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International Arbitration

Cayman Islands
Law & Practice
and
Trends & Developments

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CAYMAN ISLANDS

Law and Practice

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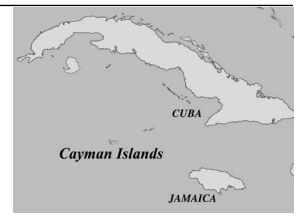

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1. General

1.1 Prevalence of Arbitration

The Cayman Islands arbitration industry continues to develop following the introduction of the modern Arbitration Law, 2012 ("the Law"). To date, arbitration in the Cayman Islands has remained mainly domestic in nature, but the introduction of the Law, combined with support from the Cayman Islands' strong and highly regarded court system, the legal profession's expertise in complex financial disputes and the anticipated establishment of the Cayman International Arbitration Centre (CIAC – www.caymanarbitration.com), should facilitate the development of the Cayman Islands as a centre for international arbitration.

1.2 Trends

The decision of the Grand Court of the Cayman Islands in BDO Cayman Ltd concerning Argyle Funds SPC Inc [2018 (1) CILR 114], 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. While the BDO decision has been successfully appealed in part (Argyle Funds SPC Inc (in Official Liquidation) v BDO Cayman Ltd, CICA (Civil) 8 of 2018, unreported, 8 October 2018), the appeal did not displace the Grand Court's core decision to enforce the arbitration agreement by way of an anti-suit injunction. A 2019 Grand Court decision which suggested that the courts would give effect to arbitration clauses in the context of just and equitable winding-up petitions was very recently overturned by the Cayman Islands Court of Appeal. Nevertheless, as explained in **3.2 Arbitrability**, this does not necessarily prevent parties from crafting arbitration clauses that would give effect to an intention to submit all disputes to arbitration.

On the enforcement side, the cases of In re China Healthcare Inc (FSD 120 of 2018, Kawaley J, 3 October 2018, unreported) and VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & others (FSD 137 of 2016, Mangatal J, 19 February 2019, unreported) (the latter very recently overturned by the Cayman Islands Court of Appeal) (see **12.3 Approach of the Courts**) illustrate the Cayman Islands' Courts' considerable and continually growing expertise in matters regarding the recognition and enforcement of foreign arbitral awards. Also, on 29 May 2019, the Grand Court granted an application for the enforcement in the Cayman Islands of a USD1.5 billion arbitral award made by an ICC Arbitration Tribunal sitting in Minnesota, USA (Arcelormittal USA LLC v Essar Steel Limited and Others (Cause No. FSD 74 of 2019, Kawaley J, 2 July 2019, unreported)).

Furthermore, as noted above, it is anticipated that 2020 will see the establishment of CIAC, which it is hoped will offer an attractive option for parties wishing to arbitrate in the Cayman Islands.

The Cayman Islands took robust steps to minimise the impact of the global COVID-19 pandemic. The administration of justice, including the court system, adapted swiftly and continued to function largely undisturbed. That said, worldwide air travel restrictions will inevitably affect the ability and willingness of parties to travel to the Cayman Islands. Therefore, COVID-19 might reasonably be expected to have some impact on the timing and scope of initiatives such as the establishment of CIAC. However, it is understood that the CIAC project is still expected to go ahead.

1.3 Key Industries

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

1.4 Arbitral Institutions

For the time being, domestic arbitrations tend to be ad hoc. A variety of major arbitral institutions tend to be named in arbitration agreements with an overseas seat. The anticipated establishment of CIAC suggests that the Cayman Islands may have their own arbitral institution in the near future. The Cayman Islands Association of Mediators and Arbitrators (CIAMA – http://ciama.ky) continues to be named in arbitration agreements as the appointing body.

2. Governing Legislation

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.

The enforcement of arbitral awards made by arbitral tribunals seated in other jurisdictions is governed by the Foreign Arbitral Awards Enforcement Law (1997 Revision) (FAAEL), in which the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is given domestic effect.

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. The Arbitration Agreement

3.1 Enforceability

Subject to certain limited exceptions, an arbitration agreement must be in writing and must be contained in a document signed by the parties or in an exchange of communications (s. 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, except 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 (s. 26(1) of the Law). At the same time, s. 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 have, until very recently, appeared 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 for contingency fees by a US law firm should be released. The firm's engagement letter contained a New York arbitration clause. The court held that, because the need for a liquidation reserve depended on the strength of the claim, which was within the scope of the arbitration clause, the application to release the reserve itself had to be stayed in favour of arbitration, pursuant to s. 4 of the FAAEL.

In reaching this conclusion, the court cast doubt 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 subject to arbitration in New York. While Sphinx did not overrule Cybernaut, it may be seen as being indicative of a greater willingness by the courts to give effect to arbitration clauses even against the background of insolvency proceedings. In a similar vein, in Re Times Property Holdings Ltd [2011 (1) CILR 223], the court stayed a creditor's winding-up petition pending arbitration of the alleged indebtedness in Hong Kong, which further demonstrates the Cayman Islands' pro-arbitration stance.

This trend of the courts holding the parties to their arbitration agreements even in the context of winding-up proceedings was continued by the decision in In re China CVS (Cayman Islands) Holding Corp [2019 (1) CILR 266], in which the Grand Court stayed a petition for the just and equitable winding-up under s. 4 of the FAAEL in favour of arbitration of the underlying issues, pursuant to the arbitration clause in the relevant shareholders' agreement. While the decision acknowledged that the actual remedy of just and equitable winding-up could only be granted by the court, it also demonstrated that the court was prepared to leave distinct arbitrable issues underpinning the application for such relief to the arbitral tribunal (particularly when alternative non-winding-up relief is also sought), in accordance with the relevant arbitration clause. However, in a very recent judgment, the Cayman Islands Court of Appeal reversed the Grand Court's decision in China CVS (CICA Appeal Nos: 7 & 8 of 2019, 23 April 2020, unreported). The Court of Appeal held that the disputes underlying a petition for just and equitable winding-up cannot be hived off to arbitration, because they form an indivisible part of the threshold question that is within the sole jurisdiction of the court – namely, whether it is just and equitable to wind up the company. The decision seems to represent a retrenchment of the recent trend favouring the enforcement of arbitration agreements in the insolvency context. Nevertheless, the Court of Appeal decision notes that the parties could give full effect to the arbitration agreement in this sort of case by expressly agreeing to exclude recourse to just and equitable winding-up, which is possible under s. 95(2) of the Companies Law (2020 Revision). Therefore, if the parties wish to protect their arbitration agreement against the consequences of the Court of Appeal decision in China CVS, they can do so by expressly agreeing to forego the right to present a just and equitable winding-up petition. Clearly, the nexus between arbitration and insolvency continues to be an actively evolving area.

Separately, while there is no prohibition against referring disputes that involve allegations of fraud to arbitration, s. 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

The enforcement of arbitral awards is dealt with in more detail below, as is the enforcement of arbitration agreements by way of ancillary relief. As for 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 (s. 3(3) of the Law).

3.4 Validity

The invalidity of the contract containing the arbitration clause does not entail the invalidity of the arbitration clause itself (s. 4(6) of the Law). Indeed, a dispute about the validity of the substantive agreement may be arbitrated in accordance with the arbitration agreement (s. 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 (s. 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 (s. 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 on the number of arbitrators, there shall be a single arbitrator (s. 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 the 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). Currently, the CIAMA will act as the appointing authority if the parties request it to do so.

There is no default procedure under the Law that applies in the case of multi-party arbitrations, but the parties are free to agree their own procedures or adopt institutional rules.

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 on 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 s. 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 (s. 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 (s. 18(3) of the Law). The parties are free to agree on the procedure for challenging an arbitrator (s. 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 (s. 19(4) of the Law). A challenge does not suspend the arbitration proceedings, nor prevent the tribunal from making an award while the challenge is being decided (s. 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 his or her capacity), or if he or she has refused or failed to properly 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 (s. 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 (s. 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 (s. 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 (s. 18(1) of the Law). This is a continuing duty (s. 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 (s. 25 of the Law).

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The arbitral tribunal is competent to rule on a challenge to its jurisdiction (s. 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, a party – if it accepts jurisdiction – has 30 days after receiving notice of that ruling to apply to the court to decide the matter (s. 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.

The Law does not contain the same detailed provisions for challenging a negative ruling on jurisdiction as contained in s. 67 of the English Arbitration Act 1996. However, if the arbitral tribunal rejects jurisdiction and the decision raises a point of law, it should be open to a party to appeal that decision on a point of law under s. 76 of the Law.

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 (s. 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 s. 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 s. 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]).

For the court's approach in the particular context of winding-up proceedings, see **3.2 Arbitrability**.

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 other party to the arbitration into arbitration proceedings (Unilever Plc v ABC International [2008 CILR 87]). Furthermore, in VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & others (FSD 137 of 2016, Mangatal J, 19 February 2019, unreported), the Grand Court set aside an order enforcing a foreign arbitral award due, in part, to the fact that the fund was not party to the arbitration agreement in question. Although VRG was recently overturned on appeal (see **12.3 Approach of the Courts**), the case still exemplifies the close attention the Grand Court pays to the issue of proper parties.

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 s. 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 s. 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 (s. 49(1) of the Law).

Unless otherwise agreed, an application for an interim measure under s. 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 (s. 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 (s. 50 of the Law), and shall be required to provide security, unless the tribunal considers it unnecessary or inappropriate to do so (s. 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 it to any party if the arbitral tribunal later determines that the measure or order should not have been granted (s. 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 (s. 52(1) of the Law).

In addition, the court has its own, free-standing jurisdiction to order the same 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 (s. 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 (s. 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 but 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 (s. 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 to be agreed by the parties or determined by the tribunal. However, Part VII of the Law provides for some basic elements of procedure that apply in default of agreement.

Unless there is 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 claim, the points in issue, and the relief or remedy sought, and the defendant is required to state his defence (s. 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 (s. 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 (s. 33 of the Law). The arbitral tribunal may appoint one or more experts to report to it on specific issues (s. 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, and to conduct the arbitration without unnecessary delay, and without incurring unnecessary expense (s. 28 of the Law). The Law also imposes the duties of disclosure on the arbitrators (see **4.5 Arbitrator Requirements**).

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 (s. 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 the 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, s. 39 of the Law gives 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 (s. 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; 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 the 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.

The Grand Court upholds this principle. For example, in Appalachian Reinsurance (Bermuda) Ltd v Mangino [2014 (1) CILR 152], the Grand Court found that an arbitral tribunal's decision to render summary judgment without an oral hearing was lawful in light of, among other things, the parties' agreement that the tribunal was not required to follow judicial formalities or rules of evidence.

8.2 Rules of Evidence

No specific rules of evidence apply to arbitral proceedings in the Cayman Islands. Indeed, pursuant to s. 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 (s. 42 of the Law).

8.3 Powers of Compulsion

Unless otherwise agreed by the parties, the arbitral tribunal has the power to order the discovery of documents and to direct a party or witness to be examined on oath or affirmation (s. 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 s. 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 (s. 41 of the Law). The powers of compulsion available to the court under ss. 40 and 41 are available against both parties and non-parties.

9. Confidentiality

9.1 Extent of Confidentiality

Pursuant to s. 81 of the Law, arbitral proceedings are private and confidential. The 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 (s. 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.

In principle, the courts are prepared to grant sealing orders in appropriate cases, as demonstrated by the decision of the Cayman Islands Court of Appeal in Sasken Communication Technologies Limited v Spreadtrum Communications Incorporated [2016 (1) CILR 1], by which the court ordered that certain documents on the court file of the earlier application to enforce an arbitration award should be sealed so that no third party could inspect them without leave of the court and notice being given to the parties.

10. The Award

10.1 Legal Requirements

The legal requirements for an arbitral award are stipulated in s. 63 of the Law. The arbitral award must be in writing and must be signed by all the arbitrators or by the majority, if the reason for any omitted signatures is stated. 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 (s. 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 (s. 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 (s. 67 of the Law).

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

10.2 Types of Remedies

Pursuant to s. 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, without 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 (s. 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 (s. 58 of the Law).

While arbitration awards tend to be private (see **9. Confidentiality**), 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 the court, and upon notice being given 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 (s. 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 of the 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:

- confirm the award;
- vary the award;
- remit the award to the arbitral tribunal for reconsideration in whole or in part; or
- 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 s. 76 of the Law, the court also has the power to set aside an award under s. 75 of the Law, in the following circumstances:

- if a party to the arbitration agreement was under an incapacity or was 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 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 (s. 75(3) of the Law).

Whether the award is challenged by way of an application to set it aside under s. 75 or by way of appeal under s. 76, the procedural requirements in s. 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 (s. 76(2) of the Law), but 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 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 s. 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 s. 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 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." The New York Convention is given domestic effect by the FAAEL.

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 (the 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 (the Washington Convention). It is worth noting that the Cayman Islands has three UK BITs extended to it (with Belize, Panama and St Lucia).

12.2 Enforcement Procedure

A domestic arbitration award is enforced under the Law, pursuant to s. 72 of which 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 s. 5 of the FAAEL. Enforcement may be refused on the grounds set out in s. 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 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 expiration 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 s. 2 of the Act is that an award that has been registered in accordance with s. 1 of the Act is of the same force as a judgment of the Grand Court. 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 the 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 (s. 75(1)(b)(ii) of the Law) and also for refusing leave to enforce a foreign award (s. 7(3) of the FAAEL).

The Grand Court is robust in enforcing (or permitting the recognition of) foreign arbitral awards, where appropriate. An example of successful enforcement is the case of In re China Healthcare Inc (FSD 120 of 2018, Kawaley J, 3 October 2018, unreported), where the Grand Court allowed a petitioner to rely on a Hong Kong arbitral award to wind up a company despite the fact that the award was subject to a set-aside application in Hong Kong. In reaching its decision, the Grand Court was assisted by and made observations on the similarities between the relevant provisions of the FAAEL and the Hong Kong statutes governing the setting aside of arbitral awards, deriving as they both did from the New York Convention and the UNCITRAL Model Law. This fact allowed the Grand Court to view the relevant decisions of the Hong Kong courts as persuasive, and is an intriguing example of the sort of cross-jurisdictional consistency that is made possible by the fact that the relevant national laws have a common root in international instruments. The judgment also reiterated the two key pro-arbitration principles adopted by the Cayman Courts: ensuring that arbitration agreements are honoured by enforcing agreements to arbitrate,

and enforcing arbitration awards after arbitral disputes have been adjudicated by the contractually agreed tribunal.

At the same time, the Grand Court is astute in exercising its limited discretion to refuse enforcement where it considers that the award offends the fundamental principles established by the New York Convention. The case of VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & others (FSD 137 of 2016, Mangatal J, 19 February 2019, unreported) is a recent example of the Grand Court enforcing those principles. In VRG, the Grand Court refused to enforce an award obtained in an ICC arbitration in Brazil in circumstances where the Grand Court found that the defendants were not parties to the arbitration agreement, and where findings of liability were made on grounds that had not been pleaded or argued in the arbitration. As such, not only was the award found to have violateed the principles established by the New York Convention, but it was also held to be contrary to the public policy of the Cayman Islands, which provides a right for each party to be heard.

The Grand Court's judgment in VRG was very recently overturned by the Cayman Islands Court of Appeal (Gol Linhas v MatlinPatterson Global Opportunities (CICA 012 of 2019, 11 August 2020, unreported)), which dismissed the challenge to the award's enforcement, while staying execution of the enforcement judgment pending the conclusion of appellate proceedings in Brazil courts. The Court of Appeal judgment does not cast doubt on the Grand Court's powers to refuse enforcement in appropriate limited circumstances, but it does make some important observations that are of particular interest in enforcing arbitral awards from civil law seats.

First, where an arbitral award has already been subject to a supervisory challenge in the courts of its seat, the Cayman Islands courts can be expected to be slow to diverge from the conclusions reached by the court of the seat on issues of its own law (even if formal issue estoppel might not have been established). Second, although objections to award enforcement based on due process or public policy are to be judged by Cayman Islands standards, due respect is to be accorded to established foreign doctrines of procedure (in this case, the civil law principle of iura novit curia) applicable under the curial law of the arbitral seat chosen by the parties even if they might diverge from common law concepts of due process. Third, the defence of due process violation or public policy requires proof of substantial injustice, which in turn requires a showing that the alleged violation made a significant difference to the outcome.

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, enforcement of the award remains subject to Cayman Islands law on sovereign immunity, by virtue of Article 55 of the Washington Convention.

13. Miscellaneous

13.1 Class-Action or Group Arbitration

In general, even in the context of litigation, the Cayman Islands do not have the concept of "class action" as it is commonly understood in jurisdictions such as the United States. That being said, in principle, it is possible in the litigation setting for a single plaintiff to bring so-called "representative proceedings" on behalf of a group of plaintiffs with the same interests. However, historically, this has been rare in non-insolvency litigation.

As for arbitration, the Law does not make any express provision for class action or group arbitration. The Law also prevents an arbitral tribunal from consolidating arbitral proceedings or hearing them concurrently without the parties' consent (see **13.4 Consolidation**). In the circumstances, and given that there are no class action or group arbitrations seated in the Cayman Islands, as far as is known, such proceedings might only be possible if they are specifically provided for in the relevant arbitration agreement between all the relevant parties.

13.2 Ethical Codes

The Cayman Islands Legal Practitioners Association (CILPA) has promulgated a voluntary code of conduct for Cayman Islands attorneys-at-law (the Code of Conduct), which makes no differentiation between litigation and arbitration. Rule 1.10 of the Code of Conduct requires Cayman Islands attorneys-at-law to have regard to the provisions of the International Principles on Conduct for the Legal Profession promoted by the International Bar Association (the IBA Code). However, where the IBA Code and the Code of Conduct conflict, the Code of Conduct prevails.

Ultimately, all counsel who are attorneys-at-law admitted to practice in the Cayman Islands are subject to the disciplinary jurisdiction of the Grand Court. Pursuant to s. 7(1) of the Legal Practitioners Law (2015 Revision) (LPL), a judge of the Grand Court has the power, for reasonable cause shown, to suspend any attorney-at-law from practising for a specified period, or to strike his name off the Court Roll. While it is not necessary to be a Cayman Islands-admitted attorney-at-law in order to represent a party in an arbitration seated in the Cayman Islands (s. 34 of the Law), the potential sanction under s. 7 of the LPL is clearly formidable from the point of view of a local attorney.

No domestic code of conduct applies to foreign attorneys (or non-lawyers) conducting arbitration proceedings in the Cay-

man Islands. However, foreign attorneys might be expected to be subject to their own domestic ethical codes.

13.3 Third-Party Funding

The climate for third-party funding in the Cayman Islands has improved in recent years.

Until recently, the settled understanding was that third-party litigation funding could only be utilised by liquidators in insolvency situations, with the sanction of the Court. This was due to the fact that, in solvent situations, such funding was typically understood to offend against the common law doctrines of maintenance and champerty (essentially, funding litigation for commercial gain).

However, in Company v A Funder [2017 (2) CILR 710], the Grand Court issued a declaration in relation to a proposed funding agreement intended to fund the enforcement of an overseas arbitral award in the Cayman Islands that the funding agreement in question was not unlawful, despite the fact that the statement that the object of the proposed funding was solvent was uncontested. The decision also set out a useful list of factors (which are essentially the same as under English common law) that the court would consider when evaluating such funding agreements.

The industry can derive further comfort from the subsequent judgment of the Grand Court in Trustee v The Funder (Cause No. 98 of 2018, 26 July 2018, Segal J, unreported), in which, having evaluated a proposed third-party funding agreement against the factors set out in Company v A Funder, the court declared lawful a third-party funding agreement intended to fund the defence by the Trustee of Cayman proceedings relating to the assets of the Trust.

While neither of these decisions concerned third-party funding of Cayman arbitration per se, it is likely that the Grand Court would follow the English decision of Bevan Ashford v Geoffrey Yeandle [1999] 2 Ch 239, which ruled that the doctrines of maintenance and champerty also apply to arbitration proceedings. As such, the principles applied in Company v A Funder and in Trustee v The Funder permitting a third-party funding arrangement in the context of litigation should be equally applicable in an arbitration.

It should be noted that both decisions were uncontested, so this development awaits its first test in a fully adversarial setting. Nevertheless, these recent decisions of the Grand Court strongly suggest that third-party funding arrangements would be allowed to stand in the context of an arbitration, subject to the same considerations as apply under English law.

13.4 Consolidation

The arbitral tribunal may only consolidate arbitral proceedings or hold concurrent hearings in two or more arbitral proceedings if and to the extent the parties to the relevant arbitration agreements have agreed to this (s. 36 of the Law). Without such agreement, the arbitral tribunal has no power to consolidate or to hold concurrent hearings.

The Law confers no power on the courts to consolidate separate arbitration proceedings. Given the underlying principle of non-interference in the arbitral process, the courts might have been expected to be reluctant to do so even if they did have such power.

13.5 Third Parties

See **5.7 Third Parties**.

Carey Olsen represents clients across the full spectrum of contentious and non-contentious work, and is widely recognised for its expertise in both international and domestic dispute resolution and litigation cases, including investment fund, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, and regulatory investigations, employment disputes and advisory work.

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CAREY OLSEN

Trends and Developments

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The Cayman Islands remains a pro-arbitration jurisdiction, with recent court decisions demonstrating the judiciary's readiness to engage with the difficult nexus between arbitration and insolvency. These and other developments discussed below increasingly bring the Cayman Islands in line with the criteria for an effective and efficient seat of international arbitration promulgated by the Chartered Institute of Arbitrators in its London Centenary Principles. While the jurisdiction continues to develop and improve, parties can legitimately start considering the Cayman Islands as a potential choice of seat for arbitrating disputes in the international financial services industry.

Cayman has been a major centre of the global financial services industry for decades. It hosts nearly 11,000 hedge funds, which constitutes more than 60% of the world's hedge funds by number and by net assets. Cayman is also the world's second largest captive insurance centre, and is the domicile of 50% of the companies listed on the Hong Kong Stock Exchange. Of the world's 50 largest banks, 40 have a presence on the Islands.

Consequently, Cayman is home to a legal profession, judiciary, and a body of accountancy, audit and other financial professionals with unique and extensive expertise in the resolution of funds and other complex financial services disputes – a concentration of know-how which belies the Islands' diminutive size and idyllic location. To give but one recent example, in 2018 the Grand Court delivered a 1,300-page judgment in the landmark trial of AHAB v Al-Sanea, which lasted for a little over a year and concerned claims in excess of USD9 billion in relation to what has been called "one of the largest Ponzi Schemes in history". On a daily basis, the legal profession and the courts of the jurisdiction deal with numerous other high-value multi-jurisdictional financial services disputes, ranging from contract claims to fraud, and involving parties the world over: New York to Beijing, and Buenos Aires to Moscow.

This deep sectoral expertise and breadth of experience are grounded on a stable democratic government and an independent legal and judicial system based on English common law and offering ultimate recourse to the Privy Council in London (which is comprised of the same Judges who sit in the Supreme Court of England and Wales). Despite this, to date, the Cayman Islands has not been known as a seat of international arbitration. However, with the introduction of the modern Arbitration Law, 2012 (the Arbitration Law), which is based on the UNCITRAL Model Law and the English Arbitration Act 1996, and the subsequent development of the jurisdiction, the Cayman Islands measures up increasingly well against the ten benchmarks laid down for an effective and efficient seat of international arbitration by the CIArb London Centenary Principles. This increasingly positions the jurisdiction to deploy its expertise in financial services disputes in the context of international arbitration.

Law

The first of the London Centenary Principles is that the arbitration seat should offer a clear, effective and modern international arbitration law that recognises and respects the parties' choice of arbitration as the method for settlement of their disputes by providing the necessary framework for facilitating fair and just resolution through arbitration, limiting court intervention, and striking an appropriate balance between confidentiality and appropriate transparency.

The Arbitration Law meets all of these criteria, and the manner in which the Cayman Courts have interpreted and implemented it over the years is consistent with the spirit of the London Centenary Principles.

The Arbitration Law provides the essential framework for a fair and just arbitration process, but without unnecessarily impinging on the parties' freedom to contract a procedure of their own design or adopt one from an established arbitral institution, while providing fall-back default rules for use where parties fail to address a key area. The parties are free to agree their own procedures for selecting arbitrators. The Cayman Islands Association of Mediators and Arbitrators (CIAMA – http://ciama.ky/) will act as appointing authority if called upon to do so (and it continues to be designated as such in arbitration agreements). Alternative appointment procedures under the Arbitration Law are available in default of such agreement, with the Grand Court having the power to designate the appointing authority as a last resort. The Arbitration Law also imposes disclosure requirements on arbitrators with regard to circumstances that might reasonably compromise their impartiality or independence, and provides for a procedure by which an arbitrator might be challenged and removed.

The Arbitration Law takes a similar approach to the procedure and powers of the arbitral tribunal. The starting point is the parties' wide discretion to agree on or adopt such rules for their arbitration as they desire, and to endow their arbitral tribunal with such powers as they wish. A set of fundamental fall-back rules is provided in the Arbitration Law, however, if the parties neither agree a set of rules of their own nor adopt a set devised by an arbitral institution.

The Arbitration Law provides for the privacy and confidentiality of all arbitral proceedings, save to the extent that the parties might agree otherwise. Where arbitral proceedings have to be brought into court (for example, for purposes of the enforcement of awards or other ancillary matters), the Grand Court has shown itself to be sensitive to the parties' confidentiality concerns, sealing specific documents on the court record where this was deemed appropriate (Sasken Communication Technologies Limited v Spreadtrum Communications Incorporated [2016 (1) CILR 1]). On the other hand, where confidentiality is not insisted upon on good grounds, court judgments in relation to arbitrations are made public in the usual course.

As for the scope of court intervention, while the Arbitration Law vests the Grand Court with a number of powers necessary to support a fair and just arbitration process, the Arbitration Law is explicitly founded on the key principles of non-intervention and party and tribunal autonomy, trammeled only by exceptional considerations of public interest. This brings the legislative framework in the Cayman Islands in line with major seats of international arbitration around the world.

Judiciary

The second of the London Centenary Principles is that the seat should be endowed with an independent judiciary, which is competent and efficient, has expertise in international commercial arbitration and is respectful of the parties' choice of arbitration as their method for settlement of their disputes.

The independence and professionalism of the Cayman Islands judiciary is a given and is safeguarded by the Code of Conduct for the Cayman Islands judiciary promulgated pursuant to s. 106(10)(a) of the Cayman Islands Constitution Order 2009. The Code of Conduct for the judiciary is founded on the commonly accepted values adopted by the international judicial community more than 20 years ago, known as the Bangalore Principles of Judicial Conduct. As noted above, the judiciary regularly deals with some of the largest and most complex financial litigations worldwide, such as the USD9 billion AHAB case.

The Grand Court and the Court of Appeal of the Cayman Islands also have considerable expertise in international commercial arbitration, having dealt with dozens of arbitration-related cases, ranging from the enforcement of arbitral awards through to the grant of anti-suit injunctions to restrain breach of arbitration clauses, as well as rulings on the interpretation of arbitral awards, the arbitral procedure, issues of confidentiality, and applications in the context of the discovery process.

The jurisdiction continues to refine its approach to the difficult nexus between arbitration and insolvency. In 2019, the Grand Court reaffirmed its readiness to give effect to arbitration clauses, even in the context of applications for winding up, in its decision in the case of In re China CVS (Cayman Islands) Holding Corp [2019 (1) CILR 266]. In China CVS, the Grand Court stayed a petition for the just and equitable winding up in favour of arbitration of the underlying issues pursuant to the arbitration clause in the relevant shareholders' agreement. In 2020, the Cayman Islands Court of Appeal reversed the Grand Court decision in China CVS (CICA Appeal Nos: 7 & 8 of 2019, 23 April 2020, unreported), casting doubt on how far the courts are prepared to extend the long line of previous decisions that paid appropriate deference to valid arbitration agreements, including the Court of Appeal decision in In Re Sphinx Group (CICA No. 6 of 2015, 2 February 2016), and the Grand Court decisions in BDO Cayman Ltd concerning Argyle Funds SPC Inc [2018 (1) CILR 114] and in Re Times Property Holdings Ltd [2011 (1) CILR 223]. However, the Court of Appeal in China CVS did emphasise that it would be open to the parties to give full effect to their election to arbitrate by expressly excluding recourse to the just and equitable winding up jurisdiction.

Although the Court of Appeal decision in China CVS could be seen as a blow to the jurisdiction's reputation for respecting the parties' choice of arbitration, it would be more accurate to see the decision as part of the courts' continuous engagement with the difficult issues that arise at the constantly evolving junction of the court's insolvency jurisdiction and the parties' election to arbitrate. As such, this line of cases continues to underline the judiciary's considerable expertise in navigating the line between the parties' contractual choice of arbitration and the class nature of remedies in a winding up.

Legal Expertise

The third of the London Centenary Principles is that the seat should offer the arbitrating parties an independent and competent legal profession with expertise in international arbitration and international dispute resolution, so as to provide a significant choice for parties who seek representation in the courts of the seat or in the international arbitration proceedings conducted at the seat.

Like the jurisdiction's judiciary, its legal professionals have extensive experience in litigating international arbitration matters in the Cayman Islands courts, such as the enforcement of

awards and anti-suit injunctions or applications to set aside an arbitral award.

While the jurisdiction is yet to become a seat of international arbitration in its own right and, therefore, its legal professionals are yet to develop substantive expertise in arbitrating international arbitration disputes in the Cayman Islands, the jurisdiction has a number of practitioners who have substantive prior arbitration experience.

The nature of the legal profession in the Cayman Islands means that its attorneys generally – and dispute resolution attorneys in particular – come from a wide variety of jurisdictions and legal backgrounds. Diverse practice areas and multiple jurisdictions are represented, including Australia, Canada, England and Wales, New Zealand, the Republic of Ireland and others. Among them, there are attorneys with substantive past experience of commercial international arbitration as well as investment treaty arbitration. Some of those attorneys organise as members of CIAMA. Furthermore, due to the fused nature of the legal profession in Cayman – whereby attorneys are entitled to and frequently do appear as advocates in front of both the Grand Court and the Court of Appeal – legal professionals in the jurisdiction have considerable experience of advocacy.

At this stage, only the gradual development of the jurisdiction as a seat of international arbitration will substantially promote the further broadening and deepening of arbitration expertise in the seat.

Recent developments in third-party funding rules in the Cayman Islands should also facilitate the parties' access to counsel of their choice. While third-party litigation funding outside of liquidation context has not, until now, been developed in the Cayman Islands, recent Grand Court decisions in Company v A Funder [2017 (2) CILR 710] and in Trustee v The Funder (Cause No. 98 of 2018, 26 July 2018, Segal J, unreported) suggest that third-party litigation funding may now be possible, whether in litigation or in arbitration, subject to the arrangements satisfying similar tests to those applicable in England and Wales.

Education

The fourth of the London Centenary Principles is that there should be an implemented commitment to the education of counsel, arbitrators, the judiciary, users and students of the character and autonomy of international arbitration, and to the further development of learning in the field of arbitration.

Few jurisdictions can boast institutions on the scale of the Chartered Institute of Arbitrators, the promulgator of the London Centenary Principles, which serve to promote the education of counsel, arbitrators and the judiciary in a jurisdiction, among other things. The Cayman Islands is in the early stages of developing similar institutions and practices.

CIAMA is a not-for-profit organisation that has for a number of years been dedicated to creating a culture of best practice in arbitration and mediation in the Cayman Islands through encouraging continuing education in the field.

Furthermore, it is anticipated that, subject to the exigencies of COVID-19, 2020 will see the establishment of the Cayman International Arbitration Centre (CIAC), which, it is hoped, will also help promote these objectives as part of its work.

Right of Representation

The fifth of the London Centenary Principles calls for a clear right for parties to be represented at arbitration by party representatives of their choice (including but not limited to legal counsel), whether from inside or outside the seat.

This right is enshrined in the Arbitration Law, which provides that, unless otherwise agreed by the parties, 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.

Accessibility and Safety

The sixth of the London Centenary Principles requires the seat to be free from unreasonable constraints on entry, work and exit for parties, witnesses and counsel in international arbitration, and calls for adequate safety and protection of the participants, their documentation and information.

Needless to say, parties, witnesses and counsel already regularly come to the Cayman Islands for the purposes of attending the numerous court proceedings that take place in the jurisdiction. The Cayman Islands lie within easy reach of Miami, New York and some of the other cities on the Eastern Seaboard of the United States, as well as a direct flight away from London. No visa is required to visit the islands for citizens of a large number of countries, including the USA, most European states, China, many states in Central and South America, the Caribbean, Africa, the Middle East, Oceania and Asia, as well as most former Commonwealth states. Should work permits be required in some circumstances, the firms of attorneys in the jurisdiction have considerable experience ain obtaining such visas quickly and efficiently in the context of Leading Counsel coming in from London for the purposes of major court hearings and trials.

As to safety, the Cayman Islands is an inherently safe and stable jurisdiction, with a low crime rate and superb hotel facilities.

Facilities
The seventh of the London Centenary Principles demands that the seat should possess functional facilities for the provision of services to international arbitration proceedings, including transcription services, hearing rooms, document handling and management services, and translation services.

In addition to the real-time transcription services available on the Islands, the jurisdiction enjoys easy access to transcription and translation services from the USA, with Miami less than a 90-minute flight away. All of the major law firms in the jurisdiction have adequate document handling and management facilities. These services and facilities have been successfully utilised in some of the largest trials to take place in the Cayman Islands courts.

In terms of hearing rooms, the island of Grand Cayman is home to numerous high-quality hotels, all of which offer multiple meeting and conference rooms, and all of which have extensive experience in hosting regular conferences and business meetings.

Moreover, the anticipated establishment of CIAC is expected to provide parties with alternative facilities, including technological solutions that will permit remote appearances for arbitrators, counsel and witnesses from anywhere in the world, where necessary, and the visual presentation of electronic evidence during hearings.

Ethics
The eighth of the London Centenary Principles calls for the establishment of professional and other norms that embrace a diversity of legal and cultural traditions, and for the development of norms of international ethical principles governing the behaviour of arbitrators and counsel.

The ethical standards of the legal profession in the Cayman Islands are safeguarded by the courts and promoted by the Cayman Islands Legal Practitioners Association (CILPA) by way of its voluntary code of conduct for Cayman Islands attorneys-at-law (Code of Conduct). In addition to its own provisions, the Code of Conduct requires all Cayman Islands attorneys to have regard to the provisions of the International Bar Association International Principles on Conduct for the Legal Profession.

Local arbitration institutions such as CIAMA and, soon, CIAC may be expected to contribute to the further development of arbitration-specific norms in due course.

Enforceability
The ninth of the London Centenary Principles is that the jurisdiction must demonstrate adherence to international treaties and agreements governing and affecting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made in other countries.

The Cayman Islands' ability to adhere to these principles as an arbitral seat is backed by the experience and expertise of the jurisdiction's legal professionals and courts in evaluating foreign arbitral awards against those same principles in the process of their enforcement.

The jurisdiction has developed a strong track record of enforcing arbitral awards that adhere to the relevant international principles – as embodied in the Cayman Islands' Foreign Arbitral Awards Enforcement Law (1997 Revision) (FAAEL), which gives domestic effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). At the same time, the jurisdiction is astute to refuse enforcement where an award offends against the fundamental precepts of the New York Convention and the FAAEL.

Most recently, on 29 May 2019, the Grand Court granted an application for the enforcement in the Cayman Islands of a USD1.5 billion arbitral award made by an ICC Arbitration Tribunal sitting in Minnesota, USA (Arcelormittal USA LLC v Essar Steel Limited and Others (Cause No. FSD 74 of 2019, Kawaley J, 2 July 2019, unreported)). This is only the latest in a long line of decisions that required the jurisdiction's judiciary and legal profession to consider the enforceability of an award, stretching as far back as the 1989 decision in In re Swiss Oil Corporation [1988-89 CILR 277] and spanning numerous decisions since the introduction of the FAAEL in 1997.

That the judiciary and legal profession in the jurisdiction have a keen appreciation of the norms governing the ready recognition and enforcement of arbitral awards in other countries is also demonstrated by detailed consideration of complex issues of due process in the context of interaction between civil and common law jurisdictions in the 19 February 2019 judgment in VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & others (FSD 137 of 2016, Mangatal J, 19 February 2019, unreported) and in the subsequent reversal of that judgment by the Cayman Islands Court of Appeal (Gol Linhas v MatlinPatterson Global Opportunities (CICA 012 of 2019, 11 August 2020, unreported)). The Grand Court refused to enforce an ICC arbitration award from Brazil because it found that the award offended against the fundamental principles of the FAAEL and the New York Convention, which require the defendants to be parties to the arbitration agreements and the findings of liability to be made on grounds that have been pleaded in the arbitration.

The Cayman Islands Court of Appeal, in overturning the Grand Court, emphasised the significance of findings of local law made by the court of the arbitral seat's supervisory jurisdiction in the context of a domestic challenge to the award. The Cayman Islands Court of Appeal also held that consideration of due process and public policy in the context of enforcement proceedings under Cayman Islands law takes account of well recognised civil law doctrines such as iura novit curia.

Immunity

The tenth and final of the London Centenary Principles is that there should be a clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

This protection is enshrined in the Arbitration Law, which provides that an arbitrator is not liable for any consequences resulting from his or her negligence or mistake of law, fact or procedure, but will be so liable if they acted in bad faith.

The above survey of the recent trends and developments in the Cayman Islands shows that, while the jurisdiction undoubtedly has room for further development in certain areas, it has developed a strong foundation and track record in many of the London Centenary Principles, including in particular in the crucial areas of law, judiciary and enforceability.

Combined with the jurisdiction's excellent expertise in complex financial services disputes, and even as the jurisdiction continues to develop in the other areas identified by the London Centenary Principles, the Cayman Islands is now at a stage of its development as an arbitral jurisdiction where parties can legitimately start considering the Cayman Islands as a potential choice of seat for arbitrating disputes in the international financial services industry.

Carey Olsen represents clients across the full spectrum of contentious and non-contentious work, and is widely recognised for its expertise in both international and domestic dispute resolution and litigation cases, including investment fund, corporate, commercial and civil disputes, banking, financial services and trusts litigation, fraud and asset tracing claims, and regulatory investigations, employment disputes and advisory work.

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