



Guide to Enforcement of Foreign Judgments in the Cayman Islands

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PREFACE

The information contained in this Guide is for informational purposes only and should not be treated as constituting legal advice. Readers are encouraged to consult their professional advisers before making decisions or taking actions on the numerous and complex issues involved in the enforcement of foreign judgments in the Cayman Islands

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INTRODUCTION

In today's global business market it is commonplace for contracting parties to be resident in different countries. The Cayman Islands are home to over 90,000 companies, many of which conduct their business exclusively outside of the Islands. When faced with the task of litigating against such a company, a claimant will generally choose to conduct the litigation in his home country if he is able to do so, as it will be more cost-effective and convenient for him. In such circumstances, a claimant will wish to ensure that he is able to obtain monetary satisfaction for his claim and accordingly that any judgment obtained overseas is capable of being enforced in the country within which the defendant's main assets are situated.

STATUTORY REMEDIES

As the Cayman Islands is a British Overseas Territory, the United Kingdom has authority to extend treaties ratified on its behalf to the Cayman Islands by Order in Council. Although the United Kingdom is party to many international treaties, no such treaty has in fact been extended to the Cayman Islands, with the single exception of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Furthermore, the Cayman Islands itself has not yet entered into any international treaty or accord addressing reciprocal enforcement of judgments; therefore, there remains no international system for doing so.

Seeking to facilitate the enforcement of foreign judgments, the Legislature of the Cayman Islands passed legislation in 1967, which is presently known as the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (the "Law"). Under the Law 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Islands on application to the Cayman court, after which the judgment is deemed to have the same force and effect as if originally made by the Cayman court. The Law is potentially an extremely useful piece of legislation; however, it only extends to those jurisdictions where the Governor in Council is satisfied that Cayman Islands judgments will be reciprocally recognised. To date, the Law has only been extended to various Australian states and territories, making the Law of limited utility.

There are a number of other statutory provisions in the Cayman Islands legislation which seek to provide reciprocal enforcement in respect of maintenance orders in family cases. In addition, a foreign arbitration ruling may be enforced in the Cayman Islands under the Foreign Arbitral Awards Enforcement Law (1997 Revision).

COMMON LAW

In the Cayman Islands, foreign judgments from countries such as the United States and the United Kingdom, to which the Law does not apply, may only be enforced at Common Law.

If a foreign judgment creates a debt between the parties to that action then it is capable of being enforced in the Cayman Islands under the Common Law principles of the law of obligations. In order to enforce a judgment in this regard, a foreign claimant will be required to bring a new action in the Cayman Islands in which the cause of action is a debt claim based on the foreign judgment and non-payment thereof. The debt claimed for is a simple contract debt and subject to the usual limitation period of six years.

Traditionally a foreign judgment could only be enforced if it was for a debt as described above; however, this area of law changed significantly following the case of *Bandone v Sol Properties* [2008] CILR 301. That case involved a claim for enforcement of a foreign court's order for specific performance of a contract for the transfer of shares. The Grand Court agreed to do so by ordering rectification of the company's Register of Members. The Court in the *Bandone* case confirmed that the direct enforcement of foreign judgments should no longer be

confined to those for a debt or specific sum of money: non-money judgments may now be recognized and enforced by way of equitable remedies, should the principle of comity require it. When deciding whether or not to enforce non-money judgments, the Court will also have regard to general considerations of fairness, and will ensure that enforcement would not favour foreign litigants over domestic litigants or in any way jeopardize the integrity of the Cayman Islands legal system.

In any event, the Cayman court will not need to re-examine the merits of the underlying case, obviating the delay and expense for the claimant of having to re-try his claim. Instead, the Cayman court will look to see if there is a valid judgment and at the following factors prior to granting a new judgment in the Cayman Islands on the basis of the obligation created by the foreign judgment.

Personal jurisdiction

Notwithstanding that the foreign court may have determined that it had jurisdiction over the defendant, the Cayman court will need to be satisfied that the foreign court had such jurisdiction according to Cayman Islands principles of law.

According to Cayman Islands legal principles, a foreign court will be recognised as having had personal jurisdiction over the defendant if the defendant:

- a) was ordinarily resident in the foreign country at the time of commencing the foreign proceedings. (Residence for a corporation in this context is determined by the place in which it carries on business);
- b) voluntarily participated in the proceedings before the foreign court, other than simply to contest jurisdiction;
- c) appeared as a party in the proceedings before the foreign court, whether as a plaintiff or counter-claimant; or
- d) expressly agreed to submit to the jurisdiction of the foreign court (as opposed to the laws of the foreign country), by contract or subsequent conduct.

It should be noted that nationality of the defendant is not regarded as a sufficient base for jurisdiction, nor is mere transient presence in the foreign country, nor the fact that the defendant has property within the foreign country.

Final judgment

A Cayman court will only recognise or enforce a foreign judgment that is final and conclusive, rather than interim or interlocutory in nature. A summary judgment or a default judgment will be regarded as 'final' for this purpose. A judgment will be regarded as final and conclusive even if it is under appeal in the foreign court, although if execution has been stayed, the Cayman court will usually also stay enforcement of the judgment which it grants in the Cayman Islands.

Not contrary to public policy

Although there are few practical examples in the jurisprudence, it is a well-accepted principle that a court should not recognise or enforce a foreign judgment where doing so would be contrary to public policy. In essence, the Cayman court will not uphold a foreign judgment which is repugnant to the Cayman Islands system of law such as a tax judgment, for example.

CHALLENGES/DEFENCES

A defendant may seek to challenge the authority of or basis for the foreign judgment on the following limited grounds:

- 1) That the foreign judgment was obtained by fraud, either on the part of the court or the opposing party;

- 2) That the foreign court was not competent to pronounce the judgment;
- 3) That the foreign judgment was obtained in proceedings contrary to natural justice or where the defendant's rights were grossly violated;
- 4) That it would be contrary to public policy to recognise or enforce the foreign judgment, for example where the foreign law is repugnant to Cayman law.

Where the defendant is able to assert any of these grounds, this may form a defence to the foreign claimant's demand and will have to be proved to the satisfaction of the Cayman court in the normal way.

It is equally open for a defendant to rely on a foreign judgment as a defence to a new claim brought against him in the Cayman Islands, for example where the foreign court had earlier ruled in his favour on the same cause of action. For this defence to operate however, the foreign judgment must have been as to the merits of the case rather than a question of procedure which may not be applicable in the Cayman Islands.

PROCEDURE

The originating process in the Cayman Islands is by Writ of Summons which will set out the cause of action and details of the claimant's claim. Personal service of the Writ of Summons is required, and, where the defendant does not reside in the Cayman Islands, an application must be made for leave to serve the defendant wherever he may be found. Where personal service is not practicable or possible, application may be made to the Cayman court to serve by substituted service, for example by registered mail or advertisement in a newspaper in the area in which the defendant resides or carries on business.

Once service is effected, the defendant is required to file an Acknowledgment of Service and a Defence within the statutory time limits. In enforcement cases, the Defence will generally be limited to those defences set out above. In the absence of filing such an Acknowledgment of Service or Defence, the claimant may apply for Default Judgment which is processed administratively by the Clerk of the Court. If the defendant does file a Defence, the claimant may nevertheless apply for Summary Judgment on the grounds that the defence raised is spurious and that there is no real triable defence to the action. It would be very unusual for the matter to go to full trial in the absence of exceptional circumstances, as the merits of the underlying case will generally not be re-examined by the Cayman court.

EXECUTION REMEDIES

Since traditionally the main purpose of obtaining a further judgment in the Cayman Islands has been to enforce the claimant's claim against the defendant's assets, it is helpful to briefly consider what means of execution are available to a judgment creditor. These include, in summary:

- 1) a warrant of execution by which the defendant's moveable assets (including cash, etc.) are seized and sold to pay the judgment debt;
- 2) a sale of land by which the judgment creditor may charge and sell immovable property to the defendant, even if mortgaged;
- 3) an attachment of assets beneficially owned by the defendant which are in the hands of a third party, such as a bank account;
- 4) a garnishee order by which debts owed to the defendant can be claimed in satisfaction of the judgment debt;
- 5) an order for commitment to prison for willfully refusing to pay a debt that is within the defendant's means to pay; or

- 6) a liquidation or bankruptcy order by which the defendant's estate is wound up for failure to pay a due debt of \$100 or more.

PRE-TRIAL INJUNCTIVE RELIEF

Where a claimant is able to show that he has a strong case against the defendant but that the defendant is likely to dissipate his assets prior to enforcement of a judgment becoming possible, the claimant may be entitled to obtain a freezing order (known as a Mareva Injunction) enjoining the defendant from disposing of or removing from the Cayman Islands, all or any of his assets to the extent required to satisfy any judgment the claimant may obtain. Such an injunction order may be served on the defendant's bank and also exposes the defendant himself to the usual contempt of court proceedings should he ignore it.

COSTS AND INTEREST

The foreign judgment may already contain an order for costs and/or interest and, once finally determined or certified, this may form part of the capital amount of the judgment debt awarded in the Cayman Islands. Even if the foreign judgment contains no award for interest, the Cayman Islands judgment will automatically accrue interest at the standard judgment interest rate from the date of its award unless otherwise ordered. It is also a general rule in the Cayman Islands that a successful party will recover the fees and costs of the litigation incurred in the Cayman Islands from the opposing party in the absence of special circumstances. However, such an award of costs must be subjected to an assessment process (known as 'taxation') or agreed by the losing party before it becomes enforceable as a monetary judgment and in practice will seldom equal the actual fees and disbursements incurred in the exercise.

JURISDICTION OF THE CAYMAN COURT

Where the defendant is not resident in the Cayman Islands, the Cayman court will itself need to be satisfied that it has jurisdiction to hear the matter. The Cayman court has personal jurisdiction over any person who is properly served and the Grand Court Rules set out the circumstances in which the Cayman court will allow service of a Writ of Summons on a defendant who is not present in the Cayman Islands. Included among these is the case where the Writ of Summons seeks to enforce a foreign judgment. There is accordingly no jurisdictional problem with regard to suing a non-resident defendant for enforcement of a foreign judgment in the Cayman Islands.

CONCLUSION

Although the Cayman Islands has no treaties in place to facilitate the recognition and enforcement of judgments rendered worldwide, its Common Law system nevertheless affords a relatively simple and inexpensive means of doing so. In respect of a substantial number of Cayman Islands resident companies, which have assets such as bank accounts in the Cayman Islands but conduct the majority of their business outside of the Cayman Islands, the procedure has been well-trying and has proved effective. Furthermore, traditional Common Law restrictions have been removed, widening the ability of the Court to enforce all kinds of foreign judgments.

For more specific advice on the Enforcement of Foreign Judgments in the Cayman Islands, we invite you to contact the following:

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