

# Recognition and enforcement of foreign judgments and arbitral awards in the Cayman Islands

GUIDE

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## Introduction

This guide examines the route to the recognition and enforcement of foreign judgments and arbitral awards in the Cayman Islands.

## Recognition and enforcement of foreign judgments

The Cayman Islands is a user friendly jurisdiction for the enforcement of foreign judgments.

The Cayman Islands has enacted the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the **Act**) in relation to the enforcement of foreign money judgments. However, at present, the Act only extends to judgments made by the Superior Courts of Australia and its External Territories.

Any other foreign judgments must be enforced under common law rules. The Grand Court of the Cayman Islands (the **Grand Court**) may enforce a foreign judgment where:<sup>1</sup>

- (a) the foreign judgment was given by a court of competent jurisdiction in accordance with Cayman Islands conflicts of law rules;
- (b) the foreign judgment is final and conclusive; and
- (c) the foreign judgment has not been obtained by fraud, in opposition to natural justice or in contravention of the public policy of the Cayman Islands.

The ability to enforce directly a foreign judgment made *in personam* was originally limited to money judgments. However, this has been extended by the Grand Court (being the court of first instance) to non-money judgments where the principles of comity require enforcement.<sup>2</sup>

## Competent jurisdiction

A foreign court will be of competent jurisdiction to give a judgment *in personam* capable of enforcement in the Cayman Islands, if either:<sup>3</sup>

- (a) the judgment debtor was, at the time the proceedings were instituted, present in the foreign country;
- (b) the judgment debtor was the plaintiff or counter-claimant in the proceedings in the foreign court;
- (c) the judgment debtor was the defendant and submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings and contesting them on the merits; or

<sup>1</sup> *Banco Mercantil Del Norte SA (Grupo Financiero Banorte) v Cabal Peniche* [2003] CILR 343.

<sup>2</sup> See *Miller v Gianne* [2007] CILR 18 at paras 6-68; *Bandone v Sol Properties Incorporated* [2008] CILR 301 at paras 60-64; *Masri v Consolidated Contractors* [2010] (1) CILR 265 at para 6.

<sup>3</sup> See *Banco Mercantil v Cabal Peniche* [2003] CILR 343 at para 8; *Dicey & Morris Conflict of Laws (Dicey)*, rule 43.

(d) the judgment debtor was the defendant and, before the commencement of the proceedings, agreed in respect of the subject-matter of the proceedings to submit to the jurisdiction of the foreign court.

### Final and conclusive

Whether a decision is final and conclusive will depend on the nature of the judgment. A foreign judgment will ordinarily still be considered to be final and conclusive notwithstanding a potential or pending appeal to a higher foreign court.<sup>4</sup>

### Foreign judgment obtained by fraud, in opposition to natural justice or in contravention of public policy

The Grand Court will not enforce a judgment that has been obtained by fraud, in opposition to natural justice or in contravention of public policy. The requirement that the foreign judgment not be in opposition to natural justice requires that the foreign court has given notice to the litigant that they are about to proceed to determine the rights between the litigant and the other party and that, having given notice, it affords the litigant an opportunity to present their case before the court.<sup>5</sup>

### Foreign judgments that cannot be enforced in the Cayman Islands

The Grand Court will not enforce a judgment debt of a foreign court which is shown to be a judgment payable in respect of taxes, a fine or other penalty. The Grand Court will not enforce penal laws of a foreign country, being those where a sum is payable to the state, on grounds that it is contrary to public policy.<sup>6</sup>

In addition, pursuant to the Trusts Act (2021 Revision), the Grand Court will not recognise or enforce a foreign judgment which fails to apply Cayman Islands law in determining questions such as capacity, validity, administration or the existence and extent of powers arising under a Cayman Islands law trust, or the effect of which is to render a Cayman Islands law trust or disposition of property under such a trust void, voidable or liable to be set aside by reason that the laws of the foreign jurisdiction prohibit or do not recognise the concept of a trust or because the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of heirship or certain other rights.

In *Bandone SDN BHD & Ors v Sol Properties Incorporated & Ors* [2008] CILR 301 the Grand Court clarified that the Grand Court will not enforce a foreign *in rem* judgment in relation to property in the Cayman Islands.

A foreign judgment that cannot be enforced in the Cayman Islands may still be able to be recognised by the Grand Court if it is final and conclusive on the merits and is made by a foreign court of competent jurisdiction.<sup>7</sup> While a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises.<sup>8</sup> An example of a domestic court recognising rather than enforcing a foreign judgment, is when the domestic court recognises a foreign judgment as being *res judicata* (ie a cause of action estoppel) on a particular cause of action, or giving rise to issue estoppel on a particular issue or fact decided by the foreign court.<sup>9</sup>

### Procedure

The applicant must start fresh proceedings in the Cayman Islands by issuing a writ of summons suing for the amounts due and owing or for specific performance pursuant to the foreign judgment. Applicants may be able to take advantage of the procedures to obtain a judgment in default or summary judgment, depending on the circumstances. An application for the enforcement of a foreign judgment at common law may also require an application for leave to serve the defendant outside of the Cayman Islands.

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<sup>4</sup> *Dicey*, paras 14-023 – 14-027.

<sup>5</sup> *Banco Mercantil v Cabal Peniche* [2003] CILR 343 at para 22.

<sup>6</sup> *Kalley (as Trustee of EB Trust and PB Trust) et al v Manus and five others* [1999] CILR 566; *In the matter of PH Millard and WH Millard* [2013] (2) CILR 83.

<sup>7</sup> *Dicey* rule 41(2).

<sup>8</sup> *Dicey* para 14-002.

<sup>9</sup> See *Dicey*, rule 41(2), para 14R-001 for a statement of the general principle. See also *Dicey* para 14-030.

## Methods of enforcement

Once an enforceable judgment is given by the Grand Court, the full range of domestic enforcement procedures become available. These include:

- (a) Garnishee order, namely an order that a third party who owes money to the judgment debtor re-direct payment of that debt to the judgment creditor;
- (b) Charging order, namely an order over the judgment debtor's assets in the Cayman Islands for the amount of the judgment debt, enabling the judgment creditor to force a sale of the assets to satisfy the judgment debt;
- (c) Appointment of a receiver to collect and realise property over which the receiver is appointed for the benefit of the judgment creditor;
- (d) Writ of execution, namely an order for the seizure of the judgment debtor's assets to the value and in satisfaction of the judgment debt; and
- (e) Committal proceedings, namely proceedings to commit the judgment debtor for criminal prosecution if they take steps to frustrate and/or do not comply with an order permitting the judgment creditor to seize the judgment debtor's assets.

## Enforcement of foreign arbitral awards

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**) provides for the ready enforcement of foreign arbitral awards in contracting states (there are currently 166 contracting states). The New York Convention was extended by the UK Government to the Cayman Islands in 1980.

The Cayman Islands have embraced arbitration as an alternative mechanism for dispute resolution and the Grand Court is familiar with the enforcement of foreign arbitral awards. The enforcement of foreign arbitral awards is governed by the Arbitration Act, 2012 (the **Arbitration Act**) and the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the **Enforcement Act**). The Enforcement Act gives domestic effect to the New York Convention in the Cayman Islands.

## Leave to enforce an arbitral award

Section 72 of the Arbitration Act provides that an award made by an arbitration 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. Once leave is granted the court may enter judgment in terms of the award.

An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application to the court, shall be enforced subject to the provisions of section 6 and 7 of the Enforcement Act. This applies regardless of whether or not it is an award made in pursuance of an arbitration agreement in the territory of a state, other than the Cayman Islands, which is a party to the New York Convention (a **Convention Award**).

An application for leave to enforce an arbitral award is made by an *ex parte* originating summons before the Grand Court. The application must be supported by an affidavit stating the name and usual or last known place of residence or business of the applicant and of the person against whom it is sought to enforce the award, stating either that the award has not been complied with or the extent to which it has not been complied with at the date of application and exhibiting the arbitration award and arbitration agreement.

Once leave is granted, the order granting leave must be served on the respondent. The respondent has 14 days after service of the order, or, if the order is to be served out of the jurisdiction, within such other period as the court may fix, to apply to set aside the order. The arbitral award must not be enforced until after the expiration of that 14 day period or until the court has disposed of any application made within that 14 day period.

## Grounds on which enforcement of a foreign arbitral award may be refused

Reflecting article V of the New York Convention, section 7 of the Enforcement Act provides that enforcement of a foreign arbitral award may be refused by the court if the person against whom it is sought to be enforced proves that:

- (a) a party to the arbitration agreement was under some incapacity;
- (b) the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (c) they were not given proper notice of the appointment of the arbitration proceedings or were otherwise unable to present their case;
- (d) subject to subsection (4) (relating to the staying of certain court proceedings), that the award deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, with the law of the country where the arbitration took place; or
- (f) 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, or under the law of which, it was made.

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.

## Stay of legal proceedings

Section 5 of the Enforcement Act provides that if any party to an arbitration agreement commences any legal proceedings in court against the other party in respect of any matter agreed to be referred to arbitration, then any party to the proceedings may apply to the court to stay the proceedings. Such an application must be made at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings.

The court must stay the proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

## Conclusion

The Cayman Islands is a user friendly jurisdiction for the enforcement of foreign judgments and arbitral awards. Enforcement should be considered at an early stage in foreign proceedings and arbitrations to ensure that matters are dealt with in a way that does not give rise to risks of the ultimate judgment or award being difficult or impossible to enforce.

## Contacts

To find out more please get in touch with your usual Mourant contact, or alternatively, a full list of contacts specialising in Cayman Islands litigation and dispute resolution can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2021 MOURANT OZANNES ALL RIGHTS RESERVED