English law. If forced to choose, therefore, I would prefer to say that in the case of such a clash, the English test should predominate, while of course regard has to be given to the current extant possibilities of appeal. The doctrine of estoppel is designed to work justice and not injustice, as Lord Upjohn remarked in *Carl Zeiss* at 947D (and see *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)*, [2014] EWCA Civ 855, [2014] QB 458 at 516E). Moreover, if it therefore might have been said that, as it has turned out, VRG's proceedings here are premature, there remains the possibility of adjournment, provided for by the New York Convention and the CI Enforcement Law.

121. I will proceed then to the second ground on which Mangatal J rejected an estoppel, namely that the issues in the Brazilian courts and in the Cayman Islands were not identical. After all, if the issues are not identical, indeed the judge said that they are "not even materially or substantially the same" (at para [135]), the question of estoppel fails in any event. But if they are the same, then those decisions of course are the best evidence of Brazilian law (in the absence at any rate of some compelling evidence that the Brazilian courts erred) and therefore, estoppel or not, these courts should not in justice come to a different conclusion on a matter of Brazilian law.

122. It will be recalled that the judge's reason for finding that the issues were not the same was that she concluded that the Brazilian courts are not required to reach a decision *de novo* as shown by the fact that the São Paulo Court of Appeals referred to *compétence-compétence* "which is the principle that the tribunal has the power to rule on its own jurisdiction" (at para [128]).

123. In reaching this conclusion, the judge cited nothing from the Brazilian courts' judgments, nor anything from the expert reports before her. It was sufficient that the Court of Appeals had made references to *compétence-compétence.*

124. In my judgment, however, the judge erred in this respect. The principle of *compétence-compétence* says nothing about the test which a court brings to bear when the issue of an arbitrator's jurisdiction is challenged. It is merely the doctrine which says that it is thought in general to be better and more efficient if the arbitrator takes the first, or initial, look at the issue, before it comes before a court for its definitive judgment. This is clear from the discussion about the principle in *Dallah*. It is also clear (i) from the Brazilian Arbitration Law, (ii) from what the Court of Appeals said in its judgment about the principle of *compétence-compétence* and (iii) from that Court's lengthy discussion (at pages 13-19 of its judgment) of the issues of contract interpretation which underlay the issue of jurisdiction.

125. As for (i), the Arbitration Law itself sets out both the *competence-competence* principle and the right to challenge the arbitrator's views in court by an action to annul: see articles 8, 20 and 20.2, 32 and 33 cited at para 30 above. It may be noted that where the arbitrator *declines jurisdiction*, that is definitive, but where the arbitrator *rejects the challenge* to his jurisdiction, his decision is subject to review in an action "to declare the arbitral award null in the cases set forth in this law". Article 33.1 emphasises that the action to annul should comply with the ordinary procedure set out in the Code of Civil Procedure. Mr Gomm confirmed in his cross-examination that an article 33 annulment action was like any other action and that it was for the judge to make up his own mind in it. That is what any neutral reading of the Arbitration Law confirms. Thus in the case of an annulment action under article 33, the issues for the court are set out plainly in article 32, inter alia "if (1) The arbitration agreement is null", or (4) "It has exceeded the principles of the arbitration agreement", or "(8) It violates the principles set forth by Article 21.2" ie the principles of due process. Those are the issues for the court. The due process issues under challenge plainly are not ultimately for the arbitrators to decide, but for the court, as Mr Gomm confirmed. The issues of contract interpretation under article 21.2 (1) and (4) are *in pari materia*.

126. As for (ii), the Court of Appeals cited a lengthy extract from a Brazilian treatise on arbitration about *compétence-compétence*, which included the following:

> The arbitrator's initial analysis has been mentioned numerous times, because at the right time, after the arbitral award, the matter can be submitted for examination by the courts, if a defect in the agreement results in any of the cases set out in article 32.1 of the Arbitration Law (causes of an invalidity of an arbitral award). In other words, the public courts are not excluded, nor could they be, from examining the "existence, validity and efficacy of the clause", after the arbitral award by the current, proposed, and highly regarded system.

The treatise's references to article 32.1, the expression "nor could they be", and the expression "examining", all support my understanding of the relevant provisions of the Arbitration Law, as well as Mr Gomm's evidence under cross-examination.

127. As for (iii), the Court of Appeals dealt with the merits of the issue as to the existence and scope of an arbitration agreement binding the MP Funds in a passage extending over many pages, all of which is in my judgment redolent of a court making its own independent decision. In that passage the Court of Appeals reviews the limited evidence underlying the issues of contract interpretation for itself, cites extensively from a treatise, which itself cites from further underlying authority, rehearses Brazilian jurisprudence, and naturally refers to the judgment under appeal. There is no suggestion that the Court of Appeals is paying deference to the arbitral

tribunal's own award, or is conducting some form of limited review, the nature of which has never at any time been explained by Mr Flynn, the judge, or Mr Gomm.

128. Although not directly relevant at this point, the Court of Appeals' judgment continues with its own examination of the due process challenge, again citing treatise authority, and stating that "the judgment under appeal correctly and accurately specified application of the maxim: "*mihi factum, dabo tibi ius*." Mr Gomm expressly accepted that the court was there making its own independent assessment.

129. It must be recognised that, apart from some incontrovertible facts relating to the contractual documents in issue, the questions for the Brazilian courts were pure points of their own law, points of contract interpretation. In such circumstances, it is difficult for me to understand how, in upholding the first instance judgment, or in finding the arbitrators' own understanding to be correct, the Court of Appeals was doing other than expressing its own consideration of the matter.

130. In para 27 of Mangatal J's judgment, she said that the independent judicial approach mandated by *Dallah*, approving *Azov*, was to be contrasted with the approach in other jurisdictions. She said: "In many jurisdictions, the issue is a different one, i.e. whether on a *review* [the judge's emphasis] of the tribunal's decision on jurisdiction, paying due deference to the decision of the tribunal, the tribunal's decision on jurisdiction should stand". "Review" is the word used by Mr Flynn to contrast with the independent consideration required by *Dallah*. In using that word, he appears to have been influenced by the use of it by Ms Hilary Heilbron QC in *Dallah*, who there submitted (unsuccessfully) that in effect the English court's consideration of the issue of agreement to arbitrate should be in some way aetiolated and all but determined by the arbitrators' decision (see Lord Mance at para [21]). However, as Lord Justice Moore-Bick pointed out in the court of appeal (at para [21]), the term "review" was unhelpful, because –

> If it meant no more than that the court should have regard to the tribunal's reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal's reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I took her to mean, since it was essential to her argument that the court should at least accord great weight to the tribunal's conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when exercising the exercise of a judicial discretion and a full rehearing, not to mention one that is capable of flexibility in its application.

131. Mangatal J did not identify the "many" jurisdictions where some other approach, described as a "review", takes place. In *Dallah*, England, France and the USA, three important arbitration jurisdictions are identified as all following the "full rehearing" approach, and none is identified as following a different approach, although Lord Mance comments (at para [25] of his judgment) that the US case of *China Minmetals* examines some of the "nuances (principally relating to the time at which courts review arbitrators' jurisdiction)".[3]

132. Moreover, the language of the New York Convention itself mandates the *Dallah* approach, as Lord Mance pointed out at para [28] of his judgment, where he says that "This language points strongly to ordinary judicial determination of that issue". The same point was made by Moore-Bick LJ in the court of appeal (at para [22] of his judgment, where he said, referring to what the judge of first instance had said, as cited at para [14] of Moore-Bick LJ's judgment) that –

> In the absence of any authority, either in this country or abroad, which tends to support the conclusion that the language of article V(1) is to be given a meaning different from that which it naturally bears and in the light of the close similarity of language between the Convention and the [English] statute, I think the judge was right to treat the question as one of statutory interpretation and that his conclusion on the meaning of section 103(2) was clearly correct.

The same point may be made about the language of the Brazilian Arbitration Law, which itself follows the New York Convention.

133. It is true that Mr Gomm had said in his fourth report both that "it is very difficult in fact to identify what standard of review or consideration the Brazilian courts applied" and that "it appears they primarily reviewed the correctness of the tribunal's decision on jurisdiction rather than considering that question *de novo*". However, he does not explain that comment further in his report; in cross-examination he accepted that the question of due process was considered by the courts afresh; and his written comment in no way explains what, in a matter which entirely depended on contract interpretation and where there were no facts in dispute, is the difference between reviewing the correctness of a decision of law and considering that question of law afresh.

134. In this connection, it is relevant to point out that in the *Azov* case the issue was whether *any* contract had ever been finalised. That was a heavily fought, heavily factual, issue which depended in part on expert evidence on foreign law which the arbitrators had heard over many days. The question which arose when the issue came before the commercial court under the English Arbitration Act's section 67 review of the arbitrators' substantive jurisdiction was

[3] Another nuance is that, as in Brazil, some jurisdictions do not permit a challenge from a decision of the arbitrators to *decline* jurisdiction.

whether fresh evidence and fresh reports could be placed before the court, or whether the matter had to be looked at exclusively with the same evidence and therefore it might be said through the same eyes as the arbitrators. No, said the court. As Lord Collins put it in *Dallah* (at para [96]), "where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge". Or as Lord Mance put it (at para [26]), the parties are "entitled to a full judicial determination on evidence". In *Dallah*, as in *Azov*, there was much dispute in fact. But in this case, because the law in the Brazilian courts was the law of the Agreement, and the facts were otherwise plain on the contractual documents, the dispute as to jurisdiction was one of law.

135. Mr Flynn submitted, nevertheless, that a reading of the Brazilian courts' judgments showed that they were not directing themselves by their views of Brazilian law but in some way by reference to what the arbitrators had decided. He emphasised the use of the word "possible" in Judge Amaral's ruling, eg in the sentence "The discussion revolves around whether it is possible or not to nullify the arbitral sentence, which claim was based, primarily, on four points". It is true that one might expect a different word or expression from "possible", such as "this court ought" or "the law allows". It remains, however, a case where the claimant for nullity bears the burden of showing that the arbitrators have gone wrong in some way. "Can it meet that burden?", is what I take the judge to be asking. In any event, I cannot read the judge's exposition as being other than an expression of his own view of what the law requires. Thus the third point discussed is the due process point. This is plainly not something on which deference is owed to the challenged tribunal. As Judge Amaral said in that regard: "The documentation offered by the parties unequivocally proves the broad possibility for argument, discussion and challenges." And the fourth point discussed is lack of reasons, which again is plainly a matter for the judge, on his reading of the award, as he says: "The mere reading of the referenced decision...allows one to verify that the subject-matter was analysed with a high degree of detail..." One would therefore not expect a different test or approach when it comes to the two points of contract interpretation: as to which the judge said first, on the question whether there was no agreement to arbitrate, that "such was not the case", and then gave his reasons, which included the facts about the Agreement and Addendum 5; and on the second point, as to the scope of the arbitration agreement, he said that "the clause of the contract itself, as it was drafted, did not limit the scope of jurisdiction, thus there is not verified any violation of Art 32, Clause IV...". I have already given my reasons for viewing the São Paulo Court of Appeals' judgment as its own judicial determination of the issues on appeal.

136. I therefore reject the submission that a different test was applied from that which obtains under English and Cayman law to the MP Funds' article 33 challenge to the validity of the arbitral tribunal's Awards. In my judgment the issues faced and decided by the Brazilian courts are the same issues as would arise on the MP Funds' defences under the New York Convention and the CI Enforcement Law.

137. In the circumstances, those Brazilian judgments are plainly the best evidence there is of Brazilian law, of what a Brazilian court would decide on the issues in question here. They are determinative (see for instance *Malicorp* at [25]). Mr Flynn submits that there has been no appeal on the issues of Brazilian law. But once it is decided that the Brazilian judgments in this case are decisions on the same issues as lie before this court, plainly within this appeal, it is impossible to go behind them as a matter of Brazilian law. That would remain the case even if there was no technical estoppel on the ground that those judgments were still under appeal in Brazil. Even if it would in theory be possible to show that those judgments had been overturned in another case, the MP Funds have not sought to do that.

138. I would therefore hold that the MP Funds are estopped from challenging the Brazilian law decisions handed down on the validity of the arbitrators' jurisdiction in this case. I will revert below on the subject of the outstanding possibility of appeal in Brazil.

139. It follows that, in turning now to the subject of due process and public policy, I do so on the basis that the MP Funds were involved in an arbitration to which they were bound by their agreement, and that the Brazilian courts have considered and given their independent answer to the question of due process.

Due process and public policy

140. It is common ground that public policy and substantial or natural justice are matters for Cayman law: see, for instance, *Pemberton v. Hughes* [1899] 1 Ch 781 at 790, *Yukos v. Rosneft* at [151] and *Cukorova* at [32]. However, where an enforcing court is concerned with litigation under a foreign law, the matter is not necessarily as straightforward as it might be with domestic litigation or with arbitration seated in England. Public policy might be an over-powerful tool to bring to bear, and not all issues of due process are matters of substantial justice.

141. In this connection, Mr Lowe refers to the influential decision of Mr Justice Colman, acknowledged to be an experienced judge in such matters, in *Minmetals*. There a Chinese award was challenged in the Chinese courts on the basis that the award debtor had not been given a chance to make representations about another award (in a sub-sale arbitration) which the

arbitrators had relied on for a question of quantum. The Chinese courts remitted the matter back to the arbitrators. On the resumed arbitration, the arbitrators invited the respondent to explain its complaint. It failed to do so, and the arbitrators affirmed their award. It was challenged again in the Chinese courts, this time unsuccessfully. It now came for enforcement in England, and the award debtor raised defences under section 103(2)(c) (inability to present a case) and (f) (public policy). The defences were dismissed and the award was enforced.

142. As to the section 103(2)(c) defence, Colman J said that the award debtor had failed to take advantage of the opportunities available to it on remission both to explain its complaint and to ask for a copy of the sub-award. These were matters within its control.

143. As to the section 103(2)(f) defence, Colman considered *Adams v. Cape Industries plc* [1990] Ch 433 (Scott J and CA) (as to which, see below) and observed that it had involved "quite exceptional facts" (at 329j). He pointed out, by reference to the case of *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, (at 330*j*) that –

> it was necessary to have regard not only to the public policy of discouraging international commercial corruption, but to the countervailing policy of giving effect so far as possible to the finality of international arbitration awards and to discouraging the relitigation of issues already determined by arbitrators by adducing evidence not shown to have been unavailable before the arbitrators.

144. Colman J continued as follows (at 331*c-h*):

> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.
>
> In summary, therefore, in an case where an enforcee alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations: (i) the nature of the procedural injustice; (ii) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that

> jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award; and (v) if the enforcee has failed to invoke that remedial jurisdiction, for what reason, and in particular whether he was unreasonable in failing to do so.

145. In the present case, factor (v) above does not apply, factors (ii), (iii) and (iv) are all answered in VRG's favour, and factor (i) remains a live issue.

146. I consider other cases which have been cited to us on the question of English and Cayman public policy attitudes to due process challenges to a foreign judgment or award.

147. In *Adams v. Cape Industries* the question arose as to the enforcement of a Texas default judgment for over USD 15 million, in the absence of a judicial hearing. The defendants had not appeared, hence the default judgment, but the question of quantum remained. There were 462 separate plaintiffs. The judge accepted the plaintiffs' counsel's assessment as to the level of various quantum bands and the allocation of individual plaintiffs within those bands. Scott J at first instance had directed himself that the requirements of substantial justice "cannot...be divorced from the legitimate expectations of both [parties] in the context of the procedural rules applicable to the case, but had concluded that in the absence of any judicial assessment of the damages, there had been a breach of substantial justice (at 500). The essence of the decision was that, in simply accepting counsel's assessments for himself, the Texan judge *had not acted in accordance with Texan procedural law*. The court of appeal expressed itself thus (at 564):

> We have found this to be a matter of difficulty...Scott J expressed his view that the system of civil justice evidenced by the Federal Rules and explained by the witnesses was an unimpeachable system of justice within one of the great common law jurisdictions of the world and was plainly in accordance with the requirements of natural justice. We make the same respectful acknowledgment. But, as Scott J pointed out, the defendants make no criticism of that system of justice. Their complaint was that, at the invitation of the plaintiffs' counsel, Judge Steger did not proceed in accordance with it.

148. In *Hebei Import & Export Corporation* [1999] HKFCA 40 a Chinese award had been challenged in the Chinese courts but not on the public policy grounds raised as a defence to enforcement proceedings in Hong Kong. The leading judgment of the court, with which the other members agreed in their concurring judgments, was given by Sir Anthony Mason NPJ. There had been a factory inspection attended by experts and the Chief Arbitrator but not the parties, followed by an experts' report, after which the award debtor admitted liability. The award debtor now complained that it had not been able to attend the inspection, that improper communications had been made to the Chief Arbitrator at the inspection, that it had not had an opportunity to deal with the report, and that it had been denied a hearing. It complained in Hong

Kong of fundamental breaches of natural justice, and of bias. Those complaints were rejected. The complaints could have been raised before the arbitrators themselves, as well as the Chinese courts, but were not. What is of interest for present purposes is what the Final Court of Appeal said as a matter of principle.

149. Thus Sir Anthony Mason said this:

> 100. The question then is whether the two matters of which the respondent complains, namely the alleged refusal of a hearing and the communications to the Chief Arbitrator were fundamental conceptions of morality and justice of Hong Kong…
>
> 101. The critical question, however, is whether what happened in this case was contrary to these basic notions. In approaching this question, it is relevant to take account of the fact that the parties agreed to an arbitration which was to be governed by the CIETAC Arbitration Rules and the PRC Arbitration Law. The fact that the parties agreed to procedures which differ from those which would ordinarily apply in Hong Kong is a circumstance of which we must take account (see Ordnance s. 2AA(2)(a)).

150. And Mr Justice Bokhary PJ said this:

> 28. When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.
>
> 29. In regard to the refusal of Convention awards on public policy grounds, there are references in the cases and texts to what has been called "international public policy". Does this mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are also affected? I think it should be taken to mean the latter…
>
> 30. None of this is to say that the proper approach is insular. It is eclectic…

151. In *Cukorova* there was an ICC arbitration governed by Swiss curial law with respect to a substantive agreement governed by Turkish law. The award creditor sought to enforce the award in the BVI. The award debtor defended enforcement on the grounds that the arbitral tribunal lacked jurisdiction, that it, the enforcee, had not been able to present its case, and on public policy. The Privy Council rejected all three defences. Lord Clarke said:

34. The general approach to enforcement of an award should be pro-enforcement. See e.g. *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) at 973:

> 'The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards...[it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V.'

152. The essence of the award debtor's complaint was that it was not given the chance to call a certain witness (Mr Berkmen), despite numerous requests that he be heard. There was also a complaint that its adherence to the disputed arbitration agreement in question was found on the basis of tacit acceptance, and that that had not been anticipated. But the Privy Council found that the claimant had, on the first day of the hearing, submitted that tacit adherence (acceptable under Turkish law) was part of its case; and that it was satisfied by the tribunal's own reasons for not calling Mr Berkmen. The defences against enforcement were therefore dismissed.

153. Mr Flynn relied in particular on *Malicorp*, which he submitted was a case on essentially similar facts. *Malicorp* concerned an Egyptian award, in favour of the English contractor, Malicorp, against the Egyptian Government. The arbitrators found that Egypt had validly avoided the concession contract for mistake, but nevertheless awarded damages against it on a basis which had never been sought or put. First, Malicorp sought unsuccessfully to enforce in France. Secondly, Egypt sought to set aside the award in Egypt, and succeeded, pending an appeal to the Egyptian cour de cassation. Thirdly, Malicorp sought to enforce in England, and failed on two grounds: the Egyptian set aside of the award would be recognised; and a defence under section 103(2)(c) of the English Arbitration Act had been proved.

154. It is not clear from Walker J's judgment in the English court on what ground the Egyptian courts had set aside the award, but he went into the arbitration proceedings with care. He established that Malicorp had sought damages against Egypt on the ground of breach of contract, and that Egypt claimed it was entitled to avoid the contract for fraud. However, the arbitrators rejected Malicorp's case, made no finding on Egypt's case, and found instead that Egypt was entitled to avoid the contract for mistake. They then went on, nevertheless, to award damages against Egypt under article 142 of the Egyptian Civil Code which entitled damages to be awarded where a contract is void but *restitutio in integrum* may not be possible. Nothing like this had been pleaded, argued or mentioned. The judge concluded that the award of damages under article 142 "must have been a complete surprise to Egypt" (at para [41]). He continued:

> It would have been astonishing, if there had been any suggestion that this was in contemplation that Egypt would fail to protest that the tribunal ought to make a finding on its case on fraud rather than allocate responsibility on the footing of a good faith mistake on the part of Malicorp. It would similarly have been astonishing, if there had been any suggestion that damages in place of reinstatement were contemplated, that Egypt would fail to protest that such damages could not properly incorporate an element of loss of profit.

155. A review of these authorities discloses that (i) where due process is concerned, although the standards are ultimately those for an English court to set, regard must properly be had for foreign procedure and what the courts of that foreign procedure have to say about the issue of due process; (ii) there has been no case in which an award which has been challenged in but upheld by the supervisory courts in the country of its seat has been refused enforcement on a due process challenge which has been considered and rejected by the foreign court; (iii) there has been no similar case in which a major doctrine of the civil law, such as *iura novit curia*, has been rejected as contrary to substantial justice as that is understood in English law.

156. I therefore turn to the doctrine of *iura novit curia*, which Mangatal J regarded as irrelevant, both on the ground that "it is a question of Cayman law as to whether there was procedural fairness" and on the ground that Mr Gomm's evidence that the doctrine did not apply as a matter of Brazilian law to international arbitration was to be accepted. As to the first of those grounds, the judge did not take into account that element of English law which refers as appropriate to foreign procedure; and as to the second of those grounds, the judge did not have the advantage of the scholarly material which is available to this court.

157. That material is a treatise entitled *Iura Novit Curia* in International Arbitration, published by NYU's Center for Transnational Litigation, Arbitration and Commercial Law, 2018. It comprises 15 chapters contributed by practitioners and scholars from 15 separate countries about the role of *iura novit arbiter* in those countries – from Argentina to the United States. There are then two concluding chapters: chapter 16 entitled *Iura Novit Curia* in International Law, and chapter 16 entitled General Report on *Jura Novit Curia*.

158. The treatise is too lengthy to cite in detail. I extract, however, some references from the chapters on Brazil (for obvious reasons), from France, Germany, Sweden and Switzerland, as being important civil law centres of international arbitration in Europe, and from the United States and England and Wales, as being important common law centres of international arbitration.

159. It seems (see at 426-7 of the treatise) that the doctrine of *iura novit curia* can be traced right the way back, past the great Roman jurists, to no less a figure than Aristotle, who in his *Rhetorics* said –

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

160. As for Brazil, the author, Rafael Alves, a practitioner and professor, refers to the instant case as being one of three paradigmatic cases on the subject, the other two being slightly later, *TEC* in 2013 and *EIT* in 2015 (at 72-75). In *TEC*, the São Paulo Court of Appeals upheld the first instance court in rejecting a due process challenge to a Brazilian award, "confirming the application of *jura novit curia* in arbitration under Brazilian law…because the arbitrators *may* apply a *different legal basis* compared to the ones argued by the parties, as long as the *questions of fact* remain the same". In *EIT*, the first instance court upheld a challenge "because the arbitral tribunal decided the case based on a *question of fact* (gross negligence) that had *not* been subject to prior discussion between the parties. The judge also clarified that, had the arbitral tribunal only applied a *different legal basis*, the "*jura novit curia* principle" would be applicable, and the arbitral award would be valid." All three cases await appeal. The author therefore concludes (at 81):

> Second, with respect to *domestic arbitral awards subject to Brazilian law*, so far, in general terms, Brazilian courts have been more lenient to *accept* the application of *jura novit curia* in arbitration and *reject* setting aside procedures…provided that only *questions of law* are concerned (not questions of fact), that is, when the arbitrators provided *a different legal basis or legal reasoning* for the proven facts, as compared to the ones brought by the parties. In any event, arbitrators should exercise *caution in avoiding surprises* and preserving *parties' procedural rights* in such regard, as violation of *due process of law* is also a ground to set a domestic award aside under Brazilian law (Article 32, VIII, of the Brazilian Arbitration Act).

161. As for France, the authors Gilles Cuniberti and Nicolina Bordian, respectively a professor and senior lecturer and both practitioners, make the opening point (at 169) that the New York Convention is almost never raised before French courts, which directly apply French law. French law recognises the doctrine of *iura novit curia* in international arbitration, but requires all points, whether of fact or law, to be submitted to the discussion of the parties (at 171).

162. As for Germany, the authors Burkhard Hess and Leon Marcel Kahl, respectively a professor and research fellow at the Max Planck Institute, conclude that the principles of *iura novit curia* or *da mihi factum dabo tibi ius* as understood in German law permit arbitrators to apply the laws they deem applicable even if not chosen or pleaded by the parties on the basis that while the parties are responsible for the facts, it is the tribunal that must apply the law. However,

neither court nor arbitral tribunal should surprise a party with a point that a conscientious and knowledgeable party could not expect (at 195, 215/6).

163. As for Sweden, the authors James Hope and Elisabeth Hallberg, both practitioners, observe that the principle of *iura novit curia* is mandatory for both courts and arbitral tribunals in Sweden (at 366). However, it is good practice, but not required, to invite parties to comment on matters which might take them by surprise (at 372). Failure to do so, however, is unlikely to provide any grounds for setting aside the award, "unless due process has been violated in a fundamental respect; for example, if the arbitral tribunal has been obviously partisan and thus violated the principle of equality" (at 374).

164. As for Switzerland, the authors Andrea Bonomi and David Bochatay, respectively a professor and practitioner, state that it is "undisputed that the rule *iura novit curia – or iura novit arbiter*, as it is often referred to in this context – is part of Swiss arbitration law" (at 381). That means that arbitrators "can freely assess and determine the legal implications of the facts of the case" and "are entitled to rely on legal grounds that were not pleaded by the parties" (at 382). That might even be their duty (at 386). However, they cannot go outside the relief requested (what in England we might call the prayer), a point made by other contributors: thus a party which had claimed a declaration that a contract was invalid could not be awarded damages for breach of it (383, and see also at 393). Although there is a general principle of due process of the right to be heard, this does not limit the principle of *iura novit curia*, but the other way round: "an award cannot be set aside on the sole ground that the arbitral tribunal has drawn from the facts legal consequences that were not pleaded, without giving the parties the opportunity to comment on such legal grounds". Only very exceptionally, where the relevance of the unpleaded and undiscussed grounds was unforeseeable, can the award be set aside. However, "this exception is construed narrowly by the Federal Tribunal…the parties have to demonstrate that the rule of law or legal argument was unforeseeable and truly came as a surprise. As case law shows, an annulment for violation of the right to be heard in connection with *iura novit curia* is very scarce" (at 389). Only two such cases have been found (at 390).

165. As for the United States, the author Aaron Simowitz, a legal scholar, sums up the matter in his conclusion as follows (at 423/4):

> A brief survey of the U.S. landscape reinforces the general rule as articulated by the United States Court of Appeals for the Ninth Circuit in *Iran v. Gould*[4]: Arbitral awards will be reviewed on the basis of arbitrators' powers, not parties' pleadings. A U.S. court should be extremely unlikely to disturb an international award on the basis of *jura novit arbiter* unless much more is shown. First, U.S. courts will

[4] *Ministry of Def. of the Islamic Republic of Iran v. Gould Inc* 969 F 2d 764, 771 (9th Cir 1992)

> almost certainly require a showing of prejudice. Second – even if a party can demonstrate prejudice – a U.S. court will require some additional, exceptional factors, such as significant *ex parte* communication.
>
> On occasion, U.S. courts have been accused of merely paying lip service to the principle of deference to arbitral tribunals (for example, in the long-running critiques of the 'manifest disregard of law' basis for setting aside a Convention award). However, in the realm of *jura novit arbiter*, one can expect U.S. courts to be as good as their word. U.S. courts are accustomed to practically unfettered discretion in whether to independently investigate questions of law. U.S. courts should find no basis to question their habitual deference to arbitral tribunals – quite the opposite.

166. As for England and Wales, the author Professor Loukas Mistelis states in his opening abstract that "Whereas courts in civil law jurisdictions accept this principle more broadly, courts in common law jurisdictions are less willing to accept its existence in international arbitration" (at 135). He speaks of a middle ground or "third way" developed and advocated for international arbitration. He confirms the nature of the doctrine in civil law, ie "As long as the parties establish the facts of the case, the courts will give them the law – or in the words of the well-known Latin maxim: "*da mihi facta, dabo tibi ius*" (at 136), but states that it is not a doctrine of the common law. He examines jurisprudence which shows that in arbitration seated in England under English law the courts have tended to regard a decision on a point of law without notice to the parties as a breach of natural justice; but he also mistakenly cites jurisprudence concerning new factual points as though they were concerned with new points of law (*The Vimeira* [1984] 2 Lloyd's Rep 66 (CA)). Even so, he cites (at 152) authority for it being sufficient notice that a point is raised "only briefly" (*Terna Bahrain Holding Co WLL v. Al Shamsi* [2012] EWHC 3283, [2013] 1 All ER (Comm) 580 at para [106], Popplewell J as he then was)[5]. Professor Mistelis concludes (at 167) as follows:

> Hence, it appears that arbitral tribunals seated in the UK may adopt a moderate *iura novit arbiter* approach which is not as wide as the one observed in civil law systems, but is wider than the discretion of the English judge. This development is embedded in the English Arbitration Act with the clear parameters of due process and efficiency and also the evolution of international arbitration rules, such as those of the ICC or the LCIA which vest arbitral tribunal with significant discretion as regards applicable law provided that due process is being observed.

[5] "If a point is raised only briefly, that is in accordance with the idea of speedy resolution which is an objective of the arbitral procedure (whether or not in a given case the objective is achieved). It is none the less so if a host of what turns out to be bad points are also raised and it is on those other points that the party raising the issues concentrates his exposition. Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses" *Terna* at para [106].

167. What Professor Mistelis does not cover, however, is the attitude of English law to the doctrine of *iura novit curia* or *iura novit arbiter* when it applies under foreign, civil, law in a foreign seated arbitration. For that, the jurisprudence discussed in this judgment above is all that avails from the researches of counsel in the appeal.

168. Chapter 16 of the treatise is entitled *Iura Novit Curia* in International Law, the author of which is Dr Friedrich Rosenfeld, a practitioner and professor in Germany. It is to Dr Rosenfeld that I owe the reference to Aristotle above. It is clear from his chapter that the doctrine is well represented in international law and that a broad range of international adjudicators have applied it.

169. Finally, chapter 17 of the treatise, the author of which is Dr Giuditta C Cordero-Moss, a professor of the University of Oslo, is headed "General Report on *Jura Novit Arbiter*. She concludes (at 480):

> *Jura novit arbiter*, the maxim that justifies the arbitral tribunal's development of its own legal reasoning, may *prima facie* be deemed to contradict the fundament of arbitration, that is, the supremacy of party autonomy. A deeper examination, however, shows that the vast majority of the examined legal systems give the tribunal the power to make its own legal inferences from the submitted facts, and to independently interpret and apply the law…In many legal systems, however, the arbitral tribunal is expected to inform the parties of its independent legal reasoning, so as to give them the possibility to comment. These powers of independent legal reasoning only in few systems go so far as to permit the tribunal to order remedies different from those that were requested by the parties. Also, these powers have to be exercised cautiously and in the respect of the legal framework (particularly, of the principle of fair hearing). Moreover, they should ensure predictability – and this may be achieved if the tribunal reasons according to the guidelines laid down in the private international law.
>
> Recognising the tribunal's power to develop its own legal reasoning is not detrimental to arbitration, but quite to the contrary: it supports the role of arbitration as a credible method to settle disputes, and it thus contributes to counteracting emerging trends to restrict the scope of arbitrability in the name of ensuring more accurate application of the law.

170. In my judgment, this review of the treatise on *iura novit curia / iura novit arbiter* enables the following conclusions to be drawn for the purposes of this appeal:

(i) It is clear that the doctrine is standard in the civil law, even if not practised in the common law world.

(ii) It is impossible to say that Brazilian law does not recognise the doctrine as being applicable to international arbitration seated in Brazil.

(iii) It is impossible to say in general that the doctrine is not recognised in international arbitration. That makes it all the more improbable that, despite

the Brazilian cases of *MP Funds, TEC and EIT*, it could be concluded that Brazilian law only recognises the doctrine in the courts and in entirely domestic arbitration but not in international arbitration.

(iv) A line, possibly an uneasy line, may have to be drawn between cases where the doctrine answers the due process question of the right to be heard and cases where even a reasonable and conscientious party can be said to be unfairly caught by surprise such as to be deprived of substantial or natural justice.

(v) It is a different matter for a tribunal, court or arbitrator, to trespass outside the relief requested.

171. It is in these circumstances that I must resolve the most delicate conflict in this appeal.

172. I do not know of any other case in English or Cayman jurisprudence in which the significance of the doctrine of *iura novit curia* has fallen for appreciation as part of a due process or public policy challenge to recognition or enforcement of a foreign arbitral award. Although it is clear that ultimately due process or public policy have to be judged by home standards, it is also clear from the jurisprudence cited above that, where foreign court judgments (*Adams v. Cape Industries*) or arbitral awards (*Minmetals*) are concerned, the English court will take account of foreign law and procedure. The doctrine of *iura novit curia* is so widespread and well recognised in the civil law that I would be concerned if English and Cayman law would simply seek to ignore it. Half the world practises civil law, including nations which have helped to build the system of international arbitration, of which Switzerland is a leading example.

173. In the case of international arbitration in particular (but also in the case of exclusive jurisdiction clauses) the place or seat of arbitration, with its governing curial law, is a matter of choice. The parties cannot easily be excused from the responsibility of being aware of the procedural law which governs their arbitration. This does not apply in the same way to court cases, in the absence of an exclusive jurisdiction clause, where jurisdiction may be imposed by law rather than by choice.

174. Although it is possible and acceptable to consider that due process and public policy can be tantamount to the same thing, at any rate in cases where the breach of due process constitutes a negation of substantial or natural justice, it also needs to be remembered that breaches of due process come in every degree, from the most insubstantial to the most outrageous – which is why the English Arbitration Act will only give effect to a challenge to an English award based on due process ("serious irregularity" under section 68 of that Act) if the complainant proves substantial injustice as well as serious irregularity. For that purpose, it must therefore prove that the opportunity to address the point might well have made a significance difference, otherwise no substantial injustice can be shown. There has been no serious attempt, however, to prove an

analogous requirement in this case. That said, and given the separate defence provided for due process, I am inclined to think that the New York Convention defence of public policy is really intended for something which goes beyond even serious breaches of due process. Ultimately, however, this does not matter.

175. It is the requirement of the proof of substantial injustice that is fundamental to a due process challenge under section 68 of the English Arbitration Act in the case of an English award. I have no doubt that the same is true for the purpose of a due process challenge in the Cayman Islands to a Cayman award. In *Terna*, a much cited authority, Popplewell J put the matter thus (at para [85(3)]):

> A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

Popplewell J repeated that in his judgment in *Reliance Industries Ltd v. The Union of India* [2018] EWHC 822 (Comm), where he added (at para [15]):

> The principle at (3) reflects what was said in the Report on the Arbitration Bill of February 1996 by the Departmental Advisory Committee on Arbitration (the 'DAC Report'), namely that '[t]he court does not have a general supervisory jurisdiction over arbitrations'; the parties having chosen arbitration rather than litigation, s. 68 is 'designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'

176. A fortiori, in my judgment, must be the position where an English or Cayman court has to consider a due process challenge to the enforcement of a foreign award rendered under the procedure of a foreign law and on its merits reflecting the application of a foreign substantive law.

177. In the present case, the due process issue raised by MP Funds has been, in one form or another, considered by (i) the arbitral tribunal itself, (ii) the ICC Court of Arbitration, (iii) Judge Amaral, (iv) the São Paulo Court of Appeals, (v) the Supreme Court of Brazil (even if there is still an outstanding appeal there), and (vi) Mangatal J. I say that it has been considered by the arbitral tribunal itself, because their award makes express its consideration of and reasons for application of the doctrine of *iura novit curia*. For the same reason, namely because the award is express about its application of the doctrine and its motivation therefor, it is relevant to point out that the doctrine and its application have passed the scrutiny of the ICC Court, which is a

scrupulous reviewer of draft awards. I have discussed the role of Judge Amaral and of the São Paulo Court of Appeals above. And Mangatal J, as I have also discussed above, felt able to ignore the doctrine on the basis that it was a matter for Cayman law and that it did not apply to domestic Brazilian arbitration concerning international parties (international arbitration in Brazil).

178. What do we know about the particular circumstances in which the arbitrators applied the doctrine? The essential factual issues concerned first, the proper level of the company's working capital, and secondly the alleged fraud or malice of the respondent parties, and in particular the MP Funds' Mr Lap Chan. Those matters were hotly disputed, but resolved in favour of VRG. Although the fraud was deployed by VRG in their pleadings and submissions in favour of lifting the corporate veil, as an abuse of the privilege of separate corporate personalities, it cannot or ought not to have been a surprise that it came to be regarded as a fraudulent misrepresentation inducing the contract; or that the damages were at least the R$ for R$ adjustment to the price provided by the contract which had been so induced. Moreover, article 148 had been raised, even if briefly or in passing. It is said in the MP Funds' evidence that the arbitrators' reliance on article 148 was a surprise, but I do not see why it should have been so or can be reasonably adjudged to have been so in the setting of a procedural system which allowed the arbitrators to fit the law to the facts: about which the MP Funds must or ought to have been advised. I do not see why a proven fraudster found guilty of intentional deceit in the negotiation of a contract on behalf of its special purpose vehicles should complain of the obvious consequences of that deceit. I do not consider that the MP Funds could bring themselves within, for instance, the German exception of what a conscientious and knowledgeable party could not expect in a legal regime where the doctrine of *iura novit curia* applies.

179. In these circumstances, I consider that the fact that the Brazilian courts (and the ICC Court) have considered the arbitrators' deployment of the doctrine without finding (or warning about) a breach of due process to be significant and a matter for serious reflection.

180. I recognise nevertheless English and Cayman law's concern for the common law preference of inviting discussion of a new point of law, in the absence of which the court may well be inclined to accept a supervisory challenge to an award. I pay the closest and most earnest regard to that concern, which is healthy and just. Nevertheless, I find myself unable to condemn as unjust and against our own public policy a doctrine which is upheld in one of the great systems of law throughout the world, a fortiori when it has passed through the supervisory protections of the courts of the seat. If a domestic award is faulted by an English court on the basis of proof of substantial injustice, the award will in all probability (absent something to undermine the

independence and impartiality of the arbitral tribunal) be remitted to the arbitrators so that the error can be repaired. If, however, a foreign supervisory court dismisses a challenge, applying its own procedural law as the law of the seat and/or its own substantive law as the law of the obligations concerned, it is a significant matter for a court of another nation, asked to enforce an award pursuant to its Convention obligations, to disregard the promptings of the supervisory seat and insist that it knows better. Ex hypothesi, there will be no possibility of remission to the arbitral tribunal.

181. I therefore turn to consider the reasons which Mangatal J gave (set out in her para 172, cited at para 82 herein above) for concluding that it would be unfair to expect the MP Funds reasonably to have foreseen the arbitral tribunal's decision. She gave four reasons. The first was that article 148 imposes a tortious liability whereas the liability VRG claimed was contractual. However, a party accused of fraud in the negotiation of a contract should not, in my judgment, in the civil law setting of *iura novit curia*, be surprised to be found liable on a tortious basis. To conclude otherwise is to set the doctrine of *iura novit curia* at nought (which is what the judge essentially did). In any event, the principle of making a parent company liable for a subsidiary's fault as an *alter ego* through the process of piercing the corporate veil is not itself based on contractual liability, but is *sui generis* and depends not only on the subsidiary's fault but on the parent's own personal wrongful abuse of the benefits of independent personality of the limited company: and that partakes as much of delict as of contract.

182. The second reason was to contrast liability under article 148 with the arbitral tribunal's determination of jurisdiction. However, that determination did not depend on the *alter ego* theory being contractual but on the width of the wording of the arbitration agreement, to which, for other reasons, the tribunal adjudged that the MP Funds had adhered.

183. The third reason was to suggest that neither VRG nor the MP Funds had directed their evidence to alleging, or defending themselves against, the charge of fraud or malice in the negotiation of the Agreement, but only to abuse of separate corporate personality. However, in my judgment it is impossible to read the Final Award, significant parts of which I have set out above, as justifying that conclusion. In any event, it is irrelevant that either party mistakes where to apply its ammunition.

184. The fourth reason was to deny that the parties to the arbitration were concerned with questions of causation or damage flowing from the fraudulent misrepresentations alleged. Again, I find that conclusion hard to understand. One only has to read paragraphs 573 or 600 (for instance) of the Award (cited at para 26 above) to find the question of causation answered. Indeed, it is somewhat odd to find a submission that misrepresentations about working capital were of no

causative consequence. As for loss and damage, it is plain that the parties to the arbitration were concerned with litigating the loss flowing from misrepresentations as to the airline's working capital. The quantum of the price adjustment provided for by the Agreement (which despite the fraud there was no question of rescinding), being a R$ for R$ compensation for a misrepresentation as to the working capital of the airline, appears as a most natural figure, negotiated by all the parties to the arbitration, for compensating VRG in damages against the fraud committed against it.

185. The judge's fifth reason was essentially the same point as her fourth, but joined by the conclusion that "this was not the relief sought by VRG at all". It is of course true that VRG did not expressly found its case on article 148 as distinct from an *alter ego* and piercing of the corporate veil theory. But it is not true that it did not claim as its relief the loss which it was awarded, viz compensation according to the criteria of the price adjustment clause (estimated at a figure greater than awarded) for which not only the Sellers but also the MP Funds were to be held liable, even though the latter had not signed the Agreement. I refer to the Terms of Reference and "Statement of Argument", about which I shall say more in the section below.

186. Finally, in dealing with the judge's reasons, I refer to her para 179 (cited at para 86 above, where she preferred Mr Gomm's view that the doctrine did not apply to an international arbitration seated in Brazil or to international arbitration in general, which in my judgment in the light of the Brazilian judgments and the treatise on *jura novit curia* is an improbable or impossible conclusion to arrive at.

187. In any event, the judge never appears to have been asked to ask herself whether the MP Funds could prove that substantial injustice might have been caused so that a significant difference in outcome might have resulted. For myself, I have not been so persuaded.

188. In all these circumstances, although I have found the issue, in its way novel to English and Cayman jurisprudence, difficult and challenging, I have concluded that a New York Convention or a CI Enforcement Law defence, whether of due process or public policy, has not been proven.

Scope of the reference, and Terms of Reference

189. Finally, the MP Funds submitted, and Mangatal J agreed, that the arbitral tribunal purported to decide matters beyond the scope of the submission to arbitration. The judge did not refer expressly to the Request for Arbitration or the Terms of Reference, but simply concluded that, because VRG's legal grounds for holding the MP Funds liable were premised on the *alter ego*

theory, "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" (at para 183).

190. In my judgment, however, that conclusion is simply a further demonstration of the judge's decision to set at nought the doctrine of *iura novit curia*. Ex hypothesi, the doctrine comes into play when the tribunal adopts as its own legal grounds for decision a legal categorisation which a party has not adopted for itself. However, this final issue has to be considered on the basis that the arbitrators in this case were entitled to do so, at any rate as long as they did not go outside the *petitio* or relief or prayer claimed. As to that, Judge Amaral specifically covered this point in his judgment, at para [3][iv] thereof (my interpolated numbering, cited herein at para 45 above), a passage which was cited with approval by the São Paulo Court of Appeals.

191. In the arbitration, VRG claimed (inter alia) that the MP Funds had defrauded it in negotiating the Agreement by misrepresenting the airline's working capital accounts and that Mr Lap Chan had himself played a direct role in doing so and in preparing and altering critical figures in his own handwriting; and that it had done so in order by its deceitful conduct to induce VRG to pay a higher price than the airline's true book value (see for instance VRG's "statement of arguments" at paras 34ff). In order to remedy (inter alia) this deceit, VRG claimed in its prayer, both in its request for arbitration and in its statement of arguments, the payment of an amount to be ascertained by the arbitral tribunal (unquantified in the former document but quantified at over R$ 139 million in the latter document) "in accordance with the price adjustment criteria" set out in the Agreement's price adjustment clause 5, but not specifically designating such claim to payment to be either contractual or by way of damages.

192. As for the Terms of Reference, at that initial stage, the matters were addressed more broadly and with less detail, and it is fair to say that the emphasis was on performance of the price adjustment clause. Nevertheless, it was recorded that VRG claimed that the MP Funds' abuse and unlawful and inequitable conduct justified piercing the corporate veil. As is common with such ICC terms of reference, the document stated as to "Issues to be Determined" that –

> 43. The Tribunal shall decide on all of the issues to be determined resulting from the claims and requests of the parties described in paragraph D above and in the written documents that the parties present during the proceedings. The Tribunal may also decide on new claims by the parties, under the terms of Article 19 of the ICC Rules.
>
> 44. The Tribunal does not consider it appropriate at this time to list the issues to be determined, making use of the power granted to it to that end by Article 18 of the ICC Rules.

193. Such drafting is common in ICC terms of reference to avoid the potential of what are essentially pleading points turning into jurisdictional traps. If thereafter the parties or any of them considered that the claims or arguments being addressed raised procedural issues as to the scope of the reference which might need to be determined by the arbitral tribunal under the ICC Rules, then they could raise the issue before the tribunal. Neither this court nor Mangatal J have been asked to find that the MP Funds ever sought to do so. As stated above, Mangatal J decided this point merely as an adjunct to her rejection of the doctrine of *iura novit curia*.

194. In any event, in my judgment Mangatal J mistook the significance of a doctrine of piercing the corporate veil as being a contractual remedy and over-emphasised its distinction from an obligation in fraud. I can illustrate this by reference to the leading modern English authority on piercing the corporate veil found in *Petrodel Resources Ltd v. Prest* [2013] UKSC 34, [2013] 2 AC 415. There Lord Sumption explained that in the civil law piercing the corporate veil depended on showing abuse of rights such as fraud, malfeasance or evasion of legal obligations (at para [17]). In English law, the expression covered an amorphous net of principle, but was (similarly) founded on what he called the "evasion principle", which depended on "a legal right which exists independently of the company's involvement" (at para [28], and see also Lord Neuberger at para [81]). Moreover, it ultimately resided in the concept that "fraud unravels everything". As Lord Denning said in *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702 at 712, cited by Lord Sumption at para [18] and by Lord Neuberger at para [83], "No court in this land will allow a person to keep an advantage which he has obtained by fraud...Fraud unravels everything." So far as Brazilian law is concerned, we have of course all the material which I have referred to and relied on in this judgment.

195. This fourth defence raised by the MP Funds is one to which comparatively much less attention has been paid, so much so that it is possible, although the matter is arguable, that VRG failed to appeal against the judge's brief paragraphs about it. In any event, Mr Lowe has asked this court, if necessary, for leave to amend his grounds of appeal in order to meet it. I would grant leave, and put VRG on terms that it amend its grounds of appeal accordingly.

Discretion

196. Mr Lowe submits that even if he is wrong on each or even all of the above issues, this court still has a discretion to enforce the award. As it is, in my judgment VRG has no need for the exercise of such a discretion. But if it did, I would not exercise it in VRG's favour.

The outstanding appeal process in Brazil

197. It is still possible, even if on past form it seems unlikely, that the MP Funds could ultimately succeed in their outstanding appeal to the Supreme Court in Brazil. If such an appeal did succeed, then it is difficult to conceive, on the issues considered in this judgment, that the award ought to be enforced in the Cayman Islands. How is this possibility to be guarded against? Article VI of the New York Convention and section 7(5) of the CI Enforcement Law allow the court before which enforcement is sought to adjourn the enforcement proceedings pending the outcome of set aside proceedings in the courts of the seat. It is plainly too late for that. However, the next best thing is that execution of a judgment to enforce ought to be stayed pending the outcome of the MP Funds' Brazilian appeal. Were that appeal to be allowed, the MP Funds would be entitled to return to these courts to have the stay made permanent.

Conclusion

198. In conclusion, I would allow VRG's appeal and enforce the award, subject to a stay pending the conclusion of the Brazilian proceedings.

Sir John Martin JA

199. I agree

Sir John Goldring, President

200. I also agree.