

Litigation & Dispute Resolution

Second Edition

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Cayman Islands

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Efficiency/integrity

The Cayman Islands are a British Overseas Territory, with a stable democratic system of government and a low crime rate. The legal system is based on the English common law, as amended by domestic statute, with the Privy Council as the highest Court of appeal. The legal structures, concepts and approach are instantly recognisable to any English, US or other common law adviser. This backbone of legal similarity and political stability has proved crucial to the growth of the Islands.

Over the last 20 to 30 years, the Cayman Islands have developed specific legislation to facilitate a wide range of international financial transactions. In addition, the Cayman Islands have a broad and deep pool of accountants, bankers, lawyers and other service providers in order to offer service levels similar to those found in the leading onshore centres.

Over 40 of the top 50 banks globally hold licences in the Cayman Islands. With nearly 10,000 registered investment funds, Cayman Islands fund vehicles are routinely used by institutional and independent asset managers. Cayman vehicles are considered, by a very wide margin, to be the market leader for offshore hedge funds. In terms of insurance, the Cayman Islands are one of the most attractive jurisdictions for captive vehicles, and continue to be the leading jurisdiction for healthcare captives.

The administration of justice in Cayman is carried out on three levels: Summary Court, Grand Court and the Court of Appeal. In 2009, in response to the needs of the financial services industry, the Financial Services Division of the Grand Court was established (the FSD). The FSD has dedicated, highly experienced and sophisticated judges presiding over complex financial services disputes.

Appeals from the Grand Court lie to the Cayman Islands Court of Appeal. Further appeal lies to the Judicial Committee of the Privy Council in London. Judgments of the Privy Council are persuasive in many jurisdictions. By way of example, the Privy Council recently made new law extending the tort of malicious prosecution to civil as well as criminal cases, in the Cayman Islands matter of *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited* [2013] UKPC 17.

Enforcement of judgments/awards

In principle, foreign judgments and arbitral awards can be enforced in the Cayman Islands Courts. With the exception of Australian judgments, there is presently no system for registration and automatic enforcement of foreign judgments. Instead, judgments are generally enforced by Court action as if they were based on a contractual right. The process for enforcement therefore involves the commencement of a fresh action in the Cayman Islands Courts. Judgment is usually granted on a summary basis. Once granted, the judgment can be enforced by seizure of property or other means, as with any other local judgment.

There are a number of well established formal requirements which must be satisfied before the Court will enforce a foreign judgment or arbitral award. These are as follows:

- The foreign Court or tribunal was competent to hear the claim.
- The judgment or award involves a positive obligation, such as an obligation to pay a debt or perform a specified task.

- The judgment or award is final and conclusive.
- The judgment or award does not involve taxes, fines or penalties.

The requirement that the foreign Court was competent to hear the claim should be assessed with reference to the principles of Cayman Islands law, rather than the law of the country making the judgment. This important distinction was illustrated in the case of *Banco Mercantil Del Norte SA v Cabal Peniche* [2003 CILR 343], in which the Cayman Islands Court declined to summarily enforce a judgment of the Mexican Courts.

It was argued that the defendant in that case had submitted to the jurisdiction of the Mexican Court by voluntarily appearing in those proceedings. The appearance relied on what is known as Amparo proceedings in the Mexican Courts. The aim of the Amparo proceedings was to obtain an order setting aside the deemed service of the proceedings. This would be considered a submission to the jurisdiction of the Mexican Courts, but under Cayman Islands law it would not.

Under Cayman Islands law, purely contesting the jurisdiction of the Court does not amount to a voluntary submission to the jurisdiction. Accordingly, on the facts of this case, there was real doubt that the Mexican Court had jurisdiction (applying Cayman Islands law), and the Cayman Islands judge declined to grant summary judgment on the enforcement application. The judge concluded: “*I am of the view that this was a purely jurisdictional hearing on the face of the record. The threshold for a summary judgment is not met in my view.*”

Another area that merits caution is trust law. Practitioners should be aware that there are circumstances in which the Cayman Islands Courts will not recognise foreign trust laws or enforce judgments that are inconsistent with Cayman Islands trust law and practice. The *Trusts Law (2011 Revision)* will sanction the transfer of property into a trust, with the intention of defeating rights conferred by a foreign law “*by reason of a personal relationship*”, such as that of husband and wife, or defeating forced heirship rights under a foreign law. For example, a trust might be established to prevent a relative from inheriting property he or she would have inherited as of right under the relevant foreign law. The Cayman Islands Courts will not recognise a judgment of a foreign Court requiring the transfer of property into a trust of this nature to be set aside.

Cross-border litigation

A very large part of the business of the Cayman Islands Courts is cross-border in nature. The judges of the Cayman Islands Courts regularly interact and cooperate with judges from other jurisdictions. The Cayman Islands Courts are in principle receptive to requests for judicial assistance from other Courts, including requests for the production of documents or the examination/deposition of witnesses located in the Cayman Islands.

A good example of successful cooperation between the Cayman Islands and other Courts is the collapse of the Bank of Credit and Commerce International (“BCCI”). BCCI’s worldwide operations were put into a coordinated liquidation process in 1991. The liquidation has since resulted in substantial recoveries for creditors. Central to the success of the liquidation was a plea-bargaining agreement struck between the Cayman Islands liquidators and the United States authorities. The following extract from one of the overseas liquidator’s reports confirms the extent of the co-operation involved.

“In November and December of 1991, under the supervision of the Grand Court of the Cayman Islands, the District Court of Luxembourg, and the High Court in England, the BCCI liquidators negotiated an historic plea and co-operation agreement with the United States. The Agreement was presented to the Grand Court of the Cayman Islands and approved in December 1991.”

“In accepting this agreement, Judge Joyce Hens Green of the United States District Court for the District of Columbia stated:

The Plea Agreement now before the Court reflects, on a truly global measure, extraordinary efforts and amazing co-operation of a multitude of signatories representing myriad jurisdictions, to fully settle actions against the corporate defendants, which had operated in 69 countries around the globe, and through the plea restitution, to locate

and protect all realizable assets of BCCI for the ultimate benefit of the depositors, creditors, United States financial institutions, and other victims of BCCI. The promise of the Plea Agreement is that those extraordinary efforts, that amazing co-operation, should continue.”

Cross-border insolvencies have continued to generate ground-breaking decisions. An example is the English Supreme Court decision in *Rubin v Eurofinance* [2012] UKSC 46, where the English Supreme Court established that a judgment made in foreign insolvency proceedings would not be enforced against an English defendant, unless the defendant had been within the jurisdiction of the foreign Court.

It had previously been suggested that judgments made in insolvency proceedings in the country of an insolvent company's incorporation or centre of main interests (including claims to set aside pre-insolvency transactions) should be enforced against defendants domiciled elsewhere, even where they had not submitted to the insolvency jurisdiction.

The decision in *Rubin* is likely to be followed by the Courts in the Cayman Islands and other offshore jurisdictions. It may lead to more claims having to be brought in offshore jurisdictions where asset holding companies are domiciled.

The *Rubin* decision also brings the conflict of laws position in international insolvencies more in line with applicable principles in commercial cases. An interesting variation on this theme was presented in the Cayman Islands case of *Irving Picard and Bernard Madoff Investment Securities LLC (in Securities Investor Protection Act Liquidation) v Primeo Fund (In Official Liquidation)* [Unreported, 14 January 2013]. In this case, applying *Rubin*, liquidating trustees appointed in the United States brought proceedings in the Cayman Islands to recover assets alleged to be due to the bankrupt Madoff estate. The proceedings had to be brought in the Cayman Islands because the defendants were not within the jurisdiction of the United States bankruptcy Courts.

However, the liquidating trustees sought to argue (amongst other things) that the Cayman Islands Courts should apply the relevant United States bankruptcy laws rather than Cayman Islands law. It was argued that it was open to the Cayman Islands Courts to apply foreign bankruptcy laws, based on sections of the Cayman Islands companies legislation that encourage cooperation with foreign office-holders. The Cayman Islands Court found that any avoidance proceedings (e.g. proceedings to set aside suspect transactions) a foreign office-holder wishes to bring in the Cayman Islands would have to be brought under the applicable Cayman Islands legislation. It follows that a careful analysis of the rights and remedies available in the Cayman Islands must be undertaken before avoidance claims are brought against parties domiciled in the Cayman Islands.

Privilege and disclosure

Cayman Islands law follows the traditional common law approach to both privilege and disclosure. Privilege will apply to legal advice generally and also to communications made in contemplation of litigation. During the course of litigation, all parties are under an automatic and strictly enforced obligation to disclose documents within their control that relate to the matters in issue. This includes documents that are adverse to their case and that may lead to a “train of enquiry”. Parties must also identify documents that were once but are no longer within their control, for example if they have been lost or destroyed.

One issue that must always be considered when litigating in the Cayman Islands is confidentiality. Unlike the traditional common law approach, where disclosure obligations generally override confidentiality, Cayman Islands law requires that the leave of the Court be first obtained before certain confidential documents are disclosed. *The Confidential Relationships (Preservation) Law (2009 Revision)* (“CRPL”) makes it a criminal offence to disclose (including in litigation) confidential information with respect to business of a professional nature without leave of the Court.

A recent example of the CRPL in practice is a decision of the Hon Mr Justice Foster, dated 26 April 2013 (the party names were withheld for obvious reasons) in which he declined to permit the disclosure of certain banking records requested by a Production Order issued at the request of the

English police. The judge noted the desirability of international co-operation and that the CRPL permitted the Court to allow disclosure for the purpose of proceedings before “any court, tribunal or other authority”. However, he found that the police were not an “authority” within the meaning of the CRPL and declined to grant leave. He concluded that to disclose “confidential material to the police to assist them in their investigation is a step too far and would in effect amount to sanction of the acquisition by the police of a wide range of generalised material that is clearly confidential; in effect sanction of a “fishing expedition”.”

Costs and funding

Courts in the Cayman Islands follow the principle of “loser pays” in most situations. The winner generally has to wait until the conclusion of the case to receive payment, and only then after the amount has been assessed by the Court in a process called taxation. It is possible in some circumstances to require the provision of security for costs up front. It is also possible to ask the Court to require third parties who have in fact been directing litigation behind the cloak of the named party to pay the winner’s costs. Contingency fees are not recoverable in the Cayman Islands.

There have been a number of high-profile claims in recent times against directors of Cayman Islands companies for breach of duty, amongst other things. One particular feature of Cayman Islands’ company law is the availability of widely drawn exclusions of liability for directors.

Cayman Islands law follows the traditional approach of the English Courts in trust cases, where trustees may exclude liability very widely. It is not uncommon for the Articles of Association of Cayman Islands companies to also provide for a company pursuing claims against its directors to indemnify the directors for their costs of the proceedings. In the case of *BTU Power Management Company v Abdul Hayat* (Unreported, 1 June 2009), the Cayman Islands Court enforced Articles which required a company to pay a director’s defence costs up front.

Interim relief

Interim relief such as asset-freezing injunctions are in principle available in the Cayman Islands, although it should be noted that there is at present no facility to grant asset-freezing injunctions in support of proceedings in other jurisdictions. This can present real problems when putting together coordinated international recovery actions.

Unlike most European jurisdictions where conventions establish the relative priority of the different jurisdictions, in the Cayman Islands it is often necessary to seek the assistance of the Court to prevent unlawful “forum shopping” by granting an anti-suit injunction. Anti-suit injunctions are normally aimed at preventing a party (who is subject to the jurisdiction of the Cayman Islands Courts) from pursuing litigation in another country that should be litigated in the Cayman Islands. This will commonly be where there is an exclusive jurisdiction clause, or where a claim raises issues that can only be determined by the Courts of the Cayman Islands.

This last issue was raised in the case of *Asia Pacific Online Limited v Marcus Watson and Others* (Unreported, 25 April 2012) in which the Cayman Islands Court granted an “anti-anti-suit injunction” to restrain intended anti-suit injunction proceedings about to be brought in the United States. The dispute related to Chapter 11 proceedings in which it was alleged certain shares in a Cayman Islands company would be expropriated against their wishes through the Chapter 11 process. The Court granted the injunction, on the basis that the US proceedings could amount to a repudiation of the constitution of a Cayman Islands company.

International arbitration

The evolution of arbitration in the Cayman Islands has not been totally as a result of dissatisfaction with litigation. In fact, litigation in the Cayman Islands can be an efficient method of resolving disputes that are not appropriate for resolution by ADR. Resolving a dispute by means of litigation before the Cayman Courts, especially since the introduction of the FSD, can be a relatively swift and economical process. Depending on the complexity of the dispute in question, it can take less than a

year for a newly filed action to get to trial. There is little backlog of cases compared to other major jurisdictions, and the Cayman judiciary is highly qualified and experienced, and very competent to deal with the most complex technical and commercial disputes.

Nevertheless, the principal benefits of arbitration, such as for example, confidentiality, the limited discovery requirements, and the fact that the relatively amicable nature of arbitration enables parties to take part in proceedings whilst continuing to engage in business relations, are making arbitration more popular with both the Cayman and international business communities.

Arbitration clauses, sometimes prefaced with clauses providing for other non-binding means of dispute resolution to be tried before commencing arbitration proceedings, are introduced regularly in both domestic and international commercial contracts governed by Cayman law.

Most parties selecting arbitration in the Cayman Islands for the resolution of international commercial disputes will expressly provide in their agreements for the arbitration to be governed by the rules of a particular organisation or arbitral body. Such rules may be trade-specific or general. They may be the arbitration rules of an international institution such as the American Arbitration Association (AAA), the International Chamber of Commerce (ICC) or the London Chamber of International Arbitration (LCIA). Alternatively, the parties may devise their own rules or adopt the *ad hoc* rules of an organisation such as the United Nations Commission on International Trade Law (UNCITRAL). Whatever formal rules or procedure are adopted, the choice of the Cayman Islands as the seat of the arbitration will facilitate the arbitration process, due to the unique combination of features it provides including its favourable legislation, the high calibre and expertise of its judiciary, and its commercial and business population and efficient systems of communication.

Before 2 July 2012, arbitration proceedings in the Cayman Islands were governed by the Arbitration Law (2001 Revision), which was based on the English Arbitration Act 1950. That legislation was replaced with the Arbitration Law 2012 (the Law) with effect from 2 July 2012, and applies to all arbitration proceedings commenced in the Cayman Islands after that date. Under the former legislation, the Court was not required to stay arbitration proceedings commenced in breach of an agreement to arbitrate. It merely had a discretionary power to do so. Under the Law, the Court now *shall grant a stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed*. In addition, the scope for judicial interference during arbitration proceedings; the wide powers of the Court to review and strike down arbitral awards; the lack of any detailed provisions in the former legislation providing a framework for the conduct of arbitration proceedings in the absence of express agreement between the parties; all were perceived weaknesses of the former legislation, and provisions to address all of these were incorporated into the Law, as detailed below.

Pursuant to the Law, arbitration agreements may be in the form of either an arbitration clause in a contract, or a separate agreement. Whichever form it takes, with a couple of specific exceptions, an arbitration agreement must be in writing, and it must be contained in a document signed by the parties or in an exchange of letters, facsimile, telegrams, electronic communications or other communications which provide a written record of the agreement.

Subject to certain mandatory rules, the parties may agree to adapt the arbitral process to suit their needs. In particular, the parties may agree on the number and method of appointment of the arbitrators; their specific areas of expertise and qualifications; the language of the arbitration; whether the arbitration is to be conducted under institutional rules, and if so which arbitration boards to adopt; whether to nominate an appointing authority to choose the members of the arbitral tribunal or to retain the power to choose the tribunal themselves. However, it is important to note that the provisions of the Law will only take effect in this regard in the absence of express agreement between the parties.

The enforcement of arbitration agreements, and of resulting arbitral awards made in countries which are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), is governed by the Foreign Arbitral Awards Enforcement Law, which was originally enacted in 1975 and later revised in 1977 (the FAAEL). The FAAEL incorporates the provisions of the NY Convention into Cayman Islands Law.

As the Law is relatively new, its provisions are, as of yet, untested in the Cayman Courts. However, given that it is largely based on the UNCITRAL Model Law and the English Arbitration Act 1996, there is an existing body of case law in England and the Commonwealth which will provide guidance to the Cayman Islands Courts as to the interpretation and application of common provisions of the Law.

Mediation and ADR

The Cayman Islands Courts embrace, but do not require, the resolution of disputes by alternative methods of dispute resolution (ADR). The advantages of ADR include confidentiality, comparatively limited discovery and disclosure requirements, reduced costs, time-saving, and the preservation of business relations. All conventional forms of ADR are available in the Cayman Islands, and practitioners are familiar with them.

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