

## Article

# Cayman Enforcement of Foreign Arbitral Awards: The Pro-Enforcement Objective and Purpose of the Law

Authors: Anna Lin, Partner | Jonathon Milne, Partner | Natalie Fung, Legal Manager

In the recent judgment of *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others (Appellants)* [2022] UKPC 21, the Privy Council upheld the decision of the Court of Appeal of the Cayman Islands to the effect that the Appellants had no grounds to resist the recognition and enforcement of an arbitration award issued by a Brazilian tribunal (the “Award”).

It is clear from this decision, together with previous authorities, that it is difficult for parties attempting to persuade the Cayman court that the foreign tribunal has erred and to resist enforcement on that basis alone. Even though there are a range of potential defences available to an opposing party, there is a high threshold to meet to convince the Cayman court that enforcement should be refused.

## The Dispute and the Award

The dispute in the *Gol Linhas* proceedings arose under a share purchase and sale agreement dated 28 March 2007 for the sale of shares in an airline company (the “SPA”). The purchaser was a company which was later merged into the Respondent making it its universal successor under Brazilian law. The sellers were subsidiaries of a Delaware company established by the Appellants as a vehicle to invest in the Brazilian airline business. The first Appellant is a Cayman Islands exempted limited partnership.

The Appellants were not parties or signatories to the SPA, but signed an addendum to the SPA giving an undertaking to not compete with the airline business for a period of time. The Respondent and the sellers disagreed with respect to the calculation of the adjustment of the purchase price. As a result, the Respondent referred the matter to arbitration under Brazilian law claiming a sum from the sellers pursuant to the price adjustment clause and alleging that there was an abuse of legal personality which would justify piercing the corporate veil, holding the Appellants jointly and severally liable with the sellers for the sum claimed.

The Brazilian tribunal ruled in favour of the Respondent but rejected the submission that the circumstances warranted the piercing of the corporate veil. Ultimately, the tribunal held that the Appellants were liable to pay the sum claimed based on the concept of “third party malice” under Brazilian law.

## Historical Background

Between December 2010 and August 2020, the Appellants made various applications to the Brazilian court seeking to set aside the Award (the “Annulment Action”). Those applications failed and, as a result, the Appellants exhausted all rights of appeal in the Brazilian Courts.

On 1 September 2016, the Respondent made an *ex parte* application to the Grand Court of the Cayman Islands for leave to enforce the Award against the Appellants and an order was granted by Ms. Justice Mangatal (the “Enforcement Order”). In response, at the *inter-*

*partes* stage, the Appellants applied to set aside the Enforcement Order and, on 19 February 2019, Mangatal J delivered a judgment setting aside the Enforcement Order.

The Respondents' first attempt to apply for leave to appeal was refused, but was subsequently allowed after the Respondent renewed its application. On 11 August 2020, the Cayman Court of Appeal delivered a judgment granting the Respondent leave to appeal, allowing the appeal and restoring the Enforcement Order, which allowed the Respondent to enforce the Award.

The Appellants then appealed to the Privy Council.

## The Privy Council Decision

The Appellants relied on Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York (the "Convention"), as implemented in the Cayman Islands by the *Foreign Arbitral Awards Enforcement Act 1975 (1997 Revision)* (the "FAAEA"), and appealed on the following grounds:

1. The Cayman Court of Appeal was wrong to find that the Appellants were precluded by issue estoppel from resisting enforcement pursuant to Article V (1)(a) of the Convention on the ground that they were not parties to the arbitration agreement given that these issues were decided in the Annulment Action;
2. The Cayman Court of Appeal was wrong to find that the Award did not fall within Article V(1)(b) and/or V(2)(b) of the Convention on the basis that there was a serious breach of natural justice or due process by the Brazilian tribunal by finding the Appellants liable on a legal ground that the Respondent did not raise and not allowing the Appellants to be heard on that point; and
3. The Cayman Court of Appeal was wrong to find that Article V(1)(c) of the Convention did not apply on the basis that the subject matter of the Award is beyond the scope of the submission to arbitration given that, even if the Appellants were parties to an arbitration agreement, the scope of the agreement was limited to the non-compete obligation contained in the addendum.

### *First Ground*

Under common law principles, to give rise to an issue estoppel on a foreign judgment, the below requirements must be satisfied:

1. The judgment was given by a court of a foreign country with jurisdiction to give and the judgment is final and conclusive on the merits;
2. The parties in the two actions must be the same; and
3. The issue decided by the foreign court must be the same as the issue in the domestic proceedings.

There was no dispute that the first and second requirements were satisfied. With respect to the third requirement, the Privy Council held that based on the terms of the judgments of the Brazilian court it was apparent that, in the Annulment Action, the Brazilian court made an independent or *de novo* determination of the issue about the validity of the arbitration agreement and did not just undertake a limited review of the arbitral tribunal's decision. As such, the Privy Council agreed with the Cayman Court of Appeal's decision that the circumstances gave rise to an issue estoppel.

### *Second Ground*

The Privy Council was not satisfied that there was a serious breach of due process or denial of procedural fairness so as to justify a refusal of the enforcement of the Award. This was decided taking into consideration factors including the Brazilian court's finding that there was no violation of due process and that this was upheld at the highest level of the Brazilian court system.

### *Third Ground*

The argument that the dispute was not within the scope of the arbitration agreement was dealt with in the Annulment Action and the Brazilian court had rejected that argument. Therefore, the Privy Council held that there was an issue estoppel and the argument could not be put forward again.

As such, the Privy Council upheld the Cayman Court of Appeal's decision.

## Cayman Courts' Pro-Enforcement Attitude

Whilst the Convention offers a range of potential defences to be advanced in response to recognition and enforcement proceedings in the Cayman Islands, the bar is high in terms of what defendants will need to put forward as evidence in order to satisfy the Cayman court that there is a compelling defence.

In the present case, one of the purported grounds for refusal was a serious allegation that there was a breach of due process or denial of procedural fairness, given that the Appellants were allegedly deprived of a chance of being heard on certain points. In other words, the Appellants claimed that the Brazilian tribunal had violated their fundamental rights. Although there was no dispute that the Brazilian tribunal had relied on a legal ground that was not argued by the parties, the Privy Council observed that it was relevant to take into account that the Award was upheld by various Brazilian courts and refused to accept the Appellants' submissions on this ground.

The Privy Council's findings in this case are consistent with the Cayman court's previous judgments in *In the Matter of Arcelormittal USA v Essar Steel et al* and *In the Matter of China Hospitals Incorporated*. The Convention, which formed the basis of the FAAEA, has a broad public policy goal of upholding the validity of arbitral awards and adopting a restrictive approach to undermining them. Recent authorities suggest that the Cayman court is pro-enforcement, which is consistent with the goal of the Convention, and will only allow recognition and enforcement of a foreign arbitral award to be rejected in limited circumstances with the benefit of cogent evidence in support.

---

### Contacts:

**Anna Lin**  
Partner, Hong Kong  
anna.lin@conyers.com  
+852 2842 9591

**Jonathon Milne**  
Partner, Cayman Islands  
Jonathon.milne@conyers.com  
+1 345 814 7797

**Natalie Fung**  
Legal Manager, Hong Kong  
natalie.fung@conyers.com  
+852 2842 9427

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

For further information please contact: [media@conyers.com](mailto:media@conyers.com)