DISPUTE RESOLUTION IN

CAYMAN ISLANDS

Liam is a senior associate in Campbells' litigation, insolvency and restructuring group where he specialises in insolvency, restructuring, investment fund litigation and shareholder disputes. As part of his practice, Liam advises on both Cayman and BVI law, having spent three years working for a leading law firm in the British Virgin Islands prior to joining Campbells' Cayman office in 2015.

Liam has particular expertise in offshore disputes arising out of the PRC, having worked in Campbells' Hong Kong office as a registered foreign lawyer between 2016 and 2017. Liam is an INSOL International Fellow (2017).

Guy is head of our litigation, insolvency and restructuring group. He has acted for officeholders and stakeholders in relation to the restructuring and liquidation of numerous Cayman Islands companies. Guy also has a busy general litigation practice involving widely varying commercial contexts and structures, but with a particular emphasis on shareholder and investment fund disputes.

Recent instructions include advising the Liquidation Committee of SAAD Investments Company Limited, acting for a dissenter group in substantial fair-value appraisal proceedings arising from a take-private transaction involving Nord Anglia Education, Inc, and advising LDK Solar Co, Ltd and its provisional liquidators in connection with the cross-border restructuring of US$700 million of offshore debt across the LDK group.

Guy is ranked by all the major legal directories. He has given expert evidence of Cayman Islands law to various foreign courts and is a regular speaker at international insolvency and fund conferences.

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"One of the reasons that clients choose to incorporate Cayman entities is the reputation of the Cayman judicial system for resolving high-value complex disputes in a fair, efficient and expeditious manner."

GTDT: What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? To what extent are treaty claims increasing?

Liam Faulkner and Guy Manning: Litigation remains by far the most common form of dispute resolution used in the Cayman Islands to settle commercial disputes. Proceedings are invariably commenced in the Grand Court, which has unlimited jurisdiction.

To date, international arbitration has not been a prevalent method of dispute resolution in the Cayman Islands. However, in recent years the Cayman government has taken a number of steps that aim to establish the Cayman Islands as an international arbitration centre, with the hope that in the long run parties will choose to resolve their disputes through arbitration seated in the jurisdiction. In doing so, the government is seeking to diversify its economy and has noted the increasing success (and revenues) of other established offshore arbitration centres such as Hong Kong and Singapore. Part of the reasoning behind this policy change is the perception that there is an increasing demand for disputes to be settled by arbitration, particularly in Asia, where there has been exceptional growth in the use of offshore entities as inward and outward investment vehicles over the past decade. Cayman is not currently an active venue for treaty claims.

GTDT: Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? Has Brexit affected choice of law and jurisdiction?

LF & GM: The Cayman courts apply common law conflict of laws rules, which means that, in general, choice of law provisions in contracts will be upheld. The default position at common law, which applies when there is no express or implied choice of law made by the parties, is that the law with which the contract has its closest and most real connection is applied. There are no trends that would result in a shift from this position, and indeed the continuing trend is for commercial contracts governed by Cayman law to provide for any disputes to be resolved through litigation in the Cayman Islands courts. Brexit has had no impact in this regard. Despite the recent progress that has been made to promote the jurisdiction as an international arbitration centre, litigation remains the preferred choice for resolving disputes, and one of the reasons that clients choose to incorporate Cayman entities is the reputation of the Cayman judicial system for resolving high-value complex disputes in a fair, efficient and expeditious manner.

Traditionally the Cayman Islands have not attracted cross-border arbitration. Parties that do submit to arbitration to resolve issues of Cayman Islands law will typically have agreed to conduct their arbitration in other jurisdictions and will only come to Cayman if there is a basis upon which to commence ancillary proceedings in support of the arbitration, for example, for injunctive relief against assets within the jurisdiction, or if the unsuccessful party has assets here against which the arbitral award can be enforced. While it is too early to call any trends that may have emerged as a result of the enactment of the Arbitration Law 2012 (the 2012 Law), an enhanced legislative framework is now in place for parties to conduct arbitrations in Cayman. Time will tell whether greater numbers of commercial parties agree to arbitration clauses with the Cayman Islands as the seat of arbitration, leading to an upturn in the number of arbitrations conducted here.

The 2012 Law provides a model clause for the choice of arbitral law that offers certain default provisions, such as:

- a period for the parties to seek to resolve their differences before initiating arbitral proceedings (10 days to respond in writing to a particularised complaint with remedy sought);
- the seat of arbitration (the Cayman Islands);
- the language of the arbitration (English);
- the number of arbitrators (one); and
- the designation of an appointing authority to appoint an arbitrator.

These provisions can, however, be varied by the parties to the arbitration agreement.

The Cayman Islands are an international financial centre and trends will typically be shaped by those who use Cayman entities as part of their investment structures. The past

Liam Faulkner

Guy Manning

several years in particular have seen a dramatic increase in disputes involving Asian-based clients using offshore entities, often as holding companies within a group structure. Arbitration has been a popular form of dispute resolution in Asia for a number of years, as evidenced by the success of Hong Kong and Singapore, which have established themselves as world-leading arbitration centres. One of the primary reasons for this pro-arbitration stance is the ability of the parties involved to maintain privacy throughout the dispute resolution process, which is often compromised when a dispute is resolved through the courts as a result of the common law principle of open justice that is enshrined in Cayman Islands legislation. To ensure that confidentiality is protected, the Cayman Islands legislature includes confidentiality provisions that do not appear in the Model Law; for instance, ensuring that arbitral proceedings must be conducted in private and confidentially with any disclosure of confidential information relating to the arbitration being actionable as a breach of confidence. The court will only publish information if all parties consent to its release or if the court is satisfied that the information would not reveal any matter that the parties might reasonably wish to remain confidential. The seriousness with which obligations of confidentiality are taken in the Cayman Islands is one of the reasons why the jurisdiction is highly likely to continue its growth as a sophisticated arbitration centre. Cost is also a concern to clients and the flexibility of the arbitral process allows the parties to tailor the process to their specific needs and to limit what have traditionally been the most expensive areas of court litigation.

The legal profession in the Cayman Islands is well placed to service the anticipated increase in arbitration cases. The Cayman Bar is well respected and a number of its practitioners are experienced in arbitration matters and ancillary court proceedings in support of arbitration. Under the 2012 Law, clients are given the freedom to choose their representation unless any restrictions have otherwise been agreed between the parties, with the effect that a party may be represented by a legal practitioner whether from the Cayman Islands or elsewhere or by any other person of their choosing.

GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?

LF & GM: The Cayman Islands has a mature legal market for high-value commercial contentious matters and continues to attract the top talent from other common law jurisdictions such as the UK, Australia, New Zealand and Canada. There are numerous independent firms and practitioners who participate in and create a large and highly competitive market for dispute resolution services.

GTDT: What have been the most significant recent court cases and litigation topics in your jurisdiction?

LF & GM: Campbells recently acted for an ad hoc group of creditors of Ocean Rig Group in its cross-border restructuring of over US$3.69 billion of New York governed debt

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effected through four inter-related schemes of arrangement – in value terms, the largest judicially approved restructuring in the Cayman Islands. In each case, the scheme companies moved their COMI from the Marshall Islands to the Cayman Islands not long before the schemes were promoted; but that did not prevent the schemes subsequently receiving recognition in parallel Chapter 15 proceedings. The successful restructuring underscores the flexibility of Cayman schemes of arrangement, including where the debt is governed by foreign law.

The case was the first time that the US and Cayman courts approved a court-to-court protocol to promote cooperation between the two courts pursuant to the Judicial Insolvency Network (JIN) guidelines for communication and cooperation between courts in cross-border insolvency matters, which were published in 2017 following the inaugural meeting of JIN in late 2016.

GTDT: What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

LF & GM: The Cayman Islands has a sophisticated, ethical and impartial judiciary that is well used to dealing with complex international disputes, traits that are shared by the legal profession. Clients have confidence that due process will be observed in the Cayman Islands' legal system. In the event that there are grounds for appeal, the appeals will be heard in a timely manner by an experienced Court of Appeal with a final right of appeal to the Privy Council in London. Many international investors and businesses choose to incorporate their companies in the Cayman Islands or to enter into contracts governed by Cayman law in the knowledge that any disputes will be dealt with efficiently, expeditiously and fairly, which may not always be the case in other jurisdictions. The Cayman Islands is therefore well set up to attract clients from jurisdictions whose legal systems have a reputation for judicial corruption, or where there is no clear separation of powers between the executive and the judiciary.

The cost associated with litigation in the Cayman Islands is comparable to other jurisdictions that enjoy the benefits of a highly developed legal system (but typically less than London and New York), although costs incurred on any given dispute will of course ultimately depend on the complexity of the issues that fall to be determined and the manner in which the parties litigate the case. The volume of arbitrations in the Cayman Islands is insufficient at present to comment on any differences in clients' attitudes towards arbitration and litigation.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

LF & GM: In a recent decision of the Grand Court in *A Company and A Funder* (unreported, Segal J, 23 November 2017), the Grand Court approved third party funding of commercial litigation in a case that falls outside of the typical insolvency context and in doing so provided useful guidance on the factors that the Court will consider when asked to decide whether a funding agreement is unenforceable as a matter of public policy. This decision represents an incremental step towards the increasing availability of litigation funding in the Cayman Islands, which has also been the subject of proposed legislative reform in recent years. In late 2015, the Law Reform Commission submitted a discussion paper on conditional and contingency fee arrangements pursuant to a referral from the Attorney General and a call by the Court of Appeal for an examination of the law governing such agreements in the Cayman Islands, with a view to reform. The paper examined the development of conditional and contingency fee arrangements in other commonwealth jurisdictions and other types of litigation funding such as before-the-event insurance, after-the-event insurance and litigation funding agreements. A draft Private Funding of Legal Services Bill was also prepared in late 2015, which is based upon the Ontario Solicitors Act, the UK Court and Legal Services

THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

Campbells recently acted as co-counsel in two related arbitration proceedings administered by the ICC's International Court of Arbitration in respect of very high-value complex disputes governed by Cayman Islands law with related court proceedings in the Cayman Islands, Hong Kong and the PRC, which provides a useful comparative insight into the different dispute resolution processes and approaches in each jurisdiction.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

To make a major inroad into the arbitral space, the Cayman Islands must establish a dedicated, technologically advanced arbitration centre to meet the standards now expected in international arbitration. It is clear that there will need to be a significant financial commitment if the Cayman Islands are going to compete with other established international arbitration centres such as Hong Kong and Singapore, both of which enjoy strong government support.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

Parties to a dispute should have a clearly defined objective of what they want to achieve from the process and seek advice from legal counsel at an early stage as to how that objective can be achieved in the most timely and cost-effective manner. The client should seek a detailed cost–benefit analysis of the process and have a clear understanding of the point at which the risk and cost of the process outweigh any potential upside. It is important that the client undertakes this exercise both before any substantive steps are taken and periodically throughout the dispute resolution process.

Liam Faulkner and Guy Manning
Campbells
Cayman Islands
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Act and the Contingency Fee Act of South Africa. The Bill provides for contingency fee agreements that comprise the US-style agreement, as well as conditional fee-style agreement and provisions for third-party funding. The Bill would also abolish the torts and offences of maintenance and champerty and follows the approach taken in relation to these issues in other common law jurisdictions. Both legal practitioners and commercial funders await further progress in 2018.

GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

LF & GM: An interesting area of development is the impact of arbitration clauses in corporate insolvency proceedings. In general, the Grand Court regards formal insolvency processes as 'non-arbitral' because they amount to 'class remedies' rather than a resolution of private rights. However, the Court will apply well-established principles as to the primacy of arbitration agreements to enforce arbitration and exclusive jurisdiction clauses that form part of a contractual agreement entered into between a company in liquidation and a third party, regardless of whether the agreement was entered into prior to the commencement of the company's liquidation. In *Deutsche Bank AG London (and others) v the Official Liquidator of the Sphinx Group (and others)*, unreported, 2 February 2016, the Court of Appeal of the Cayman Islands stayed a summons that had been issued by creditors of the company in liquidation seeking the release of part of a reserve made by the liquidators so that an arbitration could take place between the liquidators and their former attorneys to resolve a fee dispute (in respect of which the reserve had been made), in accordance with an arbitration clause in the engagement letter. In doing so, the Court of Appeal followed the English line of authority, commencing with *Fulham Football Club v Richards* [2012] CH 333. In a separate decision of the Grand Court delivered on 13 February 2018 in *In the matter of an application of BDO Cayman Ltd concerning Argyle Funds SPC Inc (In Official Liquidation)*, the Grand Court granted an anti-suit injunction to restrain the joint official liquidators of Argyle from continuing litigation commenced in the Supreme Court of the State of New York against Argyle's former statutory auditor and three related parties in breach of the contractual dispute resolution clause contained in the engagement letter, which required disputes to be settled by arbitration in the Cayman Islands. In doing so, the Court confirmed that it will hold parties to their contractual bargain and reinforces confidence in the Cayman Islands as a pro-arbitration jurisdiction.

GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

LF & GM: The most significant recent development in arbitration in the Cayman Islands is the introduction of the 2012 Law. Prior to 2012, arbitration proceedings in the Cayman Islands were governed by the Arbitration Law (2001 Revision), a piece of legislation that was heavily influenced by the English Arbitration Act 1950. That legislation was ill-suited to the demands of modern international arbitration. Ultimately, it was considered that the Arbitration Law (2001 Revision) did not do enough to make arbitration a more attractive method of dispute resolution than normal legal proceedings in the Grand Court. For example, under that Law there was no obligation upon the courts to stay proceedings commenced in breach of an arbitration agreement but merely a discretion to do so. The courts also had wide-reaching powers to review and overrule arbitral awards, which resulted in such awards being perceived as non-binding and potentially open to challenge. One thing that all successful arbitration centres have in common is a supportive but non-interventionist judiciary that understands the need to support the arbitral process with minimal intervention. This was recognised and addressed by the Cayman Islands legislature, which enacted the 2012 Law, ceding greater powers to the arbitral tribunal. The Grand Court Rules (Orders 72 and 73) provide procedural rules for arbitration-related court applications, which must be commenced in the Financial Services Division of the Grand Court. These rules expressly provide for a stay of legal proceedings commenced in breach of an arbitration agreement and an arbitration agreement will only be unenforceable in limited circumstances (ie, where it is void, voidable or otherwise unenforceable). Accordingly, repudiation, frustration or rescission of a contract is insufficient to prevent the enforceability of an agreement to arbitrate, and these issues will instead fall to be determined by the arbitral tribunal. The development of a legislative framework that was designed with modern international arbitration in mind demonstrates the strong support that exists from the Cayman Islands government for promoting the jurisdiction as an international arbitration centre.

GTDT: How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

LF & GM: In recent years mediation, as well as other forms of ADR, has slowly been gaining momentum as an alternative to litigation and arbitration.

While the Cayman Islands have a number of experienced accredited mediators, informal mediation is infrequently used to settle large commercial disputes arising out of the financial services industry. If a commercial dispute cannot be resolved by negotiation between the parties it will often proceed to be determined by the court. The use of mediation in the Cayman Islands is primarily confined to family cases, where its increasing popularity and success resulted in new rules being introduced that require mandatory mediation for all new family cases, including divorce matters and all matters involving the welfare of a child (apart from cases in which the state has had to intervene).