

## 公报文章

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

## 开曼对外国仲裁裁决之执法：主张执法与法规目的

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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

近日枢密院在 *Gol Linhas Aereas SA (前称 VRG Linhas Aereas SA) (答辩人) v Matlin Patterson Global Opportunities Partners (Cayman) II LP and others (上诉人)* [2022] UKPC 21 维持开曼群岛上诉法院的判决，即上诉人并无理据拒绝承认及强制执行巴西仲裁处颁布的仲裁裁决（“该仲裁裁决”）。

由过往案例及该判决结果显示，当事人试尝说服开曼群岛法院是不容易的，更不能单单只提出就外国法院出错为由而要求不执行该判决。虽然反对方拥有一系列潜在抗辩理由但能足以说服开曼群岛法院的门槛相当高。

### 争议及裁决

*Gol Linhas* 一案的争议始于一份日期为 2007 年 3 月 28 日关于一家航空公司股份出让的股份买卖协议（“买卖协议”）。买方为一家公司，而该公司后来合并入答辩人中，按照巴西法规该合并使答辩人继而成为全财产继承人。卖方原为上诉人于特拉华州成立的子公司以作为上诉人投资巴西航空业务的工具。第一上诉人为开曼群岛豁免有限合伙入。

上诉人并不是买卖协议的合约方或签署方之一，但在买卖协议附录中的承诺不参与航空业务竞争书是由上诉人所签署的。由于答辩人和卖方对出售价格调整未能达成共识，因此答辩人把事情以仲裁方式并按照巴西法规及根据价格调整条

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

款向卖方索取金额及控诉当中有滥用人身份借以要求揭开公司面纱及要求上诉人及卖方对所索偿金额负连带责任。

虽然巴西法院批准答辩人申索但认为案情并不符合揭开公司面纱条件故予以拒绝。最终，巴西法院按巴西法规中“第三者恶意”概念判处上诉人须负责索偿金额。

## 历史背景

在 2010 年 12 月至 2020 年 8 月期间，上诉人曾向巴西法院提交多则有关于搁置该仲裁裁决的申请（“无效申请”）。该些申请均被撤回，故此，上诉人已耗尽所有在巴西法院上诉的权力。

在 2016 年 9 月 1 日，答辩人向开曼群岛大法院提交了单方面的申请（*ex parte application*），法官 Justice Mangatal 女士判令向上诉人就该仲裁裁决强制执行的法庭命令（“执行命令”）。就此，于多方当事人阶段中，上诉人申请搁置执行命令，并在 2019 年 2 月 19 日，法官 Justice Mangatal 女士亦判定搁置执行命令。

答辩人第一次尝试作出上诉申请被拒，但后续答辩人的申请获重新考虑。在 2020 年 8 月 11 日，开曼群岛上诉法院接受答辩人的上诉申请，判定上诉成功并恢复执行命令，令答辩人可以执行先前的该仲裁裁决。

上诉人继而上诉至英国枢密院。

## 枢密院的判决

上诉人基于受联合国会议有关纽约的国际商业仲裁所采纳的承认及执行外国仲裁裁决公约（“公约”）的第五章以及在开曼群岛执行的外国仲裁裁决法案 1975（1997 年的修订版）（“FAAEA”），就以下的依据作出上诉：

1. 鉴于被告人并非仲裁协议订约方，而有关事宜已于撤销权诉讼中有所决定，故开曼群岛上诉法院判定上诉人因禁止反言而不得根据公约第 V (1)(a) 条拒绝强制执行，实为错误。
2. 开曼群岛上诉法院错误地判定该仲裁裁决不受制于公约的第 5 章 (1) (b) 及/或第 5 章 (2) (b)，基于到巴西法庭在判定一个答辩人未有提出及上诉人未许可回应的法律依据，严重违反自然公正或正当程序的原则；及
3. 开曼群岛上诉法院错误地判定公约的第 5 章 (1)

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

(c) 不应用于该案件，基于该仲裁裁决超于所提交的仲裁的范围，即使上诉人包括在仲裁协议内，该协议的范围只限于在附录的竞业责任。

#### *就依据的第一点*

在普通法的原则下，在给予在海外判决的既判争点禁反言，需满足以下的条件：

1. 该判决须获该司法管辖权的海外法院给予及认可该判决为最终及结论性的特点；
2. 两个案件的当事人须相同；及
3. 海外法庭判定的争议须与本地程序涉及的争议相同。

该案件毫无疑问地满足了以上的第一点及第二点的条件。就第三点的条件，枢密院判定，基于巴西法院裁决的内容，巴西法院在判定无效申请时在有关仲裁协议的有效性争议上作出了独立或重新的决定同时并未有作出受制于该仲裁裁决作出判决。因此，枢密院同意开曼群岛上诉法院就案件是否涉及给予既判争点禁反言的决定。

#### *就依据的第二点*

枢密院不认为巴西法院有作出严重违反正当程序或拒绝行使程序公义并且巴西法院的行为不足以正当化去拒绝执行命令。这应取决于一篮子的因素包括巴西法院的裁决，而该裁决未有违反正当程序和由巴西最高司法机构所维持。

#### *就依据的第三点*

巴西法院早已在无效申请中拒绝就不在诉讼协议的范围的论点。因此，枢密院判定该案件有既判争点禁反言而该论点不会再次进一步作讨论。

因此，枢密院维持了开曼群岛上诉法院的判决。

### **开曼群岛法院对执法的取向**

纵然公约中就承认及强制执行程序提供一系列可予提出的潜在抗辨理由，但能以说服开曼群岛法院的门槛相当高，被告人须提出十分有说服力抗辨理由。

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.

**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.**

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在前述案例，上诉人指出其中一个对被拒绝的理据较为严重的指控为程序失当或缺乏公平公正的程序，上诉人声称被剥夺被聆听的机会，即等于上诉人声称巴西法院侵犯了其基本权利。虽然巴西法院所依据的法律理据并未有受到争论但枢密院认为值得注意的是该裁决已被不同的巴西法庭认定及拒绝接纳上诉人的申请。

枢密院在此案例的判决与开曼群岛法院前于 *In the Matter of Arcelormittal USA v Essar Steel et al* 和 *In the Matter of China Hospitals Incorporated* 案中的判决是一致的。公约是以 FAAEA 为基础而成立的，其广泛公共政策目标为维持仲裁裁决及对拒绝裁决采取严格方针。按近期案例来看，开曼群岛法院倾向强制执行，与公约目标相符，并只容许在有限的情况下及具有相当说服力理据支持下才会拒绝外国仲裁裁决。

本文不应被视为法律建议或法律意见，其内容并非详尽无遗，仅可作为概览及一般参考资料。感谢您的垂阅。

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