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Enforcement of Judgments 2022

Cayman Islands: Trends & Developments

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Trends and Developments

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Judgment Debtors Beware: Enforcing Foreign Judgments and Arbitration Awards in the Cayman Islands Using Novel Funding Arrangements

The Cayman Islands has long been considered a jurisdiction friendly to foreign investors, not least because of the well-established laws which govern the enforcement of foreign judgments and arbitration awards. Two recent developments are now bolstering the jurisdiction's reputation as an investor-friendly business location, namely the ground-breaking introduction of the Private Funding of Legal Services Act 2020 and the recent decision of the Privy Council in Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners [2022] UKPC 21.

Enforcing foreign judgments

The Cayman Islands has not entered into bilateral treaties for the reciprocal enforcement of foreign judgments. Instead, the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "Reciprocal Enforcement Act") governs the recognition and enforcement of judgments granted by the courts of certain foreign jurisdictions as ordered by the Governor. Currently, only judgments of the Superior Courts of Australia and its external territories are recognised in the Cayman Islands pursuant to the Reciprocal Enforcement Act; and any other foreign judgment, irrespective of jurisdiction, is recognised by following the well-trodden path of the common law.

The process for seeking the enforcement of a foreign court judgment or award at common law is fairly uncomplicated and simply involves the issuing of a writ of summons before the Financial Services Division in the Grand Court of the Cayman Islands (the "Grand Court") seeking an order in terms identical to the judgment granted by the foreign court. The Grand Court may enter a domestic judgment on the same terms as the foreign judgment if it:

- was given by a court of competent jurisdiction;
- is final and conclusive;
- is not fiscal, penal or contrary to public policy; and
- is sought to be enforced within the six-year statutory limitation period applicable in the Cayman Islands.

Foreign money judgments are regularly enforced in the Cayman Islands by issuing new proceedings for the payment of the foreign judgment debt. The writ of summons that commences proceedings in the Cayman Islands will then be served on the defendant (or served outside of the jurisdiction, where necessary). Often, summary judgment is sought against the defendant. A straightforward enforcement of a foreign money judgment can be obtained fairly quickly and inexpensively.

Non-monetary judgments can also be enforced at common law where the principle of comity requires it and where all of the necessary conditions are met. However, given that the enforcement of non-monetary judgments is slightly more complicated than the simple enforcement of foreign money judgments, the proceedings can be lengthier and therefore more expensive.

To the extent that any enforcement proceedings were to be challenged, the time and cost

of pursuing such proceedings would naturally increase. Grounds on which a defendant may seek to challenge the enforcement of a foreign judgment include that:

- the judgment was obtained by fraud;
- the defendant did not have notice of the foreign proceedings, or did not participate in the proceedings;
- the foreign court did not have jurisdiction to decide the matter; or
- the enforcement of the foreign judgment would be contrary to public policy.

For completeness, it bears mention that certain types of judgments cannot be enforced in the Cayman Islands either under the Reciprocal Enforcement Act or at common law. These are judgments relating to the penal laws of another country, foreign tax judgments or circumstances where enforcing the judgment would be contrary to the public policy or the laws of the Cayman Islands.

Enforcing foreign arbitration awards

Similarly to foreign judgments, foreign arbitral awards are not automatically enforceable in the Cayman Islands. Any party seeking to rely on or execute against a foreign arbitral award must seek leave of the Grand Court to do so, by making an application to have the award recognised or enforced, as the case may be. Where a party simply wishes to have an award recognised, for example, in order to rely on it in separate proceedings relating to the same issue, it must make an application for recognition. On the other hand, a party wishing to execute against an award, often because it wishes to gain access to assets within the jurisdiction, will need to apply for the enforcement of the award. An arbitral award does not need to be enforceable to be recognised, but does need to be recognised in order to be enforceable.

As a British Overseas Territory, the Cayman Islands is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Any award made in an arbitration conducted in a New York Convention jurisdiction is enforceable in terms of the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the "Enforcement Act").

The Arbitration Act 2012 ("Arbitration Act") extends the options for enforcement and recognition of foreign arbitration awards to all arbitrations, regardless of where such award is made. These two pieces of legislation form the legislative framework that governs the recognition and enforcement of foreign arbitral awards in the Cayman Islands, which is normally a relatively straightforward process.

Recognition

Under Section 5 of the Enforcement Act, a New York Convention award is treated as binding for all purposes on the persons between whom it was made. Similarly, under Section 72(5) of the Arbitration Act, an award (whether a New York Convention award or not) is recognised as binding.

However, to the extent that a party seeks to rely on that award in any manner, such as by relying on it in pleadings for issue estoppel, application must be made to have the award formally recognised for that purpose. Such an application takes the same form, and follows the same procedure, as an application for the enforcement of an award, the only difference being the nature of the relief sought.

Enforcement

With the introduction of the Arbitration Act, the process for commencing enforcement proceedings in the Courts of the Cayman Islands has also become fairly straightforward. Under Sec-

tion 72 of the Arbitration Act, "an award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect". Section 72(5) stipulates that application for an award to be enforced (or relied upon, as the case may be) is to be made in accordance with the Enforcement Act. Practically speaking, therefore, all foreign arbitral awards are subject to the same procedure, regardless of which jurisdiction they were granted in.

The procedure for seeking leave to enforce a foreign arbitration award is set out in the Grand Court Rules (GCR). Application must be made by use of an ex parte originating summons (Order 73, rule 31(1), GCR). The application must be accompanied by an affidavit setting out the following information:

- the name and usual or last known place of residence or business of the applicant and the person against whom the enforcement of the award is being sought; and
- either confirmation that the award has not been complied with, or an explanation of the extent to which it has not been complied with, at the date of the application.

Under Section 6 of the Enforcement Act, the application for enforcement must be accompanied by the following documents:

- the duly authenticated original award or a duly certified copy of it;
- the original arbitration agreement or a duly certified copy of it; and
- where the award or agreement is in a language other than English, a full translation of those documents, which is certified by an official or sworn translator or, by a diplomatic or consular agent.

The fact that the application for enforcement will be made on an ex parte basis means that the applicant must give full and frank disclosure to the Court. The application should therefore address the following information:

- details of the claim;
- details of attempts made to enforce the award in any jurisdiction; and
- grounds for the potential challenge of the enforcement of the award.

The Court has very limited grounds for refusing to enforce a foreign arbitral award. These are set out in Section 7 of the Enforcement Act and include the following:

- that a party to the arbitration agreement was suffering under some incapacity;
- that the arbitration agreement was not valid;
- that a party to the arbitration was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- that the arbitral award deals with matters that are beyond the scope of the submission to arbitration;
- that either the composition of the arbitral authority or the adopted procedure of the arbitration was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or
- that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which it was made.

In addition, where the award is in respect of a matter that cannot be settled by arbitration or where it would be contrary to public policy to enforce the award, the court may refuse enforcement under the Enforcement Act. The latter ground was recently the subject of the decision in Gol Linhas, in which the Court's ability

to refuse enforcement on the grounds of due process and public policy were considered in detail by the Privy Council.

Gol Linhas

Following an arbitration seated in Brazil, Matlin-Patterson (the "Appellants") applied to the Brazilian courts to have the arbitral award set aside. The Appellants' application before the Brazilian courts was unsuccessful and all rights of appeal in Brazil had been exhausted. Thereafter, Gol Linhas (the "Respondent") sought to enforce the award in the Cayman Islands and applied to the Grand Court seeking an order in those terms.

The grounds on which the Appellants resisted enforcement of the award in the Cayman Islands were similar to their original grounds challenging the arbitral award, which were rejected by the Brazilian courts. Those grounds included that:

- they were not party to the arbitration agreement;
- there was a violation of due process because the arbitral tribunal held them liable on a legal basis which they were not given an opportunity to address, and which was not pleaded or argued before the arbitral tribunal; and
- the legal ground on which the arbitral tribunal had held them liable fell outside of the scope of the submission to arbitration.

Although leave to enforce the award was first granted on an ex parte basis, on 19 February 2019, in the first instance inter partes decision of the Grand Court, the judge upheld all the grounds of challenge brought by the Appellants and refused to enforce the award in the Cayman Islands. The Court of first instance also refused leave to appeal that decision. However, in November 2019, an application by the Respondent for leave to appeal was heard and granted by the Court of Appeal of the Cayman Islands (the "Court of Appeal").

On 11 August 2020, the Court of Appeal delivered its judgment allowing the Respondent leave to enforce the arbitral award in the same manner as if it had been a judgment of the Grand Court. In summary, the Court of Appeal held that:

- it was not contrary to substantial justice nor the public policy of the Cayman Islands for the arbitrators to determine the legal consequences of the facts of the arbitration, without giving the Appellants an opportunity to comment on the legal basis which they had adopted for their decision; and
- the legal basis for the arbitral tribunal's decision was not beyond the parties' agreed scope of the submission to arbitration.

The Appellant appealed the decision of the Court of Appeal to the Privy Council (the highest appellate Court of the Cayman Islands), which was asked to consider three issues, namely, (i) the validity of the arbitration agreement (as relevant to the question of issue estoppel), (ii) the due process/public policy arguments against the arbitral award, and (iii) whether the arbitral tribunal's award had strayed outside of the agreed scope of the submission to arbitration. In its decision on 19 May 2022, the Privy Council confirmed the Court of Appeal's rulings on all three of the issues and concluded that none of the grounds relied on by the Appellants justified a refusal to enforce the award in the Cayman Islands.

Regarding the validity of the arbitration agreement, the Privy Council held that the Brazilian domestic courts had undertaken an independent investigation of the validity of the agreement and had reached a final and binding conclusion regarding that issue, during the Appellants' (unsuccessful) application for the award to be set aside by the Brazilian domestic courts. On that basis, the Privy Council held that issue estoppel would operate against the Appellants

to prevent the validity argument from being re-litigated in the context of the enforcement proceedings before the Cayman Islands courts.

Considering the question of due process and the public policy of the Cayman Islands, the Privy Council noted that the point was finely balanced. It remarked in its conclusion that in the present case, the "prudent" course would have been for the arbitral tribunal to adopt a more conservative approach by requesting the parties' comments on the legal point upon which it ultimately relied. Had that occurred, the concern that the parties had not had an opportunity to address the tribunal on that legal point would not have arisen. That notwithstanding, the Privy Council ultimately concluded that the tribunal's reliance on the point did not amount to "so serious a denial of procedural fairness as to justify refusal to enforce the award". In coming to its conclusion, the Privy Council held that the requirement which must be met in order to show a breach of due process is "proof, not merely that a procedure was adopted which was irregular or undesirable, but of fundamental unfairness which goes to the essence of the right to be heard". In the present case, that had not been established.

Finally, on the issue of the agreed scope of submission to arbitration, the Privy Council held that on the facts of the case, any difference between the terms of reference of the arbitration and the remedy ultimately granted "(came) nowhere close to the kind of excess of authority which would justify refusal to enforce the award." The Privy Council stated that the established practice of narrowly construing any defences to the enforcement of arbitral awards included a correlative, established practice to widely construe the scope of submission to arbitration.

For all of those reasons, the Privy Council declined to alter the Court of Appeal's order to enforce the award. As such, the Brazilian arbitral award became enforceable in the Cayman Islands.

For completeness, it should be noted that, once an order of the Grand Court is made enforcing an arbitral award, such order must be served on the parties against whom the award is to be enforced, including by way of service out of the jurisdiction, under a separate application, if necessary.

Funding enforcement proceedings

Whilst the procedure for making an application to have a foreign judgment or arbitral award declared enforceable in the Cayman Islands is usually straightforward, Gol Linhas took over three years to be fully resolved in the Cayman Islands. Cases like Gol Linhas have demonstrated that where challenges to enforcement are being made, rather than being straightforward and reasonably cost-effective, enforcement proceedings can be lengthy and, consequently, expensive to litigate. That relative uncertainty may have previously caused some reluctance amongst litigants to commence enforcement proceedings in the Cayman Islands.

Until very recently, contingency fee arrangements and litigation funding were not as readily available to litigants in the Cayman Islands as they are in other established jurisdictions. Issues of champerty and maintenance (and their prohibition) under the common law often created insurmountable barriers to litigants finding alternative avenues for the funding of litigation. The sanction of third-party funding was considered by the courts on a case-by-case basis but, previously, the position was not codified by legislation. The recent introduction in the Cayman Islands of the Private Funding of Legal Services Act, 2020 (the "Private Funding Act") has caused a substantial sea change in the ability of litigants to fund proceedings commenced in the jurisdiction. That legislation will have a direct bearing

on parties' willingness and ability to institute proceedings in the Cayman Islands seeking to enforce foreign judgments or arbitral awards in the jurisdiction.

Contingency fee arrangements

The Private Funding Act, which entered into force on 1 May 2021, now allows for contingency fee arrangements to be entered into between litigants and attorneys in the Cayman Islands. Although contingency fee arrangements were occasionally accepted by the Court, they were only allowed in respect of a foreign lawyer's fees in matters involving cross-border litigation and, only in instances where that foreign lawyer's jurisdiction allowed contingency fees. A contingency fee arrangement between a Cayman Islands attorney-at-law and a litigant was a concept previously unheard of in the jurisdiction.

Now, under Section 3 of the Private Funding Act, an attorney "may enter into a contingency fee agreement with a client in which it is agreed that the remuneration paid to the attorney-at-law for the legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition or completion of the matter in respect of which the legal services are provided."

Section 4 of the Private Funding Act outlines certain conditions in relation to an attorneys' renumeration which must be met in order for them to be able to enter into a contingency fee arrangement with a client. These include a restriction that whilst an attorney may now charge a "success fee" (or uplift) over and above its normal fee, that success fee is capped at 100% of the attorney's usual fees. However, for claims sounding in money, that success fee cannot exceed an "allowed percentage" of the total sum recovered by the client. Similarly, instead of a success fee, an attorney may charge a percentage of the value of the recoveries made by a client in claims involving either money or property up to an "allowed percentage" in accordance with the Private Funding of Legal Services Regulations 2021. In both cases, that percentage is currently capped at a maximum of 33.3% of the sum of money or value of the property recovered (excluding the attorney's costs).

Importantly, under Section 4(4) of the Private Funding Act attorneys and their clients may contract out of the above-mentioned caps by making a joint application to the Grand Court within 90 days of entering into such a contingency fee agreement. In determining whether to sanction such a contingency fee agreement, the Grand Court will consider the nature and complexity of the claim as well as the expense and risk associated with the proceedings and any other factor that the Court may deem relevant in the circumstances.

It bears mention that the required form and content of the contingency fee agreement is set out in Section 5 of the Private Funding Act, which specifies that the agreement must be (i) in writing and (ii) signed by both the client (or an authorised representative if the client is not a natural person) and the attorney. Furthermore, in accordance with Section 12 of the Private Funding Act, where the client is acting in a fiduciary capacity (for example as a trustee under a deed or will, or as a guardian of property or to a minor child), the contingency fee agreement must be presented to the Clerk of the Court before payment is made to the attorney. The Clerk of the Court will examine the contingency fee arrangement and may disallow any part of it or it may require the Grand Court to make a direction thereon.

Litigation funding

The Private Funding Act has also codified the ability of litigators to make use of third-party litigation funding. Section 16 defines a litigation funding agreement as an agreement:

- under which a funder agrees to fund in whole or in part the provision of legal services to a client by an attorney-at-law;
- which relates to the provision of legal services; and
- under which the client agrees to pay a sum to the funder in specified circumstances.

A litigation funding agreement must be made in writing and shall comply with certain prescribed requirements (as regulated by the Cabinet), including that the funder has provided certain prescribed information (if any) to the client before the litigation funding agreement is entered into. In accordance with Section 16(2), the sum to be paid by a client to the funder shall consist of (i) any awarded costs payable to the client in respect of the relevant proceedings and an amount calculated by reference to the funder's anticipated expenditures in funding the provision of the services, or (ii) a percentage of the sum or value of the property recovered in the relevant proceedings.

As adverted to above, Section 19 of the Private Funding Act states that the Cabinet may make regulations in respect of contingency fee agreements and litigation funding agreements. Whilst the Regulations made currently provide further details and clarifications in relation to contingency fee arrangements (as noted above), there are no further requirements relating to litigation funding agreements specified in the Regulations at this time.

Conclusion

Whilst the Private Funding Act is fairly short and "light touch", it is a very welcome piece of legislation in the Cayman Islands, particularly in respect of complicated enforcement proceedings. Due to the past inability of litigants to seek alternative means of funding the provision of legal services in the Cayman Islands, it is likely that many assets of foreign judgment debtors situated in the jurisdiction went unrecovered. However, the introduction of contingency fee arrangements and litigation funding options now make those assets more readily recoverable, by allowing parties who have successfully litigated arbitration proceedings or foreign judgment proceedings more creative options for funding the enforcement of those awards in the Cayman Islands. Judgment debtors beware!

Collas Crill is a highly regarded offshore law firm with offices in the Cayman Islands, Jersey, Guernsey, the British Virgin Islands, and London. With more than 35 partners and directors and over 85 lawyers and legal professionals, the firm delivers a comprehensive range of legal services to clients in Cayman and around the globe. Collas Crill is regularly instructed to advise on the enforcement of judgments and arbitral awards in the Cayman Islands, and across the multiple offshore jurisdictions in which it operates.

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