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International Arbitration 2022

Cayman Islands: Law & Practice

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CAYMAN ISLANDS

Law and Practice

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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 Act, 2012 (the "Act"). To date, arbitration in the Cayman Islands has remained mainly domestic in nature, but the introduction of the Act, 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 Impact of COVID-19

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, until recently, worldwide air travel restrictions inevitably affected the ability and willingness of parties to travel to the Cayman Islands. As a result, COVID-19 had an impact on the timing 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. The COVID-19 pandemic does not appear to have affected these trends.

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 – ciama.ky) continues to be named in arbitration agreements as the appointing body. The Cayman Islands chapter of the Chartered Institute of Arbitrators has established a regular programme of seminars for local practitioners.

1.5 National Courts

Disputes related to international and domestic arbitrations are heard in the specialist Financial Services Division of the Grand Court.

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 Act, which is based on the UNCITRAL Model Law on International Commercial Arbitration 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 Act (1997 Revision) (FAAEA), 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 Act or the FAAEA 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 Act). 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 Act, but its use is not mandatory.

3.2 Arbitrability

The Act 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 Act). At the same time, s. 26(2) of the Act 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 FAAEA.

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. It should be noted, however, that the court must be satisfied that the debt is being disputed bona fide on substantial grounds before it will stay the winding-up proceedings in favour of arbitration (Re Grand State Investments Limited (FSD 11 of 2021, RPJ, 28 April 2021, Unreported)).

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 FAAEA 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 subsequent 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 Act (2021 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 forgo 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 Act 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

In their approach to construing the scope of arbitration clauses, the national courts have followed English case law, particularly the judgment of the House of Lords in Fiona Trust v Privalov [2007] Bus LR 686 (McAlpine Limited v Butterfield Bank (Cayman) Limited (CICA 30 of 2019, 21 November 2019, unreported).

The national courts' approach to 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 Act 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 Act, except as provided by the Act (s. 3(3) of the Act).

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 Act). Indeed, a dispute about the validity of the substantive agreement may be arbitrated in accordance with the arbitration agreement (s. 4(7) of the Act), 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 Act). 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 Act).

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

Pursuant to ss. 15(1) and 16(1) of the Act, 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 Act). 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 Act). Currently, the CIAMA will act as the appointing authority if the parties request it to do so.

There is no default procedure under the Act 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 Act).

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 Act). 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 Act). The parties are free to agree on the procedure for challenging an arbitrator (s. 19(1) of the Act). 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 Act). 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 Act).

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 Act).

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 Act). 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 Act).

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 Act). This is a continuing duty (s. 18(2) of the Act).

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 Act).

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 Act). 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 Act).

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 Act 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 Act.

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 Act 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 Act). 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 FAAEA, 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 FAAEA (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]). If the requirements of s. 4 of the FAAEA are satisfied, the stay is mandatory. It is, however, for the court to decide whether those requirements are satisfied, including whether there exists a real or genuine dispute to be referred to arbitration within the meaning of s. 4 of the FAAEA (SC Global Vision Fund SPC v Oasis Buono Ltd (Grand Ct. FSD No 39 of 2020, July 8th, 2020, Unreported)).

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

5.7 Jurisdiction Over 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) Act, 2014, but the analysis of such issues is beyond the scope of this article. Of note, however, is s. 7 of the Act, 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 Act 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 Act 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 Act).

Unless otherwise agreed, an application for an interim measure under s. 44 of the Act 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 Act). 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 Act), and shall be required to provide security, unless the tribunal considers it unnecessary or inappropriate to do so (s. 49(2) of the Act).

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 Act).

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 Act).

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 Act). 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 Act). 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 Act). However, Part VII of the Act 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 Act 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 or her claim, the points in issue, and the relief or remedy sought, and the defendant is required to state his or her defence (s. 32 of the Act). 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 Act). 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 Act). The arbitral tribunal may appoint one or more experts to report to it on specific issues (s. 37 of the Act).

7.3 Powers and Duties of Arbitrators

The Act requires the arbitral tribunal to act fairly and impartially, to allow each party a reasonable opportunity to present his or her case, and to conduct the arbitration without unnecessary delay, and without incurring unnecessary expense (s. 28 of the Act). The Act 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 Act). 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 Act confers certain powers on the tribunal in the absence of any agreement to the contrary by the parties. Specifically, s. 39 of the Act 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 Act). 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 Act, 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 Act).

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 Act).

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 Act, 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 Act). 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 Act, arbitral proceedings are private and confidential. The disclosure of confidential information relating to the arbitra-

tion 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 Act 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 Act). 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 Act. 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 Act).

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 Act). 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 Act).

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

10.2 Types of Remedies

Pursuant to s. 57(2) of the Act, 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 Act). 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 Act).

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 Act). 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 Act, the court also has the power to set aside an award under s. 75 of the Act, 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 or her case;
- if the award deals with a dispute or contains decisions on matters not contemplated by or not falling within the terms of the submission to arbitration;
- if the composition of the tribunal or its procedure is not in accordance with the agreement of the parties, or is contrary to any mandatory provisions of the law;
- if the award was induced or affected by fraud, corruption or misconduct by an arbitrator; or
- if there was a breach of the rules of natural justice.

Furthermore, the award may be set aside if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the Act, 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 Act).

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 Act 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 Act), but there is no scope for excluding the right to set aside the award.

The Act 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 Act 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 Act 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 Act.

As regards the enforcement of foreign arbitration awards, the operation of the New York Convention has been extended to the Cayman Islands by the UK 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 FAAEA.

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 UK 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 Act, 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 FAAEA. Enforcement may be refused on the grounds set out in s. 7 of the FAAEA, which match the grounds for refusal of enforcement set out in the New York Convention itself. The same s. 7 of the FAAEA also sets out the circumstances in which enforcement may be stayed where the award is subject to ongoing set-aside proceedings in the courts of its seat. Examples of how the Grand Court approaches this issue are discussed below (**12.3 Approach of the Courts**).

Whether in the case of a domestic arbitration award enforceable under the Act or a foreign arbitration award enforceable under the FAAEA, 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 Act or under the FAAEA, 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 Act, the FAAEA 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 Act) and also for refusing leave to enforce a foreign award (s. 7(3) of the FAAEA). Under s. 7(5) of the FAAEA, the court may, if it thinks fit, adjourn enforcement

proceedings if an application has been made to set aside the award in the courts of its seat.

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 FAAEA 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 violated 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 later 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. In terms of the stay mechanism employed by the Court of Appeal in this case, it was too late, on the facts of that case, to have the enforcement proceedings adjourned pursuant to s. 7(5) of the FAAEA. Instead, the Court of Appeal ordered that the execution of the enforcement judgment be stayed pending the resolution of the appeal in Brazil.

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.

The Cayman Islands Court of Appeal judgment in GoI Linhas v Matlin Patterson has recently been upheld by the Privy Council ([2022] UKPC 21).

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.

In a recent decision in Essar Global Fund Ltd v Arcelormittal (JCPC 2021/0051), the Privy Council endorsed the judgment of the Cayman Islands Court of Appeal which held that Norwich Pharmacal relief is, in principle, available in the Cayman Islands in aid of enforcement of foreign arbitral awards.

Thus, Cayman Islands continue to build their reputation as an arbitration-friendly jurisdiction which also offers a diverse toolkit of judicial measures that can be used in aid of enforcement.

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 USA. 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 Act does not make any express provision for class action or group arbitration. The Act 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 Act (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 or her 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 Act), 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 Cayman 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 been transformed by the coming into force on 1 May 2021 of the Private Funding of Legal Services Act 2020 (PFLSA).

Until a few years ago, the settled understanding was that third-party litigation funding could only be utilised by liquidators in insolvency situations, with the sanction of the court. While there was some recent helpful case law on third-party funding in other circumstances, eg, Company v A Funder [2017 (2) CILR 710] and Trustee v The Funder (Cause No 98 of 2018, 26 July 2018, Segal J, unreported), the concepts of maintenance and champerty remained current.

The introduction of the PFLSA abolished the common law offences of maintenance and champerty. The PFLSA also sets out specific terms on which conditional and contingency fee agreements are now permissible. Those agreements are subject to certain caps on uplift, which may be extended upon application to the court.

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 Act). Without such agreement, the arbitral tribunal has no power to consolidate or to hold concurrent hearings.

The Act 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 Binding of Third Parties

See **5.7 Jurisdiction Over Third Parties**.

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