Market Intelligence

DISPUTE RESOLUTION 2021

Global interview panel led by Simon Bushell of Seladore Legal

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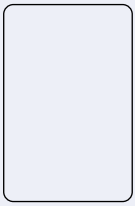

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Dispute Resolution 2021

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 office holders 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 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 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 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 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. He specialises in complex cross-border insolvency, shareholder and investment fund disputes, fraud litigation and asset recovery. Liam advises on Cayman Islands and BVI law, having spent several years in both jurisdictions. Notable instructions over the past year include advising ABRAAJ Investment Management Limited and its joint official liquidators on a wide range of issues arising out of the ABRAAJ liquidation, which is the largest insolvency ever of a private equity group.

1 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? What are the advantages and disadvantages of the most popular dispute resolution methods?

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, including establishing a dedicated and purpose-built Cayman International Arbitration Centre (CIAC), which was set to open in 2020 were it not for the covid-19 pandemic. CIAC's technology will go beyond simple video conferencing, the goal is to provide technologically advanced hearing rooms with the focus on evidence presentation and video communication, allowing remote appearances for arbitrators, counsel, witnesses, interpreters, court reports and other parties. It is hoped that technology will be used to address two of the main complaints about arbitration (which apply equally to court proceedings): expense and slow timelines.

It is hoped 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 has also proven to be a user-friendly jurisdiction when it comes to both arbitration and the enforcement of foreign arbitral awards, and readily enforces arbitral awards in the absence of a compelling reason within a narrow compass of permissible exceptions not to do so while also granting interim relief in support of arbitration proceedings.

2 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? What effect has Brexit had on choice of law and jurisdiction clauses?

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. 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, although we note the UK only recently left the EU (three and a half years after the Brexit vote) and is currently in a transition period before the changes are effected. In February 2020, following the UK's departure from the EU, Cayman was added to the EU list of non-cooperative jurisdictions for tax purposes, only to be removed in September 2020. The Cayman Islands government has confirmed that it remains fully committed to cooperating with the EU to mitigate any impact on European investors, as demonstrated by the further strengthening in 2020 of its already rigorous regulatory and compliance framework. Beyond that, we do not believe Brexit has had or will have a significant impact on the Cayman Islands.

3 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?

LF & GM: 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.

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

LF & GM: We continue to see a number of number of high-profile insolvencies involving allegations of fraud, misconduct and accounting scandals. The most high profile case in the Cayman Islands over the past 12 months was the provisional liquidation of Luckin Coffee Inc in connection with the restructuring of approximately US$1 billion of debt, following a widely publicised fraud and delisting of the Chinese coffee company and coffee house chain, which managed over 4,500 stores in China. Campbells act for the joint provisional liquidators.

The liquidations of Abraaj Holdings and ABRAAJ Investment Management Limited (AIML), which commenced in mid-2018, continue to be high-profile following

"The Cayman Islands continues to see a number of appraisal cases to determine the 'fair value' of a dissenter's shares in a statutory merger."

the collapse of the world's largest emerging markets private equity group, which was triggered by investors' allegations of misconduct. 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 official liquidators.

Campbells also acted for the London and Hong Kong based private equity firm, XIO Group, in a multibillion US dollar ownership dispute with a prominent Chinese businessman, which resulted in various legal proceedings in the Cayman Island, as well as Hong Kong and China, alleging fraud and misappropriation of assets. The global proceedings were settled in 2020.

The Cayman Islands continues to see a number of appraisal cases to determine the 'fair value' of a dissenter's shares in a statutory merger under section 238 of the Companies Act. This typically involves Chinese 'orphan' companies that are listed on the major US stock exchanges but consider themselves to be undervalued due to a lack of brand recognition in the United States. The companies delist in the US with a view to returning home and relisting in China, Hong Kong or Taiwan within 12 to 24

months in the expectation that their share prices will jump. Campbells has acted for various groups of dissenters in these substantial fair value appraisal proceedings, including Nord Anglia Education, Inc, Ehi Car Services Limited and most recently 58.com, a US$8.7 billion take-private involving China's largest online market place for classifieds.

5 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.

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

The Cayman courts were quick to respond to the covid-19 pandemic, adopting remote hearings and electronic filing as the new norm to ensure there was no disruption to the administration of justice in the Islands. Throughout 2020, the Cayman Judiciary issued a series of practice directions concerning e-filing, e-signing

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of affidavits, attesting to documents remotely, remote hearings and public access to proceedings by audio or video links. While criminal trials were postponed during the lockdowns in the Cayman Islands throughout the second quarter of 2020 (given the requirement for a jury to be present), civil and financial service proceedings continued largely unaffected throughout all of 2020, with Zoom videoconferencing enabling participants to appear from the safety of their homes.

The adoption of these practice directions enabled the Cayman courts and its participants to prepare for and successfully conduct lengthy trials with electronic bundles and witness examination via videoconference. Given that the majority of Cayman disputes typically involve onshore participants (whether clients, witnesses or leading counsel), the use of remote hearings will continue throughout 2021 and beyond, with the court expressing genuine enthusiasm for the benefits brought by the advancements in technology, particularly the transition from hard copy bundles to e-bundles, with the court also launching a new e-filing platform in February 2021.

Only time will tell whether examination of witnesses remotely via video-conference will remain prevalent post-pandemic. Certain judges have commented that it reduces cost and travel time and increases access to justice. In response

"There is a balance to be struck but the pandemic has shown that the technology works."

to the counter argument that a judge can better assess a witness' demeanour in person, one judge commented that the judge rarely gets the best view of a witness in a courtroom due to the positioning of counsel and the witness box, whereas videoconferencing allows all parties to have the same up close view of the witness in high definition. There is a balance to be struck but the pandemic has shown that the technology works.

7 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.

The notable exception is where a party seeks relief which invokes the exclusive jurisdiction of the Grand Court. In the recent decision of *Re China CVS (Cayman Islands) Holding Corp*, the Cayman Islands Court of Appeal overturned the first instance decision staying a just and equitable winding up petition in favour of arbitration of certain discrete issues cited in the petition on the basis that the power to grant the relief sought, namely a winding up order, could only be granted by the Court having regard to the totality of the circumstances which exist as at the date of hearing the petition.

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.

In a pro-enforcement decision in August 2020 (*(Gol Linhas v MatlinPatterson Global Opportunities* (CICA 012 of 2019, 11 August 2020, unreported)), the Cayman Islands Court of Appeal reversed an earlier decision of the Grand Court that refused to enforce a Brazilian arbitral award. The Court of Appeal's decision emphasised the significance of findings of local law made by the supervisory court of the arbitral seat in the context of a domestic challenge to the award. The Court of Appeal also held that consideration of due process and public policy factors in the enforcement context under Cayman Islands law required considerations of legal principles from the local jurisdiction where the award was obtained, including civil law doctrines such as *iura novit curia* ('the court knows the law').

8 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 Arbitration Law, 2012. 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

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with minimal intervention. This w as recognised and addressed by the Cayman Islands legislature, which enacted the Arbitration Law, 2012, 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.

9 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 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).

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

On 7 January 2021 the Cayman Islands gazetted the Private Funding of Legal Services Act 2020, an act that legalises third-party litigation funding agreements (LFAs) and contingency fee agreements (CFAs) in the Cayman Islands. The act will come into force on 1 May 2021.

Prior to the act being adopted, both third-party litigation funding and contingency fee arrangements were restricted by the long-standing torts of maintenance and champerty. In practice, they were only available in the insolvency context where the insolvent entity's stakeholders, legal advisers or a third-party funder would fund litigation on the condition of obtaining a success fee or share of the profits. There have been a number of developments over the past six years leading towards the legalisation of such funding arrangements, first with the introduction of a draft Funding of Litigation Bill in 2015 (following a Law Commission Report the same year) and then two decisions of the Grand Court in *A Company and A Funder* (unreported, Segal J, 23 November 2017) and *The Trustee v The Funder* (unreported, Segal J, 26 July 2018), which sought to clarify the circumstances in which a funding agreement would not be unenforceable on public policy reasons where it fell outside of the insolvency context.

The act now repeals the torts of maintenance and champerty in the Cayman Islands and regulates LFAs and CFAs, including through the imposition of statutory limits on success fees or profit sharing (which can be exceeded with the agreement of the parties and the approval of the court). Practitioners are awaiting the ancillary regulations which will further particularise the requirements of and restrictions upon LFAs and CFAs.

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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 which either invest in emerging markets such as the PRC or the Middle East or have investors from those regions. Campbells' work on advising the provisional, and subsequently the official liquidators of ABRAAJ Investment Management Limited is particularly interesting given the cultural diversity of its stakeholders, the geographical and sector diversity of the investments which need to be actively managed, and the sheer range and complexity of issues arising in the case on a daily basis.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

The Cayman Islands recently gazetted the Private Funding of Legal Services Act 2020, which legalises and regulates third-party litigation funding and contingency fee agreements in the Cayman Islands. Given the volume of litigants who are subject to the jurisdiction of the Cayman Islands law, but who have not, until now, had access to litigation funding as a means of pursuing meritorious claims or managing litigation risk, we can expect a noticeable uplift in the financing of claims from third parties and law firms alike, and the number of funders and after-the-event insurers from established markets moving into the Cayman Islands, thus increasing access for litigants.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

With covid-19 forcing legal practitioners and courts to adjust to remote hearings with attorneys, witnesses and even judges and tribunals participating from their respective homes or offices, the legal profession has proven that access to justice does not require access to a physical court room. The previously restricted use of videoconferencing and electronic documents has fallen away, without any resulting decline in efficiency or in the administration of justice. The widespread adoption of technologies used to facilitate remote hearings, therefore, seems here to stay. Courts in all jurisdictions share the same problem of being overworked, which leads to a delay in cases being heard and judgments being handed down. In addition to more judges, the courts need to embrace technology to increase efficiency and reduce costs.

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