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International Arbitration

Cayman Islands

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CAYMAN ISLANDS

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Law and Practice

Contributed by Carey Olsen

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1. General

1.1 Prevalence of Arbitration

The Cayman Islands arbitration industry continues to develop following the introduction of the modern Arbitration Law, 2012 ("Law"). For the time being, it remains mainly domestic in nature, but the introduction of the Law, combined with support from the Cayman Islands' strong and highly regarded court system, should facilitate the industry's development.

1.2 Trends

The recent decision of the Grand Court in *BDO Cayman Ltd concerning Argyle Funds SPC Inc* (FSD 163 of 2017, 13 February 2018), in which the court restrained a party from continuing proceedings commenced in breach of an arbitration agreement, emphasises the willingness of Cayman Islands courts to accord primacy to arbitration agreements, and confirms the status of the Cayman Islands as a pro-arbitration jurisdiction.

1.3 Key Industries

Cayman Islands arbitration clauses tend to be more common in service agreements involving financial institutions, professional service providers and funds.

1.4 Arbitral Institutions

Domestic arbitrations tend to be ad hoc. A variety of major arbitral institutions tend to be named in arbitration agreements with an overseas seat.

2. Governing Law

2.1 Governing Law

Arbitration proceedings commenced after 2 July 2012 that have their seat in the Cayman Islands (and the enforcement of awards made therein) are governed by the Law, which is based on the UNCITRAL Model Law and the English Arbitration Act 1996.

Enforcement of arbitral awards made by arbitral tribunals seated in other jurisdictions is governed by the Foreign Arbitral Awards Enforcement Law (1997 Revision) ("FAAEL").

2.2 Changes to National Law

There have been no changes to the Law or the FAAEL in the past year, and there is no relevant pending legislation.

3. Arbitration Agreement

3.1 Enforceability

Subject to certain limited exceptions, the arbitration agreement must be in writing and must be contained in a document signed by the parties or in an exchange of communications (section 4 of the Law). The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Incorporation by reference to another document containing an arbitration clause is also possible.

It should also be borne in mind that if a party asserts the existence of an arbitration agreement in a pleading in any arbitral or legal proceedings in circumstances where such assertion calls for a reply, and the assertion is not denied, then there is deemed to be an arbitration agreement between the parties.

A model arbitration clause is offered in the Schedule to the Law, but its use is not mandatory.

3.2 Arbitrability

The Law itself does not impose any express restrictions on the type of dispute that may be referred to arbitration, save to provide that a dispute may not be so referred if the agreement to arbitrate is contrary to public policy or if, under any other law of the Cayman Islands, the dispute is not capable of being resolved by arbitration (section 26(1) of the Law). At the same time, section 26(2) of the Law states that the mere fact that another law confers jurisdiction in respect of a matter on the court but does not refer to determination by arbitration does not mean that the dispute about the matter is incapable of determination by arbitration.

As such, the question of which matters may and may not be referred to arbitration is largely a matter of case law. In the area of insolvency law, the courts appear to be increasingly willing to give force to arbitration agreements, where appropriate. For example, in *In Re Sphinx Group* (CICA No. 6 of 2015, 2 February 2016), an issue arose in the context of liquidation as to whether a reserve created during the liquidation to meet claims by a US law firm should be released. The relevant engagement contained a New York arbitration clause, and the court had to decide whether it could decide the issue in the liquidation proceedings or whether it had to be referred to arbitration. The court held that, as the issue of whether the reserve was to be released was dependent on the validity of the US law firm's claims, which were within the scope of the arbitration clause, the application to release the reserve had to be stayed pursuant to section 4 of the FAAEL in favour of arbitration.

In reaching this conclusion, the court cast doubt (without overruling) on the reasoning in the earlier case of *Cybernaut Growth Fund, LP* [2014 (2) CILR 413], in which the court refused to strike out or stay a winding up petition brought on just and equitable grounds despite the fund arguing that the dispute giving rise to the petition was already the subject of arbitration in New York. While *Sphinx* did not overrule *Cybernaut*, it may be seen as indicative of a greater willingness by the courts to give effect to arbitration clauses even against the background of insolvency proceedings.

Separately, while there is no prohibition against referring disputes that involve allegations of fraud to arbitration, section 74(2) of the Law gives the courts the discretion to revoke the authority of the arbitrator and to order that the agreement shall cease to have effect, so far as may be necessary to enable that question of fraud to be determined by the court.

3.3 National Courts' Approach

Enforcement of arbitral awards is dealt with in more detail below, as is enforcement of arbitration agreements by way of ancillary relief. As to the support given by the courts to the arbitral process in general, the Law is founded on the following key principles:

- the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;
- the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
- the court should not intervene in matters governed by the Law, except as provided by the Law (section 3(3) of the Law).

3.4 Validity

The invalidity of the contract containing the arbitration clause does not, without more, entail the invalidity of the arbitration clause (section 4(6) of the Law). Indeed, a dispute about the validity of the substantive agreement may be arbitrated in accordance with the arbitration agreement (section 4(7) of the Law), and an arbitration clause that forms part of a contract is treated as an agreement independent of the other terms of the contract (section 27(2) of the Law). A decision by the arbitral tribunal that the contract is null and void does not entail the invalidity of the arbitration clause (section 27(3) of the Law).

4. The Arbitral Tribunal

4.1 Limits on Selection

Pursuant to ss. 15(1) and 16(1) of the Law, the parties are free to choose any number of arbitrators and to agree such procedure for the appointment of the panel in accordance with any rules they may have chosen.

4.2 Default Procedures

If the parties fail to agree the number of arbitrators, there shall be a single arbitrator (section 15(2) of the Law). If the parties fail to agree the rules for appointing the tribunal, there is a default procedure that ultimately relies on the so-called 'appointing authority', being either the person or authority chosen by the parties to appoint an arbitrator or, in default of such, a person or authority designated for this purpose by the court (ss. 16(2)-(5) of the Law).

4.3 Court Intervention

The court does not have jurisdiction to intervene directly in the selection of arbitrators. However, if the parties have failed to agree the identity of the 'appointing authority' and recourse to such becomes necessary due to the failure of the parties to select the arbitration panel, the court will have the jurisdiction to choose the identity of the 'appointing authority' (see the definition in section 2(1) of the Law).

4.4 Challenge and Removal of Arbitrators

Unless there is a provision to the contrary in the arbitration agreement, the authority of the arbitrator is irrevocable, except by leave of the court (section 17 of the Law). However, there are procedures for challenging or removing arbitrators.

An arbitrator may only be challenged if there are justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed by the parties (section 18(3) of the Law). The parties are free to agree on the procedure for challenging an arbitrator (section 19(1) of the Law). If no procedure is agreed, the deadline for making the challenge shall be 15 days from the constitution of the tribunal or upon becoming aware of any of the grounds for challenge, whichever is later. In either case, the challenge is decided by the tribunal itself in the first instance. If the challenge fails, the aggrieved party can apply to the court within 30 days (section 19(4) of the Law). A challenge does not suspend the arbitration proceedings or prevent the tribunal from making an award while the challenge is being decided (section 19(6) of the Law).

An arbitrator may be removed if he or she is physically or mentally incapable of conducting the proceedings (or if there are justifiable doubts as to capacity), or if he or she has refused or failed properly to conduct the proceedings or to use all reasonable dispatch in doing so. In all cases, removal can only take place where substantial injustice has been or will be done to the party applying (section 20(1) of the Law).

The power of removal is vested in the court, except where the parties have vested some other person with this power (section 20 of the Law). The fact that an application for the removal of an arbitrator is pending does not prevent the arbitrator concerned from continuing the proceedings and making an award.

In addition, the parties can terminate an arbitrator's office by agreement (section 22(1)(d) of the Law).

4.5 Arbitrator Requirements

An arbitrator has a duty to disclose to the parties (or the appointing authority) any circumstances that might reasonably compromise his or her impartiality or independence (section 18(1) of the Law). This is a continuing duty (section 18(2) of the Law).

An arbitrator is not liable for any consequences resulting from their negligence or mistake of law, fact or procedure, but will be so liable if they acted in bad faith (section 25 of the Law).

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See **3.2 Arbitrability**, above.

5.2 Challenges to Jurisdiction

The arbitral tribunal is competent to rule on a challenge to its jurisdiction (section 27 of the Law). Objection to jurisdiction should be made no later than the submission of the statement of defence.

5.3 Circumstances for Court Intervention

The arbitral tribunal is free to rule on a jurisdictional objection either as a preliminary question or in the award on the merits. If it rules on jurisdiction as a preliminary question, then, if it accepts jurisdiction, a party has 30 days after receiving notice of that ruling to apply to the court to decide the matter (section 27(9) of the Law).

If the arbitral tribunal affirms jurisdiction in its final award on the merits, then the procedures for appeal or setting aside the award detailed below are open to the parties.

5.4 Timing of Challenge

As set out above, the tribunal is the arbiter of its own jurisdiction in the first instance. Reference to court may only be made once the tribunal has ruled on its own jurisdiction, whether by way of a preliminary ruling or as part of the final award on the merits.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The Law does not specify whether the court conducts a review or a rehearing as part of a jurisdictional challenge. However, the Supreme Court in the UK has determined that an appeal against the tribunal decision on jurisdiction takes the form of a rehearing (*Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of*

Pakistan [2011] 1 AC 763), and this decision will be highly persuasive in the Cayman Islands.

5.6 Breach of Arbitration Agreement

The courts shall grant a stay of any court proceedings commenced in breach of a domestic arbitration agreement, unless they are satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed (section 9 of the Law). However, a party's right to obtain this relief is lost if it takes steps to answer the substantive claim in the court proceedings.

A similar entitlement to a stay of court proceedings is also contained in section 4 of the FAAEL and operates in aid of foreign arbitral proceedings. In the past, the Grand Court has stayed Cayman Islands court proceedings in aid of foreign arbitrations under section 4 of the FAAEL (see *I.N.E.C. Engineering Company Limited v Ramoil Holding Company Limited* [1997 CILR 230] and *Bankamerica Trust And Banking Corporation (Cayman) Limited v Trans-World Telecom Holdings Limited* [1999 CILR 110]).

5.7 Third Parties

In general, Cayman Islands law recognises privity of contract and the concept of separate corporate identity. In particular, the 'group enterprise' doctrine is not the law of the Cayman Islands, and in the past the Grand Court has curtailed an attempt by a party to an arbitration agreement to force the owners for the other party to the arbitration into arbitration proceedings (*Unilever Plc v ABC International* [2008 CILR 87]).

There are some circumstances in which the position of the non-parties and non-signatories may be more complex, such as the existence of relationships of agency, succession, novation, assignment, piercing the corporate veil, or the existence of third-party direct rights of enforcement under the Contracts (Rights of Third Parties) Law, 2014, but the analysis of such issues is beyond the scope of this article. Of note, however, is section 7 of the Law, which provides that an arbitration agreement entered into by a body corporate remains enforceable against the liquidator, receiver or administrator of that body.

6. Preliminary and Interim Relief

6.1 Types of Relief

As noted above, an arbitral tribunal may render a preliminary ruling on jurisdiction, thereby potentially terminating an arbitration before consideration of the merits. In addition, Part VIII of the Law contains powers for the arbitral tribunal to order interim measures and make preliminary orders on an ex parte basis.

In particular, under section 44 of the Law and unless agreed otherwise by the parties, the arbitral tribunal may, at any time prior to the issue of a final award and at the request of a party, grant an interim measure ordering the party to:

- maintain or restore the original position of the other 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; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

A party seeking one of these orders must satisfy the tribunal that damages would not be an adequate remedy for the harm it would suffer if the measure is not ordered, that the harm it would suffer if the measure is not ordered substantially outweighs the harm that the other party would suffer if the measure is granted, and that there is a reasonable possibility that it will succeed on the merits.

The tribunal may require the party applying for an interim measure to provide appropriate security in connection with the measure (section 49(1) of the Law).

Unless otherwise agreed, an application for an interim measure under section 44 of the Law may be made ex parte and be accompanied by a request for a preliminary order directing a party not to frustrate the purpose of the interim measure (section 46 of the Law). The tribunal may grant such an application if it considers that putting the other party on notice of the request for the interim measure may frustrate the purpose of the measure.

A party applying for a preliminary order comes under a continuing duty of full and frank disclosure until such time as the opposing party has an opportunity to present its case (section 50 of the Law) and shall be required to provide security, unless the tribunal considers it unnecessary or inappropriate to do so (section 49(2) of the Law).

A party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the same to any party if the arbitral tribunal later determines that the measure or order should not have been granted (section 51 of the Law).

6.2 Role of Courts

Unless otherwise provided by the arbitral tribunal, an interim measure is enforceable upon application to the court (section 52(1) of the Law).

In addition, the court has its own, free-standing jurisdiction to order the same powers to order interim measures in relation to arbitration proceedings, irrespective of the location of the seat of arbitration, as it has in relation to the proceedings in court (section 54 of the Law). However, in general, the court will only be willing to exercise these powers if the tribunal is unable to do so itself.

6.3 Security for Costs

Unless otherwise agreed by the parties, an arbitral tribunal has the power to order the payment of security for costs (section 38(2)(a) of the Law). However, this power is not to be exercised by reason only that the claimant is an individual ordinarily resident outside the Cayman Islands or a corporation formed outside the Cayman Islands or whose central management and control is located there.

7. Procedure

7.1 Governing Rules

The parties have wide discretion to agree on the rules to be followed by the arbitral tribunal in conducting proceedings; failing such agreement, the arbitral tribunal has wide discretion to conduct proceedings in such manner as it considers appropriate (section 29 of the Law). However, Part VII of the Law contains certain basic provisions governing the procedural aspects of an arbitration in default of agreement or determination.

7.2 Procedural Steps

In general, the procedural steps are for the parties to agree or for the tribunal to determine. However, Part VII of the Law provides for some basic elements of procedure that apply in default of agreement.

In the absence of agreement to the contrary, and in each case within the time periods agreed or ordered by the tribunal, a claimant is required to state the facts supporting his or claim claim, the points in issue, and the relief or remedy sought, and the defendant is required to state his or her defence (section 32 of the Law). Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold hearings at appropriate stages of proceedings, upon the request of a party (section 33 of the Law). Unless otherwise agreed in writing by the parties, an arbitral tribunal shall not be bound by rules of evidence but may inform itself in relation to any matter it deems appropriate (section 33 of the Law). The arbitral tribunal may appoint one or more experts to report to it on specific issues (section 37 of the Law).

7.3 Powers and Duties of Arbitrators

The Law requires the arbitral tribunal to act fairly and impartially, to allow each party a reasonable opportunity to present his case, to conduct the arbitration without unnecessary delay, and to conduct it without incurring unnecessary expense (section 28 of the Law). The Law also imposes the duties of disclosure on the arbitrators, as discussed above.

The powers of the arbitrators are largely up to the parties to define, whether by specific agreement or by adoption of the procedural rules of a particular arbitral institution. However, in default of such agreement or adoption, the arbitrators do have a number of powers, including to order security for costs, to order discovery of documents and interrogatories, to direct the giving of evidence by affidavit, to order a party or witness to be examined on oath or affirmation, to direct the preservation and interim custody of any evidence, to order samples to be taken or observations to be made or experiments to be conducted upon any property that is the subject matter of the dispute, and to direct the preservation, interim custody, or sale of any property that forms part of the subject matter of the dispute (section 38 of the Law). All orders and directions given by the arbitral tribunal shall, with leave of the court, be enforceable in the same way as a court order, and judgment may be entered in the terms of such order or direction.

Similarly, while it is up to the parties to agree on the powers that the tribunal may exercise in case of a party's default in the conduct of the proceedings, the Law confers certain powers on the tribunal in the absence of any agreement to the contrary by the parties. Specifically, section 39 of the Law confers on the arbitrators the power to terminate the proceedings for the claimant's failure to provide a statement of claim or for other inordinate delay in prosecuting the claim, in certain circumstances, and to continue proceedings and make an award despite the failure of a party to appear or produce documentary evidence.

7.4 Legal Representatives

Unless otherwise agreed by the parties, there are no particular qualifications or other requirements for the parties' representatives in the arbitral proceedings. A party may be represented by an attorney-at-law qualified to practise in the Cayman Islands, by a legal practitioner qualified to practise in another jurisdiction, or, indeed, by any other person (section 34 of the Law). However, a work permit is required to work in the Cayman Islands.

8. Evidence

8.1 Collection and Submission of Evidence

As set out above, the parties are generally free to agree the procedure for the conduct of the arbitration and, in default of such agreement, the tribunal has wide discretion to make directions as it deems appropriate. As such, there is no prescribed approach to evidence and the tribunal is free to determine matters such as admissibility, relevance, materiality

and weight of any evidence, as well as the times at which it should be submitted and the manner in which this should be done.

8.2 Rules of Evidence

No specific rules of evidence apply to arbitral proceedings in the Cayman Islands. Indeed, pursuant to section 33(6) of the Law, unless otherwise agreed by the parties in writing, an arbitral tribunal is not bound by rules of evidence but may inform itself in relation to any matter as it deems appropriate.

However, in general, one might reasonably expect an arbitral tribunal in the Cayman Islands to have regard to the International Bar Association Rules on the Taking of Evidence in International Arbitration.

A person who wilfully or corruptly gives false evidence before an arbitral tribunal is guilty of perjury, as if the evidence had been given in court, and may be prosecuted and punished accordingly (section 42 of the Law).

8.3 Powers of Compulsion

Unless otherwise agreed by the parties, the arbitral tribunal has the power to order discovery of documents and to direct a party or witness to be examined on oath or affirmation (section 38 of the Law).

These powers of the tribunal are augmented by the ability of the parties to have recourse to the courts, in certain circumstances. Pursuant to section 40 of the Law, a party may apply to the court to compel a witness to attend before an arbitral tribunal and give evidence and/or produce specific documents, but this power cannot be used to compel a person to produce a document that they could not be compelled to produce in court proceedings. Unless there is a contrary intention in the arbitration agreement, if a person fails to comply with a subpoena to attend before the arbitral tribunal (or with an order of the tribunal to do so) or if, having attended, the witness fails to answer questions or produce documents, any party to the arbitration agreement (or the arbitrator) may apply to the court for an order for the person in default to attend for examination before or produce the relevant document to the court (section 41 of the Law). The powers of compulsion available to the court under sections 40 and 41 are available against both parties and non-parties.

9. Confidentiality

9.1 Extent of Confidentiality

Pursuant to section 81 of the Law, arbitral proceedings are private and confidential. Disclosure of confidential information relating to the arbitration is actionable as a breach of an obligation of confidence, except where it is authorised by the parties and in certain other limited circumstances. As such, the default position is that all aspects of the arbitration are confidential.

However, to the extent that proceedings have to be taken under the Law in court, either to procure the attendance of witnesses and the production of documents, to secure interim relief, or to enforce the ultimate award, the default position is that such proceedings shall take place in open court, unless a party applies for them to be heard in private (section 83 of the Law). As such, a party seeking recourse to the courts should take care and take steps to preserve the confidentiality of proceedings if desired.

10. The Award

10.1 Legal Requirements

The legal requirements for an arbitral award are stipulated in section 63 of the Law. The arbitral award must be in writing and must be signed by all the arbitrators or, if the reasons for any omitted signatures is stated, by the majority. Unless the parties have agreed otherwise, or the award is on agreed terms, the award must state the reasons upon which it is based. The award must state its date and the seat of the arbitration, and will be deemed to have been made there. A copy of the award signed by the arbitrators must be delivered to each party.

Once the award is rendered, the parties may sometimes have an opportunity to invite the tribunal to make corrections to it. In respect of typographical, clerical and arithmetical errors, a party has 30 days from receipt of the award to invite the tribunal (on notice to the other parties) to make appropriate corrections. Within the same time period, a party may ask the arbitral tribunal to give an interpretation of a specific point or part of the award, with the agreement of the other parties. More substantively, within 30 days of the receipt of the award and on notice to the other party, a party may request the arbitral tribunal to make an additional award as to claims presented during the arbitration proceedings but omitted from the award (section 69 of the Law).

Generally, unless the contrary is provided in the arbitration agreement, there is no time limit within which the tribunal must render its award (section 59 of the Law). If such a time limit is imposed, the court may extend it, unless otherwise agreed by the parties.

It is worth bearing in mind that, because the arbitral tribunal is a creature of contract, it unsurprisingly has certain powers to help it ensure that its fees are paid. In particular, unless agreed otherwise by the parties, the arbitral tribunal may refuse to deliver an award to the parties if the parties have

not paid the fees and expenses of the arbitrators in full (section 67 of the Law).

There is a rebuttable presumption that the tribunal is entitled to make interim awards, if it deems it appropriate (section 62 of the Law).

10.2 Types of Remedies

Pursuant to section 57(2) of the Law, unless agreed otherwise by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court. This means that the tribunal is generally competent to award pecuniary damages, declarations, injunctions, orders for specific performance, and other remedies that a Cayman Islands court can award.

Punitive damages are not available in the Cayman Islands courts and so, absent the parties' agreement on the issue, an arbitral tribunal would not be able to order punitive damages.

10.3 Recovering Interest and Legal Costs

Unless otherwise agreed, the costs of the arbitration are at the discretion of the arbitral tribunal (section 64 of the Law). Unless costs are determined in the award itself, any party may make an application to the tribunal for a direction as to costs within 14 days of the delivery of the award.

The tribunal has power to award interest on any amount the award orders to be paid, with the rate of interest and the period for which it runs being at the discretion of the tribunal. If no rate of interest is specified in the award, it will carry the same rate of interest as a judgment debt awarded by the court (section 58 of the Law).

While arbitration awards tend to be private (see above), anecdotal evidence suggests that the usual approach is for costs to follow the event, meaning that the losing party pays the winning party's costs.

11. Review of an Award

11.1 Grounds for Appeal

With the leave of court, and upon notice to the other party and the arbitral tribunal, a party to the arbitration may appeal to the court on a question of law arising out of an award made in the arbitration (section 76(1) of the Law). An application for leave to appeal must identify the question of law to be determined and state the grounds on which leave to appeal should be granted. Leave to appeal shall be given only on the following grounds:

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

At the end of the appeal process, the court may (i) confirm the award; (ii) vary the award; (iii) remit the award to the arbitral tribunal for reconsideration in whole or in part; or (iv) set aside the award in whole or in part. If the award is remitted back to the tribunal, it shall make its award within three months of the date of the order, unless the court directs otherwise.

Separate from the right of appeal under section 76 of the Law, the court also has the power to set aside an award under section 75 of the Law. An award may be set aside in the following circumstances:

- if a party to the arbitration agreement was under an incapacity or placed under duress to enter into it;
- if the arbitration agreement is invalid under the applicable law;
- if the party was not given proper notice of the appointment of an arbitrator or the arbitration proceedings, or was otherwise unable to present his or her case;
- if the award deals with a dispute or contains decisions on matters not contemplated by or not falling within the terms of the submission to arbitration;
- if the composition of the tribunal or its procedure is not in accordance with the agreement of the parties or is contrary to any mandatory provisions of the law;
- if the award was induced or affected by fraud, corruption or misconduct by an arbitrator; or
- if there was a breach of the rules of natural justice.

Furthermore, the award may be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the Law, or if the award is contrary to public policy.

Where appropriate and where a party so requests, proceedings to set aside an award may be suspended to allow the arbitral tribunal to resume the arbitration or take such other action as may eliminate the grounds for setting aside an award (section 75(3) of the Law).

Whether the award is challenged by way of an application to set it aside under section 75 or by way of appeal under section 76, the procedural requirements in section 77 of the Law

apply. First, neither application may be brought until every available recourse within the arbitral process itself has been exhausted. Second, whichever route is pursued, the application or appeal must be brought within one month of the date of the award. Security for costs may be ordered.

11.2 Excluding/Expanding the Scope of Appeal

The parties may agree to exclude the right to appeal (section 76(2) of the Law). However, there is no scope for excluding the right to set aside the award.

The Law is silent on the question of expanding the scope of appeal or challenge, but since any appeal or challenge invokes the statutory jurisdiction of the Grand Court as opposed to the consensual and contractual jurisdiction of the arbitral tribunal, it must be the case that the scope of appeal cannot be expanded by agreement.

11.3 Standard of Judicial Review

Appeals under section 76 of the Law are concerned with examining decisions on questions of law only. The section gives no scope to appeal findings of fact.

Broadly speaking, the grounds for setting aside under section 75 of the Law go to the jurisdictional competence and procedural integrity of an award, and would not necessarily have to involve a de novo examination of all the circumstances of the case.

12. Enforcement of an Award

12.1 New York Convention

The enforcement of domestic arbitration awards is governed by the Law.

As regards the enforcement of foreign arbitration awards, the operation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") has been extended to the Cayman Islands by the United Kingdom by way of a notification made on 26 November 1980. The notification contained the reservation that, in the Cayman Islands, the New York Convention would apply "*only to the recognition and enforcement of awards made in the territory of another Contracting State*".

With regard to awards made in investor-state arbitrations, pursuant to the Arbitration (International Investment Disputes) Act 1966 (Application To Colonies Etc) Order 1967, the United Kingdom extended certain provisions of the Arbitration (International Investment Disputes) Act 1966 ("Act") to the Cayman Islands and, thereby, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington on 18 March 1965 ("Washington Convention").

12.2 Enforcement Procedure

A domestic arbitration award is enforced under the Law. Pursuant to section 72 of the Law, an award may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in terms of the award.

A foreign arbitration award is enforced under section 5 of the FAAEL. Enforcement may be refused on the grounds set out in section 7 of the FAAEL, which match the grounds for refusal of enforcement set out in the New York Convention itself.

Whether in the case of a domestic arbitration award enforceable under the Law or in the case of a foreign arbitration award enforceable under the FAAEL, the application for leave to enforce is made by ex parte originating summons under GCR Order 73 Rule 31. Once the resulting enforcement order is served on the respondent, it will have 14 days (or such longer period as the court may fix if the respondent is outside the Cayman Islands) to apply to set aside the enforcement order. The award shall not be enforced until the expiring of that period or, if an application to set aside is made, until after the application is finally disposed of.

In the case of an award under the Washington Convention, the effect of section 2 of the Act is that an award that has been registered in accordance with section 1 of the Act is of the same force as a judgment of the Grand Court of the Cayman Islands. The procedure for registering a Washington Convention award is set out in GCR Order 73 Rule 34. The application is made by an originating summons, and notice of registration must be served (an affidavit of service of such notice will be required before execution can be issued on the award) (GCR Order 73 Rule 34(2) and GCR Order 71 Rules 7 and 10(3)). Unlike with awards enforceable under the Law or under the FAAEL, there is no provision for setting aside an award under the Washington Convention. However, in certain limited circumstances, the court may stay execution of an award under the Washington Convention (GCR Order 73 Rule 34(6)).

12.3 Approach of the Courts

The enforcement mechanism for domestic and foreign arbitration awards under the Law, the FAAEL and the procedural provisions of GCR Order 73 Rule 31 is well-trodden, and the courts generally deal with such applications in an expeditious and efficient manner. The courts also have experience in dealing with set-aside applications. An award being contrary to public policy is one of the grounds for setting aside a domestic award (section 75(1)(b)(ii) of the Law) and also for refusing leave to enforce a foreign award (section 7(3) of the FAAEL).

In relation to awards under the Washington Convention, it is important to bear in mind that, while the award itself – once recognised – is enforceable as if it were a final judgment of the Grand Court of the Cayman Islands, enforcement of the award remains subject to Cayman Islands law on sovereign immunity, by virtue of Article 55 of the Washington Convention.

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