

# GUIDE TO ARBITRATION IN THE CAYMAN ISLANDS

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## PREFACE

This Guide is a summary of the law and procedures relating to arbitration in the Cayman Islands.

It is recognised that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they should be addressed to a member of the Arbitration Team, using the [contact information](#) provided at the end of this Guide.

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## 1. **ARBITRATION**

Arbitration is a mechanism of binding dispute resolution which entails resolving disputes outside the courts in accordance with procedures, structures and substantive legal or non-legal standards chosen by the parties involved. As such arbitration is distinct from non-binding forms of dispute resolution such as mediation or negotiation.

On a global basis, arbitration has been increasingly recognised as an important alternative to court proceedings in order to resolve commercial disputes. This is because many parties to commercial contracts prefer being able to conduct legal disputes without the publicity and formality associated with a courtroom. The arbitration procedure is more flexible and can result in meaningful cost savings when compared with court proceedings.

Purchasers of financial services and products have increasing regard to the quality of alternative dispute resolution mechanisms in choosing between competing offshore financial centres. Above all, widespread adoption of the UNCITRAL Model Law on International Commercial Arbitration (the **Model Law**) around the world has led international commercial enterprises to demand and expect access to the same kind of arbitration mechanism in every country where they do business. The Cayman Islands offer an arbitration regime which implements these modern international arbitration practices.

## 2. **THE ARBITRATION LAW, 2012**

The Arbitration Law, 2012 (the **Law**) came into force on 2 July 2012. The Law is a variant of the Model Law with some additional provisions to suit local conditions and other refinements which have proved successful in other jurisdictions. It is expressly founded on three fundamental principles which are the hallmarks of modern arbitration systems: (1) a fair resolution of disputes by an impartial tribunal without undue delay or expense; (2) maximum party autonomy, subject only to safeguards in the public interest; and (3) limited judicial intervention. The provisions of the Law will be construed in accordance with these principles, as will the rules of court governing arbitration-related applications, by virtue of an “overriding objective” provision.

The Law contains all the provisions that are required to underpin modern arbitration proceedings, addressing:

- (a) the formation of an effective and enforceable arbitration agreement and the enforcement of its terms;
- (b) the composition and jurisdiction of the arbitral tribunal and the conduct of an arbitration;
- (c) the commencement of arbitration and the related issue of limitation;
- (d) the making of an award, including fees and costs;
- (e) restricted rights to appeal (subject to the parties’ agreement);
- (f) the court’s power to stay legal proceedings and grant relief such as the preservation of assets to satisfy any ultimate arbitral award; and
- (g) the court’s powers to grant orders in support of the arbitration and also to enforce any award.

### 3. THE ARBITRATION AGREEMENT

#### 3.1 Arbitrability

There are no legal impediments to arbitrating any type of dispute, except where the claimant seeks relief of a type that is only available by order of the Grand Court. This will include:

- certain statutory remedies prescribed by particular laws such as the Companies Law, the Registered Land Law, or the Trusts Law; and
- orders pursuant to regulatory laws (such as the Banks and Trust Companies Law, the Mutual Funds Law or the Securities Investment Business Law).

#### 3.2 Form of Agreement

An arbitration agreement may be in the form of an arbitration clause in a contract or in a separate agreement. Except as provided for below, an arbitration agreement must be in writing and contained in a document signed by the parties or an exchange of correspondence or other means of communication that provides a record of the agreement.

An arbitration agreement will be deemed to exist in certain circumstances. This includes the situation where, in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or other document that calls for a reply and that assertion is not denied. In addition, where the parties agree (other than in writing) by reference to terms that are in writing, an agreement in writing is deemed to exist. A reference in an agreement to any other document containing an arbitration clause will also constitute a valid arbitration agreement provided that the reference is effective to make that clause part of the agreement.

A model arbitration clause is helpfully provided in an appendix to the Law. The model clause focuses attention on the fundamental elements to provide an effective, workable agreement and offers certain default provisions such as:

- (a) a period for the parties to seek to resolve their differences before initiating arbitral proceedings (ten days to respond in writing to a particularised complaint with remedy sought);
- (b) the seat of the arbitration (the Cayman Islands);
- (c) the language of the arbitration (English);
- (d) the number of arbitrators (one); and
- (e) the designation of an appointing authority in order to appoint an arbitrator.

#### 3.3 Enforceability of the Arbitration Agreement

An arbitration agreement will not be unenforceable merely because the agreement of which it forms a part is void, voidable or otherwise unenforceable. Accordingly, repudiation, frustration or rescission of a contract will not by itself prevent enforcement of an arbitration clause in the contract, which survives such an event; thus, the arbitrator can determine whether the contract has been repudiated, frustrated or rescinded.

#### 3.4 Stay of Legal Proceedings

The Grand Court rules contain a suite of procedural rules (Orders 72 and 73) which provide a comprehensive procedural code of arbitration-related court applications. All such applications must be

commenced in the Financial Services Division of the Grand Court. This division is responsible for handling the more complex commercial cases arising out of the financial services sector in the Cayman Islands. These Rules expressly provide for the stay of legal proceedings commenced in breach of an arbitration agreement. The Financial Services Division has demonstrated a commitment to upholding the supremacy of the choice of the parties to engage in arbitration. There is little opportunity for any party to delay or derail an arbitration proceeding through satellite court action.

### 3.5 **Third Party Enforcement**

The general rule is that a third party is not privy to and not bound by an arbitration agreement (and may only fall under obligation as a witness in arbitration). However, an arbitration agreement can be extended to a third party in certain circumstances, such as where the parties to the agreement elect to invoke the provisions of the Contracts (Rights of Third Parties) Law, 2014. Under that legislation, a third party may enforce a right under a contract to which it is not privy if the contracting parties expressly extend to it the right of enforcement in the contract. Where a contract so extended is subject of an arbitration agreement, the third party is treated as a party to the arbitration agreement as regards disputes relating to its rights under the contract.

Where a bankrupt individual or an insolvent body corporate has agreed to refer disputes to arbitration, any dispute arising from that contract will be enforceable against the trustee in bankruptcy or liquidator, receiver or administrator. Unless otherwise agreed between the parties, an arbitration agreement is not discharged by the death of a party and may be enforced against the party's personal representatives.

## 4. **ARBITRATORS**

### 4.1 **Composition of the Arbitral Tribunal**

The parties to an arbitration agreement may choose any number of arbitrators. Absent such agreement, the Law provides that an arbitral tribunal shall be composed of a single arbitrator. There is no requirement that an arbitrator be from or resident in the Cayman Islands.

There are no restrictions on who may act as an arbitrator. The Law also does not prevent judges from accepting appointments as arbitrators.

The Law provides that where a person is approached in connection with his or her possible appointment as an arbitrator, he or she must disclose any circumstances that might reasonably compromise his or her impartiality or independence. This obligation continues from the time of the appointment throughout the arbitration proceedings. An arbitrator may be challenged in limited instances, namely where circumstances give rise to justifiable doubts about his or her impartiality or independence, or he or she does not possess the qualifications agreed to between the parties.

### 4.2 **Method of Appointment**

The Law provides that in the absence of an agreement between the parties, the following provisions apply to the number and method of selection of arbitrators:

- where the parties fail to determine the number of arbitrators, there shall be a single arbitrator;
- in an arbitration with a single arbitrator, he or she is appointed, upon the request of one party, by the appointing authority (defined as the person or authority designated by the parties or if no such choice has been made, by the court, to appoint an arbitrator);

- in an arbitration with two or more arbitrators, the parties shall appoint an odd number (either by each party appointing an arbitrator and agreeing to the appointment of a subsequent arbitrator, or two or more parties agreeing to the appointment of the required number of arbitrators);
- in an arbitration with two or more arbitrators, where one party fails to appoint an arbitrator or if the parties fail to agree on the appointment of the additional arbitrator, the appointment shall be made, upon the request of a party, by the appointing authority;
- if, under the appointment procedure, one party fails to act, or the parties are unable to reach agreement as required, or a third party (including the tribunal) fails to perform a function assigned to it, any party may apply to the appointing authority to take the necessary measures; and
- where a request is made to the appointing authority, the authority shall, when appointing an arbitrator, have regard to a number of factors including the subject matter of the arbitration, the availability of the arbitrator, the identities of the parties, any suggestions made by the parties regarding the appointment and any qualifications required of the arbitrator by the arbitration agreement or by the parties.

The court is not directly involved in the selection of arbitrators but may be involved in designating an appointing authority (where the parties have failed to do so).

## 5. THE CONDUCT OF ARBITRATION PROCEEDINGS

### 5.1 Representation

Unless otherwise agreed, a party may be represented by a legal practitioner (whether from the Cayman Islands or elsewhere) or by any other person chosen by him or her. This allows the party flexibility to use an arbitration expert (who may or may not be legally qualified) or employ the services of overseas counsel. Foreign practitioners who appear in an arbitration in the Cayman Islands (whether as counsel or as arbitrator) will only require a temporary work permit, which is straightforward to obtain.

### 5.2 Commencement of Arbitration

The arbitration commences when:

- one party gives notice of an intention to subject a dispute to arbitration;
- one party serves on the other a notice requiring him or her to appoint or concur in appointing an arbitrator; or
- the arbitrator is named in the agreement and one party serves notice on the other requiring him or her to submit the matter to the named arbitrator.

If the parties have agreed provisions in the arbitration agreement as to how arbitration proceedings are to be commenced, those provisions must be followed.

### 5.3 Hearing

The parties can agree whether or not to have an oral hearing for the presentation of evidence and, in the absence of any agreement between the parties, the arbitrator will decide whether to hold a hearing. Unless the parties have agreed that no hearing will take place, the tribunal must, on the request of a party, hold hearings at appropriate stages in the arbitration process.

The parties often 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 including tailor-made rules.

#### 5.4 Evidence

Unless the parties have agreed rules to be followed by the tribunal, the tribunal may, subject to the provisions of the Law, conduct the arbitration in such a manner as it considers appropriate. This includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

#### 6. CONFIDENTIALITY

To ensure that privacy is maintained in relation to all aspects of an arbitration, the Cayman Islands legislature included provisions on confidentiality in the Law that do not appear in the Model Law. An arbitration tribunal is required to conduct its proceedings in private and confidentially. The Law also allows for related court proceedings to be held in private on application by a party and to restrict the publication of any confidential information relating to the proceedings in appropriate circumstances. The court will only publish information if all parties agree that such information may be published or if the court is satisfied that the information would not reveal any matter (including the identity of the parties) that any party reasonably wishes to remain confidential. If, however, 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 the law reports or professional publications, subject to redaction of certain information be redacted and/or that the reports be published only after an appropriate period of time.

Except in limited circumstances (for example, where disclosure is required or needed to protect a party's legal interests) disclosure by the tribunal or a party of confidential information will be actionable as a breach of confidence. The tribunal and the parties are required to take reasonable steps to prevent the unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration.

#### 7. POWERS OF THE TRIBUNAL

The parties may agree on powers to be exercised by the tribunal for the purpose of arbitral proceedings and any orders made pursuant to those powers may be enforced with leave of the court. The Law also provides default powers, such as the power to award security for costs, discovery of documents and interrogatories, the giving of evidence by affidavit, and the preservation and interim custody of any evidence for the purposes of the proceedings.

Subject to the parties' agreement, an arbitral tribunal may grant interim measures at any time prior to the issue of an award and to take action that would prevent prejudice to the arbitral proceedings. These include measures to maintain or restore the original position of a party or to preserve evidence that may be relevant to the resolution of the dispute. The tribunal therefore has broad jurisdiction to act, on an *ex parte* basis if required, to preserve the status quo.

#### 8. COURT POWERS IN SUPPORT OF ARBITRATION

The court is empowered to exercise any of the arbitrator's powers, and also has jurisdiction to grant interim injunctions including asset-freezing orders, but only if the tribunal is unavailable for any reason. In non-urgent cases, the court is only permitted to act with the tribunal's permission or the written agreement of all parties. Any order of the court will cease to have effect in whole or in part if the tribunal subsequently makes an order to which the court's order relates.

The court has jurisdiction to determine any preliminary point of law, if either all the parties agree or the tribunal grants permission. The court's decision may be the subject of appeal if it raises a legal question of general importance; and unless otherwise agreed by the parties the tribunal may continue the arbitration

in the meantime. This provision gives the parties flexibility to use the court to resolve a complex legal issue to which the tribunal is not best suited.

## 9. THE MAKING OF AN AWARD

The parties may agree the powers exercisable by the tribunal in terms of remedies. Subject to any such agreement, the tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings in that court.

The tribunal has a complete discretion with respect to making awards of costs in relation to an arbitration proceeding, unless a contrary intention is expressed in the agreement.

A tribunal's fees and expenses may be subjected to assessment by the court at the request of a party unless they have been fixed by written agreement or such agreement provides for determination by another person or institution.

## 10. APPEALS

A party to arbitration proceedings may appeal to the court on a question of law arising out of an award made in the proceedings, but such appeal requires leave of the court to proceed. The parties may agree to exclude this right of appeal completely.

A party also has an inalienable right to apply to the court to set aside an award which is tainted by fraud, a breach of natural justice, has some jurisdictional flaw (e.g. the agreement is invalid or does not cover the dispute, or the tribunal is not properly constituted), or is contrary to public policy.

## 11. ENFORCEMENT

### 11.1 Enforcement of Domestic Awards

Any award made by an arbitral tribunal (where it had jurisdiction) may be enforced with leave of the court, permitting judgment to be entered in terms of the award, which in turn allows a party to seek post-judgment relief. Once the court has granted leave to enforce an arbitral award, steps may be taken to enforce the award in the Cayman Islands. Methods of enforcement include:

- seizure of assets;
- garnishee order;
- charging orders over land or other assets;
- appointment of a receiver; and
- insolvency proceedings. (It is possible to wind up a Cayman Islands company where the company has failed to satisfy an arbitral award, on the basis that the company is unable to pay its debts as they fall due.)

### 11.2 Enforcement of Foreign Awards

The Cayman Islands are a party to the New York Convention and the Foreign Arbitral Awards Enforcement Law (**FAAEL**) gives domestic effect to it. Therefore, an award made under an arbitration agreement in the territory of a state that is party to the New York Convention (**Convention**) will be recognised and enforced according to its principles, on production of the original arbitration agreement and award or certified copies.

Since the passage of the Law in 2012, awards from any foreign state (regardless of whether or not it is a signatory to the Convention) can also be enforced in the Cayman Islands.



Recognition or enforcement of foreign arbitral awards can be refused only 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 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 tribunal or the arbitration procedure breached the agreement or (in the absence of any agreement) the law of the Cayman Islands; or
- the award has not yet become binding on the parties, or it has been set aside or suspended by the Cayman Islands Court or by another competent authority under the law of which the award was made.

Enforcement of a Convention award may also be refused if the award is in respect of a matter that is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

If a foreign arbitral award has been set aside by the courts of the seat of arbitration, the Cayman Islands Court will decline to recognise or enforce the award on the grounds that the award is not valid and binding on the parties under the law governing the proceedings.

## 12. CONCLUSION

The Cayman Islands is developing an arbitration industry based on a statute which implements modern international arbitration practices. The Law has the backing of the judiciary, which is committed to giving it any and all support which is required by way of arbitration applications, including fast track procedures in the Financial Services Division of the Grand Court. Commercial parties should be confident in the use of Cayman arbitration provision in their agreements.

For more specific advice on arbitration in the Cayman Islands we invite you to contact:

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