

Litigation and enforcement in the Cayman Islands: overview

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MAIN DISPUTE RESOLUTION METHODS

1. What are the main dispute resolution methods used in your jurisdiction to resolve large commercial disputes?

Litigation through the court system is the main method of dispute resolution used in the Cayman Islands to resolve large commercial disputes.

Litigation in the Cayman Islands is adversarial in nature and the standard of proof in civil matters is on the balance of probabilities. The court has wide powers under the Grand Court Rules to control the conduct of both the parties to the litigation and their legal counsel.

Alternatives to litigation through the courts, such as arbitration and mediation, are increasingly being used (see *Question 30*). However, they are still rare when compared to the prevalence of litigation initiated through the Cayman Islands courts.

The courts are increasingly conducting remote video hearings and adopting electronic filing of documents. Although these developments emerged as a response to the COVID-19 pandemic, it might be expected that at least some aspects of increased use of online technology will remain.

COURT LITIGATION

Limitation periods

2. What limitation periods apply to bringing a claim and what triggers a limitation period?

The limitation periods and trigger points differ for the different types of claims and are as follows (*Limitation Act (1996 Revision)*):

- Contract: six years commencing on the date of the breach of the contract.
- Tort (excluding personal injury, libel and slander where the time limit is reduced to three years): six years commencing, in most cases, on the date of the damage (with provision to extend where the claimant did not have the necessary knowledge of the material facts of the damage, up to a maximum of 15 years).
- Action on any sum recoverable under any legislative provision: six years from the date on which the sum was due.
- Contribution claims: two years from the date that the action accrued.
- Claims for the recovery of land: 12 years commencing from the date when the right accrued (30 years if the claim is against the Crown).

Claims by a beneficiary against a trustee for fraud, fraudulent breach of trust or the recovery of trust property have no specified limitations, but will be subject to the law of equity, such as laches.

In most cases, the limitation period commences at the time the claimant acquires the right to bring the action (see *above*). However, commencement dates can be deferred where:

- The claimant was under a disability.
- There has been an acknowledgment or part payment.
- The claim is based on fraud or mistake.
- A claimant's right of action has been deliberately concealed from him or her by the defendant.

Court structure

3. In which court are large commercial disputes usually brought? Are certain types of disputes allocated to particular divisions of this court?

Large commercial disputes are brought in the Grand Court, which is the superior court of record in the Cayman Islands with unlimited monetary jurisdiction. The Grand Court has five divisions:

- Civil Division.
- Financial Services Division.
- Family Division.
- Criminal Division.
- Admiralty Division.

Typically, large commercial disputes will be brought in either the Civil Division or the Financial Services Division. The following types of claims must be brought in the Financial Services Division:

- Proceedings relating to Cayman-registered investment funds or exempted insurers.
- Claims in excess of USD1.2 million for breach of insurance contracts.
- Any application under the regulatory laws.
- Most trust proceedings, except where net asset value is less than USD1.2 million.
- Certain actions under the Companies Act, including all winding-up proceedings.
- Any application for an order dissolving a partnership that carries on business as a mutual fund.
- Proceedings to obtain evidence in support of a foreign letter of request.
- Local bankruptcy proceedings.
- All applications made under Part XVII of the Companies Act (International Co-operation).

- Proceedings for enforcing foreign judgments and arbitral awards.
- Any action for breach of contract or breach of duty by or against a professional service provider, except where the claim is less than USD312,500.
- Proceedings brought under the Arbitration Act 2012.

All other large commercial disputes will be brought in the Civil Division, except for admiralty cases and matrimonial property disputes that must be brought in the Admiralty and Family Divisions, respectively.

The answers to the following questions relate to procedures that apply in the Civil and Financial Divisions of the Grand Court.

Rights of audience

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?

Rights of audience/requirements

All attorneys generally admitted to practise in the Cayman Islands can appear before all Cayman Islands courts. To be admitted generally, an attorney must be resident in the Cayman Islands and meet the qualification requirements of the Legal Services Act, 2020.

Foreign lawyers

The Grand Court can grant a foreign lawyer limited admission to act in a specific case. The foreign attorney must be instructed by local attorneys for that purpose and comply with the same qualification requirements as a generally admitted attorney. Typically, this discretion is granted only to foreign lawyers who have particular expertise and/or seniority, and will not be granted to junior attorneys except in "unusual and special circumstances".

FEES AND FUNDING

5. What legal fee structures can be used? Are fees fixed by law?

Cayman Islands attorneys typically charge hourly rates, which is also the basis on which recoverable costs are assessed by the court. While the recoverability of fees is fixed by the Grand Court Rules (see *Question 22*), the fees that a lawyer can charge his or her client are a matter of contract between the relevant parties and are not fixed, or in any other way limited, by law.

As at the time of writing, the scope for conditional fee arrangements is still limited and contingency fees are prohibited. However, this will change and the landscape for innovative fee structures and litigation funding will transform dramatically once the Private Funding of Legal Services Act 2020 comes into force on 1 May 2021.

The Act will abolish the common law offences of maintenances and champerty. It will permit conditional fee agreements and contingency fee agreements, provided certain conditions are met.

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

Litigation is typically funded by the parties to the action (or their related entities), but third party litigation funding is permitted in certain circumstances, and is becoming more common.

Once the Private Funding of Legal Services Act 2020 comes into force (see *Question 5*), the common law offences of maintenance and champerty will be abolished. The Act will also make specific provision for litigation funding agreements.

However, pending the coming into force of the 2020 Act, litigation funding agreements are currently permissible, provided they meet certain requirements outlined in case law. In the case of *A Company and A Funder (unreported, Segal J, 23 November 2017)*, the Grand Court provided guidance on the factors that are relevant to the lawfulness of a funding agreement:

- The extent to which the funder controls the litigation: there is risk of abuse where a non-party funder has complete control of the conduct of proceedings, but reasonable protection of the funder's financial interest by ensuring the proceedings are properly conducted may be permissible.
- The ability of the funder to terminate the funding agreement at will or without reasonable cause: unfettered termination rights give rise to a risk of impermissible levels of control by the funder.
- The level of communication between the funded party and the attorney: the funder should not be able to control the litigation by controlling communications with the attorneys conducting the proceedings.
- The prejudice likely to be suffered by a defendant if the claim fails: a funding agreement under which the funder is not liable to meet any adverse costs order raises a risk of abuse. However, this can be mitigated against by requiring the funded party to take out after the event (ATE) insurance.
- The extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation.
- The amount of profit that the funder stands to make: a funding agreement is more likely to be unlawful where the funded party is no longer in a position to derive a real benefit from a successful outcome.
- Whether or not the funder is a professional funder and/or is regulated: an important consideration is likely to be whether the funder is a member of a professional body with its own rules of conduct.

Before *A Company and A Funder*, it was already well established that a court-appointed liquidator of a Cayman Islands company can assign to a third party part of the proceeds of litigation, in exchange for litigation funding, provided the third party has no right to control or interfere with the conduct of the relevant litigation.

Insurance

Although there is an increased use of after the event (ATE) insurance by claimants that are resident in jurisdictions that have an established ATE market (for example, London), there is no established local practice of insuring against adverse litigation costs. The case of *Caribbean Islands Development Ltd (in official liquidation) v First Caribbean International Bank (Cayman) Limited [2014] (2) CILR 220* also suggests that a foreign ATE policy will not constitute acceptable security for costs where there are no assets or funds held within the jurisdiction.

COURT PROCEEDINGS

Confidentiality

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

Proceedings before the Cayman Islands court are generally held either in open court or in the judge's chambers. Proceedings in open court are open to the public, while proceedings in the judge's chambers are generally considered to be private to the parties to the proceedings. However, the presiding judge can allow other interested parties, including members of the public, to attend a chambers hearing.

In large commercial disputes the substantive trial is generally held in open court. However, interlocutory matters are generally dealt with in the judge's chambers. In insolvency proceedings, while the petition for the winding-up of the company must be heard in open court, interlocutory applications, either before the hearing of the winding-up petition or after the making of a winding-up order, are heard in the judge's chambers.

Unless otherwise ordered by the court, all originating proceedings filed with the court and all judgments and orders issued by the court are available for public inspection, on payment of a small fee. All other documents filed with the court are not available to the public and are generally only available to the parties. However, the court rules provide for a process whereby non-parties to a proceeding can apply to the court to have access to some or the entire court file.

The court's public registers of originating process orders are accessible online (www.judicial.ky/court_search/).

Pre-action conduct

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

The court does not impose any rules on the parties in relation to pre-action conduct other than in relation to judicial review proceedings (for which there is a specific pre-action protocol). However, the court has a wide discretion to order costs and can consider a party's pre-action conduct when making a costs order.

Main stages

9. What are the main stages of typical court proceedings?

Starting proceedings

Typically, proceedings in the Grand Court are commenced by one of the following methods:

- Writ of summons.
- Petition.
- Originating summons.
- Originating notice of motion.

The method used will depend on the nature of the cause of action and the relief sought.

Notice to the defendant and defence

Where proceedings are commenced by ordinary writ, the claimant must serve on any local defendant within four months of issue of

the writ. Where the defendant is outside the Cayman Islands, the writ must be served within six months.

The time for filing the defence depends on whether a statement of claim was served with the writ. If a statement of claim was served with the writ, the defendant must both:

- File an acknowledgment of service giving notice of its intention to defend the claim within 14 days of service (extended to at least 28 days if the defendant is served outside the Cayman Islands).
- File and serve a detailed defence (and any counterclaim) within 14 days of filing the acknowledgment of service.

If a statement of claim is not served with the writ, the defendant must file an acknowledgement of service within 14 days of service of the writ (extended to at least 28 days if the defendant is served outside the Cayman Islands). The claimant must then serve a statement of claim within 14 days of service of the acknowledgement of service and the defendant must serve its defence (and any counterclaim) within 14 days of service of the statement of claim.

All of the above time limits can be extended either by agreement between the parties or by way of court order.

Subsequent stages

The subsequent stages of a proceeding are as follows:

- The claimant has 14 days from service of the defence (and counterclaim) to file a reply to the defence (and a defence to any counterclaim).
- Disclosure must commence 14 days after the expiration of time for filing the last reply. In practice, this deadline is often extended by agreement in complex cases.
- After the close of pleadings, a case management conference will ordinarily be scheduled to give directions for the further conduct of the case and set the timetable for the remaining pre-trial procedures such as discovery (if it has not already occurred), exchange of witness statements, provision of expert evidence and scheduling the trial date. Depending on the complexity of the case, a number of case management conferences may need to be held.

All subsequent deadlines can be extended by agreement between the parties or by way of court order.

Filing of documents by email has been accepted by the court during the COVID-19 pandemic. The court is also currently trialling online filing software which it hopes to roll out to all Cayman law firms later this year.

INTERIM REMEDIES

10. What steps can a party take for a case to be dismissed before a full trial? On what grounds can such applications be brought? What is the applicable procedure?

Strike out

Parties can apply to strike out the whole or any part of the other party's statement of claim or defence and seek judgment on the basis that the offending pleading:

- Discloses no reasonable cause of action or defence (and there is no chance of curing the defect).
- May prejudice, delay or embarrass the trial of the action.
- Is scandalous, frivolous or vexatious.
- Constitutes an abuse of process.

Typically, little or no evidence is permitted in support of an application to strike out a pleading, as the document must be considered on the terms pleaded.

Summary judgment

Both claimants and defendants can apply for summary judgment, which is an expedited hearing of the dispute based on affidavit evidence only. The court will only grant summary judgment if it is satisfied, on the evidence presented to it, that the claim or the defence has no realistic prospect of success. The court will not grant summary judgment where there are disputes between the parties in relation to matters of law or fact that merit investigations at trial and are inappropriate for summary resolution on affidavit evidence.

Other circumstances

A party can apply for the case to be determined on a point of law or on the interpretation of a document without a trial.

In addition, a party can seek the dismissal of a case without a trial for non-compliance with procedural requirements, such as when:

- The claimant has failed, unreasonably, to take steps to bring the case to trial.
- The claimant has failed to file a statement of claim, or a defence to a counterclaim.
- Either party has:
 - failed to comply with the court's rules for the disclosure or production of documents;
 - breached, or failed to comply with, the court's rules or an order of the court; or
 - engaged in conduct which amounts to an abuse of process or which makes a fair trial impossible.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The Grand Court can order a claimant to provide security for costs where the claimant:

- Is a Cayman Islands company and there is reason to believe that its assets will be insufficient to pay the costs of the defendant, should the defendant be successful at trial.
- Is resident outside the Cayman Islands.
- Has no business or has no assets in the Cayman Islands.
- Is a nominal claimant who is suing for the benefit of some other person and there is reason to believe that he or she will be unable to pay the costs of the defendant if ordered to do so.
- Has not stated his or her address in the writ or other originating process or his or her address is incorrectly stated.
- Has changed his or her address during the course of the proceedings with a view to evading the consequences of the litigation.

If at least one of the above criteria is met, the court will only make an order for security for costs where it thinks it just to do so having regard to all of the circumstances of the case. An application for security for costs can be refused if at least one of the following applies:

- The claimant is a sovereign government or an agency of a sovereign government.
- The claim is likely to succeed at trial.
- The application has been brought too late in the proceedings.

- The defendant is using the application as a means of stifling the claimant's claim.
- The claimant's impecuniosity was caused by the defendant's actions.

12. What are the rules concerning interim injunctions granted before a full trial?

Availability and grounds

The court has jurisdiction to grant prohibitory interim injunctions in all circumstances in which it is just and convenient to do so. The basic test is twofold:

- There is a serious issue to be tried.
- The balance of convenience lies in favour of granting the injunction, pending the trial of the case.

An interim injunction will ordinarily not be granted where an award of damages will provide adequate compensation. An applicant must provide an undertaking to meet any losses suffered by the respondent in the event it is determined that the injunction should not have been granted.

Prior notice/same-day

If appropriate, the court can grant an injunction without notice to the respondent. However, the respondent has an automatic right to have the matter heard before the court at the earliest convenient date for an *inter partes* hearing.

In urgent cases (where the urgency is warranted and properly explained to the court), an injunction can be granted on the same day it is sought (subject to the availability of judges).

Mandatory injunctions

The court can grant mandatory interim injunctions. The test for a mandatory injunction is similar to the test for a prohibitory injunction in that the applicant must convince the court that the balance of convenience lies in its favour. However, for mandatory injunctions the applicant must convince the court that there is a "high probability of success at trial" rather than the lesser standard of "serious case to be tried".

Right to vary or discharge order and appeals

If an interlocutory order has been obtained without notice to the respondent, the respondent can have the matter reheard at an *inter partes* hearing. At that hearing the court can set aside, confirm the original order or make a different order in its place.

Ordinarily, interlocutory orders granted by the Grand Court cannot be appealed to the Court of Appeal without first obtaining the leave of the Grand Court (see *Question 20*).

13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?

Availability and grounds

The Grand Court can grant interim orders that freeze assets pending judgment or final order if both:

- The applicant has demonstrated a good arguable case against the respondent.
- There is evidence of a real risk that the respondent may dissipate, dispose of, hide or remove its assets from the jurisdiction prior to judgment being given.

Prior notice/same-day

Freezing orders are necessarily almost always obtained without notice to the defendant because of the requirement that there must be risk of dissipation. In urgent cases (where the urgency is warranted and properly explained to the court), an order can be granted on the same day it is sought (subject to the availability of judges).

Main proceedings

The court can grant freezing injunctions (in addition to other interim relief) in support of main proceedings that have been commenced in another jurisdiction, provided that the foreign proceedings are capable of giving rise to a judgment that can be enforced in the Cayman Islands under any law or at common law.

The court can refuse to grant a freezing injunction in support of a foreign proceeding if, in its opinion, it would be unjust or inconvenient to do so. When exercising its power to make a freezing injunction in support of a foreign proceeding, the court must have regard to the fact that its power is both:

- Ancillary to the foreign proceedings.
- For the purpose of facilitating the process of a court outside the Cayman Islands that has primary jurisdiction over the proceedings.

Preferential right or lien

A freezing order creates no preferential right or lien in favour of the claimant over the frozen assets and the defendant will usually be allowed to pay his or her normal business, legal and living expenses from the frozen assets.

Damages as a result

An applicant must give an undertaking to meet any losses suffered by the respondent if it is determined that the injunction should not have been granted.

Security

The court can require security in support of any undertaking and will often do so when the claimant is resident abroad and has no assets in the jurisdiction.

14. Are any other interim remedies commonly available and obtained?

In addition to interim injunctions and freezing orders, the court has jurisdiction, in appropriate cases, to grant the following interim remedies:

- An Anton Piller order for the seizure of property to preserve it as evidence pending a trial.
- An order appointing receivers to take control of and preserve property pending a trial (including the appointment of receivers in aid of foreign proceedings).
- An order appointing a provisional liquidator over a company pending determination of a winding-up petition to prevent:
 - dissipation of the company's assets;
 - oppression of minority shareholders; and/or
 - mismanagement and misconduct by the company's directors.
- An order for an interim payment.

FINAL REMEDIES

15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?

Available remedies (in appropriate cases) include:

- Damages.
- Final injunctions.
- Specific performance.
- An order rescinding a contract on grounds such as:
 - misrepresentation;
 - mistake;
 - duress; or
 - undue influence.
- Rectification of a written contract.
- Restitution of property where a party has been unjustly enriched.
- A declaration as to the parties' rights relating to the matter in issue.
- An order requiring a party to provide an account of profits improperly made from a breach of trust or fiduciary duty.
- In breach of trust claims, an order allowing the claimant to follow, trace and recover from the trustees or a third party property that has been applied or transferred in breach of trust.

Although damages are generally intended to be compensatory, the court has the jurisdiction in limited circumstances to award aggravated damages and exemplary/punitive damages.

EVIDENCE

Disclosure

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

On the close of pleadings, each party must prepare and serve a list of all documents that both:

- Are or have been in their (or their agent's) possession, custody or power.
- Are relevant to any of the issues in dispute in the litigation.

A document will be "relevant" if it will support or undermine either party's case, or where it will lead the other party on a train of enquiry leading to either of those consequences.

The reference to "documents" extends beyond physical documents, and includes every means by which information is stored or recorded. Although the court rules provide for these lists to be exchanged within 14 days, it is common in more complex matters for this deadline to be extended either by agreement or by court order.

After the list of documents has been exchanged, each party can inspect the documents in the other party's list, except for documents subject to privilege (see *Question 17*). The obligation to disclose documents relevant to the issues in dispute continues for the duration of the case.

Privileged documents

17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?

Privileged documents

Documents that fall into one of the following categories of privilege will ordinarily be protected from disclosure to other parties to the litigation:

- Legal professional privilege, such as:
 - legal advice privilege, which covers all documents or communications created or made by the party or by his or her legal adviser for the purpose of giving or receiving legal advice. This privilege can extend to legal advice received from an in-house counsel and exists irrespective of whether legal proceedings had been commenced or contemplated; and
 - litigation privilege, which covers all communications between a lawyer and the client with any professional agent or a third party, which came into existence after the relevant litigation had started or was contemplated and the dominant purpose of the communication was for that litigation.
- Public interest immunity, which protects documents from disclosure that would be injurious to the public interest.
- Without prejudice communications between the parties created for the purpose of genuine negotiations to settle current or contemplated litigation.

Other non-disclosure situations

Parties to litigation are also not required to disclose documents where disclosure would either:

- Put the party disclosing at risk of either criminal prosecution or exposure to a penalty.
- Be injurious to the public interest (such as documents relating to national security).

Examination of witnesses

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

Oral evidence

Trial evidence must be given orally. However, parties must prepare and exchange written statements for each of the witnesses of fact before the trial. At trial, the witness statements must be accepted as the witnesses' direct evidence without the need for that evidence to be orally read into the record.

For most court hearings other than the substantive trial, evidence is primarily given by way of written affidavit.

Right to cross-examine

All relevant parties can cross-examine the opposing party's witnesses of fact. Outside of trial, parties who wish to cross-examine persons who file affidavits with the court must seek an order from the court permitting the cross-examination.

Third party experts

19. What are the rules in relation to third party experts?

Appointment procedure

Ordinarily, expert witnesses are appointed by the party who intends to rely on their evidence. However, the court can appoint an expert directly (either with or without consensus from the parties as to the identity of the expert). The court usually gives directions at a case management conference as to the number of expert witnesses permitted for each party in each area of expertise. Each party must exchange written reports containing the substance of the expert evidence to be given, which will ordinarily include a copy of the instructions given and/or questions posed to the expert witness.

Role of experts

Expert evidence presented to the court must be independent and uninfluenced by the pressures of litigation or any party. An expert witness:

- Has an overriding duty to help the court on the matters within his or her expertise. This overrides any obligation to the party from whom the expert has received instructions or by whom he or she is paid.
- Must not omit to consider material facts that could detract from his or her concluding opinion.
- Must make it clear when a particular question or issue falls outside his or her area of expertise or if he or she has insufficient information to express a final view.
- Must advise of any change of opinion that may occur either as result of having read another expert's report, or for any other reason.

Right of reply

Where both parties intend to engage experts, expert reports will usually be exchanged simultaneously, after which a meeting of experts will often be convened on a "without prejudice" basis to identify the areas between experts that are still in dispute. A party can also cross-examine an opposing party's expert at trial on the contents of their expert report.

Fees

An expert's fees are paid by the appointing party. However, the fees (including travel costs in the event that the expert is required to go to the Cayman Islands to give expert evidence) are potentially recoverable on an award of costs.

The parties are jointly and severally liable to pay the costs of an expert appointed by the court.

APPEALS

20. What are the rules concerning appeals of first instance judgments in large commercial disputes?

Which courts

Appeals from the Grand Court are made to the Cayman Islands Court of Appeal. In certain prescribed circumstances, there can be a further appeal to the Judicial Committee of the Privy Council of the UK.

Grounds for appeal

Although there are certain limited circumstances where there is no right of appeal (such as where legislation specifically provides that the court's decision is final), ordinarily it is possible to appeal matters of law and fact, as well as an exercise of discretion by a lower court. However, appeal courts will be reluctant to overturn

findings of fact, particularly where those findings are based on the credibility of witnesses that were before the lower court. The appeal courts will also be reluctant to overturn the exercise of discretion by the lower court unless:

- The lower court misdirected itself on the principles to be applied in the exercise of its discretion.
- The decision was made taking into account factors that should not have been considered, or in disregard of appropriate matters for attention.
- The decision was plainly wrong and was not a reasonable exercise of discretion.

There are certain circumstances where leave of the Grand Court will be required before an appeal can be made to the Court of Appeal, such as in relation to almost all interlocutory orders made by the Grand Court. To obtain leave to appeal from the Grand Court, the appellant must show that the appeal has a realistic (not a fanciful) prospect of success.

Time limit

Ordinarily, an appeal must be brought by filing a notice of appeal within 14 days from when the relevant order was entered. However, if leave to appeal is required (see *above*), it must be sought within 14 days of the entry of the order and assuming leave to appeal is granted, the notice of appeal must be filed within 14 days of that grant of leave.

CLASS ACTIONS

21. Are there any mechanisms available for collective redress or class actions?

Where there is a group of claimants with a common interest and a common grievance, one or more of them can issue and continue a representative action on behalf of all of the members of that group. A representative action will not be entertained where the relief claimed is not beneficial to all of the represented parties or where there are differing interests among the members.

Any judgment or order made in a representative action will be binding on all persons within the representative group but cannot be enforced against any person who is not a party to the proceedings, except with leave of the court.

COSTS

22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?

Generally, an unsuccessful party must pay the successful party's reasonable costs of the litigation (legal fees and disbursements). However, the court has a wide discretion to make costs orders for or against parties to litigation. In certain limited circumstances, the court also has the power to make costs orders against non-parties to litigation.

When considering whether to make a costs order, the court will typically take into account the parties' conduct during the course of the litigation. This necessarily includes taking into account any payment into court, or any offer of settlement, made by a defendant during the course of the litigation. Where a payment into court, or an offer of settlement, exceeds the amount the claimant ultimately recovers on determination of the litigation, the court will ordinarily refuse the claimant any of its costs after the date that the payment or offer was made.

Costs awards can be made on either the standard basis or the indemnity basis. Where costs are awarded on the standard basis, the legal fees recoverable by a successful litigant are limited by rules prescribing the maximum recoverable hourly rates of the engaged attorneys. The recoverable rates are set by reference to the seniority of the counsel engaged and are typically lower than commercial rates. The maximum recoverable hourly rates for litigation before the Financial Services Division of the Grand Court are higher than those for other commercial proceedings. There are also rules limiting the recoverability of legal fees and disbursements in relation to foreign attorneys.

Where costs are awarded on the indemnity basis, the legal fees and disbursements that may be recovered will only be limited by what is considered to be reasonable and will ordinarily result in full recovery of most commercially reasonable rates. Indemnity costs will only be awarded where one party has conducted itself improperly, negligently or unreasonably.

Costs are not usually quantified or payable until the conclusion of the matter. However, the court can make interim costs orders in certain circumstances.

23. Is interest awarded on costs? If yes, how is it calculated?

Interest is payable from the date of entry of a costs order. The rate is prescribed by the Judgment Debts (Rates of Interest) Rules 2012, which set differing rates depending on the currency in which the judgment is given.

ENFORCEMENT OF A LOCAL JUDGMENT

24. What are the procedures to enforce a judgment given by the courts in your jurisdiction in the local courts?

In large commercial disputes, the most common forms of enforcement are:

- Writ of *fieri facias* (that is, a writ leading to an order directing the court bailiff to seize assets to satisfy the judgment debt).
- Garnishee proceedings requiring a third party who owes money to the judgment debtor to pay it to the judgment creditor instead.
- Charging orders over land or other assets.
- Insolvency proceedings.
- Appointment of a receiver or sequestrator.

CROSS-BORDER LITIGATION

25. Do local courts respect the choice of governing law in a contract? If yes, are there any national laws or rules that may modify or restrict the application of the law chosen by the parties in their contract? What are the rules for determining what law will apply to non-contractual claims?

No choice of law and non-contractual claims

The Cayman Islands courts generally respects the choice of governing law provisions contained in a contract. However, they can refuse to do so on grounds of public policy. In addition, local regulatory law (employment, health, provision of financial services and so on) will continue to apply to any party to a contract that is resident in the Cayman Islands in relation to its actions within the jurisdiction, regardless of any choice of governing law provisions contained in a contract.

26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

The court will generally exercise its discretion to give effect to a jurisdiction clause in a contract (that is, by granting a stay of proceedings commenced in the Cayman Islands in breach of the jurisdiction clause, or by granting an anti-suit injunction restraining the commencement of proceedings abroad). However, there is no absolute rule that jurisdiction clauses will be enforced and the courts will consider all the facts of the case. The courts will accept jurisdiction in spite of an exclusive jurisdiction clause where a party can show strong reasons for departing from it.

27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?

The procedure for effecting service of a foreign process in the Cayman Islands is generally dictated by the rules of the foreign court. Where the foreign court requires service in accordance with local rules, service in the Cayman Islands can be effected either by an attorney or a private process agent and must be effected by personal service on the intended recipient. Where the intended recipient is an individual, service must be by physical delivery to that individual. Where the intended recipient is a Cayman Islands company, service must be by physical delivery to the registered office.

The HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 applies in the Cayman Islands. If proceedings are to be served under this Convention, they are sent to the clerk of the court with a written request for service from the relevant authority in the other jurisdiction.

28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?

The principal provisions of the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 have been extended to the Cayman Islands by virtue of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978.

The process is commenced by the foreign court issuing a letter of request to the Cayman Islands court seeking its assistance to obtain evidence for the purposes of a foreign civil proceeding. An application is then made to the Cayman Islands court to give effect to that written request. On granting the request, the court can order one or more of the following:

- The examination of witnesses either orally or in writing.
- The production of documents.
- The inspection, photographing, preservation, custody or detention of any property.
- The taking of samples of any property and the carrying out of any experiments on or with any property.
- The medical examination of any person (including the taking of blood samples).

Once the ordered evidence is obtained, it is transmitted to the requesting court by appropriate means. The court will not make any order that could not be made in civil proceedings either before it (such as an order to deliver up legally privileged documents) or before the requesting court. The court will also not require a respondent to state what documents it holds that are relevant to the foreign proceedings (there can be no "fishing expeditions" for evidence). A proper application must identify specific documents and set out the basis on which it is said that those documents are, or are likely to be, in the respondent's possession, custody or power.

Enforcement of a foreign judgment

29. What are the procedures to enforce a foreign judgment in the local courts?

Although the Cayman Islands has enacted the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), which provides a statutory regime for the enforcement of foreign judgments, to date this regime has only been extended to judgments from Australia and its External Territories. Judgments from all other countries are enforced under common law rules, which provide that a foreign judgment will be enforceable where all of the following applies:

- The court issuing the judgment had personal jurisdiction over the defendant because that defendant:
 - was ordinarily resident in the foreign country at the time the proceedings were commenced;
 - appeared as a party in the proceeding in which the judgment was given or otherwise voluntarily participated in the proceeding (other than solely to contest jurisdiction); or
 - submitted to the jurisdiction of the foreign court either by prior agreement or subsequent conduct.
- The judgment is final and conclusive.
- The judgment:
 - has not been obtained by fraud or given in breach of natural justice; and
 - is not contrary to public policy.

The courts will not enforce judgments that relate to the penal or revenue laws of another country.

The procedure for enforcement begins with the issuing of a writ asserting an action arising from the entry of the foreign judgment. As the court will ordinarily not hear again the merits of the dispute that gave rise to the foreign judgment, actions to enforce foreign judgments are usually suitable for summary judgments. Once judgment has been given by the Cayman Islands court, it can be enforced in the ordinary way.

Although traditionally the courts would only enforce foreign judgments for a liquidated sum, the Grand Court case of *Bandone v Sol Properties* [2008] CILR 301 confirms that in certain circumstances the courts will enforce foreign non-monetary orders and judgments.

ALTERNATIVE DISPUTE RESOLUTION

30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?

The main forms of ADR used in the Cayman Islands are arbitration and mediation.

While it is not uncommon to find arbitration clauses in large commercial contracts between Cayman entities, historically these provisions would provide for the seat of the arbitration to be outside the Cayman Islands (such as New York and London). In an effort to address this, the Cayman Islands sought to modernise the law governing arbitrations conducted within the jurisdiction by passing the Arbitration Act (2012 Revision), which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985. All arbitrations in the Cayman Islands are subject to the provisions of this law. It is hoped that the passing of this legislation will lead to a rise in the number of arbitrations conducted in the Cayman Islands, however, this remains to be seen.

Mediation is also being increasingly used in the Cayman Islands to resolve disputes. It was recently made a compulsory part of many of the proceedings issued in the Family Division of the Grand Court. Although mediation is not currently required by the courts in relation to civil disputes, if it proves successful for the Family Division, it is likely to be extended to proceedings issued in the Civil and Financial Services Divisions of the Grand Court.

Despite the increased use of arbitration and mediation, the proportion of large commercial disputes resolved by means of ADR (in any form) remains small.

31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

Although the use of mediation for the settlement of all disputes (except criminal matters) is actively supported by the Cayman Islands judiciary, currently it does not form part of the court procedures except in the Family Division (see *Question 30*). Currently, the court has no jurisdiction to compel parties to commercial proceedings issued in the Civil and Financial Services Divisions of the Grand Court to undertake ADR. However, it is anticipated that this may change in the future.

32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?

The procedures adopted in arbitration and mediation are generally agreed by the parties in advance, or determined by the arbitrator or mediator who has been appointed. It is common for parties to exchange written submissions and, where appropriate, copies of relevant documents before the arbitration/mediation.

Typically, all mediations are conducted on a without prejudice basis and therefore statements made in, and documents prepared for, a mediation cannot be put before the court as evidence of admissions against the interest of the party that made them.

Arbitration proceedings must be conducted in private and confidentially (*section 81, Arbitration Act*). Disclosure of any "confidential information" relating to the arbitration is actionable as a breach of an obligation of confidence, except in certain prescribed situations. "Confidential information" is defined (non-exhaustively) as:

- Information that relates to the arbitration proceedings or any award made.

- All information supplied to the tribunal by a party (whether pleadings, evidence, statements, submissions and so on).
- Any notes or transcripts of oral evidence or submissions given before the tribunal.
- Any rulings or awards of the tribunal.

33. How are costs dealt with in ADR?

It is usual for the parties to ADR to agree in advance to split the costs of the process. The parties generally agree costs in the terms of reference to ADR. The common provision is to split the ADR process costs equally between the parties. Any other costs, such as those incurred in litigating matters, can be considered during the ADR process.

Under the Arbitration Act, unless a contrary intention is expressed, every arbitration agreement is deemed to contain a provision that the costs of the arbitration will be in the discretion of the arbitral tribunal.

If costs are not addressed by the arbitral tribunal, any party to the arbitration can, within 14 days of delivery of the award or such time as the tribunal will allow, apply to the tribunal for a direction as to the distribution of costs.

34. What are the main bodies that offer ADR services in your jurisdiction?

The Cayman Islands Association of Mediators and Arbitrators seeks to promote mediation, arbitration and other options for dispute resolution. However, it does not directly offer ADR services. A list of local professionals who may be engaged to provide mediation and arbitration services can be found on the Association's website: www.ciama.ky. The anticipated opening of the Cayman International Arbitration Centre (<https://www.caymanarbitration.com/>) should further enhance the availability of ADR in the future. Finally, the Cayman Islands chapter of the Chartered Institute of Arbitrators has recently opened and held its inaugural series of seminars.

PROPOSALS FOR REFORM

35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?

There are currently two main proposals for dispute resolution reform in the Cayman Islands, which are:

- A review of the law relating to conditional fee agreements and contingency agreements, which has already culminated in the passing of the Private Funding of Legal Services Act 2020. However, although the Act is due to come into force on 1 May 2021, some of the essential regulations ancillary to the Act are yet to be finalised.
- Consultation regarding the Foreign Judgments Reciprocal Enforcement (Amendment) Bill 2014, which provides for the registration and enforcement of the foreign judgments of a superior court of a scheduled country without the requirement of reciprocity.

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