



HOW THE CAYMAN ISLANDS COURTS CAN ASSIST PARTIES IN FOREIGN PROCEEDINGS

1 Introduction

1.1 Surrounded by beautiful sandy beaches and crystal waters, it is easy to forget that the Cayman Islands is a premier global financial centre. The Cayman Islands is the world's leading domicile for hedge funds and home to thousands of regulated investment funds and private equity funds. It has been estimated that 75% of all assets managed by US fund managers are held in Cayman Islands vehicles.

1.2 Of course, the Cayman Islands is not all about hedge funds. Its financial services reputation was built on the strength of its banking industry and it ranks in the global top 20 in terms of the value of booked liabilities and assets. The Cayman Islands is home to over 100,000 companies which are popular listing vehicles on stock exchanges in New York, Hong Kong and London. The jurisdiction is also the second largest domicile for captive insurance companies and Cayman Islands special purpose vehicles are a preferred method for securitization and other structured finance transactions. Finally, the Cayman Islands is a jurisdiction of choice for the establishment and service of trusts structures.

1.3 The Caymans Islands' financial services industry is supported by world class professionals, and a sophisticated, robust and reliable legal system based on English law. The Financial Services Division (**FSD**) of the Grand Court of the Cayman Islands (**Grand Court**) was established in 2009 to deal with complex, financial services litigation and commercial litigation, much of it with a cross-border element. The FSD judges are highly experienced and well-equipped to deal with the FSD filings.

1.4 Given the number and diversity of Cayman Islands entities, they are very often involved in foreign litigation or arbitrations, either as defendants or as third parties who may hold information or assets relevant to the foreign proceedings. This article considers how the Court can assist foreign parties at all stages of

foreign proceedings.

2 Serving foreign process in the Cayman Islands

2.1 Service of a foreign process in the Cayman Islands will ordinarily be dictated by the procedural rules which apply to the foreign proceedings. Where the foreign court or tribunal requires service in accordance with local rules, service in the Cayman Islands must be personal and may be effected either by an attorney or a private process agent. For an individual, service must be by physical delivery on the person and, for a company, service must be by physical delivery to the registered office (which is readily available to the public). Service may also be effected pursuant to the Hague Convention (**Convention**¹, which has been extended to the Cayman Islands, as an overseas territory of the United Kingdom.

3 Obtaining discovery and evidence from Cayman Island entities

Norwich Pharmacal and Bankers Trust orders

3.1 Under the *Norwich Pharmacal*² jurisdiction, the Court may order a third party mixed up in wrongdoing, innocently or otherwise, to disclose documents in their possession. This relief is regularly used to identify wrongdoers or plead claims in contemplated foreign proceedings and is often sought against Cayman Islands professional service providers, such as registered offices, who may hold relevant information. To obtain a Norwich Pharmacal order, the applicant must show that: (i) there is a good arguable case that wrongdoing has occurred; (ii) the respondent is involved, innocently or otherwise, and is more than a mere witness; and (iii) discovery is necessary, proportionate and in the overall interests of justice.

3.2 The Grand Court has emphasised that the Norwich Pharmacal jurisdiction is flexible and developing and its recent decisions have shown a willingness to order disclosure. In earlier cases, the necessity requirement was satisfied

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by establishing the evidence was necessary to identify a wrongdoer³ or to obtain the "missing piece of the jigsaw"⁴. However, the flexibility of the jurisdiction and the circumstances in which it can be used was demonstrated in the leading case of *Braga*⁵ where the Court ordered disclosure from corporate service providers in aid of foreign bankruptcy proceedings. More recently, in *Discover*⁶, the Court held that the necessity requirement was satisfied in circumstances where the discovery sought was necessary to establish whether or not there was a valid basis for bringing proceedings against the alleged wrongdoer. A full discussion of the Court's decision in *Discover* can be viewed [here](#).

3.3 Norwich Pharmacal relief has been granted post-award to assist an applicant seeking to trace assets in aid of enforcing a foreign arbitral award even where the award had not been recognised or enforced in the Cayman Islands. In that case, the requisite 'wrongdoing' was the judgment debtor's evasion of the judgment debt⁷.

3.4 The Norwich Pharmacal jurisdiction was extended to obtaining discovery from banks in the *Bankers Trust* case⁸ where the bank was ordered to produce documents to allow assets to be traced and/or preserved, in support of a proprietary claim. In addition to the threshold requirements discussed above at 3.1, an applicant seeking Bankers Trust relief must also show that: (i) there is a good reason to believe (e.g. as a result of tracing) that property held in the bank has been misappropriated by fraud or a breach of trust and is the property of the applicant; and (ii) that discovery will be used solely for the purpose of tracing money and for no other purpose.

3.5 Norwich Pharmacal orders are often coupled with confidentiality and non-disclosure ('gagging') orders, discussed below.

Letters of request

3.6 Upon request of a foreign court or tribunal, the Grand Court may order that evidence be taken in the Cayman Islands, for use in the foreign

proceedings. The Grand Court has jurisdiction to make such orders that are pursuant to the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (1978 Order)⁹. In broad terms, the requirements are that foreign proceedings must be contemplated or on foot and the evidence sought must be strictly limited to that necessary for those proceedings. The Grand Court may make a variety of orders, including the examination of witnesses, either orally or in writing; the production of documents; and the inspection, photographing, preservation, custody or detention of any property. The Grand Court will not permit fishing expeditions or make an order that it considers to be oppressive.

3.7 In *Arcelormitta*¹⁰, the Grand Court rejected an argument that the statutory jurisdiction pursuant to the 1978 Order had ousted the common law Norwich Pharmacal jurisdiction. Rather, the question to be decided on the facts of each case is whether adequate statutory relief was available pursuant to the 1978 Order and whether the statutory jurisdiction had been truly engaged. Whilst there may be some overlap in the remedies available, in some circumstances (for example, where the applicant does not yet have sufficient information to commence proceedings and where there is a risk of tipping off the wrongdoer), the 1978 Order will not be deemed to be an effective alternative remedy and will not displace the Norwich Pharmacal jurisdiction.

Search and seizure orders (Anton Piller injunctions)

3.8 *Anton Piller*¹¹ orders require a defendant to give the plaintiff's representative access to the defendant's property to search for and remove, or take copies of, documents or property, or both. The documents or property must be the subject matter of the dispute. Such applications may be made *ex parte* to avoid tipping off the defendant and the destruction of the property.

3.9 To obtain an *Anton Piller* order, an applicant must establish that: (i) there is an extremely strong *prima facie* case against the respondent; (ii) the damage, potential or actual, must be very

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serious for the applicant; and (iii) there is clear evidence that the respondent has incriminating evidence in his / her possession, and there is a real possibility that the respondent may destroy this material if he / she were to become aware of the application.

4 Freezing assets in the Cayman Islands

4.1 The Grand Court may order a *Mareva*¹² (or "freezing") injunction to prevent a party from disposing of or dealing with specified assets. *Mareva* injunctions may be ordered in support of foreign proceedings. They are frequently used in the tracing and preservation of assets where fraudulent conduct has occurred. Breach of a freezing order by a respondent may lead to contempt proceedings.

4.2 In order to obtain a *Mareva* injunction, the applicant must establish that: (i) the plaintiff has an arguable case; (ii) there is a serious question to be tried; (iii) that damages are an inadequate remedy; (iv) the balance of convenience lies in favour of ordering the injunction; (v) that it is just and convenient to do so; and (vi) that there is a real, objective risk of the defendant dissipating its assets in an attempt to prevent satisfaction of a future judgment. The applicant will also be required to give an undertaking in damages.

4.3 The Grand Court may order a freezing order against third parties against whom there is no cause of action (known as the *Chabra*¹³ jurisdiction) where the applicant establishes that there is a good arguable case that the assets in the possession of a third party are, in fact, assets that belong to a defendant against whom a cause of action is being pursued. The Grand Court may make a freezing order against a third party even if they are not based in the Cayman Islands, but has assets in the Cayman Islands.

4.4 An order for a freezing injunction is often coupled with ancillary orders. For example, a respondent may also be ordered to a sworn statement of assets (along with supporting documentation) and to provide other information to enable the applicant and the Court to ensure

compliance with the injunction.

Appointment of receivers

4.5 The Grand Court may appoint a receiver to preserve assets pending trial, including the trial of foreign proceedings¹⁴. Such relief is available even if a freezing injunction is in place, if the risk of dissipation is sufficiently high.

5 Confidentiality and non-disclosure orders

5.1 An applicant may apply for confidentiality orders (on the papers and without the need for a hearing) in advance of making applications, to prevent the defendant being made aware of the intended proceedings, and taking steps to dissipate assets or put them beyond the reach of the applicant.

5.2 Confidentiality orders may provide for the sealing of the court file in its entirety or in part; the anonymization of court documents; hearings being held *in camera*; and the anonymisation of the parties names on the cause list. Where there is a real risk that a third party respondent may (inadvertently or otherwise) put the defendant on notice of the proceedings, thereby increasing a risk that assets may be dissipated, the applicant may also seek an order prohibiting the respondent from disclosing the existence of any order made. A non-disclosure or 'gagging order' may, in appropriate circumstances, be coupled with the full suite of confidentiality orders to ensure that the defendant does not become aware of the proceedings, the relief ordered and any disclosure / information obtained.

6 Anti-Suit Injunction

6.1 An anti-suit injunction prohibits a party from commencing or continuing proceedings in a particular jurisdiction. The Grand Court has made it clear that it will restrain the commencement or continuation of proceedings in the Cayman Islands or abroad where such proceedings have been brought in breach of an exclusive jurisdiction clause and / or an agreement to resolve disputes by some other

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manner, including arbitration. However, in *Argyle*¹⁵, the Cayman Islands Court of Appeal made it clear that the Cayman Islands courts would require exclusive jurisdiction clauses to be in plain and clear language in order to be effective, particularly if the relevant contractual clauses sought to operate in favour of a non-party.

7 Enforcement of foreign judgment and arbitral awards

Recognition and enforcement of foreign judgments

- 7.1 Foreign parties may have their judgments and awards recognised and enforced in the Cayman Islands. Recognition is sufficient where the applicant does not wish to execute the judgment but seeks to rely on the foreign judgment in Cayman Islands proceedings in support of a *res judicata* or issue estoppel defence. However, where a judgment debtor wishes to execute its judgment or award in the Cayman Islands using the various Cayman Islands enforcement mechanisms, they must also obtain the necessary enforcement orders.
- 7.2 The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) provides a statutory regime for the enforcement by registration of foreign judgments, following which they have the same force and effect as if originally made by the Grand Court. However, the legislation currently only applies to judgments of the Australian courts and therefore most enforcement must be performed pursuant to the common law.
- 7.3 Under the common law mechanism, a foreign judgment creditor must commence fresh proceedings in the Grand Court to obtain a Cayman Islands judgment. Should the judgment debtor not acknowledge service and / or file a defence to the enforcement proceedings within the prescribed time limit¹⁶, judgment in default may be obtained. A plaintiff may also apply for summary judgment on the basis that the defendant has no defence.
- 7.4 A foreign judgment debtor has very limited

scope for contesting the proceedings. A foreign judgment is generally enforceable where: (i) the court issuing the judgment has personal jurisdiction over the defendant; (ii) it is a final and conclusive judgment or order; and (iii) the judgment has not been obtained by fraud or given in breach of natural justice, and is not contrary to public policy. Although traditionally the courts would only enforce foreign judgments for a liquidated sum, in certain circumstances the courts will enforce foreign non-monetary orders and judgments¹⁷.

Enforcement of foreign arbitral awards

- 7.5 The Foreign Arbitral Awards Enforcement Law (1997 Revision) (**FAAEL**) gives domestic effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) and provides for the recognition and enforcement of arbitral awards made in the territory of a signatory to the New York Convention. Non-New York Convention awards are enforceable under the Arbitration Law (2012 Revision) (**Arbitration Law**)¹⁸ and follow the enforcement procedure prescribed by the FAAEL¹⁹.
- 7.6 Section 72 of the Arbitration Law provides that an arbitral award may, with the leave of the Grand Court, be enforced in the same manner as a judgment or order of the court. Upon leave being granted, judgment may be entered in the terms of the award.
- 7.7 An application for leave to enforce a foreign arbitral award must be made by *ex parte* originating summons, supported by affidavit evidence exhibiting both the arbitration agreement and the original award (or certified copies)²⁰. As with all *ex parte* applications, there is a duty to give full and frank disclosure which should include details of the claim, the facts and legal grounds, and whether the award is open to challenge.
- 7.8 The resulting order must be served on the award debtor, who is given the opportunity to set aside recognition of the award, or to challenge enforcement. The applicable limitation period in

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which to enforce an arbitral award is six years from the date of the award²¹.

7.9 If there has been an application to set aside or suspend the award in the local jurisdiction, the Grand Court may adjourn the enforcement proceedings, and may also order the award debtor to provide security in the interim. Where an award has not been suspended or set aside by the foreign court, an application by the award debtor for a stay shall be made under the Grand Court's inherent jurisdiction or under Order 47, rule 1 of the GCR²².

7.10 Pursuant to section 7 of the FAAEL, the Grand Court may refuse to enforce a New York Convention award on limited grounds, including where a party to the arbitration agreement was under some incapacity; the arbitration agreement was invalid under the local law, or where the making of the award was induced or affected by fraud, corruption or misconduct on the part of an arbitrator.

7.11 The procedure for enforcement of ICSID awards²³ follows the same procedure for enforcing an award under the FAAEL, although there is also an additional preliminary procedure for the registration of an ICSID award which is governed by the GCR²⁴.

Enforcement options

7.12 Once a judgment from the Cayman Islands court is obtained, the full suite of domestic enforcement methods are available to the judgment creditor, which include:

7.12.1 *garnishee proceedings*: for an order that a third party who owes money to the judgment debtor to re-direct payment to the judgment creditor;

7.12.2 *charging order*: over land or other assets situated in the Cayman Islands for the amount of the judgment debt. The judgment creditor can then seek an order for sale of those assets to satisfy the judgment debt (plus accrued interest and costs) in default of payment;

7.12.3 *appointment of a receiver*: to collect and realise the property over which it is appointed for the benefit of the judgment creditor;

7.12.4 *writ of sequestration*: an order for the seizure of the judgment debtor's assets to the value and in satisfaction of the judgment debt;

7.12.5 *attachment of earnings*: an order for the payment to the judgment creditor of an appropriate proportion (judicially determined) of the judgment debtor's income; and

7.12.6 *committal proceedings*: proceedings to commit the judgment debtor for criminal prosecution where a judgment debtor take steps to frustrate and / or does not comply with an order permitting the judgment creditor to seize the judgment debtor's assets.

7.13 Alternatively, a judgment creditor may be able to petition to wind up a Cayman Islands company based on an unpaid foreign judgment debt, on the basis that it is unable to pay its debts.²⁵ Upon winding up the debtor, the Grand Court will appoint liquidators, who have broad powers to recover and realise assets, investigate the judgment debtor's affairs, and to distribute the debtor's assets to stakeholders. The legal costs incurred by a judgment creditor winding up the debtor are paid in priority.

8 Conclusion

8.1 The Grand Court has various tools to assist foreign parties, and uses them flexibly where foreign parties have been victims of fraud or wrongdoing. These tools may prove invaluable in identifying wrongdoers, to plead a claim or to freeze and trace assets. They may be deployed at all stages of the foreign proceedings. Moreover, the procedure for the enforcement of foreign judgments and arbitral awards is straightforward and allows foreign parties to avail themselves of the broad range of enforcement options available in the Cayman



Islands.

¹ The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361

² *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133

³ As was the case in *Norwich Pharmacal* (ibid)

⁴ *Axa Equity & Law Life Assurance Society plc v. National Westminster Bank plc* [1998] C.L.C. 1177

⁵ *Braga v Equity Trust Company (Cayman) Limited* [2011(1) CILR 402]

⁶ *Discover Investment Company v Vietnam Holding Asset Management Limited; Saigon Asset Management*

⁷ *USA LLC v Essar Global Fund Limited; Essar Capital Limited* (Unreported, Grand Court per Kawaley J, 29 March 2019). This decision is subject to appeal and the decision from the Cayman Islands Court of Appeal is awaited.

⁸ *Bankers Trust v Shapira* [1980] 1 WLR 1274, as applied in the Cayman Islands in cases including *Kilkerkin Investments Limited (by Clarkson Company Limited, Receiver and Manager) v Player and Six Others* 1980-83 CILR 403; *Federal Savings and Loan Insurance Corporation v Molinaro and Six Others*; and more recently in *Braga* (ibid)

⁹ The 1978 Order extends the Evidence (Proceedings in Other Jurisdictions) Act 1978 to the Cayman Islands and thereby gives statutory effect in the Cayman Islands to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (commonly known as the Hague Evidence Convention).

¹⁰ *Arcelormittal USA LLC v Essar Global Fund Limited; Essar Capital Limited* (Unreported, Grand Court per Kawaley J, 29 March 2019). This decision is subject to appeal and the decision from the Cayman Islands Court of Appeal is awaited.

¹¹ *Anton Piller KG v Manufacturing Processes Limited* [1975] EWCA Civ 12

¹² *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213

¹³ *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231

¹⁴ Section 11A of the Grand Court Law

¹⁵ *Argyle Funds SPC Inc. (In Official Liquidation) v BDO Cayman Ltd* [2018] (1) CILR 362

¹⁶ 14 days after service of the writ or, in the case of a writ served out of the jurisdiction, within a time period as fixed by the Court (O.11, r.1(3) GCR)

¹⁷ *Bandone v Sol Properties* [2008] CILR 301

¹⁸ Section 72(5)

¹⁹ Sections 6 and 7

²⁰ FAAEL, section 6

²¹ Limitation Law (1996 Revision), section 9

²² *Terk Technologies Corporation v Dockery* [2000] CILR N-1

²³ The Arbitration (International Investment Disputes) Act 1966 Order 1967 (**1867 Order**) extends the provisions of the UK's Arbitration (International Investment Disputes) Act 1966 (**1966 Act**) to the Cayman Islands. The 1966 Act implements the International Convention for the Settlement of International Disputes (**ICSID**), relating to the settlement of investment dispute between States and nationals of other States.

²⁴ Order 73, rules 4 and 34

²⁵ *In re Lhasa Ins Ltd* [1996] CILR N-3a

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