

LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

ANNUAL REVIEW 2013



FINANCIER
WORLDWIDE corporate finance intelligence

CAYMAN ISLANDS

IAN HUSKISSON
TRAVERS THORP ALBERGA

Q ARE YOU SEEING ANY RECURRING THEMES IN COMMERCIAL DISPUTES IN THE CAYMAN ISLANDS? DO ANY PARTICULAR INDUSTRIES OR SECTORS SEEM TO BE PLAYING HOST TO A SIGNIFICANT NUMBER OF DISPUTES?

HUSKISSON: As a major financial centre, the Cayman Islands have seen their fair share of disputes involving investment funds. A recurring theme has been investors seeking to place funds into liquidation where, for example, redemptions have been suspended or where the fund is in soft wind down. The Cayman Islands courts have, in general, been sympathetic to investor claims, finding that liquidation is an appropriate remedy where a fund is no longer viable. This position may change following a judgment of the Court of Appeal which is expected shortly. Another recurring theme that is common to many offshore jurisdictions is commercial confidentiality. Cayman Islands legislation imposes criminal sanctions on the usage of confidential information, even in the context of legal proceedings.

Q WHAT IS YOUR ADVICE TO COMPANIES ON IMPLEMENTING AN EFFECTIVE DISPUTE RESOLUTION STRATEGY TO DEAL WITH CONFLICT, TAKING IN THE PROS AND CONS OF MEDIATION, ARBITRATION, LITIGATION AND OTHER METHODS?

HUSKISSON: My number one tip would be to ensure that all staff understand and adhere to a strict document management policy. In the Cayman Islands, as with many jurisdictions, parties to litigation are required to give very extensive discovery of documents, including unhelpful ones. Many cases are won or lost on the strength or otherwise of the documentary evidence. An effective document management policy involves the use of technology to collect and marshal electronic documents at an early stage of a dispute or, better, before a dispute even arises. Having this material available early in a searchable form provides an enormous tactical advantage at comparatively little cost.

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Q IN YOUR EXPERIENCE, ARE MORE COMPANIES IN THE CAYMAN ISLANDS MORE LIKELY TO EXPLORE ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS BEFORE ENGAGING IN LITIGATION? ARE THERE ANY LEGAL OR PROCEDURAL OBSTACLES TO A SUCCESSFUL ADR PROCESS?

HUSKISSON: ADR seems to be used much less often in offshore rather than onshore jurisdictions, particularly in Europe where ADR may be compulsory. ADR is not compulsory in the Cayman Islands. My experience with ADR however is overwhelmingly positive and I would always encourage clients to consider it, no matter how entrenched the parties may appear. I generally like to consider early neutral evaluation as an alternative to mediation or other more traditional forms of ADR. Early neutral evaluation involves obtaining an independent and non-binding opinion on the merits of a claim. The opinion is addressed to both parties and is often obtained from a retired judge or senior counsel. The opinion will remain confidential to the parties but often serves to burst the bubble of misplaced confidence that can frequently be a bar to early settlement.

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Q HOW WOULD YOU DESCRIBE ARBITRATION FACILITIES AND PROCESSES IN YOUR PARTICULAR REGION OF FOCUS? TO WHAT EXTENT IS ARBITRATION BECOMING THE DOMINANT METHOD OF RESOLVING INTERNATIONAL DISPUTES?

HUSKISSON: The Cayman Islands have excellent facilities and are ideally placed geographically to act as a neutral venue for hearing disputes involving parties based in the Americas or elsewhere. The Cayman Islands have recently enacted a modern arbitration law loosely based on UNCITRAL. The Cayman Islands are party to the New York Convention, making reciprocal enforcement of awards in most jurisdictions relatively easy. Whilst court proceedings are undoubtedly more common in the Cayman Islands, arbitration does seem to be catching up in terms of popularity and the Cayman Islands are well placed to exploit that trend.

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Q IN YOUR EXPERIENCE, WHAT STEPS SHOULD COMPANIES TAKE AT THE OUTSET OF A COMMERCIAL AGREEMENT TO MANAGE DISPUTES THAT MAY ARISE IN THE FUTURE? IS ENOUGH ATTENTION PAID TO DISPUTE RESOLUTION CLAUSES IN COMMERCIAL AGREEMENTS, FOR EXAMPLE?

HUSKISSON: Whilst commercial parties are understandably more focused at the contracting stage on getting the deal done than what might happen if it falls apart, there is clearly much that can be done early on by way of potential damage limitation. In the Cayman Islands for example, it is possible to create a contractually binding obligation not to serve a winding up or liquidation petition. Including such a restriction in a fund or joint venture structure could remove the most potent weapon in a potential litigant's arsenal. There is also considerable scope for tailoring dispute resolution clauses to suit one party's needs. Aside from the obvious choice of law and jurisdiction issues, there are numerous options when it comes to the procedure to be used to resolve disputes. A party with limited resources for example might be better off with a rapid and binding expert determination clause than a traditional court based dispute resolution clause. This should prevent a party with greater resources from engaging in lengthy and costly court proceedings the less well off party cannot afford.

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Q TO WHAT EXTENT CAN COMPANIES AVOID DISPUTES BY BEING MORE DILIGENT IN THEIR DEALINGS WITH POTENTIAL BUSINESS PARTNERS?

HUSKISSON: There is always a tension between the need to get a deal done and the desirability of managing risk. When doing business in offshore jurisdictions such as the Cayman Islands, there is simply no substitute for taking good local advice early.

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IAN HUSKISSON

Partner

Travers Thorp Alberga

+1 345 623 2367

ihuskisson@traversthorpalberga.com

TRAVERS THORP ALBERGA
ATTORNEYS-AT-LAW

Ian Huskisson is a commercial litigator with over 15 years experience. He moved to the Cayman Islands from the London office of a major international firm. Recent engagements include acting at trial and on appeal in a ground breaking dispute over the enforceability of debenture security, leading asset recovery proceedings following a major fraud, and acting as an expert witness on insolvency law.