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

Most of the top 50 banks globally hold licences in the Cayman Islands. With 24,591 regulated investment funds as of December 2020, Cayman Islands fund 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: the Summary Court; the 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 (the "FSD") was established. The FSD is modelled on the Business and Property Courts in England and Wales. The FSD has highly experienced judges presiding over complex financial services disputes.

Appeals from the Grand Court lie with 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 with 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 decisions of the Privy Council in its capacity as the highest court of appeal of the Cayman Islands. Important decisions over the past 10 years include:

- *Shanda Games v Maso* [2020] UKPC 2 (confirming that a minority discount may be applied to "fair value" payments to a shareholder dissenting from a merger).
- *Pearson v Primeo* [2020] UKPC 3 (a liquidator is not entitled to rectify the register of members of a company in order to alter members' legal rights, even in the case of a "Ponzi" scheme).
- *Francis v Vista Del Mar* [2019] UKPC 14 (concerning the enforceability of option agreements in real estate transactions).

- *Almazeidi v Penner* [2018] UKPC 3 (addressing the requirements for judicial independence).
- *DD Growth v RMF* [2017] UKPC 36 (unlawful distributions to an investor can only be clawed back by a liquidator upon evidence of knowledge of wrongdoing).
- *Pearson v Primeo* [2017] UKPC 19 (dealing with priorities between different investors in a liquidation).
- *Crawford Adjusters and others v Sagicor General Insurance (Cayman) Limited* [2013] UKPC 17 (extending the tort of malicious prosecution to civil as well as criminal cases for the very first time).
- *Culross v Strategic Turnaround* [2010] UKPC 33 (dealing with the alteration of an investor's status from shareholder to creditor upon redemption of shares).

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. However, there are exceptions. For example, legal advice given to a company will not normally be privileged as against shareholders. Documents created for a fraudulent purpose will never be privileged; this is known as the iniquity rule.

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 at 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. The disclosure obligation extends to electronically stored documents and data.

Offshore jurisdictions such as the Cayman Islands are often unfairly labelled "secrecy" jurisdictions. In the litigation context, confidentiality is unlikely ever to justify failing to disclose a document. Furthermore, most court hearings and especially trials are heard in open court. This means that any member of the public or interested party may attend court and in some cases may be entitled to request disclosure of documents read by the judge under the principle of "open justice", even though they are not party to the claim (*The International Banking Corporation BSC v AHAB* CICA No 28 of 2017).

Prior to trial, however, a third party's rights to participate in proceedings or access documents may be more limited. A third party has no automatic right to participate as a party to proceedings unless the court gives them leave to intervene. While all originating proceedings are available for public inspection, on payment of a fee, the balance of the court file is open to inspection only by the parties to the proceeding. Further, where any matters arising in the proceedings are particularly sensitive or confidential, the court may and sometimes does make an order that the court file shall not be open to inspection either by a party or by any other person except with the prior leave of the court. In those cases, the court file will be marked as sealed and access restricted accordingly.

Evidence

Evidence is provided by witnesses and experts (where required and with leave of the court). A party can only rely on evidence at trial of a witness who has provided a signed witness statement. Signed witness statements will be accepted at trial as the witnesses' direct evidence without the need for that evidence to be read out in court, but witnesses can be cross-examined in trial. For most court hearings other than the substantive trial, evidence is primarily given by way of written affidavit.

It is also possible to obtain evidence by deposition and/or disclosure of documents from parties based in the Cayman Islands in support of proceedings in other jurisdictions. Evidence can also be obtained from third parties in some circumstances; for example, where it is necessary to trace the movement of funds through bank accounts, or where evidence is required in order to identify a "wrongdoer" or to formulate a claim.

Experts are normally appointed by the party who intends to rely on them. The court can, however, appoint an independent expert to assist in its decision-making. Experts usually exchange written reports and may be directed to provide a joint expert report to narrow the issues at dispute. Experts must be independent and uninfluenced by the matter or the party instructing them. The expert owes a duty to help the court and must only opine on matters within their sphere of knowledge.

Costs and litigation 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 request a payment on account prior to taxation and/or the provision of security for costs at an earlier stage in the proceedings if there is a demonstrable risk that a costs order will not be paid. Defendants may 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 now available in the Cayman Islands. Under the *Private Funding of Legal Services Act 2020* and related regulations, Cayman Islands attorneys may enter into contingency fee agreements that provide for an uplift of double the attorney's usual fee or up to one-third of the recovery on success. These limits can also be increased with leave of the court. It is also now permissible for parties to enter into litigation funding agreements, bringing the Cayman Islands in line with modern litigation funding practice.

It is common for the Articles of Association of Cayman Islands companies to exclude liability for a director's negligence (but not fraud, liability for which cannot be excluded) and/or to provide for a company pursuing claims against its directors to indemnify the directors for their costs of the proceedings. One such provision was enforced in the case of *Goodman v Cummings* (13 September 2018, FSD No 204 of 2006).

Class actions

There is no direct equivalent in the Cayman Islands of the United States' concept of a class action. In theory, it is possible for one claimant to bring a claim on behalf of others with the same interest in it. This is known as a representative action. It is very rare for representative actions to be brought in practice. It is more common to see the court use its case management powers to consolidate proceedings brought by different claimants or manage them together, often using sample or test cases to decide issues of law or fact that are common across the claims. It is also possible for shareholders in limited companies or partners in limited partnerships to bring claims derivatively on behalf of the company or partnership.

Interim relief

Interim relief in the form of asset freezing and other injunctions is available in the Cayman Islands. This was extended to cover injunctive relief in support of proceedings in other jurisdictions under the *Grand Court Amendment Law 2014*. This is a welcome development and assists claimants in recovering 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 that 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 United States proceedings could amount to a repudiation of the constitution of a Cayman Islands company.

In a similar vein, when a company is being wound up in the jurisdiction where it is incorporated, an anti-suit injunction is available to prevent a creditor or member from pursuing proceedings in another jurisdiction that are calculated to give him an unjustifiable priority (*Stichting Shell Pensioenfonds v Krys and another* [2014] UKPC 41).

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 the 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 that 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 is 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*."

It is also important to bear in mind that Cayman Islands law makes a distinction between a judgment that is "final and conclusive" and one that is subject to appeal. Generally speaking, the Cayman Islands courts will enforce a judgment that is "final and conclusive" in the sense that it cannot be reopened. This will be the case even if the judgment is under appeal. The potential unfairness to the judgment debtor by allowing enforcement whilst an appeal is pending can be addressed by granting a stay of execution pending the appeal. A foreign judgment or arbitral award can be considered *res judicata* under Cayman Islands law as the law of the enforcing forum despite the fact that it may not be *res judicata* in its own jurisdiction and/or is under appeal (*Gol Linhas Aereas SA v MatlinPatterson* CICA No 12 of 2019).

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 Tinto 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 cooperation 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* has been followed by the courts in the Cayman Islands and other offshore jurisdictions.

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 Cayman Islands is also a developing jurisdiction in terms of cross-border restructuring. One recent case of note is the complex restructuring through four schemes of arrangement of the Ocean Rig offshore drilling group. The Cayman Islands court supervised and implemented a restructuring of the group as an alternative to a Chapter 11 filing in the United States, which was ruled out primarily on cost grounds. The Cayman restructuring was, however, recognised and subsequently enforced by the United States courts. It constitutes a positive endorsement of the restructuring credentials of the Cayman Islands. Note there is also legislation in prospect that will introduce an insolvency practitioner-led turnaround regime.

Trusts and private client disputes

The Cayman Islands is one of the leading jurisdictions for the establishment and management of trusts and has a sophisticated professional trust sector, modern trusts legislation and an effective judicial system. Cayman's firewall provisions generally operate to protect trusts governed by Cayman Islands law, and this means that provisions of foreign laws do not allow, as a right, foreign parties to attack a Cayman trust. This is particularly relevant in the context of jurisdictions with "forced heirship" restrictions, and the protection extends to those trying to assert a personal relationship with the settlor or a beneficiary.

Trusts disputes are generally dealt with in the FSD and will cover Beddoe applications, breach of trust claims, and beneficiaries seeking to enforce their rights in respect of a particular trust settlement.

Cayman's *Trusts Law* was amended in early 2019 to enhance the inherent jurisdiction of the Cayman Grand Court in relation to the administration of trusts. In particular, the amendment gives the Grand Court the power to set aside fiduciary decisions made by mistake, effectively codifying the "*Hastings-Bass Rule*" (regarding the validity of a trustee exercising its discretion when making decisions) as it stood prior to the UK Supreme Court's decision in *Futter/Pitt v HMRC* [2013] UKSC 26. There is therefore no requirement to prove that the trustee was in breach of trust when they made the decision.

Another amendment also provides the Grand Court with the ability to sanction settlements of trusts disputes, as long as doing so would not be detrimental to the beneficiaries (as opposed to previously needing to be for their benefit).

International arbitration

The principal benefits of arbitration, such as confidentiality and potentially more limited discovery, are making arbitration more popular with 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 that had been based on the *English Arbitration Act* of 1950.

Under the 2012 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 that 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 that 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* (the "FAAEL"), which was originally enacted in 1975 and later revised in 1977. 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 conventions 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 stay proceedings before the court to enforce the arbitration agreement. A 2020 decision of the Court of Appeal, however, shows that that rule may not always extend to shareholder-type disputes, which in the Cayman Islands commonly take the form of winding-up proceedings based on just and equitable grounds (*FamilyMart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation* CICA Nos 7 & 8 of 2019).

Mediation and ADR

The Cayman Islands courts embrace but (outside of family proceedings) 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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