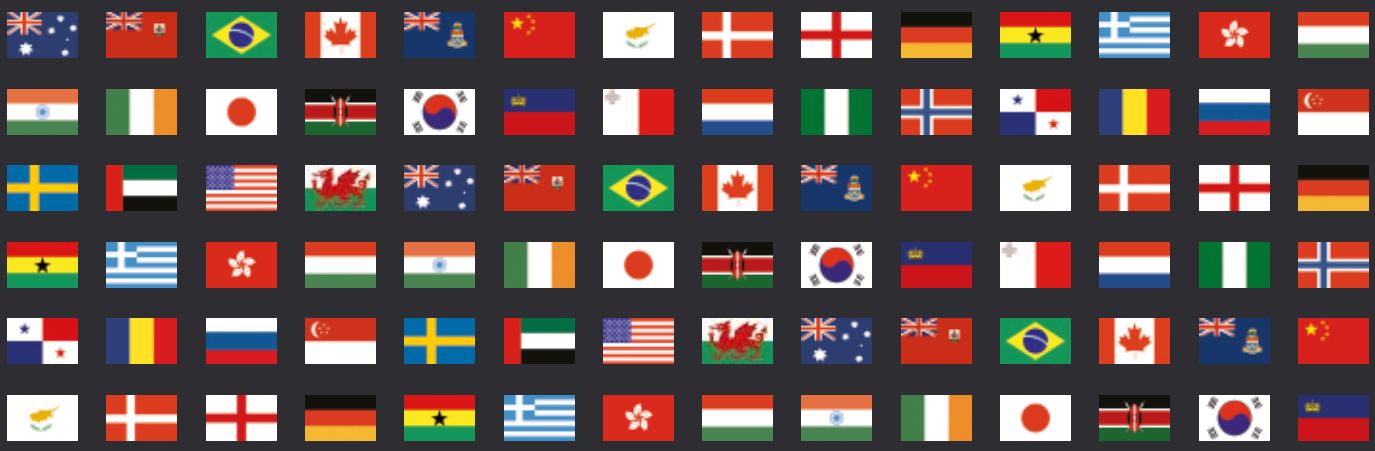
Dispute Resolution 2019

Contributing editors
Martin Davies and Kavan Bakhda



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Dispute Resolution*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Kenya.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

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Getting The Deal Through

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For further information please contact editorial@gettingthedealthrough.com

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Cayman Islands

Guy Manning, Mark Goodman and Kirsten Houghton
Campbells

LITIGATION

Court system

1 | What is the structure of the civil court system?

The main civil court of first instance is the Grand Court of the Cayman Islands (the Court), which sits full-time with between six and eight judges, recruited from the Cayman Islands and other Commonwealth jurisdictions. The Grand Court has a specialist Financial Services Division, which deals with cases concerning mutual funds, exempt insurance companies, financial services regulatory matters, applications relating to trusts, corporate and personal insolvency, enforcement of foreign judgments and arbitral awards and applications for evidence pursuant to letters of request from other jurisdictions. Grand Court cases are almost always dealt with by a judge sitting alone. Certain small civil claims worth less than CI$20,000 can be dealt with by a magistrate in the Summary Court.

Appeals from the Grand Court are heard in the Cayman Islands Court of Appeal, which generally sits three or four times a year (and can, on payment of enhanced fees, be convened more often to deal with urgent matters). The Court of Appeal has a bench of approximately six justices of appeal, all of whom are recruited from outside the Islands and are usually sitting or retired superior court judges or justices of appeal from other Commonwealth nations. The Court of Appeal usually sits with a panel of three justices of appeal.

Appeal from the Court of Appeal is to the Privy Council in London.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Proceedings in the Grand Court are usually adversarial in nature, and the judge does not normally have an inquisitorial role. The judge will listen to the evidence and legal submission of the parties, and make a reasoned decision, which is often handed down in written form. Section 21 of the Judicature Law provides that a party may apply to the Court for the case to be tried by a jury (of seven), but this course of action is exceptional.

Juries are selected from registered electors and must be under the age of 70. Sections 8 to 21 of the Judicature Law set out a comprehensive process for the selection of jurors. Attorneys who are actively engaged in litigation practice are among those persons exempt from jury service.

Judges are selected in accordance with Part V of the Constitution. Judges and magistrates are appointed by the Governor, acting on the advice of the Judicial and Legal Services Commission. Positions are advertised openly, in many Caribbean and Commonwealth jurisdictions (including the United Kingdom), and the selection process takes the form of a significant application form, shortlisting and interview. There are no specific diversity initiatives, but the Constitution contains a prohibition on discrimination, and the international nature of the candidates tends to favour a diverse bench in any event.

Limitation issues

3 | What are the time limits for bringing civil claims?

The Limitation Law provides that the time limit for bringing civil claims in tort (apart from defamation and personal injuries) and contract is six years from the date of accrual of the cause of action. Claims brought in equity (such as claims for breaches of fiduciary duty) will usually be subject to a six-year period by analogy. Claims brought in relation to documents under seal have a 12-year limitation period. The time limits may be extended in cases of fraud or deliberate concealment of the facts giving rise to a claim.

It is possible for parties to enter into 'standstill' agreements, to suspend the running of time, and a party may elect not to take advantage of a limitation defence if it wishes.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

There are no formal or mandatory pre-action steps that must be undertaken prior to the issue of proceedings, although a party's pre-action conduct might be a factor that the Court takes into account at the conclusion of the proceedings in the exercise of its discretion when making costs orders. Parties may bind themselves by contract to seek to resolve disputes by mediation or other forms of alternative dispute resolution before issuing proceedings if they choose to do so.

There is only very limited scope for compelling pre-action discovery. In rare cases, usually where a complainant knows that a wrong has been committed against him or her, but is unaware of the precise identity of the wrongdoer, and a third party through no fault of his or her own has become embroiled in the tortious act, the court may order the third party to disclose information concerning the tort and the wrongdoer by making a *Norwich Pharmacal* order, following a line of cases first developed in England. *Anton Piller* (or search) orders are also available in appropriate cases.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Most civil cases are commenced by the issue of a writ by the plaintiff. Certain kinds of cases are started by originating summons (in cases where the facts of the matter are unlikely to be in dispute, or where that procedure is required by legislation). Insolvency proceedings are begun

by petition. It is the plaintiff's (or petitioner's) responsibility to serve the other parties with the originating process once it has been issued by the court office. Originating documents are generally valid for four months from the date of issue (or six months, where the document is required to be served abroad and permission is granted by the Court to do so). Originating process must generally be served personally by delivery to the hands of the individual. Originating process may be served on a Cayman Islands company by delivery to its registered office in the Cayman Islands. If a party cannot be found, the plaintiff may apply to the court for permission to serve the document by an alternative method; for example, by advertisement in a local newspaper.

The courts generally have capacity to handle their caseload, and 'acting' judges can be and often are appointed on a temporary basis by the Governor to ensure that sufficient judges are available. The most pressing issue concerning the capacity of the courts is lack of sufficient and adequate courtrooms. It is acknowledged by government that additional modern court facilities are required, and a consultation process has recently been undertaken to assess the requirements for judicial accommodation; however, no firm proposals for the provision of new space have yet been formulated. Regrettably, it seems unlikely that new facilities will be available for some time.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

In an action commenced by writ, the plaintiff must prepare a 'statement of claim' setting out the facts upon which his or her cause of action is based. This statement of claim may either be indorsed on the writ, or presented as a separate document (known as a 'pleading'). If the statement of claim is not indorsed on the writ, the writ must contain a short statement giving sufficient information to the defendants to identify what the action is about (known as a general indorsement). Once the writ is served, the defendants have 14 days (or longer if the writ is served abroad) to file an acknowledgment of service with the Court office. Once that is done, if the statement of claim was served with the writ, the defendant has 14 days (or such other period as the parties agree or the Court directs) to file and serve a defence, which may also include a counterclaim. The plaintiff has a period of time (again, 14 days or such other period as the parties agree or the Court directs) to file and serve a reply and defence to counterclaim if necessary. At this point, the pleadings are deemed to be 'closed' and the plaintiff must file a summons for directions with the Court within one month. The summons for directions is the parties' opportunity to formulate a timetable for the remainder of the action. They may either agree or seek directions for discovery of documents, oral discovery and interrogatories (if any), exchange of witness statements and experts' reports (if required) and a pretrial timetable for the preparation of trial documents, legal submissions and other matters. Simple cases can be completed in this way in a fairly short timescale (say, six to nine months), but complex matters, particularly if they are multiparty and multi-jurisdictional, can take much longer.

Matters begun by originating summons and by petition are usually dealt with on the basis of affidavit rather than oral evidence, and can often be completed more quickly. A key factor in the length of time it takes to complete a case is the availability of court time, which can be limited.

Case management

7 | Can the parties control the procedure and the timetable?

To a large extent, they can. Parties will often agree the case management timetable without the need for a hearing on the summons for directions and can agree to vary the timetable by consent while it is running its course. In the event of non-compliance with a timetable, the parties can apply to the Court for orders imposing sanctions ('unless' orders) in the event of further non-compliance.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

Cayman Islands litigation is based on the pre-1999 English procedures, and preservation and discovery of relevant documents forms an important part of the process. An attorney has a personal obligation as an officer of the Court to ensure that his or her client complies with his or her obligations concerning discovery.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Several categories of documents attract privilege, including legal professional privilege (legal advice that would be privileged whether or not litigation was in train), litigation privilege (which protects documents generated as a result of contemplated or pending litigation), incriminating documents, documents that would be injurious to the public interest, and 'without prejudice' communications. Legal advice (as opposed to other more general advice) given by in-house counsel will be protected by legal professional privilege provided that the circulation group is sufficiently contained so that the dissemination of the advice within an organisation cannot be construed as a waiver of that privilege.

Documents that are confidential, and fall within the scope of the Confidential Information (Disclosure) Law, 2016, may not be disclosed without the permission of the party to whom the confidence attaches, unless the Court orders otherwise.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Generally speaking, yes. It is usual at the summons for directions stage for the parties to agree, or the Court to order, that statements of witnesses of fact be mutually exchanged on a certain date after time for consideration of documents and information obtained by discovery. Thereafter, a timetable will be set for the exchange of experts' reports, which can either be simultaneous or sequential, depending on the nature of the case, for without prejudice meetings of experts to take place to attempt to narrow the issues in dispute, for the composition of a joint statement of experts of like discipline, to set out areas on which they are agreed, on which they disagree, and if they disagree the reasons why. It is then often agreed or directed that the experts may serve supplemental experts' reports dealing with matters that have arisen during the course of their discussions.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The principal method for giving evidence at trial, whether factual or expert, is orally in person. Facilities can be made available for overseas witnesses to give their evidence by video link or Skype. Each witness will give his or her evidence 'in chief' (usually by confirmation that the matters set out in his or her written, signed statement or report are true to the best of his or her information and belief, making any corrections or clarifications and usually being asked a few questions by his or her own

counsel). Then the witness will be cross-examined by opposing counsel, and his or her party's counsel may ask questions in re-examination, to seek to clarify or correct matters that have arisen in cross-examination.

Interim remedies

12 | What interim remedies are available?

A broad range of interim remedies is available, including freezing injunctions, *Anton Piller* (search) orders, and orders for interim payments. As a result of a series of cases in the Grand Court, in 2015 the Grand Court Law and Rules were amended to provide that the Court may now grant interim relief in the absence of substantive proceedings in the Islands to make it easier for the Court to grant interim relief in support of foreign proceedings.

The Grand Court Rules also permit a number of other interim remedies, such as applications for default and summary judgment, and applications to strike out proceedings or pleadings on various grounds.

In corporate insolvency proceedings, liquidators may be appointed on a provisional basis, either for the purpose of promoting a restructuring (and avoiding an official liquidation) or to protect assets or prevent mismanagement pending the hearing of the winding-up petition.

Remedies

13 | What substantive remedies are available?

Apart from damages, the Court has jurisdiction to grant a number of other remedies, including permanent injunctions, declarations, accounts and enquiries and restitutionary remedies. Aggravated and exemplary damages are available, but rarely awarded. Interest is payable on damages either pursuant to contractual arrangements (if any) or at a statutory rate (which is varied from time to time) pursuant to the Judicature Law.

Corporate insolvency procedures may lead to winding-up orders, or a range of alternative orders pursuant to section 95(3) of the Companies Law, if grounds for winding up are established, but the Court is of the view that another remedy, such as the purchase of the petitioner's shares, is more appropriate.

Enforcement

14 | What means of enforcement are available?

Enforcement of money judgments within the jurisdiction can be undertaken by way of execution against goods (a writ of fieri facias), garnishee proceedings (to capture debts owed to the judgment debtor), charging orders over real estate or other property such as shares in Cayman Islands companies (which lead to orders for the sale of the property), the appointment of a receiver, sequestration or attachment of earnings. Disobedience of a court order such as an injunction can lead to committal. Winding-up or bankruptcy proceedings can also be started using a judgment debt (and on other grounds).

Public access

15 | Are court hearings held in public? Are court documents available to the public?

Trials of writ actions and final hearings of petitions and originating summonses are held in open court and are accessible by the public. Other hearings, including most applications for directions, interim relief and case management are held in chambers, but members of the public may apply to the Court for permission to attend, or can attend by agreement of the parties.

Writs and other originating process and judgments are open to inspection by the public. Other court documents are not generally available to members of the public, but those interested can apply to the Court for permission to inspect the court files. A recent practice direction permits the clerk of the court to determine such applications administratively, unless he or she considers that the matter should be referred to a judge. The applicant must provide a concise statement of the reason for the request to inspect. In winding-up proceedings the court file is open to specified categories of persons (including admitted creditors and shareholders), but not to the public.

Costs

16 | Does the court have power to order costs?

The Court has power to order costs, and has a very wide discretion in so doing, although the presumption is that the losing party will pay the successful party's costs. Unless the amount of costs is agreed between the parties, the costs are referred to the clerk of the court, or his or her nominee, for assessment by way of taxation, pursuant to Order 62 of the Grand Court Rules and the Court Costs Rules and Practice Directions. Costs are payable either on the 'standard' basis (the successful party bearing the burden of showing that its costs were reasonable), or on the indemnity basis if the Court is satisfied that the paying party has conducted the proceedings (or that part of them to which the costs order relates) improperly, unreasonably or negligently. If indemnity costs are awarded, the burden of proof shifts to the paying party to establish that the costs were unreasonable. If standard costs are awarded, the Court Costs Rules provides upper limits for the hourly rates of attorneys based on seniority, and for certain disbursements. Rules exist to prevent the duplication of effort by attorneys if overseas attorneys (usually Queen's Counsel) are retained. Brief fees and refreshers (barrister's per diem rates) are not recoverable, and barristers' time must be accounted for in time units.

The Court has power to order a claimant to provide security for costs on application by the defendant, and frequently does so. It also has power to order a defendant to provide security for the costs of a counterclaim.

The current costs regime was introduced in 2002, and has been amended (in matters of small detail only) from time to time, most recently in March 2016.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

The common law rules of champerty and maintenance are still in effect in the Cayman Islands. This means that, unless special precautions are taken, funding arrangements can have adverse consequences for the funder and the party, such as the making of costs orders directly against the funder rather than the party, and enhanced requirements for security for costs.

Following the English model, parties have attempted to introduce types of funding arrangements privately, often in the form of 'conditional fee agreements' (if the claimant does not win the case, the attorneys take no payment, but if they do, the attorney takes his or her fees with a percentage uplift to compensate for the risk). Any such arrangement must be approved in advance by the Court. In ordinary civil claims, the matter was brought to a head by the decision of the Court of Appeal in *Barrett v AG of the Cayman Islands* [2012] 1 CILR 127, where the Court held that a winning plaintiff could not recover the uplift from a paying defendant, or possibly even the amount of his or her basic fees.

The Court of Appeal indicated that legislative reform was required to clarify the position. This has not yet occurred but, in December 2015, the Law Reform Commission published a discussion document and a draft Private Funding of Legal Services Bill. If enacted, it would (among other things) repeal the common law offences of maintenance and champerty and permit the use of contingency and conditional fee agreements in most types of case. However, (as yet unspecified) limits on the percentages recoverable in contingency fee agreements and the uplifts on fees recoverable in conditional fee agreements would be imposed, as would limits on the amounts payable to third-party funding providers, subject always to the Court's discretion to permit agreements falling outside the statutory limits in appropriate cases.

In the decision of Hon Justice Andrew Jones QC in *In the matter of ICP Strategic Credit Income Fund Limited* [2014] 1 CILR 314, the question of litigation funding in a corporate insolvency context was considered in some detail. The judge held that there was nothing to prevent the liquidators from assigning the 'fruits of the action' to a third party. The liquidators were not entitled under the Companies Law to assign a cause of action that was personal to the company or to assign the proceeds of an action that had been vested in them in their capacity as liquidators (eg, a statutory preference claim). Such a claim did not form part of the company's property, which was limited to the property owned by the company at the time it entered liquidation, and any assignment of the liquidator's fiduciary power would necessarily be contrary to public policy. Further, any funding agreement that gave the third party the ability to control the litigation, including by indirectly exerting undue influence or control, would be void on the grounds of maintenance and champerty. Such an agreement risked the integrity of the litigation process and, accordingly, corrupted public justice. The party that provided the funding must not, therefore, be entitled to terminate the contract, cease paying the legal fees or cease providing legal services. Further, it must not be able to insist upon the continuation of the legal claim if the liquidators no longer wish to pursue it, or demand payment for services already rendered should the liquidator decide to discontinue the action.

Aside from the above, all manner of different funding arrangements are now being utilised. Common arrangements in the insolvency context (with the approval of the Court) include those where the funder will advance funding at very attractive (to the funder) rates of interest and will also obtain a percentage of any damages or judgment sum recovered.

Pure contingency fee arrangements, by which attorneys obtain a percentage of the recoveries in litigation, remain illegal and contrary to public policy in the Cayman Islands, although the Court will authorise liquidators to enter into such arrangements with foreign attorneys for the purpose of foreign proceedings, provided that they are permissible in the applicable foreign jurisdiction.

Outside the context of insolvency proceedings, the Grand Court has very recently reviewed the lawfulness of litigation funding agreements in *A Company v A Funder*, Hon Justice Segal, unrep, 23 November 2017. In that matter, a company had obtained an arbitration award against a third party, and wished to seek to enforce it and obtain a freezing order from the Grand Court. The company had third-party funding provided by the defendant to the proceedings, and wished to obtain a predetermination as to whether reliance on that funding agreement, which was governed by English law, might constitute criminal or other unlawful conduct in the Cayman Islands because of the continued existence of the crimes of maintenance and champerty. Accordingly, it issued proceedings against the funder for a declaration, and the funder did not contest the proceedings. The judge and the company each recognised that this was a somewhat artificial exercise. The funding agreement in issue was in two stages: investigation of the award debtor's assets and funding of the enforcement processes. The company had broadly agreed to pay the funder on the basis of an 'uplift' on the fees incurred, together with a contingency fee of a percentage of the recoveries. The company retained sole conduct of the proceedings and ability to settle. Justice Segal conducted a thorough review of the Cayman Islands and other Commonwealth authorities, and held that in considering whether a funding agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice. He found that this question requires the closest attention to the nature and surrounding circumstance of a particular agreement, and that the rules against champerty are primarily concerned with the protection of the integrity of the litigation process in the Cayman Islands. The underlying concern is a risk of abuse, because the funder's prospect of and need to protect and maximise its profits might tempt the funder to interfere with the litigation process in a way that might inflate claims, suppress evidence or suborn witnesses. A number of features of significance were identified:

- the extent to which the funder controls the litigation;
- the ability of the funder to terminate the funding agreement at will or without reasonable cause;
- the level of communication between the funder and the funded party's attorneys;
- the prejudice likely to be suffered by the defendant if the claim fails;
- the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation;
- the amount of profit that the funder stands to make; and
- whether or not the funder is a professional funder or is regulated.

Correct application of the considerations outlined should ensure that any such funding ought not to have a tendency to corrupt public justice and should protect the integrity of the litigation process. Provided that these principles are respected and these important policy goals are achieved, commercial funding of litigation, which can promote access to justice, should not be objectionable or subject to enhanced requirements or constraints. In the event, the judge held that the funding agreement should be appropriately amended so as to comply with the Code of Conduct for Litigation Funders, following which he would make the declaration sought, even though it would not be binding as against the defendant to the enforcement proceedings.

More recently, in *The Trustee v The Funder*, unrep, Segal J, 26 July 2018, a funding agreement was approved by the Grand Court outside the liquidation context, applying the principles discussed above, but without considering the incremental development that it involved. The background to the case was that a professional trustee had been precluded from utilising the assets of the trust under management to pay its legal expenses to defend itself against a claim brought against it by certain beneficiaries of the trust (and among the beneficiaries themselves.) The learned judge considered whether, in the round, the funding agreement under consideration gave rise to a tendency to corrupt public justice, undermine the integrity of the litigation process or give rise to a risk of abuse and concluded that, in the circumstances of this particular case, the funding agreement did not constitute or involve unlawful maintenance or champerty. He approved it, subject to a number of amendments necessary to make it consistent with the wording approved in *A Company v A Funder*.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance is uncommon, whether before or after the event, but is permissible.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

The Cayman Islands does not have a form of 'class action' as the term is understood in the United States. However, it is possible for parties with the same interest in proceedings to bring 'representative proceedings', in which one person acts as the plaintiff, on behalf of the group. Defendants can also be sued in a representative capacity. Use of this procedure in the Cayman Islands has historically been rare in ordinary litigation, although it is adopted more regularly in insolvency proceedings.

We are aware of one action currently in progress in which the plaintiffs organised themselves as if they were 'true' class action plaintiffs in the United States, and they are suing the defendants using the representative action procedures in Cayman. A recent security for costs application made by the defendants was successful, partly because the judge accepted that if the defendants were successful, and obtained a costs order against the plaintiffs, it would be extremely difficult to enforce against the very large group of individuals in many jurisdictions.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Parties have an appeal from a 'final' order (for example, a judgment following a trial) as of right. Appeals from interlocutory or interim orders are possible with the permission of the Court, which must initially be sought from the first instance Grand Court Judge at the hearing of the application in question, or an application must be made by summons within 14 days of the decision appealed against. The applicant must show that there are arguable grounds for appeal, whether as a result of an error of law, or fact, or mixed fact and law. If the Grand Court judge refuses permission, a written, and then an oral, application may be made to the Court of Appeal, often represented by a single judge of the Grand Court sitting as a justice of appeal for that purpose. The Court of Appeal Rules were significantly improved and updated in 2014, particularly with regard to the procedures for obtaining leave to appeal. Leave must now be obtained to appeal from the Court of Appeal to the Privy Council, although in the case of appeals from final orders, this is largely a formality. The Privy Council has recently issued a series of amended Practice Directions governing its procedures and these are available on its website.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments are currently enforced at common law, by the issue of a writ based upon the unpaid foreign judgment debt. These proceedings must be initiated in the Financial Services Division. The Law Reform Commission has suggested various amendments to the largely redundant Foreign Judgment Reciprocal Enforcement Law (which only applies to certain courts of Australia) to make reciprocal recognition of foreign judgments more easily available, but these have not yet found favour with the legal and financial services community, and a bill put forward in 2014 to legislate for these changes has not yet been enacted.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Apart from the interim orders referred to above, and subject always to the provisions of the Confidential Information (Disclosure) Law also referred to, the Grand Court will supervise formal letters of request from foreign courts, and will also conduct depositions pursuant to letters of request in some circumstances.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Law, 2012 is based on the UNCITRAL Model Law.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Generally speaking, an enforceable agreement must be in writing signed by the parties or contained in a series of communications that provide a record of the agreement. Arbitration agreements can also arise if pleaded in a court document and not denied by the opposing party. Further, if parties agree orally by reference to terms that are in writing and that incorporate an arbitration clause, that arbitration clause is deemed to be an agreement in writing.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the contract is silent as to the appointment of an arbitrator, the parties are free to agree the identity and number of arbitrators. If they cannot do so, the Arbitration Law provides for a default position of a single arbitrator. If the parties are unable to agree on the identity of an arbitrator or arbitrators, the Arbitration Law provides for the 'appointing authority' (currently the Grand Court) to appoint the arbitrators on application and with regard to a number of factors such as the subject matter of the dispute, the availability of the arbitrator, the identity of the parties, any suggestions made by the parties, any qualifications requested by the agreement of the parties and any other factor likely to secure the appointment of an independent and impartial arbitrator. Sections 18 to 20 of the Arbitration Law provide a mechanism to challenge the appointment of an arbitrator on grounds of lack of impartiality, independence or agreed qualifications, ill health, failure or refusal to conduct the proceedings or delay. The application is made to the tribunal in the first instance, and then to the Grand Court, Financial Services Division. There is no appeal from an order of the Grand Court in this instance.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

As described above, the parties are free to choose their arbitrators, and in default, the Grand Court may do so. The parties are not limited to arbitrators who are based in the Cayman Islands, and may choose from the wide pool of arbitrators available internationally. However, there are a number of qualified and experienced arbitrators available in the Cayman

Islands, most of whom are members of the Cayman Islands Association of Arbitrators and Mediators, or the Cayman Islands' informal chapter of the Chartered Institute of Arbitrators. The pool of arbitrators available is therefore wide and would meet the needs of complex arbitration.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

The Arbitration Law provides in general terms that the tribunal shall act fairly and impartially, allow each party a reasonable opportunity to present their case, conduct the arbitration without unnecessary delay and conduct the arbitration without incurring unnecessary expense. It also provides for majority decisions in tribunals with more than one member if the parties so agree. Other than those general guidelines, the parties are largely free to agree the procedure and rules of evidence and law to be adopted by the tribunal. If they do not agree, the Arbitration Law contains a series of default procedures and powers that the tribunal must adopt.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Apart from the provisions concerning the appointment and removal of the tribunal, the Court has a number of powers in relation to the conduct of an arbitration, including:

- to stay legal proceedings brought in contravention of an arbitration agreement;
- to order that interpleader proceedings be determined in accordance with any relevant arbitration agreement;
- to extend time for commencing arbitration proceedings if limits imposed by the contract would cause undue hardship;
- to review a tribunal's positive finding as to its own jurisdiction;
- to enforce a tribunal's orders and directions, including security for costs and interim relief;
- to issue a subpoena to compel a witness to attend at arbitration and to compel that person to attend before the court for examination if he or she fails to comply or produce documents;
- to order security for the amount in dispute;
- to grant interim relief, including for prevention of dissipation of assets (or grant any other interim injunction or interim measure);
- to enforce interim measures granted by the tribunal;
- to extend time for making an award;
- to enforce consent awards;
- to assess (tax) the costs of the arbitrator in certain circumstances;
- to make awards of costs in the event arbitration proceedings are aborted and to make provision for the costs of the arbitration so that an award may be released;
- to order property recovered as a result of the arbitration to stand as security for legal fees;
- to determine any substantial question of law in the course of the proceedings;
- to enforce the award as if it were a judgment of the Court; and
- to set aside the award if a New York Convention ground is made out.

Many of these powers can be excluded by agreement of the parties.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Unless the parties agree otherwise, the tribunal has power, by section 44 of the Arbitration Law, to:

- grant interim relief to maintain or restore the original position of a party pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Award

30 | When and in what form must the award be delivered?

Unless otherwise agreed by the parties, the tribunal may make more than one award at different points in time during the proceedings. If it makes multiple awards, the tribunal must specify in the award the issue, claim or part of a claim that is the subject matter of a particular award.

Awards are required to be in writing and signed – in the case of a sole arbitrator, by the arbitrator him or herself or, in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators if the reason for any omitted signature is stated. The award must give reasons for the decision, unless the parties have agreed that reasons are not necessary or the award is an award on agreed terms. The date of the award and the seat of the arbitration must be stated in the award and the award will be deemed to have been made at the place of the arbitration. After the award is made, a copy of the award signed by the arbitrators must be delivered to each party. At the request of any party to an arbitration agreement, the appointing authority may certify an original award registered with it, certify a copy of any relevant original arbitration agreement or arrange for the translation and sworn certification of any award or agreement not stated in the English language.

Appeal

31 | On what grounds can an award be appealed to the court?

A party may, with the permission of the Court, appeal to the Court on a question of law arising out of an award. The parties may contract out of the right to appeal if they wish. The Arbitration Law sets out a number of factors to be considered by the Court when granting permission to appeal and the Court may not grant permission unless it is satisfied that:

- the determination of the question will substantially affect the rights of one or more of the parties;
- the question is one that the arbitral tribunal was asked to determine; and
- on the basis of the findings of fact in the award the decision of the arbitral tribunal on the question is obviously wrong or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt and, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

The order made on such an application is appealable only with the further leave of the Court. A further appeal to the Court of Appeal is possible with the leave of the Court of Appeal, but the Court of Appeal may only grant leave if it is satisfied that the point of law concerned is one of general importance, or that there is some other special reason that it should be considered by the Court of Appeal. Final appeal rests with the Privy Council.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

A domestic award made by an arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect. Where leave is given, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked jurisdiction to make the award. In relation to foreign arbitral awards, the provisions of the Foreign Arbitral Awards Enforcement Law, 1997 enact the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into Cayman Islands law. An action on the award may also be commenced by writ. There have been no recent changes in enforcement procedures.

Costs

33 | Can a successful party recover its costs?

Unless a contrary intention is expressed, every arbitration agreement shall be deemed to include a provision that the costs of the arbitration shall be in the discretion of the arbitral tribunal. The tribunal would usually follow the same principles as to the award of costs as applied by a Grand Court judge.

The parties are free to agree the costs that might be recovered. In the absence of agreement, the losing party will normally be ordered to pay the successful parties' legal costs and disbursements (taxed by the arbitrator if necessary) and the costs and expenses of the tribunal. There has been no decision in the Cayman Islands concerning the recovery of third-party funding costs incurred as a result of an arbitration; however, it is possible that the Grand Court would follow the recent decision of the English Commercial Court in *Essar Oil Fields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), in which the judge held that the words 'other costs' in section 59(1)(c) of the Arbitration Act 1996 were broad enough to encompass third-party funding costs. While we would expect the Grand Court to be sympathetic to parties seeking to claim these costs, the Arbitration Law 2012 does not include a provision similar to the English provision, and accordingly, it is by no means a foregone conclusion that they could be recovered without the agreement of the parties.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

ADR is a relatively new concept in the Cayman Islands, and is taking some time to reach critical mass. There is a Cayman Islands-specific association of mediators and arbitrators, which is willing to act as an appointing body (www.ciama.ky), but the number of appointments has so far been quite small. A mediation scheme for family cases is currently being developed by the Judicial Administration. A small number of commercial mediations take place, but they are by their nature confidential, and it is difficult to obtain firm information on numbers.

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Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

There is currently no mandatory requirement to attempt ADR prior to or during litigation or arbitration and no power to compel parties to attempt it. Parties may bind themselves by contract to do so if they wish. If requested by all parties, the Court or tribunal may stay the proceedings for ADR to be attempted.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Unlike some other Caribbean jurisdictions, the Cayman Islands has not adopted a form of the 1999 English Civil Procedure Rules, and still relies upon the 1999 Rules of the Supreme Court of England and Wales, modified accordingly, for the basis of its Grand Court Rules.

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