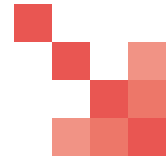


Cayman Islands

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GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

As the general awareness and appreciation of alternative dispute resolution (ADR) mechanisms continues to grow, there has been a significant rise in local arbitrations, principally for insurance and construction disputes. The Arbitration Law was revised and updated in 2001 and there are proposals to reform it substantially. The Law Society is currently preparing draft legislation for recommendation to the government, which would radically reform and update the Arbitration Law to bring it in line with modern international models (such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985).

Two factors that usually attract parties to arbitration are already present in litigation in the Cayman Islands: the courts are relatively accommodating to parties that require confidentiality, and/or flexible timetables. However, arbitration clauses provide added comfort to parties by minimising the scope for jurisdictional challenges, satellite litigation and successive appeals.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

The Chartered Institute of Arbitrators has recently established a Cayman chapter (with the author, Jeremy Walton, as its Chairman) for the purpose of providing arbitral services in the Cayman Islands. Arbitrations can and do take place in the Cayman Islands by agreement between the parties under the rules of other international institutions, including:

- The American Arbitration Association (AAA).
- The International Chamber of Commerce (ICC).
- The London Court of International Arbitration (LCIA).

More often, ad hoc arbitrations are conducted under rules of the parties' own devising (whether or not by adoption of an external set of rules).

3. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

Arbitration proceedings are governed by the Arbitration Law, which sets out:

- The procedures.
- The powers of the arbitrators.
- How and when a court can intervene.

The Foreign Arbitral Awards Enforcement Law (1997 Revision) provides for the circumstances in which a foreign award can be enforced in the Cayman Islands.

UNCITRAL Model Law

The UNCITRAL Model Law has not been adopted, although proposed reforms will see the introduction of equivalent provisions into Cayman arbitration law (*see Question 1*). At present, the Arbitration Law already provides greater scope for judicial intervention during the course of an arbitration, to assist the parties or the arbitrator, by conferring on the Cayman Islands Court powers to grant interim measures and preliminary orders (*see Question 20*). The Arbitration Law also confers a more detailed and more extensive jurisdiction on the Cayman Islands Court for setting aside and remitting arbitral awards for reconsideration (*see Question 22*).

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

There are mandatory provisions in the Arbitration Law relating to:

- The authority of an arbitrator or umpire appointed under an arbitration agreement being irrevocable, except by leave of the court or by a contrary intention expressed in the agreement.
- An arbitration agreement not being discharged by the death of any party. In these cases the agreement is enforceable by or against the personal representatives of the deceased.

- The court staying a proceeding where the parties to the agreement have submitted to arbitration, unless an exception applies (see *Questions 15 and 17*).
- The appointment of an umpire where the arbitration agreement provides for three arbitrators.
- The arbitrator or umpire having the power to make an award at any time.
- The default powers of the arbitrator or umpire.
- An award for costs being taxable by the courts, unless the award directs otherwise.
- The interest on an award being carried at the same rate as a judgment debt from the date of the award, unless the award directs otherwise.
- A remitted award being made within three months after the date of the court order, unless the order directs otherwise.
- The power of the court to give relief where an arbitrator is not impartial or the dispute involves a question of fraud by ordering that the arbitration agreement cease to have effect, or revoking the authority of any arbitrator or umpire. In this case, the court can refuse to stay any action brought in breach of the agreement.
- Matters relating to the authority and award of a Clerk or Special Referee as well as the powers of the Grand Court and Court of Appeal as to references by order.
- Miscellaneous powers of the courts in relation to interim orders (see *Question 20*).

5. Are there any requirements relating to independence or impartiality?

An arbitrator's authority can be revoked by the Grand Court if it is established, on application by a party to the arbitration, that the arbitrator is not or may not be impartial.

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

Claims that can be raised by arbitration are subject to the same law of limitation as applies to court actions. Parties to an arbitration agreement cannot contract out of the limitation periods prescribed by the law. Different claims are subject to different limitation periods, although most claims made in arbitration (for breach of contract and in tort) are subject to a six-year limitation period.

The limitation period runs from the date of accrual of the cause of action, which in contract claims is at the time of the breach of contract. To avoid being time-barred, an arbitration must be commenced within this period. An arbitration is treated as commenced when one party serves a notice on another party, either requiring their appointment or

agreement to the appointment of an arbitrator, or alternatively requiring the submission of their dispute to a designated arbitrator (depending on what the arbitration agreement provides).

ARBITRATION AGREEMENTS

7. For an arbitration agreement to be enforceable:

- What substantive and/or formal requirements must be satisfied?
 - Is a separate arbitration agreement required or is a clause in the main contract sufficient?
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Legal requirements and formalities

An arbitration agreement is usually considered binding where there is any agreement in writing (that may or may not form part of a wider agreement) to submit to arbitration a dispute that has arisen, or may arise in the future, between the parties to that agreement. It is not necessary that the arbitrator is named in the agreement. There are no other form or content requirements.

Form of agreement

A separate arbitration agreement is not required. It is sufficient to include an arbitration clause in the main contract.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/ characteristics or selection of arbitrators?

The Arbitration Law states a number of provisions that will be deemed to be contained in the arbitration agreement in the absence of any contrary intention. In particular, it imposes the following qualifications and restrictions on the number and method of selection of the arbitrators:

- If no other preference is given, then a single arbitrator must be appointed.
- If the choice is two arbitrators, an umpire must be appointed by the arbitrators to determine the arbitration if they cannot agree.
- If an arbitration agreement provides that three arbitrators must be appointed, one appointed by each party and the third appointed by the other two, this is treated as an agreement for the appointment of an umpire, rather than a third arbitrator, by the other two arbitrators. If three arbitrators are to be appointed by some other means, an award by any two of them is binding on the parties.
- An arbitrator, third arbitrator or umpire must be appointed if the parties' appointment procedure is not complied with or if an appointee fails to act.

The Arbitration Law also sets out a number of provisions that are deemed to be contained in all arbitration agreements relating to:

- The terms of, and procedure for, referring disputes to arbitration.
- The procedural and substantive powers of arbitrators.
- The powers of the court to:
 - appoint and remove arbitrators;
 - tax costs awards; and
 - hear references from, and challenges to, arbitration proceedings.
- The power of the Grand Court, on the application of any party, to order an umpire to determine the arbitration instead of the appointed arbitrators.

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

The general rule is that a third party is not privy to and not bound by an arbitration agreement (and can only fall under obligations as witnesses in an arbitration). However, in the following scenarios an arbitration agreement can be extended to a third party:

- **Agency/trusts.** The claimant is a person for whose benefit, or for whose account, the contract was made.
- **Succession.** The claimant has succeeded by operation of law to the rights of the named party.
- **Novation.** Due to a statutory or consensual novation, the claimant has replaced the person originally named as a party to the contract.
- **Assignment.** The claimant is the assignee of the benefit of the contract.
- **Insolvency.** The claimant is a trustee in bankruptcy who has adopted a contract containing the arbitration agreement.

PROCEDURE

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

Appointment and removal of arbitrators

If the arbitration agreement does not provide for the appointment or removal of arbitrators, there are provisions in the Arbitration Law to assist the parties in dealing with these issues (see *Question 8*).

In relation to the removal of an arbitrator, the Grand Court can:

- Order an umpire to take charge of an arbitration as the sole arbitrator.

- Remove an arbitrator or umpire who fails to make sufficient progress in the arbitration in a reasonable time.
- Remove an arbitrator who fails to be impartial.
- Revoke the authority of an arbitrator who is not impartial.
- Remove an arbitrator or umpire who is guilty of misconduct or has conducted the proceedings unsatisfactorily (and in these circumstances, the Grand Court can set aside an award).

The Grand Court has ancillary powers to appoint replacement arbitrators and umpires to enable the arbitration to proceed. Alternatively (in rare cases) it can order that an arbitration agreement cease to have effect and determine the dispute itself.

Commencing arbitration proceedings

The Arbitration Law does not state a time frame within which an arbitration proceeding must commence after a dispute has arisen. However, if the agreement states that notice or some other procedural step must occur in a fixed time to commence the arbitration proceeding, the Grand Court can extend the time for commencing the proceeding for such a period as it thinks proper, if it believes that in the circumstances of the case undue hardship would be caused.

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

The parties usually select a set of procedural rules in the arbitration agreement, either by:

- Reference to, and incorporation of, a recognised body of rules (such as those of the ICC or the AAA); or
- Including tailor-made rules to govern the particular subject matter of any reference to arbitration.

If the rules do not address a particular procedural issue that arises during the arbitration, the arbitrator can refer to the procedural law of the seat of the arbitration.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

General powers

The Arbitration Law provides that arbitrators and umpires have the following powers, unless a contrary intention is expressed in the arbitration agreement:

- To administer oaths, or take affirmations of the parties and witnesses to the reference.
- To correct any clerical mistake or error in an award arising from an accidental slip or omission.

Disclosure and attendance

An arbitrator has the power to order, but not compel, the disclosure of documents or attendance of a witness. An arbitrator cannot penalise a third party for non-compliance with an order. Where an arbitrator deems it necessary to compel the disclosure of documents or attendance of a witness, the assistance of the Grand Court can be sought.

EVIDENCE**13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?**

The Arbitration Law requires the parties to produce to the arbitrator all documents in their possession or power, which may be required or called for by the arbitrator, unless:

- It is otherwise stated in the arbitration agreement; or
- There is any legal objection.

The parties can agree different rules on disclosure, including electronic discovery, that are far more flexible in comparison to the strict structure of disclosure in litigation (governed by The Grand Court Rules 1995).

CONFIDENTIALITY**14. Is arbitration confidential?**

The Arbitration Law does not impose any duty of confidentiality on the parties. Therefore, the scope and duration of confidentiality in arbitrations relies on agreement, although there is usually an implied term in arbitration agreements that proceedings are confidential.

Proceedings are held in private and the arbitrator can give explicit directions about keeping particular matters confidential (such as commercially sensitive information that has been disclosed).

COURTS AND ARBITRATION**15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?**

The Grand Court can assist in every stage of the arbitration process and, in particular, in the following areas.

Procedural issues

The Grand Court can:

- Stay legal proceedings started in a matter that falls within the scope of an arbitration agreement.

- Extend any time limits for starting arbitration proceedings and for making an award.
- Determine any question of law arising during an arbitration referred to the Court by an arbitrator.
- Enforce the payment of an arbitrator's fees and the payment of costs awarded by an arbitrator against a party.
- Enforce an arbitral award in the same way as a judgment (this can include a foreign arbitral award).

Witnesses and documents

The Grand Court can issue orders to compel the attendance and examination of witnesses, and the production of documents, to the same extent as if it were trying the action in the Grand Court.

Interim measures

The Grand Court can:

- Order a party that starts an arbitration to provide security for the other party's costs.
- Use the same broad powers as are ancillary to an action in the Grand Court to:
 - make asset preservation orders;
 - grant interim injunctions;
 - make search and seizure orders; and
 - appoint a receiver.

Appointment and removal of arbitrators

See *Questions 8 and 10*.

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

The Grand Court generally respects the parties' previous agreement to resolve disputes through arbitration. It does not seek to frustrate arbitration, nor does it tolerate delaying tactics by a party seeking to delay progress in the arbitration.

17. What remedies are available where proceedings are started in the local court in breach of an arbitration agreement?

Where there is a valid and binding arbitration agreement, the Grand Court recognises and enforces it by staying any legal proceedings started in breach of such an agreement, as long as the applicant is ready and willing to do all things necessary for the proper conduct of the arbitration.

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

In this situation it is more usual to apply to the court where the foreign proceedings are started for an injunction. However, the Cayman court can, in appropriate circumstances, grant an anti-suit injunction, where the party acting in breach of the arbitration agreement is subject to the jurisdiction of the Cayman court.

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction accept the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

The Arbitration Law does not contain any specific provisions allowing the arbitral tribunal to rule on its own substantive jurisdiction, nor does it set out any procedural requirements for such an objection. However, the arbitrator, through the adoption of the concept of kompetenz-kompetenz, can determine a dispute regarding issues of jurisdiction.

The court can also determine disputes on jurisdiction in the same way that it would in any proceedings that come before it.

REMEDIES

20. What interim remedies are available from the tribunal? Can the tribunal award:

- Security for costs?
 - Security or other interim measures?
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The tribunal cannot order security for costs or other interim measures unless it is agreed by the parties to give the tribunal the power to make these orders. However, the Arbitration Law provides the Grand Court with jurisdiction to make interim orders (in the same way as in court proceedings) such as:

- Security for costs.
- Discovery of documents and interrogatories.
- Giving of evidence by witness statement.
- Examination on oath of any witnesses within and outside of the jurisdiction.
- Preserving interim custody or sale of any goods that are the subject of dispute.
- Securing the amount in dispute.
- Detaining, preserving or inspecting any property or thing that is a subject of the reference.
- Interim injunctions and the appointment of a receiver.

21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

The Arbitration Law does not limit the types of award that can be made save that a mandatory injunction cannot be ordered. A final award is valid as long as it:

- Resolves all disputes validly referred to the arbitrator.
- Does not go beyond the jurisdiction conferred on the arbitrator by the arbitration agreement.
- Is capable of being carried out.
- Is enforceable by the court (only mandatory injunctions are not ordered in arbitral awards).

APPEALS

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal?

Arbitrators can state, in the form of a special case to be decided by the Grand Court, any question of law arising during the arbitration or an award (including any part of an award). They can also be compelled to do so by a court order made on the application of a party to the arbitration.

A special case can be stated while arbitration proceedings are still pending. It must be a question of law which is all of the following:

- Open to serious argument.
- Important to the resolution of the dispute.
- Raised in good faith without an ulterior motive (such as a desire to cause delay).

This effectively provides parties to an arbitration with a right of appeal (subject to the Grand Court's leave) in a genuine case, and they cannot validly deprive the arbitrator of this discretionary power, or oust the supervisory jurisdiction of the Grand Court in an arbitration agreement.

A special case typically contains two alternative awards, one of which is adopted and enforced by the Grand Court depending on its view of the arbitrator's own conclusion on the question of law.

A Grand Court decision on a special case can be appealed to the Court of Appeal, but not without leave from either the Grand Court or the Court of Appeal.

The Grand Court:

- Can set aside an award where an arbitrator is guilty of misconduct or has conducted the proceedings in an unsatisfactory manner (known in other jurisdictions as serious irregularity) (see *Question 10*).
- Has a general discretion to remit an award, or any of the matters referred to arbitration, for reconsideration by the arbitral tribunal.
- Arguably has an inherent jurisdiction to set aside awards (although this jurisdiction is rarely invoked) for:
 - admitted mistake;
 - an error of law on the face of the award; or
 - having no jurisdiction.

COSTS

23. What legal fee structures can be used? For example, hourly rates and task based billing? Are fees fixed by law?

Court litigation in the Cayman Islands is generally faster than in most other comparable jurisdictions. However, there is always scope for the parties to resolve their disputes faster and at less expense through arbitration by means of their ability to tailor the arbitral procedures to suit the particular needs of any case.

Fees for simple, single-issue arbitrations are in the range of US\$10,000 (about EUR7,300) including the arbitrator's costs. A complex arbitration, like court proceedings, costs over US\$100,000 (about EUR73,000) in fees, and considerably more in the largest cases.

Lawyers generally charge hourly rates rather than a lump sum or on a contingency fee basis. Hourly rates range from US\$250 (about EUR180) for paralegals to US\$700 (about EUR500) for partners.

24. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider when awarding costs?

The arbitration agreement can provide for the allocation of costs incurred by the parties. However, any provision stating that, regardless of the outcome of the arbitration, a party must pay part or all of its own costs, is void. In the absence of any agreement to the contrary, the arbitral tribunal has a wide discretion in awarding costs between the parties.

If no provision for costs is made in an award, any party can apply to the arbitral tribunal for a costs order. Any costs ordered by an award are subject to taxation (assessment) in the Grand Court, unless the award indicates otherwise. As a result, a successful party to arbitration is likely to recover a large part of its costs (usually 50% to 75%) according to the principles and rules governing the recovery of costs in legal proceedings before the Grand Court.

ENFORCEMENT

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

A local arbitration award can, with leave of the Grand Court, be enforced in the same way as a court order to the same effect and, where leave is given, judgment can be entered in the terms of the award. It can then be subject to enforcement proceedings like any other court order (see *Question 28*).

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

The Cayman Islands is party to the New York Convention. An award made in the Cayman Islands is recognised and enforced in countries that have ratified the New York Convention, on production of the original arbitration agreement and award or certified copies. Recognition or enforcement can be refused in those countries if the defaulting party proves that:

- A party to the arbitration agreement was (under the applicable law) under some incapacity.
- The arbitration agreement was not valid under its applicable law or, if the agreement does not provide for an applicable law, under the law of the country where the award was made.
- It was not given proper notice of the arbitrator's appointment or of the arbitration proceedings, or was otherwise unable to present its case.
- The award deals with a dispute outside the terms of, or contains decisions on matters beyond the scope of, the submission to arbitration (although if the award also contains separable decisions on matters that were submitted to arbitration, they can be enforced).
- The composition of the arbitral tribunal or the arbitration procedure breached the arbitration agreement or (in the absence of any agreement) the law of the Cayman Islands.
- The award has not yet become binding on the parties, or it has been set aside or suspended by the Grand Court or by another competent authority under the law of which the award was made. As an interim measure, proceedings to enforce an award can be adjourned pending the determination of an application to set aside or suspend the award before a competent authority.

An award cannot be enforced if its enforcement is contrary to public policy in the jurisdiction where enforcement is sought.

In relation to jurisdictions that have not ratified the New York Convention, whether or not an arbitration award is enforceable depends on that country's domestic laws.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

Generally, a foreign arbitration award is enforceable under conflicts of law principles, which require the award to be both:

- Made in accordance with an arbitration agreement that is valid by its applicable law.
- Valid and final according to the law governing the arbitration proceedings.

In addition, an award made under an arbitration agreement in the territory of a state that is party to the New York Convention is recognised and enforced according to its principles (*see Question 26*).

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

An arbitral award can, by leave of the court, be enforced in the same way as a court judgment or order to the same effect and, where leave is given, judgment can be entered in terms of the award. Enforcement proceedings then follow the same procedures as in normal litigation, with a similar range of procedural options including:

- Contempt applications.
- Garnishee applications.
- Bankruptcy petitions.

Some enforcement processes can be very swift, while others take more time.

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Jeremy is a Member of the Cayman Islands Law Society, the International Bar Association, the Bar of England and Wales, the Honourable Society of Lincoln's Inn, the Chartered Institute of Arbitrators (Chairman of the Cayman Chapter), the Civil Mediation Council and the Association of Contentious Trust and Probate Specialists. Jeremy is also an accredited mediator.

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Recent disputes in which Chris has acted include: representing excess insurers of the Hyatt Regency Grand Cayman in connection with claims arising from damage sustained during Hurricane Ivan, representing insurers in the defence of arbitration proceedings concerning an insurance claim pursued by the owners of Morritt's Tortuga Club, representing the developer of the Ritz-Carlton Grand Cayman in connection with disputes arising from the development, including the professional negligence claim brought against the architects formerly retained on the project, and defamation proceedings brought against the publisher of a Florida-based business publication.

Chris is a member of the Law Society of England and Wales and the Cayman Islands Law Society.

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