market intelligence

Dispute Resolution

Insolvency litigation looming large

Simon Bushell leads the global interview panel

2019

Major cases • ADR • Choice of law • Specialist litigation firms
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Welcome to GTDT: *Market Intelligence*.

This is the 2019 edition of *Dispute Resolution*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

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DISPUTE RESOLUTION IN THE

CAYMAN ISLANDS

Guy Manning is head of Campbells' litigation, insolvency and restructuring group. He is based in the firm's Cayman Islands office, where he has acted for officeholders and stakeholders in relation to the restructuring and liquidation of numerous Cayman 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.

Notable recent instructions include acting for ABRAAJ Investment Management Limited and its joint provisional liquidators, 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.

Liam Faulkner is a partner in Campbells' litigation, insolvency and restructuring group, where he specialises in shareholder and investment fund disputes. He advises on both Cayman and BVI law, having spent significant time in both jurisdictions. Liam is an INSOL International Fellow (2017). Notable instructions over the past 12 months include advising ABRAAJ Investment Management Limited and its joint provisional liquidators on complex issues following the collapse of the world's largest emerging markets private equity group, and acting for the London and Hong Kong based private equity firm XIO Group in multi-jurisdictional litigation.

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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? What is the balance between litigation and arbitration?

Guy Manning and Liam Faulkner: 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 seek 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.

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? Does Brexit continue to affect choice of law and jurisdiction?

GM & LF: 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, 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. 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 with a final right of appeal to the Privy Council in London. Brexit has not had any discernible impact to date on the choice of law and jurisdiction in Cayman matters.

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? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

GM & LF: The Cayman Islands has a mature and highly sophisticated legal market for high-value commercial contentious matters and continues to attract the top talent from other common law jurisdictions such as the United Kingdom, 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. The nature of the Cayman Islands as a jurisdiction means that each of the leading firms would consider themselves to be a specialist litigation firm for complex offshore disputes.

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

GM & LF: The most high-profile cases in the Cayman Islands over the past 12 months have been the provisional liquidations of Abraaj Holdings and ABRAAJ Investment Management Limited (AIML), which were triggered by investors' allegations of misconduct against the world's largest emerging markets private equity group. AIML acts as the investment manager to over 40 private equity fund vehicles with around 600 limited partners and at one time managed over US$14 billion in assets. AIML is deeply insolvent with liabilities in excess of US$1 billion. Campbells acts for Stuart Sybersma and David Soden of Deloitte as AIML's joint provisional liquidators.

Campbells also acted recently 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 effected through four interrelated schemes of arrangement – in value terms, the largest judicially approved restructuring in the Cayman Islands. In each case, the scheme companies moved their centre of main interest 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 US and Cayman courts approved a court-to-court protocol to promote cooperation between the two courts pursuant to the Judicial Insolvency Network (JIN)

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Guy Manning

Liam Faulkner

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?

GM & LF: 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.

GM & LF: An interesting area of reform is third-party litigation that now has momentum following the decision of the Grand Court in *A Company and A Funder* (unreported, Segal J, 23 November 2017). In that decision, 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 (the Bill) was also prepared in late 2015, which is based upon the Ontario Solicitors Act, the UK Court and Legal Services

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"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."

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 2019.

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

GM & LF: 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 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?

GM & LF: 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 on 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

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THE INSIDE TRACK

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

As the pre-eminent offshore jurisdiction for private equity funds, we see a large number of complex, high-value and high-profile disputes involving investment funds that either invest in emerging markets such as China or the Middle East or have investors from those regions. Campbells' work on advising the provisional liquidators of ABRAAJ Investment Management Limited is particularly interesting given the cultural diversity of its stakeholders, the geographical and sector diversity of the investments that need to be actively managed during the provisional liquidation, and the sheer range and complexity of issues arising in the case on a daily basis.

Describe the approach adopted by the courts in your jurisdiction towards contractual interpretation: are the courts faithful to the actual words used, or do they seek to attribute a meaning that they believe the parties actually intended?

The principles of contractual construction under Cayman law are essentially the same (if not the same) as under English law. The starting point is to consider whether the words used are clear and unambiguous. As Lord Mustill said in *Charter Reinsurance v Fagan* (1997) AC 313, 'the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used' If the language used is ambiguous, however, then the court must ascertain what a reasonable person (that is a person with all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract) would have understood the parties to have meant.

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

Litigation should be a commercial decision, not an emotional one. It is essential to be able to articulate a clear commercial rationale for each step that is taken. Clients should have a defined (and realistic) objective of what they want to achieve from the process and seek advice as to how that objective can be achieved in the most time and cost effective manner. Clients should also seek a detailed cost benefit analysis of the process and have a clear understanding of the point at which risks and costs may outweigh any potential upside.

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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 (for example, 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?

GM & LF: In recent years, mediation has slowly been gaining some traction 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).

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