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Varig Case and Implied Consent: Is the Signing of an Amendment Sufficient?

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On August 11th, 2020, the Cayman Islands Court of Appeals [overturned](#) the [decision](#) that denied the enforcement of the arbitral award that ordered the MatlinPatterson Global Opportunities Partners private investment fund (“MP Funds”) to pay approximately USD 55 million to Gol Airlines. The amount refers to the purchase of the airline Varig by Gol.

The Underlying Dispute

After Varig’s purchase operation was completed, it came to Gol’s attention that the balance sheet that served as parameter for establishing the final price had been tampered with. The matter was discussed in the International Chamber of Commerce arbitration No. 15372, leading to the MP Funds’ condemnation.

The procedural issue addressed by the Arbitral Tribunal and that is now once again discussed in the Cayman Islands’ courts regards the extension of the arbitration agreement and implied consent, a recurring subject in arbitrations.

The Issue of Implied Consent

It is common knowledge that arbitration agreements bind only the ones who consent to them. Be that as it may, there are some occasions when parties seek to extend this consent, to reach so-called third parties. This is usual, for example, in groups of companies, when a party seeks to extend the arbitration agreement to bind companies of the same group as one of the signatories.

In the matter at hand, the airline initiated the proceedings not only against the sellers, but also against MP Funds. MP Funds was not a signatory to the share purchase agreement that contained the arbitration clause and therefore could not be part to the proceedings. Nonetheless, it had signed one of the Contract Amendments. The Amendment did not mention arbitration. Its objective was to provide a non-compete obligation for the signatories and thus integrate it into the Contract, which is supported by the expression “including amending the terms of the Contract”.

As a result, the Claimant requested the Arbitral Tribunal to declare that it had jurisdiction to hear

the case against MP Funds on the grounds that it became a signatory to the arbitration agreement when it signed the Amendment even though it was not a direct signatory to the Contract.

But would the signature of an Amendment suffice to constitute implied consent to the arbitration clause?

Well, the guiding principle of arbitration is *consent*. Yet it will not always be expressed. It may be that the parties' behavior demonstrates a genuine intention to participate in the arbitration procedure.¹⁾ It is the so-called implied consent.

The Arbitral Tribunal's Ruling on the Procedural Issues

When analyzing the issue in 2007, the Arbitral Tribunal recognized that the subjective limits of the arbitrator's jurisdiction did not impose any obstacle. In this sense, the arbitrators ruled that they had jurisdiction over MP Funds in its *partial award*.

The reasoning behind the decision was that the Amendment constitutes part of the main Contract. For this reason, the arbitration agreement provided for in the Contract is binding on all signatory parties, whether in the main Contract or in the Amendment. In view of that, all disputes between the parties of the contractual relationship had to be resolved through arbitration.

MP Funds' Attempts to Annul the Award before the Brazilian Courts

After the final award on the merits, which ordered MP Funds to pay USD 55 million to Gol, the latter filed an annulment action of the arbitration award, on the grounds that it had not signed the Contract containing the arbitration clause and therefore the Arbitral Tribunal would have no jurisdiction over it. Although it had already brought these arguments before the Arbitral Tribunal in the beginning of the arbitration proceedings, once again the arbitrators' consent and jurisdiction were brought to discussion.

Notwithstanding, the *trial judge recognized* that MP Funds consented to the arbitration clause for having signed the Amendment, which rendered the award valid. The case was also subsequently analyzed by the *São Paulo Court of Appeals* and by the *Brazilian Superior Court of Justice* and, likewise, the award remained unchanged. Nevertheless, there still was a pending appeal before the Brazilian Supreme Court.

Gol's Attempts to Enforce the Award

However, the obstacles did not stop there. Gol still needed to enforce the award. The company's first attempt in the United States was unsuccessful. The United States Court of Appeals for the Second Circuit *ruled* that the Amendment was only an annex to the Contract and thus did not link MP Funds to the arbitration clause.

The second attempt was in the Cayman Islands. The enforcement of the arbitration award was

challenged on four grounds: (i) MP Funds was not party to the arbitration agreement relied on; (ii) if they were, the claims were outside the scope of the arbitration agreement; (iii) the Arbitral Tribunal decided the case on a legal argument not raised by the Claimant, which was contrary to Cayman Islands public policy; and (iv) the legal basis relied on by the Arbitral Tribunal was not within the Terms of Reference of the arbitration procedure and so had never been submitted to the Arbitral Tribunal for decision.

On the other hand, Gol's argument was based mainly on estoppel due to the Brazilian Courts' decisions. However, the Grand Court [rejected](#) Gol's claims for estoppel. It agreed with MP Funds' reasoning on all four grounds and refused to enforce the award.

The Cayman Islands Court of Appeals Ruling

The Court of Appeals accepted Gol's submissions, entirely reversing the decision of the Grand Court, and allowing the enforcement of the arbitration award. The Court of Appeals' decision addressed all the arguments brought up by MP Funds. As to those related to implied consent, which is the focus of this article, it ruled that "*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*". Thus, it held that MP Funds are estopped from challenging the Brazilian law decisions regarding the validity of the arbitrators' jurisdiction.

Ultimately, the Court of Appeals decision represented a "light at the end of the tunnel" in the Varig Case. Ten years after the proceedings were concluded, it allowed the arbitral award to be enforced.

However, since it was possible that MP Funds succeeded in their remaining outstanding appeal before the Brazilian Federal Supreme Court, the Court of Appeals granted a stay of execution pending the outcome of the Brazilian proceedings. It considered that, in this scenario, it would be difficult to conceive that the award should still be enforced in the Cayman Islands. Therefore, it established that if the appeal were to be successful, MP Funds would be entitled to return to the Cayman Islands' courts and have the stay made permanent.

Nonetheless, after the Cayman Islands Court of Appeals decision, the Brazilian Federal Supreme Court [judged](#) the remaining appeal. It upheld the decisions of the Brazilian lower courts. On 29th August the Supreme Court's decision became *res judicata*. Thus, given that the stay of execution was associated with the judgement of this appeal, Gol should now be allowed to enforce the arbitral award.

Conclusion

The analysis of this case demonstrates how controversial the issue of implied consent is on international arbitration. Although the Arbitral Tribunal's understanding was that MP Funds demonstrated its intent to submit to arbitration when signing the Amendment, the perception of the United States Court of Appeals and of the Cayman Islands Grand Court was different. Conversely, the interpretation of the Brazilian courts was consistent: the signing of the Amendment is sufficient to characterize implied consent.

The Amendment contained a specific provision establishing that it intended to modify the Contract. In this sense, it is part of the contractual relationship and thereby binds all its signatories to the arbitration agreement.

After all, a company that, in the exercise of its autonomy, signs one of the amendments to a share purchase agreement is clearly aware of the context of the operation, of the main contract's provisions and of the legal consequences of its signature. Thus, it cannot later argue that it did not intend to participate of the arbitration procedure. In another words, the signing of the Amendment can and should be considered as implied consent.


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References

FOUCHARD, Philippe; GAILLARD, Emmanuel; GOLDMAN, Berthold. *Fouchard, Gaillard, ?1 Goldman on International Commercial Arbitration*. The Hague: Kluwer Law International, 1999, p. 281.

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