# THE DISPUTE RESOLUTION REVIEW

Eleventh Edition

**Editor**
Damian Taylor

THE LAWREVIEWS

# THE DISPUTE RESOLUTION REVIEW

ELEVENTH EDITION

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# PREFACE

*The Dispute Resolution Review* provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 573 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

**Damian Taylor**
Slaughter and May
London
February 2019

**Chapter 5**

# CAYMAN ISLANDS

*Kai McGriele and Richard Parry*[1]

## I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Cayman Islands is a British Overseas Territory. A Governor, a Cabinet of ministers and a Legislative Assembly have executive and legislative power, subject to a power of disallowance by the British Secretary of State for Foreign and Commonwealth affairs. The Cayman Islands enacts statutes and regulations, and, unless expressly extended to apply there, English statutes enacted after 1727 have no general application to the Cayman Islands.

The courts of the Cayman Islands reach their decisions in cases before them on the basis of the law of the Cayman Islands and applicable precedent. Where there are no binding Cayman Islands decisions, then decisions from English courts and those of other common law jurisdictions will be considered persuasive argument.

The Grand Court of the Cayman Islands (the Grand Court) is, in most cases, a Superior Court of Record of First Instance, having unlimited jurisdiction in both criminal and civil matters. Appeals from the Grand Court go to the Cayman Islands Court of Appeal, which is also a Superior Court of Record. The final level of appeal from the Cayman Islands Court of Appeal is the Judicial Committee of the Privy Council.

An action for relief up to a value of CI$20,000 can be brought in the Summary Court. Claims for a higher value, or other matters such as judicial review or winding up companies, should be brought in the Grand Court. The business of the court takes place in six divisions: civil, criminal, matrimonial and family, admiralty, probate and administration and financial services. Civil law claims, for example, for breach of contract, tort, trust matters and companies, would be brought in either the civil division or the financial services division, the latter being used for complex and higher value civil cases that normally arise out of the Cayman Islands' financial sector. Cases in the civil and financial services divisions are decided by a judge sitting alone and only in a civil case for fraud would the defendant have the option of a jury trial.

Subject to approval by a judge, evidence may be given and hearings conducted by telephone or video link. Employment cases will in the first instance be dealt with by a labour tribunal, with rights of appeal to the Grand Court. Immigration decisions are appealed to the Immigration Appeals Tribunal with rights of appeal to the Grand Court.

1 Kai McGriele is a partner and Richard Parry is an associate at Solomon Harris.

## II THE YEAR IN REVIEW

The year 2018 saw many important decisions including those on the nature of the illegality defence, the application of alternative dispute resolution (ADR) and choice of jurisdiction clauses to non-parties to a contract, litigation funding approval requirements and the court's ability to consider a company's petition made without shareholder approval when a creditor's petition has been filed. These decisions are summarised below.

### i Ahmad Hamad Algosaibi & Brothers v. Saad Investment Finance Corporation Limited & Others (Unreported Judgment) (FSD Cause No. 54 of 2009) Grand Court, Financial Services Division (Smellie, CJ)

The Chief Justice handed down his judgment in one of the largest running fraud trials earlier this year, dismissing Ahmad Hamad Algosaibi & Brothers' (AHAB) claims in addition to dismissing counterclaims brought by two of the defendants.[2]

The litigation began as a result of a family dispute between the Algosaibi family, which controlled AHAB, and Mr Maan Al Sanea, who had married into the family. One of the divisions of AHAB was the Money Exchange of which Al Sanea was the managing director between 1981 and its collapse in 2009. The financial crisis of 2009 affected AHAB's credit lines, which led to a default prompting AHAB to commence proceedings against Al Sanea and over 40 corporate defendants seeking to recover US$9.2 billion in borrowing on the basis that a fraud had been perpetuated against AHAB by Al Sanea (the corporate defendants were alleged to be vehicles of the fraud). The claim was pursued in Cayman against 16 corporate defendants, which were placed into official liquidation shortly after the claim was brought under the control of liquidators.

The judgment exceeds 1,300 pages and deals with several issues of fact and areas of law, primarily:

*a* the knowledge and authority of the borrowing of AHAB was 'overwhelming';

*b* the forgery allegations were without foundation;

*c* AHAB's claims were proprietary in nature in tracing the proceeds and the legal test for establishing these was not met. The Court held that in law it was possible to infer the required links in transactions to establish a tracing claim, but on the facts this was not made out; and

*d* as the tracing claim failed so did the dishonest assistance, conspiracy and unjust enrichment claims.

The Court upheld the defendants' assertion of the illegality defence against AHAB, endorsing the principle from the 18th century case of *Everett v. Williams*[3] that parties to a fraudulent partnership or enterprise will not be entitled to invoke the Court's powers to recover the proceeds of their fraudulent partnership from their fellow criminal.

Several aspects of the judgment are subject to appeal, which is expected to be heard in 2019.

2 Unreported, Smellie CJ, FSD 54 of 2009, Final Official Judgment, 31 May 2018.

3 (1811) 104 ER 725.

### ii Argyle Funds SPC Inc (In Official Liquidation) v. BDO Cayman Ltd

On 8 October 2018, the Cayman Islands Court of Appeal (CICA) delivered its judgment in *Argyle Funds SPC Inc (In Official Liquidation) v. BDO Cayman Ltd*.[4] CICA's decision allowed a partial appeal by the joint official liquidators of Argyle to bring claims in the New York courts for gross negligence and fraud against three entities affiliated with Argyle's Cayman auditors, BDO Cayman Ltd. These claims arose as a result of BDO's alleged failure to identify and alert Argyle, during the course of four audits, of two obliterating frauds that ultimately resulted in Argyle's collapse. CICA's unanimous decision was made despite express contractual provisions in BDO's Engagement Letters that purported to restrict dispute resolution to mediation or arbitration and a clause giving Cayman courts exclusive jurisdiction.

CICA decided that for BDO's affiliates to be able to rely on the sole recourse and exclusive jurisdiction clauses there would have had to be clear and express terms to that effect in Argyle's contract with BDO. In particular, CICA considered that while claims between the parties fell within the dispute resolution clause restrictions, whether or not those restrictions applied to non-parties needed to be considered in the context of the contract as a whole, not just the language used in the exclusive jurisdiction clause.

In this case, the contract claims against the affiliates for fraud and wilful misconduct fell within the carve-out in the sole resource clause. The intended effect of that clause was that Argyle should be free to bring claims that fell within the carve-out in judicial rather than arbitration proceedings. If it had been the parties' intention to limit such judicial claims to being brought in the Cayman courts, then CICA's view was that the parties would have expressly provided for this in the carve-out or the jurisdiction clause, but they did not do so. Instead the carve-out clause referred to 'applicable laws', which was an indication that the parties' contemplated claims would be brought in jurisdictions other than Cayman.

The main takeaway for the professional services industry in the Cayman Islands is that where work is delegated to related entities outside of the Cayman Islands, any attempt to contractually limit a client's rights to bring claims against those entities must be expressly articulated within the contract – any ambiguity risks rendering such clauses nugatory.

### iii In the Matter of CW Group Holdings Limited

This matter concerned two competing applications to appoint joint provisional liquidators (JPLs) over CW Group Holdings Ltd (the Company).[5] The first application was brought by Bank of China (BOC), a creditor of the Company, pursuant to a winding up petition by another creditor, Fubon Bank (Hong Kong) Ltd. A week later, Brownstone Ventures Limited (Brownstone), also a creditor, filed an application seeking the winding up of the Company on the ground that the Company was unable to pay its debts as they fell due.

Simultaneous with and pursuant to Brownstone's application, the Company, acting through its board of directors, applied to appoint different joint provisional liquidators over the Company to those put forward by BOC, on the basis that the Company intended to present a compromise or arrangement to its creditors. The Cayman Court heard both BOC and the Company's respective applications for the appointment of JPLs at the same hearing.

4 *Argyle Funds SPC Inc v. BDO Cayman Ltd*, Unreported, Field JA, CICA 8 of 2018, 8 October 2018.

5 *In the Matter of CW Group Holdings Limited*, Unreported, Parker AJ, FSD 113 and FSD 122 of 2018, 3 August 2018.

The judgment in this case confirms, applying the 2017 judgment of McMillan J in *Re CHC Group Ltd*, that where a creditor has already filed a winding-up petition in respect of a company, the directors of the company may apply for the appointment of JPLs without a shareholder resolution or express provision in the company's articles of association. In *CHC Group Ltd*, McMillan J considered himself able to distinguish the case before him and that before Mangatal J in the *Matter of China Shanshui Group Limited*,[6] when Mangatal J held that directors of a company do not have standing to apply for the appointment of JPLs unless expressly authorised to do so by the company's articles of association or a valid shareholders resolution, on the basis that in *CHC Group Ltd,* the application by the Company for the appointment of JPLs was made pursuant to a creditor's winding-up petition already in existence and pending.

In terms of the competing applications for the appointment of JPLs, in preferring the application for 'light touch' JPLs, namely, whose involvement was designed to restructure and rescue the Company, the Court affirmed that the evidential threshold to be crossed in order to assert that a company intends to present a compromise or arrangement to its creditors is low. The company need only demonstrate that it intends to present a compromise or arrangement – there is no need for a plan to have been formulated.

### iv A Company v. A Funder

The case involved a Korean multinational seeking the sanction of the Cayman Court that it could legally obtain third-party funding from a professional funder, which it intended to use to issue proceedings in Cayman to seek recognition and enforcement of a New York arbitration award and related judgments.[7]

In a landmark decision, the Grand Court approved a third-party funding agreement and provided clear guidance to funders and plaintiffs alike as to the criteria that will be considered in assessing whether an agreement is enforceable. The case is significant because while the Cayman courts had previously sanctioned third-party funding agreements in principle, most notably in the case of *Re ICP Strategic Credit*,[8] the approval was limited to the use of funding for the benefit of impecunious litigation estates. This case, on the other hand, involved a large international company looking to benefit from third-party funding for other commercial reasons, most notably the ability to manage risk and cost.

In his judgment, Segal J summarised the developments of the common law in the Cayman Islands and highlighted leading case law in other common law jurisdictions, most notably the England and Wales Court of Appeal decision in *Giles v Thompson*,[9] which had previously laid down a test to assess the competing public policy principles at play when considering funding agreements. Segal J helpfully identified seven factors that should be taken into consideration when assessing whether a third-party agreement is enforceable pursuant to Cayman Islands law:

*a* the extent to which the funder controls the litigation;

*b* the ability of the funder to terminate the funding agreement at will or without reasonable cause;

*c* the level of communication between the funded party and the attorney;

6 [2015] (2) CILR 255.

7 *A Company v. A Funder*, Unreported, Segal J, FSD 68 of 2017, 23 November 2017.

8 *Re ICP Strategic Credit Income Fund Ltd* [2014] 1 CILR 314.

9 *Giles v. Thompson* [1993] 3 All ER 321.

*d* the prejudice likely to be suffered by a defendant if the claim fails;
*e* the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation;
*f* the amount of profit that the funder stands to make; and
*g* whether or not the funder is a professional funder or is regulated.

The decision in *Re A Funder* was subsequently tested in *The Trustee v The Funder*,[10] in which a trustee sought a declaration that a proposed funding agreement would be enforceable and would not be deemed a form of maintenance or champerty under Cayman law.

Segal J considered the proposed funding agreement and went through the seven features he identified in *Re A Funder* when considering whether a litigation funding agreement gave rise to a tendency to corrupt public justice, undermined the integrity of the litigation process or gave rise to a risk of abuse. Upon review, he found that it did not constitute or involve maintenance or champerty and issued a proposed declaration using the same wording as was used in *Re A Funder*.

## III COURT PROCEDURE

### i Overview of court procedure

Civil litigation in the Cayman Islands involves the commencement of an action by an aggrieved party setting out the nature of the claim made and whom it is made against. There are procedures for both parties to set out the facts and law applicable to the dispute, provide documentary and witness evidence and then have a trial of the issue. There may be rights of appeal of the decision made.

Procedures, forms and fees for civil proceedings worth over CI$20,000 are governed by the Grand Court Rules 1995 (GCR),[11] subsequent amendments, sub-rules and practice directions. The GCR do not apply to disputes governed by Parts I to III of the Succession Law (Probate and Administration) Rules 1977 (as amended); the Matrimonial Causes Rules 1986, (as amended); the Grand Court (Bankruptcy) Rules 1977 (as amended); Summary Court Rules 2004; and The Companies Winding Up Rules 2008 (as amended).[12]

### ii Procedures and time frames

#### *General: Grand Court Rules*

*Originating process*

Civil proceedings in the Grand Court may be begun by writ, originating summons, originating motion or petition (originating process) sealed by the court. All originating process must be in the prescribed form. The majority of claims commence with the aggrieved party (plaintiff) issuing a writ, endorsed with a general statement of the nature of the claim and the relief the plaintiff is seeking (generally endorsed writ). Alternatively they may issue the writ with a statement of claim that gives full details of the facts of the claim (statement of claim).

10 *In the Matter of the Litigation Funding* – FSD 98 of 2018 (NSJ) Note of Proposed Ruling.
11 Grand Court Rules 1995 (Revised). G24/2003 Section 1.
12 Companies Winding Up Rules, 2008. GE5/2009 Section 3.

*Service*

The writ must be served on the party named in the writ (defendant) together with a form of acknowledgement of service (AS) within four months of the writ being issued if the defendant is located or domiciled in the Cayman Islands, or six months if the writ must be served outside of the jurisdiction. The plaintiff may apply to extend the deadline.

*Other pleadings*

Where a writ has been served on a defendant in the Cayman Islands, the defendant has 14 days to complete and file the AS with the court to indicate whether they will defend the claim. Where a generally endorsed writ has been served the plaintiff must serve the statement of claim within 14 days of the date for filing the AS. When the defendant has been served with the statement of claim they have 14 days from the date for filing the AS to file a defence and any counterclaim. The plaintiff then has 14 days from the date for filing the defence and any counterclaim to file any reply and any defence to counterclaim. The defendant may then file a reply to the defence to counterclaim within 14 days of the date for filing the reply and any defence to counterclaim.

*Challenges to jurisdiction*

Any challenge by the defendant to the jurisdiction of the Grand Court must be brought by motion or summons within 14 days of the date for filing the AS.

*Case management*

Once the pleadings are deemed to be finalised (14 days from the expiry of the time for filing the last pleading), the plaintiff then has one month to file for an order for directions from the court on how to proceed.

*Discovery*

Within 14 days of the pleadings being finalised, the parties must serve on the other party a list of the documents that are or have been in his possession, custody or power relating to any matter in question between them in the action.

*Extensions of time*

All the above 14-day deadlines can be, and usually are, extended by agreement between the parties or order of the court.

*Interlocutory applications*

Interlocutory applications to determine matters such as procedure or points of law, or applications to strike out a claim or give summary judgment, are begun by asking the court to issue a summons. The summons must be served on the other party not less than four clear business days before the hearing date given by the court. Depending on the urgency, degree of complication and time required to hear the application, the court will be able to hear a summons within two to six weeks of it being issued. Evidence is given by affidavit. Cross-examination on affidavit evidence may be sought by court order but is not usual.

*Injunctions*

A plaintiff or counterclaiming defendant can apply to the court for various injunctions, usually where it considers urgent action is needed. These are generally held with only the applying party present (*ex parte*) with a subsequent hearing held later with both parties present (*inter partes*). To prevent the process being abused, the party making the application will usually be required to provide the court with an undertaking or money paid into court as security for any loss caused. This is in the event that the court later decides, when all the facts are available that the injunction should not have been granted. The types of injunction include:

*a* to prevent action being taken or to compel someone to do something;

*b* to prevent assets being dissipated by freezing them (a *Mareva* injunction);[13]

*c* to trace assets by ordering someone who is not a party to the action but who has innocently facilitated a wrongdoing to disclose information (a *Norwich Pharmacal* injunction);[14]

*d* to trace assets by ordering a non-party such as a bank to make full disclosure of confidential information to trace assets (a *Bankers Trust* injunction);[15]

*e* to enter and search premises to find documents or movable property and prevent their destruction (an *Anton Piller* injunction);[16]

*f* to appoint a receiver or to prevent disposal of company property before the appointment of a receiver (under GCR Order 30);

*g* to appoint a receiver or grant other interim relief in aid of proceedings outside the Cayman Islands (under Section 11A of the Grand Court Law 2015 Revision) (including a stand-alone *Mareva* injunction).

### iii Class actions

There is no formal process for class actions in the Cayman Islands as exists in other jurisdictions, such as the United States. Where many plaintiffs would like to bring similar claims, the Grand Court can allow a representative claim to proceed, rather than have many actions with the same subject matter and issues. The result of a representative action is binding on all the parties to that action, but others that are represented but not named cannot have a judgment enforced against them without leave of the court.

### iv Representation in proceedings

Natural persons can represent themselves or can instruct a Cayman Islands qualified attorney to represent them. Those whose claim is for under CI$5,000 are encouraged to act for themselves in the Summary Court. For claims in the Grand Court the Judicial Administration recommends using an attorney. Companies must be represented by an attorney. Overseas lawyers, generally senior advocates, may be granted limited admission to the Grand Court for the duration of the hearing for which they have been retained by local attorneys.

13 *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509.

14 *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133.

15 *Bankers Trust Co. v. Shapira* [1980] 1 WLR 1274.

16 *Anton Piller KG v. Manufacturing Processes Ltd & Ors* [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975).

### v Service out of the jurisdiction

Unless the action is one where a Law provides that leave is not required for service out of the jurisdiction, a party wishing to serve a originating process on a person (natural or unnatural) located outside the Cayman Islands needs to apply for leave of the court to do so. A supporting affidavit must set out the cause of action, show that it has a good chance of success, demonstrate that there is a real issue which the court should try, where the defendant is or is likely to be and the method of service needed. The method need not be in person, so long as it is in accordance with the law of the country in which service is to be effected. The court will not grant leave unless the party makes it sufficiently clear to the court that the case is a proper one for service out of the jurisdiction.

### vi Enforcement of foreign judgments

A final and conclusive foreign judgment on the merits (i.e., not obtained by default in appearance of the defendant) for money, which is not contrary to Cayman Islands public policy (for example a tax judgment or punitive award) may be enforced by an action in the Cayman Islands for debt, if it is shown that the judgment debtor has assets in the Cayman Islands. A writ is issued and served and if the judgment debtor enters an appearance, summary judgment can be sought on the basis that there is no defence, using the foreign judgment as evidence of that fact. This includes where the judgment is under appeal provided that execution of the judgment has not been stayed. The plaintiff will need to satisfy the court that the foreign court had jurisdiction over the defendant as they were ordinarily resident in that jurisdiction, voluntarily participated in the proceedings (not simply to challenge jurisdiction) or submitted to that court's jurisdiction. The defendant may be able to show that it would be contrary to public policy to recognise or enforce the foreign judgment, for example: because it was obtained by fraud; the foreign court was not competent to pronounce the judgment; or it was obtained in proceedings contrary to natural justice or where the defendant's rights were grossly violated.

Under the Foreign Judgments Reciprocal Enforcement Law (1996 Revision),[17] a foreign judgment may be registered in the Cayman Islands on application to the Cayman court, after which the judgment is deemed to have the same force and effect as if originally made by the Cayman court. However, this law has only been extended to foreign judgments from Australia and its external territories.

Foreign arbitration awards can be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision)[18] or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[19]

17 Foreign Judgments Reciprocal Enforcement Law (1996 Revision) G1/1997 Section 1.

18 Foreign Arbitral Awards Enforcement Law (1997 Revision) G21/1997 Section 3.

19 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article III.

### vii Assistance to foreign courts

***Part XVII of the Companies Law***

On the application of a foreign liquidator or other insolvency representative, the Grand Court may make orders recognising the right of the representative to act in the Cayman Islands on behalf of the debtor; to stay proceedings against the debtor; to examine witnesses and have documents produced to it; and transfer property of the debtor to the representative.

***Non-statutory power***

The Grand Court also has jurisdiction at common law to assist a foreign liquidation, even if the liquidator is not appointed in the jurisdiction where the company is incorporated. The September 2017 judgment in *China Agrotech*[20] granted recognition and assistance to liquidators appointed by the High Court of Hong Kong to present a scheme of arrangement under Section 86 of the Companies Law (2015 Revision) on behalf of the company. The assistance sought must be of a type available to the liquidator under the law governing the liquidation.

***Evidence in support of foreign proceedings***

On a request by a court with jurisdiction in foreign proceedings, the Grand Court can make orders to produce documents or examine witnesses to obtain evidence in support of foreign proceedings.[21]

***Hague Conventions***

The Hague Conventions apply to both service of documents abroad[22] and taking evidence abroad.[23]

### viii Access to court files

The clerk keeps a register of writs and other originating processes. This file contains an office copy of all originating process documents issued by the Grand Court and is available for public inspection upon payment of the prescribed fee. The Clerk must also keep a register of judgments that must be available to the public for inspection and copies are available on payment of the prescribed fee. The Grand Court may give leave, on application, to any person to inspect or to take a copy of any document on the court file. All hearings in open court are publicly accessible and hearings in Chambers are generally accessible but the parties to the case can object and it is at the judge's discretion whether to accede to the objection or not.

### ix Litigation funding

The common law torts of maintenance (where a third party assists or encourages a claim without any benefit to the third party) and champerty (where the assistance or encouragement is given in return for an interest in the proceeds of litigation) still apply in the Cayman

20 *In The Matter Of China Agrotech Holdings Limited* 19 September 2017.

21 Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978.

22 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

23 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Islands. While the Grand Court has previously approved third-party funding agreements subject to certain conditions,[24] the scope for such agreements has been limited to liquidation proceedings involving impecunious estates.

However, recent decisions of the Grand Court[25] have approved funding agreements in commercial disputes. This represents a notable evolution in the judicial interpretation of the law as it applies to the Cayman Islands, as well as a perceived shift in public policy.

The decision will be welcomed by litigation funders and is likely to encourage further development in this sensitive area of law in the near future. It should also prompt law makers to reconsider the discussion paper prepared by the Cayman Islands Law Reform Commission in 2015,[26] which included a draft bill.[27]

## IV LEGAL PRACTICE

### i Conflicts of interest and Chinese walls

#### *Conflicts of interest*

Under the Code of Conduct for Cayman Islands Attorneys at Law,[28] without the prior informed consent of a client, an attorney must not act for a client where there is or it is reasonably foreseeable that there might be in the future, a conflict of interest with the attorney or an existing or prospective client, nor may the attorney act for more than one party in the same matter or transaction.

#### *Chinese walls*

The use of Chinese walls is provided for under Rule 1.13(2) of the Code of Conduct, which provides:

> *Unless the relevant parties have given their prior informed consent, it is not acceptable for attorneys in the same firm to continue to act for more than one client in a transaction. The use of an information barrier such as a 'Chinese wall' should be considered carefully and appropriate safeguards adopted with respect to segregating confidential information. Such a device does not overcome a conflict of interest that has already arisen.*

### ii Money laundering, proceeds of crime and funds related to terrorism

There is a long list of laws and regulations that apply in the Cayman Islands.[29] Further, the UK government has issued overseas territories orders for sanctions or restrictive measures against countries, regimes or individuals deemed to be in violation of international law on matters relating to money laundering, terrorism financing and proliferation financing.

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24 *Re ICP Strategic Credit Income Fund Ltd* [2014] 1 CILR 314.

25 *A Company v. A Funder* (unreported, 23 November 2017, Justice Segal).

26 The Cayman Islands Law Reform Commission Discussion Paper, A review of litigation funding in the Cayman Islands – Conditional and contingency fee agreement, 29 December 2015.

27 The Private Funding of Legal Services Bill, 2015 (Draft).

28 Code of Conduct for Cayman Islands Attorneys at Law.

29 Criminal Justice (International Cooperation) Law (2015 Revision); Mutual Legal Assistance (United States of America) Law 2015 Revision; Misuse of Drugs Law (2017 Revision); Misuse of Drugs (Amendment) Law, 2016; Anti-Corruption Law (2016 Revision); Proceeds of Crime Law (2017 Revision); Proceeds of Crime (Amendment) (No. 2), 2016; The Proceeds of Crime (Amendment) Law, 2017; The Terrorism Law

The most significant of the Cayman Islands laws is the Proceeds of Crime Law (2016 Revision) (PoCLaw), under which the Anti-Money Laundering Regulations 2017 (AML) have been issued. The AML applies to those carrying out relevant financial business, defined in Section 2 (definitions and interpretation) and in Schedule 6 of the PoCLaw and so do not generally apply to dispute resolution.

Under the PoCLaw, an attorney, who in the course of his or her profession knows or suspects or has reasonable grounds to know or suspect that another person is engaged in criminal conduct, commits an offence if they do not report that information to the Financial Reporting Authority as soon as is practicable. There are exceptions, including where the information or other matter came in privileged circumstances. The privilege exception does not apply where the information or other matter was communicated or given with the intention of furthering a criminal purpose.

Also an attorney who has any information which may be of assistance in preventing an act of terrorism or which would secure an arrest or prosecution under the Terrorism Law (2017 Revision) (including the belief that a person has committed an act of terrorism) must report that to the relevant authority. The exception is where the information came in privileged circumstances that did not involve the intention of furthering a criminal purpose.

### iii Data protection

The Data Protection Law, 2017 (DPL) has been passed in the Cayman Islands but is not yet in force. It is expected to come into effect in September 2019. Once in force the DPL will impose restrictions (based on eight principles) on the processing of any personal data relating to an identifiable living person, by or on behalf of, a Cayman Islands-established individual responsible for determining the manner in which the data will be processed. Under the DPL sensitive personal data such as racial or ethnic origin, religion, health, sex life, offences or court sentences is afforded special protection. As well as the DPL, how attorneys treat or process personal data is governed by the Code of Conduct for Cayman Islands Attorneys at Law.[30] This requires attorneys to protect the confidentiality of the affairs of present or former clients, unless otherwise allowed or required by law or applicable rules of professional conduct as well as common law duties on the treatment of information that must by its nature be confidential (such as health, legal or financial information), which is neither common knowledge nor in the public domain, and which is disclosed in circumstances where it gives rise to a duty of confidence.

The Confidential Information Disclosure Law 2016 also applies to confidential information where it is necessary to apply to the court for directions in proceedings where confidential information is required to be given in evidence.

(2017 Revision); The Terrorism (Amendment) Law, 2017. Proliferation Financing (Prohibition) Law (2017 Revision); Anti-Money Laundering Regulations (2017). The Cayman Islands Law Society has indicated that they expect their members to observe the Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands August 2015 (soon to change to a new 2017 version) and the List of Amendments to the Guidance Notes August 2015 insofar as they conduct relevant financial business, within the scope of the regulations. See also the Cayman Islands Monetary Authority – http://www.cimoney.com.ky/AML_CFT.

30 Code of Conduct for Cayman Islands Attorneys at Law Section 4.

## V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

### i Privilege

A person or entity may claim that documents in their possession or control are protected from disclosure in litigation. This protection is known as privilege and only the client can claim privilege and only the client can waive it. A lawyer is under a professional obligation to assert it on behalf of the client until such time as it is waived by the client. Privilege continues even if the client ceases to exist. Privilege can be expressly waived by the client if it chooses, and care must be taken not to waive privilege inadvertently. The two categories of privilege are litigation privilege and legal advice privilege.

Litigation privilege applies to confidential documents that are sent between an attorney and a client, or an attorney and a third party, or a client and a third party, and are brought into being when litigation has been commenced or is reasonably in contemplation. The test for whether litigation is contemplated is an objective one, and is satisfied if litigation is 'reasonably in prospect'. Where there is more than one purpose behind the creation of the document, the party claiming privilege must establish that the 'dominant purpose' was the litigation.

Legal advice privilege applies to documents that record confidential communications between attorneys acting in their professional capacity and their clients and created for the purpose of obtaining or providing legal advice.

#### *Without prejudice*

Where there has been a genuine attempt to resolve a dispute then without prejudice privilege can prevent such communications between the parties for that purpose from being put before the court.

### ii Production of documents

#### *Discovery*

Once the pleadings close, within 14 days of the last pleading each party must serve on the others a list of all the documents (including those held electronically, film, photographs etc.) which are or have been in his or her possession, custody or power relevant to the matters between them in the action which the court is being asked to decide. (The definition of documents includes all forms of electronic documents.) Disclosure of documents is not limited to those documents on which a party wishes to rely in the proceedings, but also documents that may harm or undermine a claim or defence. Documents that may not be in the possession of a party may be under its power or control, for example, they are held by a related third party such as a subsidiary.

If a party considers another has not disclosed all the documents it should, then it can apply to the court to order that further documents be disclosed, identifying which documents it considers are missing. The documents or class of documents need to be identified carefully and their relevance explained, as the courts will not allow a party to abuse the process by going on a 'fishing expedition' to see what it might find.

Where full disclosure would result in the parties spending a disproportionate amount of time comparing the value or complexity of the issues in dispute or the relevance or usefulness of the documents to be disclosed, parties can ask the court to limit the extent of discovery.

## VI ALTERNATIVES TO LITIGATION

### i Arbitration

The Cayman Islands Arbitration Law (2012) (the Arbitration Law) provides procedural rules regulating the Grand Court's practice and procedures in relation to arbitrations (which can be varied by agreement) and sets out the duties of arbitrators. It is based on the UNCITRAL Model Law and the English Arbitration Act 1996. Foreign arbitration awards can be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision)[31] or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958). The court supports the arbitration or mediation process where it has the power to do so, for example: in adjourning or staying proceedings to enable an arbitration or mediation to take place; enforcement or support for procedural or other interlocutory decisions; or (with leave) hear an appeal on a point of law of an arbitrator's decision. An arbitral award can be appealed to the Grand Court on a point of law and set aside under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[32]

Under Section 28 of the Arbitration Law an arbitral tribunal must act fairly and impartially, allow each party a reasonable opportunity to present his or her case, and conduct the arbitration without unnecessary delay or expense.

### ii Mediation

Aside from the introduction of compulsory mediation by the Family Division of the Grand Court, there is no provision, currently, in the Cayman Islands court rules for court-mandated alternative dispute resolution (ADR), with consequent costs consequences for failure to comply.

The court may apply a stay of proceedings where the parties have contractually agreed to submit to an ADR process. However, ADR is not commonly used in Cayman Islands disputes.

## VII OUTLOOK AND CONCLUSIONS

There is a significant decision expected in the Weavering liquidation from the Privy Council in 2019 related to redemption clawback claims, and we also expect to continue to see more 'fair value' cases brought by dissenting shareholders involved in mergers. In the context of the developing line of litigation funding cases, we anticipate that more applicants will be seeking the sanction of the Cayman Islands courts for funding outside of the insolvency arena. Schemes of arrangement are expected to be a popular method of restructuring, particularly in light of the courts' recent acceptance of debtor in possession rescue financing through such a scheme and the court's confirmation that there is a low bar for a company to show intention to prevent a compromise or arrangement. The Cayman Islands courts are dedicated to providing a 'best in class' service and have received praise for the speed and manner in which they listed and disposed of cases in 2018. The efficient management of the *Saad* trial in 2018 is a prime example of the courts' ability to effectively deal with large and complex cases.

31 Foreign Arbitral Awards Enforcement Law (1997 Revision) G21/1997 Section 3.

32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V.

**Appendix 1**

# ABOUT THE AUTHORS

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Kai McGriele is a partner in the Solomon Harris litigation group and has been with the firm since 2012. Formerly with Cadwalader (London) and Appleby (Jersey), Kai's practice focuses on general commercial litigation with a particular emphasis on insolvency and restructuring, having represented liquidators, directors, and secured and unsecured creditors in both Cayman and foreign insolvency proceedings. Kai also has extensive experience representing both institutional trustees and beneficiaries in a variety of complex multi-jurisdictional trust disputes. Kai is both English and Cayman-qualified and in addition was called to the Jersey Bar as a Jersey advocate in 2012 (non-practising). Kai's professional memberships include the Law Society of England and Wales, the Cayman Islands Law Society, INSOL, RISA, NAFER and STEP. Kai is also a member of the STEP Council Cayman.

**RICHARD PARRY**

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Richard Parry has been an associate with Solomon Harris since 2016. He completed his training contract in the United Kingdom with Eversheds LLP (now Eversheds Sutherland LLP) where he worked for eight years representing the world's leading banking, investment and insurance institutions in financial disputes. In addition to being qualified in the United Kingdom and the Cayman Islands, Richard is also a licensed US attorney, having been admitted to the California State Bar in 2013, giving him the ability to offer valuable advice and insight on a variety of cross-border matters. Richard's core practice centres on general commercial litigation, with a focus on professional liability, insurance disputes, fund litigation and contentious real estate. He also has experience in corporate finance, property transactions, insolvency, regulatory compliance and litigation funding. Richard's professional memberships include the Law Society of England and Wales (non-practising), the State Bar of California, the American Bar Association, the Cayman Islands Law Society, INSOL and RISA.

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