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Joe Tirado

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Cayman Islands

Jeremy Walton & Anna Snead
Appleby (Cayman) Ltd.

Introduction

The primary sources of arbitration law in the Cayman Islands are the Arbitration Law, 2012 (the **Law**) and the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the **FAAEL**), which gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the **New York Convention**). The Cayman Islands has been a party to the New York Convention since 1981. The Law, which came into force on 2 July 2012 and applies to all Cayman-seat arbitrations commenced after that date, completely overhauled the arbitration regime in the Cayman Islands and brought it in line with the UNCITRAL Model Law; it also draws on the arbitration laws of other common law jurisdictions, including the English Arbitration Act 1996 (the **English Act**). The Law is expressly founded on the following principles, which are considered a hallmark of modern arbitration: the fair resolution of disputes by an impartial tribunal without undue delay or expense; maximum party autonomy, subject only to such safeguards as are necessary in the public interest; and limited judicial intervention.

Arbitration agreement

An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement. The Law stipulates that the arbitration agreement must be in writing and contained in: (i) a document signed by the parties; or (ii) an exchange of correspondence or other means of communication that provides a record of the agreement, although there are also a number of exceptional circumstances in which an arbitration agreement will be deemed to exist. A Schedule to the Law contains a model arbitration clause, which parties are encouraged to adopt or adapt.

There are no legal impediments to arbitrating any type of dispute which the parties have agreed to submit to arbitration, unless the arbitration agreement is contrary to public policy or such dispute is not capable of determination by arbitration by virtue of any other law of the Cayman Islands.

The Cayman Islands recognise the principle of competence-competence, a principle central to international commercial arbitration, by expressly providing in the Law that the tribunal has the power to rule on its own jurisdiction, including objections as to the existence or validity of the arbitration agreement. Therefore, any jurisdictional objections must first be raised with the tribunal itself. The tribunal may choose to rule on jurisdictional objections either as a preliminary question or as part of its final award on the merits.

The Cayman Islands also recognise the doctrine of separability, by providing in the Law that for the purposes of allowing the tribunal to rule on its own jurisdiction, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other

terms of the contract. This ensures that the arbitral proceedings may continue, regardless of any arguments regarding the invalidity of the underlying agreement.

Arbitration procedure

In conducting the arbitration proceedings, the tribunal is required to: (i) act fairly and impartially; (ii) allow each party a reasonable opportunity to present its case; (iii) conduct the arbitration without unnecessary details; and (iv) conduct the arbitration without incurring unnecessary expense. Subject to these rules, the parties are largely free to agree the procedure to be followed by the tribunal. In practice, the parties will usually select a set of procedural rules in the arbitration agreement, either by reference to and incorporation of a recognised body of institutional rules or by devising tailor-made rules. If the parties fail to agree on the procedural rules to be followed, the tribunal may conduct the arbitration in such a manner as it considers appropriate, subject to relevant provisions of the Law.

Pursuant to the Law, unless agreed otherwise, an arbitration commences when: (i) one party gives notice of an intention to submit a dispute to arbitration; (ii) one party serves on the other party a notice requiring him to appoint or concur in appointing an arbitrator; or (iii) the arbitrator is named in the agreement and one party serves a notice to the other requiring him to submit the matter to the named arbitrator. The parties may agree the deadlines by which the statement of claim and defence shall be presented to the tribunal (failing which, the deadlines will be determined by the tribunal) and the parties must submit all documents which they consider to be relevant with their statements. Subject to any contrary agreement by the parties, the tribunal will decide if the proceedings are to be conducted by oral hearing for the presentation of evidence; on the production of documents; and on the use of telecommunications technology. Unless the parties have agreed that no hearings shall take place, the tribunal must hold hearings at appropriate stages, upon the request of a party.

The tribunal may make procedural orders or give directions for security for costs; the discovery of documents and interrogatories; the giving of evidence by affidavit; requiring a party or witness to be examined on oath or affirmation; and for the purposes of asset preservation. The tribunal may also appoint one or more experts to report to it on specific issues, and may require a party to provide any relevant information or documents to the expert.

Tribunals in Cayman seat arbitrations usually take the following approach to the taking of evidence:

(i) parties or party officers will tender sworn affidavits or witness statements and may be cross-examined upon request by the other party;

(ii) party-appointed experts are preferred to tribunal-appointed experts, whose evidence will be admitted similarly to party witnesses;

(iii) the tribunal will not insist on inspection of documents; and

(iv) the tribunal will be inclined towards reducing the scope and extent of discovery generally at the request of a party.

The parties may also agree what powers may be exercised by the tribunal in the event that one party fails to take a required step. For example, unless otherwise agreed, where the claimant fails to provide its statement of case by the agreed time or the deadline provided by the tribunal, the tribunal may terminate the proceedings; where the respondent fails to provide its defence within the required deadline, the tribunal may continue the proceedings without treating the failure as an admission of the claim.

The assistance of the Cayman court can be sought in certain circumstances during the arbitration process, including to compel disclosure from third parties or to order a person to attend before the court to produce certain documents. The court may also exercise general powers in support of arbitral proceedings, but the court will only act in the event that the tribunal has no power or is unable for the time being to act effectively.

The tribunal is required to conduct arbitral proceedings in private and confidentially, and disclosure by the tribunal or a party of confidential information relating to the arbitration shall be actionable as a breach of an obligation of confidence unless disclosure is provided with a number of limited exceptions. Where an application is made to the Cayman court, a party may apply for that application to be heard privately and may also seek directions as to whether any, and if so what, information relating to the arbitration proceedings may be published. The court will only publish information if all of the parties agree that such information may be published or the court is satisfied the publication of the information would not reveal any matter that any party reasonably wishes to remain confidential. If a judgment is given in respect of arbitration proceedings which the court considers to be of major legal interest, the court may direct that reports of the judgment be published in law reports or professional publications but that certain information be concealed, or that the reports be published only after the end of an appropriate period of time.

Arbitrators

The parties to an arbitration agreement may choose any number of arbitrators they wish; in the absence of agreement, the Law provides for the appointment of a single arbitrator. There are no restrictions on who may act as an arbitrator and the Law does not impose any limits on the parties' freedom to select arbitrators. The writers would expect any contractually stipulated requirement for arbitrators based on nationality, religion or gender to be recognised in the Cayman Islands, following the English Supreme Court decision in *Jivraj v Hashwani* [2011] UKSC 40. While that decision is not strictly binding on the Cayman court, its reasoning would be highly persuasive and we would expect the Cayman court to follow the same approach.

The parties to an arbitration agreement may agree a procedure for the appointment of arbitrators. In the absence of such agreement, the Law provides that in the case of a single arbitrator, the arbitrator will be appointed by the "appointing authority" (such appointing authority to be chosen by the parties or otherwise chosen by the court). In the case of two or more arbitrators, each party will appoint an arbitrator and agree to the appointment of a subsequent arbitrator or alternatively, two or more parties will agree to the appointment of the required number of arbitrators.

Where a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstances which might reasonably compromise his impartiality or independence. This obligation continues from the time of the arbitrator's appointment and throughout the arbitration proceedings.

The authority of an arbitrator appointed by or by virtue of an arbitration agreement is (unless stated otherwise in the arbitration agreement) irrevocable except by leave of the court. An arbitrator's authority may therefore only be challenged in limited circumstances, namely where: (i) circumstances exist that give rise to justifiable doubts about his impartiality or independence; or (ii) he does not possess the qualifications agreed to between the parties. A party may also apply to the court for the removal of an arbitrator: (i) who is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts

as to his capacity to do so; or (ii) who has failed or refused to properly conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award; *and* where substantial justice has been, or will be, caused to the party. If, however, the parties have vested the power to remove an arbitrator in a specific person, the court will only exercise its power of removal if it is satisfied that the applicant has exhausted every recourse to that person.

An arbitrator will not be liable for any consequences or costs resulting from: (i) negligent acts or omissions in his capacity as arbitrator; or (ii) any mistake of law, fact or procedure made by him in the course of arbitration proceedings or in the making of an arbitral award. Notwithstanding this, an arbitrator may be liable for an act or omission shown to be in bad faith.

Interim relief

Unless otherwise agreed by the parties, the tribunal has the power to grant any interim measure ordering a party to:

(i) maintain or restore the original position of the other party pending determination of the dispute;

(ii) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;

(iii) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(iv) preserve evidence that may be relevant and material to the resolution of the dispute.

The tribunal does not need to seek assistance from the court before granting interim relief, however, the tribunal must be satisfied that: (i) the harm which would likely result if the relief was not ordered would not be adequately remedied by damages; (ii) that harm substantially outweighs the harm that it is likely to result to the party against whom the relief is ordered; and (iii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. Where a request is made for an interim measure in order to preserve evidence or assets, these conditions will only apply to the extent that the tribunal considers appropriate. At the same time as applying for interim relief, a party may also seek from the tribunal a preliminary order directing the other party not to frustrate the purpose of the interim measure. Any interim measure granted by a tribunal will be recognised as binding, and will therefore be enforceable upon application to the court (subject only to the limited grounds on which the court may refuse enforcement of any arbitral award).

The tribunal may make orders and directions in support of the arbitral process, including for asset preservation orders; the discovery of documents and interrogatories; the giving of evidence by affidavit; and security for costs. The power to grant security will not be exercisable merely due to the fact that the claimant is: (i) an individual ordinarily resident outside the Cayman Islands; or (ii) a foreign corporation or association (or whose central management and control is exercised outside of the Cayman Islands).

The Cayman court has broad powers which may be exercised in support of arbitral proceedings, which includes the granting of an interim injunction or any other interim measure. However, the Law expressly provides that if the case is one of urgency, the court may make such orders as it thinks necessary for preserving evidence or assets; if the case is not one of urgency, the court can only act with the permission of the tribunal,

or the agreement in writing of the other parties. In any event, the Cayman court will act only if the tribunal has no power to act or is unable to act effectively for the time being. By this, the Cayman Islands seeks to maintain the balance between the court intervening where necessary in order to provide sufficient support to the arbitral process, and the court intervening too much, such that the arbitral process is undermined.

Section 54 of the Law further provides that the Cayman court has the same power to issue interim measures in relation to arbitration proceedings (irrespective of whether the seat of the arbitration is the Cayman Islands) as it has in relation to court proceedings. The Law provides that the court must exercise those powers "*in accordance with its own procedures and in consideration of the specific principles of international arbitration*". By virtue of section 43(5) of the Law, the Cayman court will only act where a tribunal vested by the parties with power to issue interim measures is unable to do so (for example, where it has not yet been appointed).

The Law does not provide for the appointment of an emergency arbitrator prior to the constitution of the tribunal. However, as discussed above, the Cayman court has the power to issue interim measures in urgent circumstances such as where the tribunal has not yet been appointed.

Pursuant to section 9 of the Law, if court proceedings are initiated despite an existing arbitration agreement, the Cayman court *must* grant a stay of the legal proceedings commenced in breach of that agreement, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The application must be made to the court after the party has acknowledged service and before the party has delivered any pleading or taken any step in the proceedings to answer the substantive claim.

In recent years, there has been a question mark over the application of the mandatory stay provisions in the Law to winding up proceedings, where a creditor petitions to wind up a company for non-payment of a contractual debt, but that debt is disputed and arises out of a contract containing an arbitration agreement. Until recently, the trend in the Cayman Islands was for the court of first instance to retain its jurisdiction to assess the merits of the dispute in relation to the debt: *Re Duet Real Estate Partners 1 LP* (unreported, 7 June 2011); *In The Matter of Ebullio Commodity Master Fund L.P.* (unreported, 24 May 2013). A stay in favour of arbitration would only be ordered once the court had determined that there was no "genuine and substantial dispute" in relation to the debt; this required the court, in the first instance, to undertake a merits-based assessment of the dispute, which runs counter to the policy of giving absolute primacy to arbitration agreements.

In February 2016, the Cayman Islands Court of Appeal considered this issue in the decision of *Re SphinX Group of Companies* (Cause CICA 06/2015). The Court of Appeal applied and indorsed the reasoning in the English Court of Appeal decision of *Salford Estates (No.2) Limited v. Altomart Limited* [2015] Ch. 589 that whilst petitions to wind up a company for non-payment of a debt do not fall within the statutory provisions mandating a stay in favour of arbitration, the court's power to make a winding-up order is itself discretionary. Therefore, where a debt is disputed and subject to an arbitration clause, unless there are "exceptional circumstances", the court should exercise its discretion to stay or dismiss the petition in order to compel the parties to resolve the dispute by arbitration. In the writers' views, this provides welcome clarification: this pro-arbitration approach will ensure that the primacy of the agreement to arbitrate is recognised and upheld by the Cayman court, whilst allowing the court to retain its discretion to wind up a company in wholly exceptional circumstances.

The Cayman court may also grant an anti-suit injunction to restrain foreign proceedings in appropriate circumstances, where the party acting in breach of the arbitration agreement is subject to its jurisdiction.

Arbitration award

The Law stipulates that an award must be made in writing and shall be signed: (i) by the arbitrator (in the case of a sole arbitrator); or (ii) by all arbitrators or the majority of the arbitrators if the reason for any omitted signature is stated in the award (in the case of two or more arbitrators). The award must state the reasons upon which it is based, unless the parties have agreed otherwise or the award is simply made for recording settlement. The award must also state the date of the award and the seat of the arbitration; the award will be deemed to have been made at the place of the arbitration. The tribunal may make more than one award at different points during the proceedings.

If the tribunal consists of more than one arbitrator, a decision of the tribunal shall be made by all or a majority of the tribunal. If no majority decision can be agreed, the parties may agree on a process to arrive at a final and binding decision; this could be appointing an arbitrator to act as chairman with a casting vote. No specific provision is made in the Law dealing with dissenting opinions.

There is no time limit within which an award must be rendered, unless specified in the arbitration agreement (and any such time limit may be extended by the court, whether that time has expired or not). An application to the court for an extension of time cannot be made unless all available tribunal processes for an extension of time have been exhausted and the court will not make an order unless it is satisfied that substantial justice would not otherwise be done.

The Law provides that the tribunal may award interest on the whole or any part of: (i) the amount which the award orders to be paid, up to the date of the award; (ii) the amount claimed in the arbitration and outstanding when the arbitration began or paid before the tribunal made its award; or (iii) any outstanding amount of any amounts awarded, including any award of arbitration expenses. An award ordering payment of interest may specify the interest rate and the period for which interest is payable. Unless the award states otherwise, an award will carry interest from the date of the award at the same rate as a judgment debt (currently at the rate of 2.375% for judgments in US dollars).

Unless a contrary intention is expressed, every arbitration agreement is deemed to include a provision that the costs of the arbitration will be in the discretion of the tribunal. If the award does not deal with costs, a party may apply to the tribunal for a direction regarding costs within 14 days. The Law does not specify how the tribunal should deal with the issue of costs, but in practice awards as to costs tend to follow the traditional costs rules for litigation.

In the recent English decision of *Essar Oilfields Services v Norscot Rig Management Pvt* [2016] EWHC 2361, the court upheld the decision of the arbitrator to award the successful party its costs of third party litigation funding which it had obtained in order to bring the arbitration, in addition to the award of costs and damages. The arbitrator had concluded that the funding costs fell within the ambit of section 59(c) of the English Act (and the relevant ICC Rules) which defines "costs of the arbitration" as including "legal and other costs". The English court considered the correct test in determining what costs fell within the ambit of "other costs" to be whether those costs were incurred in bringing or defending a claim, and commented that the expression "other costs", "*should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order*".

This decision is potentially very significant, since, following the English court's reasoning, it appears open to a tribunal to award recovery of other categories of costs (including, for example, a party's uplift in a conditional fee arrangement and/or an after the event insurance premium). The decision of *Essar v Norscot* would be treated as highly persuasive in the Cayman Islands and, in the writers' views, would likely be followed by the Cayman court.

Challenge of the arbitration award

The Law provides that an award is "made" when it is signed and delivered to the parties. An award is final and binding on the parties; once made, it cannot therefore be varied, amended, corrected or added to by the tribunal. The exception to this is that the tribunal has the power to correct any error in computation, any clerical or typographical error or error of a similar nature in the award and/or to give an interpretation of a specific point or part of the award. This may be done upon the request of a party or by the tribunal on its own initiative.

There are only two limited mechanisms by which an award may be challenged or appealed.

First, a party may apply to the court to set aside the award on one of the limited grounds stated in the Law. These grounds include that: (i) a party to the arbitration agreement was under an incapacity or placed under duress to enter into the arbitration agreement; (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under the laws of the Cayman Islands; and (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings. The court may also set aside the award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the Law or the award is contrary to public policy.

Second, unless the parties have agreed to exclude this right of appeal, a party to the arbitration agreement may, with the leave of the court, and upon notice to the other parties and the tribunal, apply to the court on a question of law arising out of an award. Leave to appeal to the court will only be given if the court is satisfied that: (i) the determination of the question will substantially affect the rights of one/more parties; (ii) the question is one that the tribunal was asked to determine; (iii) on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and (iv) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in the circumstances for the court to determine the question.

If leave is granted, and the appeal proceeds, the court may: (i) confirm the award; (ii) vary the award; (iii) remit the award to the tribunal for reconsideration; or (iv) set aside the award in whole or part (although it will not do the latter unless it is satisfied that it would be inappropriate to remit the matters to the tribunal for reconsideration). Where a party has appealed to the court on a question of law arising out of an award, an application for leave to appeal against the court's decision must be made to the Cayman Islands Court of Appeal. The Court of Appeal will only give leave to appeal if the question of law before it is one of general importance, or is one that for some other special reason should be considered.

A party may only appeal to the court on a question of law, or make an application to set aside an award, if it has first exhausted every available arbitral process of appeal or review and, as detailed above, a challenge may only be brought in limited circumstances. The court may require the party to provide security for the costs of the application or appeal and/or may order that the amount payable under the award be brought into court or otherwise secured pending determination of the application or appeal.

Enforcement of the arbitration award

The Cayman Islands is favourably disposed to supporting the arbitration process by upholding and enforcing arbitral awards, subject only to limited exceptions. The FAAEL gives domestic effect to the New York Convention: an award made under an arbitration agreement in the territory of a state that is party to the New York Convention will be recognised and enforced according to its principles, on production of the original arbitration agreement and award or certified copies. Domestic awards may be enforced pursuant to section 72 of the Law with the leave of the court.

Importantly, the Law goes further than this, by providing that an arbitral award *irrespective of the country in which it was made* shall be recognised as binding and, upon application to the court, will be enforced subject to the provisions of the FAAEL *regardless of whether it is a New York Convention award or not*. Therefore, awards from any foreign state (regardless of whether the state is a contracting party to the New York Convention) may now be easily and swiftly enforced in the Cayman Islands.

The Cayman court may only refuse the enforcement of domestic arbitral awards in circumstances where it is shown that the arbitral tribunal lacked jurisdiction to make the award and, in the case of foreign arbitral awards, on the extremely limited grounds listed in Article V of the New York Convention. Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

In terms of procedure, an application for leave to enforce an arbitral award is a straightforward and inexpensive process in the Cayman Islands. Once leave has been obtained, judgment will be entered in the terms of the award and can be enforced in the same way as a judgment or court order to the same effect. All of the common enforcement mechanisms will then be available, including garnishee orders, charging orders, the appointment of receivers by way of equitable execution, and winding up.

Investment treaty arbitration

Certain multilateral investment treaties have been extended to the Cayman Islands by the government of the United Kingdom, including the Washington Convention of the Settlement of Investment Disputes between States and Nationals of Other States (1965) (**ICSID**) and the Convention Establishing the Multilateral Investment Guarantee Agency (**MIGA**).

No bilateral investment treaties exist directly between the Cayman Islands and any other countries. Certain bilateral investment treaties, between the United Kingdom and other countries, have been extended to the Cayman Islands by the government of the United Kingdom. These include bilateral treaties for the promotion and protection of investments between the United Kingdom and Panama, Belize and St Lucia respectively.

The Cayman Islands is also an associate member of the Caribbean Community (**CARICOM**), which aims to promote economic integration and cooperation among its members. CARICOM in turn has signed individual trade agreements with Columbia, Costa Rica, Cuba, Dominican Republic and Venezuela.

Jeremy Walton
Tel: +1 345 814 2013 / Email: jwalton@applebyglobal.com

Jeremy Walton is a partner and Group Head of Appleby's Dispute Resolution team in the Cayman Islands. Jeremy specialises in international commercial litigation and arbitration, including directors' and shareholders' disputes; insolvency work; and asset-tracing and recovery work, often as part of cross-border and multi-jurisdictional litigation.

He has been consistently highly-ranked in various global legal directories, including by *Chambers Global* 2016 where clients have said they value Jeremy's strategic input on high-stakes commercial disputes and *Who's Who Legal: Arbitration 2016* where he was mentioned as 'one of the world's leading practitioners'.

Originally called to the Bar of England and Wales (now non-practising), Jeremy became an Attorney-at-Law in the Cayman Islands in 1997. He joined the Group in 1998 and has been a partner since 2004. Jeremy is a member of the Chartered Institute of Arbitrators and past Chairman of the Cayman Chapter.

Anna Snead
Tel: +1 345 814 2740 / Email: asnead@applebyglobal.com

Anna Snead is a senior associate in Appleby's Dispute Resolution practice group in the Cayman Islands. Anna's practice involves all aspects of commercial litigation, international arbitration and dispute resolution. Prior to joining Appleby in 2012, Anna was an associate at Mayer Brown International LLP in London.

Anna has experience advising on high value commercial contractual disputes, shareholder disputes, banking and fund litigation, professional negligence litigation and on the enforcement of foreign judgments and arbitral awards. Anna's experience also includes acting for defendants and plaintiffs in international arbitrations and advising on international arbitration practice and procedure.

Anna was admitted as a Solicitor of the Senior Courts of England and Wales in 2008 (now non-practising) and as an Attorney-at-Law in the Cayman Islands in 2012. Anna is a member of the Chartered Institute of Arbitrators.

Appleby (Cayman) Ltd.

71 Fort Street, PO Box 190, Grand Cayman KY1-1104, Cayman Islands
Tel: +1 345 949 4900 / Fax: +1 345 949 4901 / URL: www.applebyglobal.com

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