

Article

The benefits of conducting Arbitration in the Cayman Islands

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An increasing number of contracts involving Cayman Islands entities are now drafted to contain arbitration agreements which provide for disputes to be resolved through private arbitration to be conducted in the Cayman Islands (or held elsewhere in the world, or by remote video-link), subject to the supervision of the Grand Court of the Cayman Islands.

Cayman Islands law is sufficiently flexible that the parties to a contract can choose Cayman Islands law to apply to the procedural and supervisory aspects of an arbitration, while separately deciding the governing law to apply to the substance of the contract and the dispute between the parties.

For example, the substantive governing law can be selected to be Cayman Islands law, New York law, modified New York law (of the sort used in 'Bermuda Form' insurance policies), or English law.

In the insurance context, choosing Cayman Islands law as the substantive governing law is particularly beneficial to all parties to an insurance transaction, especially in the context of liability insurance policies that are designed to provide insurance against punitive damages liabilities arising in the United States (which are uninsurable under New York, California, or certain other US state laws).

Similarly, in the corporate, funds, partnership, employment, and financial services context, there is a well-developed body of Cayman Islands law (supported by decisions of the Privy Council and the common law) that offers certainty and predictability to contracting parties in any given situation.

The benefits of an arbitration seated in the Cayman Islands

There are a number of recognised benefits associated with a Cayman Islands-seated arbitration. These include the following:

Specialist Independent Arbitrators

The parties can have their disputes resolved by specialist and independent arbitrators of their choice, whether they be US, UK, or Cayman Islands lawyers, retired judges, law professors, or industry specialists. In this respect, the parties can avoid the risks, uncertainties, and potential biases of non-specialist judges or juries, and the procedural delays that can sometimes arise in litigation (which have been increasing in jurisdictions such as the US and the UK, in light of COVID-19).

Confidentiality

The arbitration process in the Cayman Islands is confidential, which can be valuable to the commercial interests of business counterparties.

Speed and efficiency

The arbitration process can be tailored to be as swift, and cost-efficient, as the parties and the arbitrators consider appropriate.

Finality

Under the Arbitration Act 2012, the grounds upon which an arbitration award may be challenged or appealed are limited, promoting finality of arbitration awards, and enabling commercial parties to resolve their disputes promptly.

International and local enforceability

Under the New York Convention, a Cayman Islands arbitration award is readily enforceable internationally (as well as locally in the Cayman Islands).

UNCITRAL Model Law and supporting jurisprudence

The Cayman Islands' Arbitration Act 2012 is based on the UNCITRAL Model Law on International Commercial Arbitration and the UK's Arbitration Act 1996. This provides a strong statutory framework for arbitration, supported by a considerable body of local and international jurisprudence.

An appropriate degree of Court intervention and support

Under the Arbitration Act 2012, the Cayman Islands court's powers to interfere with the arbitral process are reduced to the essential minimum. However, in the event that a Court application becomes necessary, the Cayman Islands has a specialist Financial Services Division within the Grand Court that is very familiar with and highly supportive of the arbitration process, which understands its role in that process, and which is readily available to assist parties and arbitration tribunals on an urgent and confidential basis, when appropriate to do so.

Ability to agree on costs in advance

Under section 64 of the Arbitration Act 2012, parties are at liberty to agree in the arbitration agreement, in advance of a dispute arising, that they shall bear their own legal costs, if that is what they want. This is often attractive for US parties unfamiliar with the English "loser pays" costs regime. In contrast, such agreements are unlawful in UK arbitration agreements, under section 60 of the UK's Arbitration Act 1996.

Enforcement of arbitration agreements

The Cayman Islands Courts will act robustly to enforce parties' rights to arbitrate, including by way of stays of proceedings and anti-suit injunctions to compel arbitration (subject to exceptional circumstances), and interim relief from the Court is available in aid of arbitration, when that becomes necessary.

Conclusion: and a caveat

As the volume and complexity of legal disputes involving Cayman Islands entities grows in the wake of COVID-19, Cayman Islands-seated arbitration offers a flexible and commercially attractive alternative to traditional litigation (whether the arbitration is conducted remotely, or held physically in the Cayman Islands).

Despite the strong benefits of arbitration in a wide range of cases, however, not all Cayman Islands legal disputes are capable of being arbitrated, and not all legal disputes are always appropriate for arbitration. There are some cases, such as insolvency or bankruptcy proceedings, certain forms of shareholder disputes, trusts disputes, fraud disputes, and multi-party transactions, where the jurisdiction of the Grand Court of the Cayman Islands is still a necessary, or a more appropriate, forum for the resolution of such disputes.

It is important, therefore, for Cayman Islands entities and their counterparties to take specialist Cayman Islands legal advice on the choice of forum, the choice of governing law, and the most appropriate dispute resolution mechanism, both at the beginning of a transaction, and at the first sign of any dispute.

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