# The Rise of Arbitration in the Cayman Islands

*When will mankind be convinced and agree to settle their difficulties by arbitration?*
Benjamin Franklin, 1783

Anecdotally, there has been a marked increase recently in the use of arbitration as a means by which to resolve commercial disputes in the Cayman Islands. As well as being consistent with the growth of arbitration internationally as a dispute resolute method, this is no doubt attributable in part to the enactment of the Arbitration Law (2012 Revision) (the "**Arbitration Law**"), which modernised the arbitration framework in the Cayman Islands. The Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration, which has now been adopted in 74 jurisdictions worldwide.[1] Arbitration typically arises as a result of the inclusion of an arbitration agreement in a commercial agreement, and so it is natural that it has taken some time following the enactment of the Arbitration Law for disputes to arise under such agreements.

In light of the increasing prevalence of arbitration, it is timely to remind potential users of arbitration in the Cayman Islands of its availability and possibly significant advantages over other forms of dispute resolution. We therefore address in this brief note some of the common questions relating to arbitration in this jurisdiction.

## What is arbitration?

Simply put, arbitration is a process by which parties agree to resolve disputes between them privately by the use of an arbitrator. As an alternative to resolving disputes in court, arbitration is a form of alternative dispute resolution which is intended to provide certain benefits to the parties in dispute by comparison to litigation (these are addressed below).

The primary difference between arbitration and other forms of alternative dispute resolution, such as negotiation and mediation, is that arbitration results in a final, binding decision (known as an 'award') which is legally enforceable.

Arbitration is actively encouraged by the legislative framework and courts of the Cayman Islands as a means by which for parties to resolve their disputes. The Arbitration Law is expressly founded on the principles that arbitration in this jurisdiction seeks to achieve the fair resolution of disputes by an impartial tribunal without undue delay or expense, with maximum party autonomy subject only to such safeguards as are necessary in the public interest, and minimal judicial intervention.

## Which disputes are arbitrable, and when can parties agree to resolve their dispute by arbitration?

In the Cayman Islands, almost all commercial disputes are arbitrable, save for a few exceptions the most notable of which is insolvency. In certain instances, statutory remedies and orders pursuant to regulatory laws are only available from the Grand Court.

Importantly, arbitration is a consensual process which requires the parties to agree, either prior to any dispute arising between them or after a dispute has arisen, to refer the dispute to arbitration. Arbitral proceedings are typically commenced as a result of a clause being included in a contract which provides that any dispute arising in relation to the agreement will be determined by arbitration. Less commonly, parties may agree after a dispute has arisen (even if there is a clause in their commercial agreement providing for disputes to be resolved by the courts of a particular jurisdiction) that they wish to refer the dispute to arbitration.

Under the Arbitration Law, arbitration agreements must be recorded in writing. It is important that an arbitration agreement is properly drafted to ensure it contains the necessary elements and to minimise the potential for a dispute as to whether a particular matter falls within the scope of the agreement to arbitrate. The Schedule to the Arbitration Law helpfully contains a model arbitration clause that parties are free to use. Alternatively, parties may agree a bespoke arbitration agreement, usually with the assistance of their lawyers to avoid any pitfalls.

## What are the advantages of arbitration?

Arbitration has a number of attractive advantages which may facilitate the resolution of disputes more efficiently, cost-effectively and privately than litigation. The key advantages of arbitration are as follows:

1. **Enforceability:** The success of international arbitration as a dispute resolution method is in large part attributable to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 ("**New York Convention**"). 157 countries, including all of the major economies, are parties to the New York Convention, which requires the courts of contracting states to give effect to arbitration agreements and to enforce arbitral awards made in other contracting states. The Cayman Islands has been a party to the New York Convention since 1980. The practical benefits of enforcing an award under the New York Convention may be significant by comparison to the enforcement of a court judgment in a foreign jurisdiction.
2. **Confidentiality:** Unlike litigation, which is essentially a public process, the Arbitration Law expressly provides that arbitral proceedings are private and confidential, and that a breach of the obligation of confidence is actionable. This feature of arbitration may be important to parties wishing to avoid the potential for adverse publicity or the risk of sensitive information entering the public domain that may arise from court proceedings.
3. **Avoiding specific legal systems**: Parties can agree to arbitrate a dispute in a particular jurisdiction as a means by which to select the forum for the resolution of disputes between them, notwithstanding that there may not be a nexus with that jurisdiction. For example, a US company may agree with a Brazilian counterparty to resolve certain disputes between them by arbitration seated in the Cayman Islands. This avoids either party 'submitting' to the jurisdiction of the other in the event of a dispute.
4. **Flexibility:** Whereas courts typically impose relatively rigid procedures, almost all arbitration procedures (addressed below) can be modified by agreement of the parties. This allows the parties a significant degree

of flexibility to tailor the procedure to the dispute where appropriate, thereby saving time and reducing cost.

5. **Selection of arbitrators:** In litigation, the court assigns a judge without the involvement of the parties. Parties to arbitration may agree on the number (typically either 1 or 3) and identity of members of the arbitral tribunal. If they are unable to agree, the Arbitration Law provides a mechanism for the constitution of the tribunal. The ability to select arbitrators (who must be free of any conflict and act independently) may be advantageous if, for example, the subject matter of the dispute is highly technical or specialised. This allows the parties to select a tribunal that is experienced with the subject matter of the dispute and best placed to resolve it.

In addition to the above, arbitration may result in disputes being determined more quickly and at lower cost than litigation, however this will depend in part upon the procedure applicable to the arbitration. Unlike a court judgment, an arbitral award is generally not appealable (save for in very limited circumstances). The finality of arbitral awards may therefore reduce the overall cost of proceedings by avoiding the potential costs of appeals.

## Which laws and procedural rules govern the arbitration?

An arbitration seated[2] in the Cayman Islands is subject to the supervisory jurisdiction of the Grand Court of the Cayman Islands and the Arbitration Law. The Grand Court's role is to exercise its powers under the Arbitration Law in support of the arbitration only where necessary. In practice, it is seldom necessary for the Court to have any involvement in arbitration proceedings, however the Court performs an important role as a 'safety net' to hold parties to their agreement to arbitrate and to support the arbitral process where required.

Arbitrations may be broadly divided into two types: institutional and ad hoc. Institutional arbitrations are administered by an arbitral institution agreed between the parties that sets the rules applicable to the arbitration and facilitates the process. Major arbitral institutions include the American Arbitration Association (AAA), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). Ad hoc arbitrations are administered by the parties themselves, without the involvement of an arbitral institution.

It is important to note that the commercial contract between the parties in dispute may be governed by and construed in accordance with the laws of a different jurisdiction to the seat of arbitration. For example, parties to an agreement governed by the laws of Canada may agree to resolve any dispute between them by arbitration seated in the Cayman Islands, in which case the arbitral tribunal would construe the contract in accordance with the laws of Canada but the procedural law of the Cayman Islands (including the Arbitration Law) would apply and the Grand Court of the Cayman Islands would exercise supervisory jurisdiction.

## How are arbitral proceedings conducted?

The Arbitration Law requires the arbitral tribunal to act fairly and impartially, to allow each party a reasonable opportunity to present its case, to conduct the arbitration without unnecessary delay, and not to incur any unnecessary expense.

If the parties have agreed to adopt the rules of a particular arbitral institution, the constitution of the tribunal and

procedure for the arbitration thereafter will proceed in accordance with those rules, save to the extent the parties have agreed to modify the procedure.

Arbitral proceedings are typically conducted in a manner broadly similar to litigation in the Cayman Islands, however there may be important distinctions relating to aspects of the proceedings, such as discovery/ disclosure and the form of witness evidence.

From a practical standpoint, arbitrators generally liaise with the parties by email where appropriate and any interlocutory or final hearings that may be necessary are typically held at the offices of one of the parties or the arbitrators, or at a venue such as an arbitral institution or specialist dispute resolution centre.

## What powers does the arbitral tribunal have?

Subject to the parties' agreement, the Arbitration Law and the applicable rules, the arbitral tribunal has wide case management powers to conduct the arbitration.

Unless otherwise agreed by the parties, the arbitral tribunal has the power to grant interim measures to order a party to maintain or restore the original position of the other party pending determination of the dispute; to take action to prevent, or refrain from taking action that is likely to cause, harm to the arbitral process; to provide a means of preserving assets out of which a subsequent award may be satisfied; and to preserve evidence that may be relevant to the resolution of the dispute.

As regards final remedies, the tribunal may, unless the parties have agreed otherwise, award any remedy or relief that a court could have ordered if the dispute had been litigated, including damages, final and permanent injunctions, specific performance and restitution.

## What happens if a party to an arbitration agreement commences court proceedings in breach of the agreement?

If a party to an arbitration agreement with a Cayman Islands seat commences proceedings in the Grand Court in breach of the arbitration agreement, the Grand Court is required to stay the proceedings in favour of arbitration.

If a party to an arbitration agreement with a Cayman Islands seat commences proceedings in a foreign court in breach of the arbitration agreement, the Grand Court may issue an anti-suit injunction to restrain that party from continuing the proceedings in the foreign court.

## Conclusion

The Cayman Islands has a pro-arbitration framework for the resolution of domestic and international disputes by arbitration. The jurisdiction has a well-established legal infrastructure, experienced lawyers and arbitrators, a stable and impartial judiciary, and a strong track record of enforcing arbitration agreements and arbitral awards. These features, combined with the Cayman Islands' geographical advantages as a neutral location for the conduct of arbitrations, make it an excellent choice as a seat for international arbitrations.

Parties are increasingly aware of the potential benefits of arbitration, and arbitration agreements are now commonly included in commercial agreements. A party to a dispute may wish to consider proposing to resolve the dispute by arbitration in appropriate circumstances. It should also be borne in mind that arbitration may be combined with other non-binding dispute resolution procedures, such as mediation, as a means by which to bring about the resolution of a dispute. Many of the leading arbitral institutions provide for a preliminary or concurrent mediation process should the parties wish to pursue mediation.

In light of the potentially significant advantages of arbitration, we strongly encourage parties to consider when negotiating dispute resolution clauses or when a dispute has arisen whether arbitration may be the preferred method of dispute resolution.

This note is intended to address briefly some of the common questions relating to arbitration in the Cayman Islands. Should you have any questions, or wish to discuss any aspect of arbitration in this jurisdiction, please do not hesitate to contact us.

[1] http://internationalarbitrationlaw.com/74-jurisdictions-have-adopted-the-uncitral-model-law-to-date/

[2] The 'seat' of arbitration is the legal jurisdiction to which the arbitration is tied. This should be specified expressly in the arbitration agreement, failing which it will be determined by the arbitral tribunal once constituted.

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