



Litigation & Dispute Resolution

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Cayman Islands

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Efficiency/integrity

The Cayman Islands are a British Overseas Territory. The legal system is based on the English common law, as amended by domestic statute, with the Privy Council in London 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 approximately 11,000 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 the Cayman Islands 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 is modelled on the English commercial court and has highly experienced judges presiding over complex financial services disputes.

Appeals from the Grand Court lie to the Cayman Islands Court of Appeal, which sits regularly throughout the year. Appeals are heard by three judges, including Lord Justices of Appeal from the English Court of Appeal. In appropriate cases, further appeal may lie to the Judicial Committee of the Privy Council in London. Judgments of the Privy Council are persuasive in many jurisdictions.

There have been numerous ground-breaking Privy Council decisions addressing issues arising out of the 2008 financial crisis, especially concerning hedge funds. Examples include: *Culross v Strategic Turnaround* [2010] UKPC 33 (dealing with the alteration of an investor's status from shareholder to creditor upon redemption of shares); *DD Growth v RMF* [2017] UKPC 36 (providing that unlawful distributions to an investor can only be clawed back by a liquidator upon evidence of knowledge of wrongdoing); and *Pearson v Primeo* [2017] UKPC 19 (dealing with priorities between different investors in a liquidation).

Others include: *Almazeidi v Penner* [2018] UKPC 3, which addresses the requirements for

judicial independence; and *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited* [2013] UKPC 17, which extended the tort of malicious prosecution to civil as well as criminal cases.

Enforcement of judgments/awards

In principle, foreign judgments and arbitral awards can be enforced in the Cayman Islands courts. At the time of writing (with the exception of Australian judgments), there is no system for registration and automatic enforcement of foreign judgments. However, it is intended that legislation will be passed extending the current registration system to most Commonwealth countries.

Even after the new legislation is passed, judgments from other countries (most notably, the United States) will continue to be enforced by court under the common law system, 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.*”

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 (2018 Revision)* will prevent the enforcement of a foreign judgment setting aside the transfer of property into a Cayman Islands trust in certain circumstances. For example, a trust might be established to prevent

a relative from inheriting property as of right (also known as forced heirship) under the relevant foreign law. The Cayman Islands courts will not recognise a judgment of a foreign court requiring the property to be returned.

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. The Cayman Islands courts generally adopt the approach taken in the well-known English case of *Rio Rinto Zinc v Westinghouse* [1978] A.C 547, where it was said: “*It is our duty and our pleasure to do all we can to assist that court, just as we would expect the [foreign court] to help us in the circumstances.*”

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 extracts from one of the overseas liquidator’s reports confirm 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. The English Supreme Court decision in *Rubin v Eurofinance* [2012] UKSC 46 is particularly relevant to offshore litigation. Here 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)* [Court of Appeal, 16 April 2014]. 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 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.

The strong, but not as yet overwhelming, trend in the Cayman Islands and other offshore cases (which are too numerous to mention here) involving Madoff and similar funds which have collapsed following the discovery of fraud is that (absent any unusual circumstances), investors who cash in prior to the collapse may keep their payments at the expense of the remaining investors. This approach is justified in part on the need for commercial certainty in order for mutual funds to operate efficiently, but contrasts sharply with that taken in the United States and other jurisdictions, where courts will generally allow clawback of payments made to investors who redeem their investments before the fraud is discovered.

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 directions from the court be first obtained before certain confidential documents are disclosed. *The Confidential Information (Disclosure) Law (2016 Revision)* (“CIDL”) defines confidential information as information arising in or brought in to the Islands concerning any property of a principal to whom a duty of confidence is owed. It is important to note that the CIDL is not a “secrecy law”. All it does is require a court application to be made before making any required disclosure. In all but the most extreme of cases, expect an order to be made permitting disclosure.

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, and to make a payment into court which (if not beaten at trial) should result in a costs order in favour of the defendant from the deadline for acceptance onwards. 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, provided they have been put on notice of their cost risk. Contingency fees are not recoverable in the Cayman Islands, although there have been a number of recent cases in which liquidators of companies have been permitted to enter into conditional fee arrangements with local lawyers, or contingency arrangements with lawyers overseas. In December 2015, the Law Reform Commission released a draft bill and a discussion paper for public consultation on conditional and contingency fee agreements between clients and lawyers in civil action cases which, if passed into law, will pave the way for a no-win, no-fee regime.

There have been several 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 (which differs from English law) is the availability of widely drawn exclusions of liability for directors. Cayman Islands law follows the traditional approach of the English common law 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 in the form of asset-freezing and other injunctions is available in the Cayman Islands. The Cayman Islands government has recently passed a law (the Grand Court Amendment Law 2014) for the purpose of clarifying the courts’ ability to grant injunctive relief in support of proceedings in other jurisdictions. This is a welcome development and assists claimants recover assets that may have been placed offshore in order to defeat claims. The Cayman Islands courts now have the power to grant a wide variety of injunctions in support of domestic and other proceedings. These include the freezing of assets, preservation of property, disclosure of assets, documents, etc.

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.

In a similar vein, the Privy Council in London (the highest appellate court for the Cayman Islands) has recently determined that when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction was available to prevent a creditor or member from pursuing proceedings in another jurisdiction which are calculated to give him an unjustifiable priority. A creditor (Shell) brought proceedings in the Netherlands against a company which was later wound up in the BVI. In those proceedings, Shell obtained an order attaching certain assets of the company. The effect of the attachments was that, if Shell succeeded in its claim in the Dutch courts, it would likely be able to satisfy its judgment debt in full, whereas other creditors who had claims in the liquidation could recover only a dividend. The purpose of the Dutch attachments was to obtain priority which Shell would not get in the liquidation. The liquidators applied for an anti-suit injunction to restrain Shell from taking steps to enforce the attachments. They lost at first instance but, on appeal, an injunction was granted. Shell appealed. The issue on appeal was whether Shell was, in principle, entitled to do what it had done, and, if not, whether an injunction could be issued to prevent it taking any steps to enforce the attachments. The court considered the fundamental principle applicable to all anti-suit injunctions, that the court does not purport to interfere with any foreign court, but may act personally upon a defendant by restraining him from commencing or continuing proceedings in a foreign court where the ends of justice require. On this basis, the court dismissed the appeal, upholding the injunction that had been granted (*Stichting Shell Pensioenfond v Krys and another* [2014] UKPC 41).

International arbitration

The principal benefits of arbitration, such as confidentiality and potentially more limited discovery, are making arbitration more popular with the international business communities. Many 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. A model *ad hoc* arbitration clause can be found in the *Arbitration Law 2012*. This replaced previous legislation which had been based on the English Arbitration Act of 1950.

Under the new 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 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; and whether to nominate an appointing authority to choose the members of the arbitral tribunal or to retain the power to choose the tribunal themselves.

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.

A NY Convention Award will be enforced as if it were a judgment of the courts of the Cayman Islands, unless one of the limited circumstances for an award to be challenged under the NY Convention can be established. The Cayman Islands courts can be expected to adopt a robust approach to enforcement of NY Convention awards. In *Globeop Financial Services LLC and others v Titan Capital Group and others* (Unreported, 23 April 2014), the Chief Justice of the Cayman Islands summarily rejected allegations of impropriety and required the enforcement of a NY Convention award from the United States.

In conclusion, the Cayman Islands courts are respectful of, and will readily enforce, arbitration awards from qualifying-convention and other countries. Where the parties have agreed that their disputes should be arbitrated, not litigated, then the Cayman Islands courts can be expected to enforce arbitration. Although a developing area of law, this is likely to extend to certain types of winding-up proceedings.

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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