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Enforcement of Judgments

Cayman Islands: Law & Practice

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Cayman Islands: Trends & Developments

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Trends and Developments

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Campbells see p.16

Enforcement is one of the key issues for anyone pursuing legal action. Even if a party “wins” by obtaining judgment in their favour, that judgment may have little if any value if it cannot promptly and cost-effectively be enforced. This is especially true for money judgments. Like most areas of the law, enforcement moves with the times; this article considers some recent trends and developments concerning enforcement of judgments and arbitral awards in the Cayman Islands.

Enforcing Foreign Arbitral Awards in the Cayman Islands

The 19 February 2019 judgment of the Grand Court of the Cayman Islands (Mangatal J) in the case of VRGLinhas Aereas SA v Matlin Patterson Global Opportunities Partners (Cayman) LP et al (the “VRG Judgment”) was a rare example of the Cayman courts refusing to enforce a foreign arbitral award under the 1958 New York Convention, and provides useful guidance to parties seeking to enforce foreign arbitral awards in Cayman.

The VRG Judgment confirmed that the Grand Court will, where appropriate, exercise its discretion to refuse enforcement of a foreign arbitral award. The case concerned several parties to the purchase of an aviation company. Post-acquisition, the purchaser and its parent acquired a passenger airline business but later sold it to a third party. A disagreement arose in relation to the final onward sale of the passenger airline business and the matter was referred to arbitration in Brazil. The successful party in the Brazilian arbitration then sought to enforce the arbitral award in the Cayman Islands.

Ultimately, Justice Mangatal refused to enforce the award on the basis that the entity against which enforcement was sought was not a party to the relevant arbitration agreement. The court also confirmed that if an arbitral tribunal considers issues which are outside the terms of the agreement to arbitrate, or unilaterally makes awards which were neither sought by a party to the proceedings nor raised in submissions, then such an award is unlikely to be enforced by the Cayman courts.

The 2019 Hague Convention on Enforcing Judgments

A significant development in the enforcement of judgments, not only in the Cayman Islands but globally, is the recently concluded (but not yet in force) Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 (the “Judgments Convention”). Although there are currently only two signatories (Ukraine and Uruguay) it is hoped that the Judgment Convention will facilitate the efficient

and cost-effective recognition and enforcement of foreign judgments among a significant number of member states in much the same way as the 1958 New York Convention successfully operates with respect to arbitral awards.

The UK is understood to be considering whether it will become a member state of the Judgments Convention, a decision which will be informed in part by its final Brexit arrangements with the EU. If the UK does join the Judgments Convention, it is likely that the Convention will be extended to British Overseas Territories including the Cayman Islands.

As the name suggests, the Judgments Convention requires contracting states to recognise and enforce judgments given in civil or commercial matters within other contracting states. Judgments able to be enforced pursuant to the Judgments Convention are at first sight quite wide and extend to any decision given on the merits by any court. The definition of “judgments” also specifically includes a decree or order and therefore includes monetary judgments, non-monetary judgments and costs/expenses judgments.

However, the Judgments Convention does not apply to certain family law matters, probate, insolvency and analogous matters, the dissolution of legal persons or associations, arbitration and related proceedings, interim measures of protection, and intellectual property. Furthermore, a judgment will only be recognised abroad if it is effective and capable of being enforced in the state of origin. Finally, the Judgments Convention will only apply to a judgment if both of the contracting states – ie, the state in which the judgment was given and the state in which it is sought to be enforced – were parties to the Judgments Convention at the time the original proceedings were instituted.

Unsurprisingly, the Judgments Convention will not apply to any judgment obtained where there was a fundamental defect in serving the claim on the defendant, where the judgment was obtained by fraud, where the judgment is contrary to the public policy of the receiving state, or where there are inconsistent rulings between the parties on the same subject matter.

Article 5 provides the bases for recognition and enforcement of judgments, only one of which must be met in order for the judgment to be enforceable. For example, if the party against which a judgment is sought to be enforced was, at the time of the judgment, habitually resident in the originating state then

that will be enough to found jurisdiction. Likewise, if a defendant maintained a branch, agency or other establishment in the originating state, or if the defendant argued on the merits of the case, or the judgment ruled on a contractual obligation and the court which gave the judgment was in the place of performance of the obligation, then jurisdiction will be found.

It is clear that the intention of the Judgments Convention is to facilitate the enforcement of foreign judgments as between contracting states in as many circumstances as possible. However, as is usual with these types of conventions, there are opt-out provisions for contracting states including that a state can opt not to apply the Judgments Convention to a specific type of matter or can refuse to have a reciprocal relationship with another contracting state.

In practice, the Judgments Convention should have the effect of reducing costs, promoting access to justice, encouraging cross-border trade and providing more certainty (or comfort) to commercial parties undertaking international trade. However, how effective the Judgments Convention will be remains to be seen. Key to its success is the number of contracting states which ratify the convention, ensuring the key players in international trade do so, and how long that takes.

The concept of the Judgments Convention is a sound one and the Convention may have a significant impact on the enforcement of foreign judgments in the Cayman Islands if and when it is extended to the jurisdiction.

Enforcement and Digital Assets

The recent explosion of digital assets and related exchanges is a hot topic in the Cayman Islands, and the jurisdiction has seen exponential growth in the legal marketplace in these areas as Cayman seeks to position itself as a leading fintech jurisdiction.

As with many new areas of industry and law, it takes a certain amount of time for government to pass statutes and regulations governing the area. This is true for the Cayman Islands, which like many jurisdictions is grappling with questions concerning the regulation of digital assets and related legal issues, such as enforcement against digital assets, which are dematerialised and frequently not amenable to traditional enforcement methods.

The first issue in enforcing against digital assets is whether they are, in law, considered “property”. Cayman Islands law traditionally recognises two forms of “property”: a “chose in possession” (ie, tangible property) and a “chose in action” (eg, a cash balance in a bank). The difficulty with digital assets is that, under this traditional definition of “property” they are neither choses in possession nor choses in action.

However, the English High Court, the judgments of which are highly persuasive in the Cayman Islands, has helpfully determined that digital assets can properly be described as “property”. In the important recent case of *AA v Persons Unknown* [2019] EWHC 3556 (Comm), the Commercial Division of the High Court granted an injunction over bitcoin and in doing so held that digital currencies satisfy the four classic criteria of property, namely, they are:

- definable;
- identifiable by third parties;
- capable in their nature of assumption by third parties; and
- have some degree of permanence.

Now that digital assets are considered “property” the next development in the law will be how in practice the courts and judgment creditors enforce against digital assets. Until such time as any bespoke regulation is enacted, the existing methods of enforcement will need to be adapted and applied as best they can.

In practice, however, enforcing against digital assets such as cryptocurrencies will likely present significant challenges for judgment creditors, especially in circumstances where the judgment debtor does not wish to part with their assets. The main reason is the very nature of cryptocurrencies themselves; they are intangible assets. The only “real world” evidence of their existence is the private “key” (or password) used to access the funds. Even then these keys can also be intangible if they are not physically stored on a digital memory device or written down.

Additionally, there are no third-party intermediaries in blockchain transactions and there is no central authority which can revoke, avoid or trace a transaction once completed. Furthermore, the person possessing the digital key to access the cryptocurrency has complete control over the assets. The digital key can be online or offline, and if offline can be moved with ease across jurisdictions. The cryptocurrency itself does not exist in any one jurisdiction.

If a judgment debtor wishes to avoid making digital assets available to satisfy judgments against them, then significant issues are likely to arise because the vast majority of traditional enforcement measures simply do not cater for digital assets.

For example, a judgment creditor may seek to enforce against digital assets by way of a writ of *feri facias* whereby the bailiff is instructed to seize the judgment debtor’s assets and sell them to satisfy the debt. At first sight, this may seem like a simple and effective method of enforcement. However, the first step will be identifying the location of the assets. If the person holding the digital key refuses to reveal its location then its location will

CAYMAN ISLANDS TRENDS AND DEVELOPMENTS

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need to be independently identified. Independent identification of the digital key's location can be extremely difficult since it can be on a USB (or several USBs), a piece of paper or even memorised; any or all of these can be spread across the globe giving rise to jurisdictional issues.

Even if the digital key is located and seized there are likely to be practical difficulties if the bailiff or other seizing entity is not tech-savvy, because a third party may have a copy of the digital key and could simply move the cryptocurrency to another digital address. So, the bailiff would need to be able to transfer the funds to a new cryptocurrency address before that opportunity arose. It is also likely that most local law enforcement is not yet familiar with what a digital asset is, how it can be accessed, or how it can be secured.

By the example above it can be seen that enforcement against digital assets is a complex issue which, given the nature of digital assets, spans the globe. Cayman has a proven track record in enacting legislation which keeps up with and compliments global developments, and the judiciary is stable and quick to adapt to change. As such, the Cayman Islands remains a jurisdiction where judgment creditors can confidently seek to enforce judgments against defendants.

Campbells is a leading full-service offshore law firm established in 1970. From its offices in the Cayman Islands, the British Virgin Islands and Hong Kong the firm provides comprehensive corporate and litigation advice and services to clients worldwide in relation to Cayman Islands and British Virgin Islands law. Campbells is regularly trusted to advise some of the most prominent names in finance, investment and insurance and is frequently involved in the largest and most complex transactions, disputes and insolvencies in both jurisdictions.

The firm's clients range from large international, financial and trading organisations to liquidators and trustees in bankruptcy of international and local entities, participants in investment and trust structures, family offices and government agencies. Campbells is a leader in advising financial service providers and other clients in connection with local and overseas regulatory investigations. Its litigators also appear regularly as expert witnesses in foreign proceedings and speak at local and international conferences.

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