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Insurance Litigation 2021

Cayman Islands: Law & Practice
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CAYMAN ISLANDS

Law and Practice

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1. RULES GOVERNING INSURER DISPUTES

1.1 Statutory and Procedural Regime

The Cayman Islands are a self-governing British Overseas Territory (BOT), with a written constitution, a local parliament, and a local court system (including the Grand Court and the Court of Appeal, with rights of final appeal to the Judicial Committee of the Privy Council).

Cayman Islands law consists of UK legislation made applicable to the Cayman Islands (as well as certain pieces of Jamaican and West Indies legislation, given the Cayman Islands constitutional history); local Cayman Islands legislation; and the common law and rules of equity (as imported from England and Wales when the Cayman Islands were first settled), subject to development over time by local Cayman Islands case law, and by Privy Council case law.

Decisions of other common law courts, including the courts of England and Wales, may be treated as persuasive as a matter of Cayman Islands law, depending on the quality of the reasoning, the seniority of the tribunal, and any distinguishing features. The human rights jurisprudence of the European Court of Human Rights may also be taken into account when considering the human rights protections contained in the Cayman Islands Constitution.

The Cayman Islands legal system is largely modelled on, and influenced by, the legal system of England and Wales, although there are certain aspects of the Cayman Islands legal system that are influenced by Canadian, Hong Kong or US jurisprudence, and the jurisprudence of other BOTs. There are also certain laws and rules of practice and procedure that are unique to the Cayman Islands.

There are various pieces of Cayman Islands legislation that are relevant to the resolution of insurance contract disputes in the Cayman Islands, the most important of which are The West Indies Insurance Act 1959 (which, by Section 3, is applied to the Cayman Islands), the Cayman Islands Insurance Act (and regulations made thereunder), and the Cayman Islands Contracts Act. The Merchant Shipping Act contains a number of sections dealing with marine, shipping, and pollution liability insurance. There are also Cayman Islands laws and regulations relating specifically to health insurance business.

The primary regulator of the conduct of Cayman Islands insurance business is the Cayman Islands Monetary Authority (“CIMA”). CIMA has published a number of Statements of Guidance and related regulatory documents regarding the conduct of insurance business in the Cayman Islands.

Insurance contract disputes in the Cayman Islands are principally resolved either by way of litigation before the Grand Court, or by way of arbitration before private, ad hoc, arbitration tribunals.

Litigation procedure in the Cayman Islands is principally governed by the Judicature Act, the Grand Court Act, the Grand Court Rules, the Grand Court Practice Directions, the Court of Appeal Act, and the Court of Appeal Rules.

Arbitration procedure in the Cayman Islands is principally governed by the Arbitration Act.

1.2 Litigation Process and Rules on Limitation

Litigation Process

The litigation process in the Cayman Islands, in general terms, involves the issue, service and exchange of court pleadings (including a writ or originating summons, a statement of claim, a

defence (and counterclaim), and reply), followed by discovery of documents, exchange of witness statements from relevant witnesses of fact, exchange of experts' written reports, and then a trial, at which witnesses are cross-examined orally, and the parties' lawyers make written and oral submissions to the court.

The litigation process often attracts a number of interim, or interlocutory, applications, which can involve substantial, adversarial hearings determined on the basis of written affidavit evidence, written submissions, and oral submissions. Occasionally, a party may be allowed to cross-examine witnesses by reference to their affidavits at interlocutory hearings.

Procedural issues which are frequently dealt with on an interim basis include jurisdictional or forum challenges, case management and timetabling issues, applications for default judgment, summary judgment, and the striking out of claims or defences, applications for security for costs, applications for specific discovery of documents, and applications for permission to rely upon expert opinion evidence.

The Cayman Islands courts are required to give reasoned decisions or judgments when deciding any case or substantial application. In some cases, the courts are capable of giving oral, ex tempore rulings, immediately upon the conclusion of the hearing, but in most complex cases the courts will reserve their judgment, with a view to preparing a detailed written judgment, which will be delivered to the parties at a later date.

The judgment is usually published on the court website (www.judicial.ky) and the parties would then be expected to attend further hearings, or make further written submissions, to deal with any arguments on consequential issues such as interest, costs, or permission to appeal.

In practice, many pieces of litigation in the Cayman Islands are resolved by way of settlement agreements between the parties, in advance of trial, or between the trial and the final judgment (or any appeal).

Limitation Periods

An insured's claim for payment of insurance policy monies will normally take the form of an action for damages for breach of contract. Under the Cayman Islands Limitation Act, the statutory limitation period for actions founded on contract is six years from the date on which the cause of action accrued. The precise date when the cause of action accrues can vary depending on the type of insurance contract. For example, a cause of action for breach of the indemnity obligation under a contract of insurance against risks of liability to third parties will ordinarily not accrue until the insured has ascertained its loss and the quantum of its loss by judgment, settlement or award. Conversely, a cause of action for breach of the indemnity obligation under a contract of insurance against first party risks will normally accrue when the damage or injury occurred.

1.3 Alternative Dispute Resolution (ADR)

Alternative dispute resolution (ADR), including mediation and arbitration, is available on a consensual basis in the Cayman Islands.

Arbitration is increasingly popular as an alternative to litigation in the Cayman Islands, and mediation is also starting to be deployed more frequently, either in advance of litigation, or during the course of litigation but in advance of trial.

There are a number of appropriate venues situated locally in the Cayman Islands that are suitable for mediations and arbitrations, and a number of locally qualified mediators and arbitrators. It is possible, however, for an arbitration or media-

tion that is jurisdictionally seated in the Cayman Islands to be physically held elsewhere, with the consent of the parties and the arbitrator, or to be conducted by remote video-link.

The Cayman Islands courts generally support the enforcement of arbitration and ADR agreements in accordance with their terms, both by way of stay orders, and anti-suit injunctions, unless there are strong reasons, on the facts of any given case, not to do so.

For example, in *Cayman General Insurance Company and NEM West Indies Insurance Limited v Divi Hotels Incorporated* [2003] CILR 363, the Grand Court of the Cayman Islands ordered the parties to an insurance contract to submit their disputes to arbitration, despite some ambiguity in the wording of the relevant arbitration and jurisdiction clauses in the policy.

The Cayman Islands courts also respect, and seek to enforce, the “Overriding Objective” in civil litigation. In appropriate cases, this can involve the judges seeking to encourage parties to narrow the issues in dispute between them, or to explore methods of ADR pending a trial.

Since the Cayman Islands, like England and Wales, is a “loser pays” jurisdiction on the issue of costs, the Cayman Islands courts also encourage settlement indirectly, through their ability to make adverse costs orders at the conclusion of proceedings, and also at the conclusion of interlocutory applications during the course of proceedings, subject to issues of set-off, and discretionary considerations as to the most appropriate method and time for any taxation or assessment of costs.

2. JURISDICTION AND CHOICE OF LAW

2.1 Rules Governing Insurance Disputes

The conflict of laws rules applicable in the Cayman Islands are largely derived from the conflict of laws rules applicable in England and Wales at common law.

In the case of insurance contracts, the conflict of law issues that arise may require an analysis of the applicable governing law (or laws) relating to the substantive dispute, as well as procedural and evidential issues, and the applicable dispute resolution or jurisdiction clause, whether those are matters that have been considered and selected by express or implied agreement between the parties, or whether, in the absence of agreement, a governing law or jurisdiction agreement is to be imputed to the parties by their conduct, by the circumstances of the case, or by matters of public policy and legislation.

As to issues of jurisdiction, the Cayman Islands procedural rules for the conduct of litigation in the Cayman Islands closely align issues of the court’s jurisdiction with the ability on the part of a plaintiff to effect service of court proceedings on a defendant, subject to the permission of the Cayman Islands court.

Insurance companies incorporated in the Cayman Islands can be served with court proceedings as a matter of right; insurance companies incorporated outside of the Cayman Islands can be served with Cayman Islands court proceedings as a matter of discretion, in various circumstances, subject to the court being satisfied that a relevant jurisdictional “gateway” is satisfied, and that the claims are properly arguable.

There have been a number of reported and unreported cases in which the Cayman Islands

courts have had to determine the most appropriate forum, and governing law, for the resolution of an insurance contract dispute. Examples include *Bodden v Manufacturers Life Insurance Company* [1990-1991] CILR N2b, and *Insurco International Ltd v Gowan Company* [1994-1995] CILR 210.

2.2 Enforcement of Foreign Judgments

There are two primary methods by which foreign judgments can be registered and/or enforced in the Cayman Islands, by or against insurers, depending on the nature of the foreign judgment.

Firstly, under the Cayman Islands Foreign Judgments Reciprocal Enforcement Act, there is a statutory regime available for the registration and enforcement of certain foreign judgments. This legislation has only, to date, been applied to judgments from Australia and its territories.

Secondly, as a matter of common law, foreign judgments from all other countries can be enforced in the Cayman Islands at common law, by way of fresh legal proceedings on the foreign judgment debt, subject to the availability of certain defences and procedural requirements. In general terms, in order to be enforceable, the foreign judgment needs to be final and conclusive; the foreign judgment needs to be for the payment of a sum of money (not being for a tax, penalty, or similar such payment); and the foreign judgment needs to be issued by a foreign court of competent jurisdiction.

Once a foreign Court judgment has been converted into a local court judgment in the Cayman Islands, it can be enforced locally in the Cayman Islands in the same method as any other local judgment.

An alternative enforcement approach, which can be appropriate in certain cases involving Cayman Islands insurance companies that might

be insolvent, is to serve a statutory demand on the company for payment of the foreign judgment debt, and then, if the demand is not satisfied within 21 days, to present a petition for the compulsory winding up of the company, or for the appointment of receivers over a particular protected cell if the company is a protected cell company.

Under Cayman Islands case law, it is also possible to recognise and enforce certain non-monetary foreign judgments in the Cayman Islands, subject to the precise circumstances of any particular case, and the potential for further legal argument at an appellate level.

2.3 Unique Features of Litigation Procedure

The Cayman Islands has a sophisticated and experienced Commercial Court at first instance, known as the Financial Services Division, comprised of specialist commercial judges. The Cayman Islands Court of Appeal is also comprised of specialist appellate judges, with considerable experience of international commercial disputes.

The Cayman Islands legal profession is a “fused” profession, with Cayman Islands attorneys performing the functions of both barristers (or advocates) and solicitors (or litigators). There are a large number of international law firms doing legal business in the Cayman Islands, and a number of those firms employ leading counsel, trial advocates, and appellate advocates. It is also possible, in appropriate cases, for Cayman Islands law firms to instruct specialist foreign QCs to appear before the Cayman Islands courts on a “limited admission” basis for specific cases.

Given the nature and value of international business conducted in the Cayman Islands, most international insurance disputes that come before the Cayman Islands courts are for substantial sums of money, and many such disputes

involve parties, documents, witnesses, and assets in multiple jurisdictions, requiring legal advice and legal representation in multiple locations. Even local insurance disputes can relate to substantial claims, given the nature of the Cayman Islands local economy.

This can mean that the costs of litigation in the Cayman Islands can be quite substantial, whether the litigation is conducted on an hourly rates basis, or by reference to an alternative business model, such as conditional fees, or contingency fees.

The Cayman Islands, like England and Wales, is a “loser pays” jurisdiction, in the sense that the “loser” is ordinarily ordered to pay the winner’s costs of the litigation, subject to the court’s discretion in the circumstances of any particular case. The issue of costs, and potential adverse costs liabilities, can be a significant component of any settlement strategy.

3. ARBITRATION AND INSURANCE DISPUTES

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

The Cayman Islands courts regularly enforce arbitration agreements in insurance and reinsurance contracts, whether by way of mandatory stay orders of local court proceedings, or by way of anti-suit injunctions and associated declarations restraining parties from commencing, or continuing, foreign court proceedings, or from enforcing foreign judgments procured in breach of a valid and binding arbitration agreement.

The Cayman Islands courts also have the power to award damages for breach of an arbitration agreement, although it is well recognised that damages would not ordinarily be an adequate remedy.

The Cayman Islands courts do retain a discretion not to enforce arbitration agreements in limited circumstances, where there are strong (and exceptional) reasons not to do so.

3.2 The New York Convention

The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards was extended by the United Kingdom Government to the Cayman Islands in 1980.

The rules and procedures relating to the enforcement of foreign arbitration awards in the Cayman Islands are contained in the Foreign Arbitral Awards Enforcement Act and the Arbitration Act, which give domestic effect in the Cayman Islands to the New York Convention.

Additional procedural requirements are set out in Order 73 of the Rules of the Grand Court of the Cayman Islands.

In summary, an application for leave to enforce a foreign arbitration award in the Cayman Islands is made by ex parte originating summons, supported by affidavit evidence. The affidavit evidence is required to exhibit the duly authenticated original arbitration award or a copy of it, the original arbitration agreement or a copy of it; and a certified English translation of the award and the agreement if they are in foreign languages.

Subject to satisfaction by the award creditor of its obligations of full and frank disclosure given the ex parte nature of the application, the evidence and the application process are intended to be quick and efficient, subject to any defences or challenges that the award debtor might wish to raise at an inter partes hearing.

In the Cayman Islands case of *Arcelormittal USA LLC v Essar Steel Limited et al*, Grand Court, unreported judgment dated 2 July 2019, the New York Convention enforcement procedure

and Order 73 were said to give rise to a “self-contained code for the enforcement of foreign awards”.

Once leave to enforce a foreign arbitration award has been granted by the Cayman Islands court, and the court order has been duly served and any enforcement challenges have been rejected (or the time for bringing such challenges has expired), the court order (and the foreign arbitration award) may be enforced locally in the Cayman Islands in the same way as any local court judgment.

The enforcement of international arbitration awards against foreign sovereign states will be subject to additional requirements, and potential immunity defences, under the provisions of the United Kingdom’s State Immunity Act 1978, which takes effect in the Cayman Islands pursuant to the State Immunity (Overseas Territories) Order 1979. This legislation has been the subject of recent consideration in the arbitration context, in the English case of *General Dynamics v Libya* [2021] UKSC 22, and in the BVI case of *Tethyan Copper Company Limited v Pakistan*, Eastern Caribbean Court of Appeal, unreported judgments dated 25 May 2021 and 4 June 2021. The Cayman Islands reported cases that deal with the topic of sovereign immunity include *Bertoli v Malone* [1990-1991] CILR Note 1, and *TMSF v Wisteria Bay Limited* [2006] CILR 256.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Arbitration represents a significant form of dispute resolution for insurance contracts in the Cayman Islands, although litigation remains popular as well.

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).

Arbitrations in the Cayman Islands are private and confidential, and, under the Arbitration Act, the grounds upon which an arbitration award may be challenged or appealed to the courts are limited, promoting finality of arbitration awards and the prompt resolution of disputes.

The Cayman Islands Arbitration Act was substantially modelled on the UNCITRAL Model Law on International Commercial Arbitration and the UK’s Arbitration Act 1996.

Under Section 64 of the Arbitration Act, the parties are at liberty to agree in the arbitration agreement, in advance of a dispute arising, that they

shall bear their own costs, if that is what they want. This can be attractive to US parties that may be unfamiliar with the “loser pays” costs rules associated with English litigation.

4. COVERAGE DISPUTES

4.1 Implied Terms

Under Cayman Islands law, having regard both to the common law and to The West Indies Insurance Act 1959, a contract of insurance is a contract based upon the “utmost good faith”, and if the utmost good faith is not observed by either party, the insurance contract may be avoided by the other party.

Terms can also be implied into insurance contracts, as with other types of contracts, as part of the process of judicial interpretation, including in cases where they are necessary to give business efficacy to the contract, where they are so obvious as to go without saying, or they embody a market custom that is notorious in the relevant market (whether that is the captive insurance market, or the commercial insurance and reinsurance market). The implication of terms in the context of insurance contracts was considered and discussed in the Cayman Islands case of *Jackson v Cayman Insurance Company Ltd* [1994-1995] CILR 313, N-19.

In the case of *Sunshine Suites Limited v NEM West Indies Insurance Limited* [2006] CILR N11, the Grand Court of the Cayman Islands declined to incorporate an implied term of under-insurance or general average into property damage and business interruption insurance policies that were not policies of marine insurance, in the absence of unequivocal express wording.

4.2 Rights of Insurers

As set out above, a contract of insurance is a contract based upon the “utmost good faith”,

and if the utmost good faith is not observed by either party, the insurance contract may be avoided by the other party.

Subject to the precise terms of any particular insurance contract, the insurer is generally entitled to expect the insured to disclose to the insurer, before the contract is concluded, every material circumstance which is known to the insured (and the insured is deemed to know every circumstance which in the ordinary course of business ought to be known by him). If the insured fails to make such disclosure, or makes a misrepresentation, the insurer may avoid the contract. Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether it will take the risk.

The principles relating to non-disclosure and misrepresentation arise as a matter of common law, and pursuant to The West Indies Insurance Act 1959, the Vehicle Insurance (Third Party Risks) Act, and the Contracts Act. The Contracts Act removes certain bars to rescission for innocent misrepresentation, and also provides for the remedy of damages for misrepresentation.

The principles relating to non-disclosure and misrepresentation have been reviewed and applied by the Privy Council in *Zeller v British Caymanian Insurance Company Limited* [2008] CILR 11, and by the Cayman Islands Court of Appeal in *Banks v The Insurance Company of the West Indies (Cayman) Limited* [2016] (2) CILR 442.

The position has also been considered at first instance by the Grand Court of the Cayman Islands in the cases of *McLaughlin v American Home Assurance Co plc* [1994-1995] CILR N-18, [1996] CILR N-6, *British Caribbean Insurance Company Ltd v Lindo and Brown* [2011] (2) CILR

282, and *Toby v Allianz Global Risks US Insurance Company* [2018] (2) CILR 202.

4.3 Significant Trends in Policy Coverage Disputes

There has been a significant increase in property damage, and business interruption insurance claims, in the past 12 months, particularly in the hospitality sector. Healthcare captives have also experienced a number of COVID-19-related claims.

4.4 Resolution of Insurance Coverage Disputes

Insurance coverage disputes are generally resolved by negotiation and settlement, although an increasing number of disputes have been referred to arbitration, or gone to court, in recent years.

4.5 Position if Insured Party Is Viewed as a Consumer

The Cayman Islands international insurance industry does not generally treat insureds, who are sophisticated international businesses, as consumers requiring a high level of consumer protection.

4.6 Third-Party Enforcement of Insurance Contracts

There are limited circumstances in which third parties may be able to enforce insurance contracts against insurers, as a matter of Cayman Islands law.

The starting point is that an insurance contract is a contract between the insured and the insurer, and the principle of privity of contract applies under Cayman Islands law, so as to exclude any rights of third parties (who are not privy to the contract).

The “privity of contract” principle, however, is subject to the Cayman Islands Contracts (Rights

of Third Parties) Act, which allows for third party enforcement in certain circumstances. Under the Contracts (Rights of Third Parties) Act, a third party can enforce a term of a contract in its own right where:

- the third party is identified in the contract by name, as a member of a class, or as answering a particular description; and
- the contract expressly provides in writing that the third party can enforce the term.

In practice, however, many insurance contracts exclude the application of the Contracts (Rights of Third Parties) Act.

Under the Vehicle Insurance (Third-Party Risks) Act, and regulations made thereunder, claimants can sometimes proceed directly against insurers in the event of the bankruptcy or winding-up of the insured.

In certain circumstances, direct actions are permitted against insurers who issue policies insuring ship owners for liability under the Merchant Shipping Act.

4.7 The Concept of Bad Faith

Under Cayman Islands law, insurance contracts are contracts of utmost good faith. In that sense, Cayman Islands law recognises the concept of contractual bad faith (where there is a breach of the contractual duty of utmost good faith). It is also possible, under Cayman Islands law, for acts of dishonesty or acts of fraud to be characterised as acts of bad faith, which might give rise to extra-contractual tort liability, for example.

4.8 Penalties for Late Payment of Claims

Under the Cayman Islands Judicature Act and the Judgment Debts (Rates of Interest) Rules 2021, the Cayman Islands courts have the discretionary power to award pre-judgment and

post-judgment interest on money judgments, depending on the currency, amount, and period.

The Cayman Islands courts also have the discretionary power to award punitive, or exemplary, damages for breach of contract, in limited circumstances.

CIMA, as the regulator of Cayman Islands insurance business, has certain regulatory powers under the Cayman Islands Insurance Act to sanction licensed Cayman Islands insurers for unsafe or unsound practices in the conduct of their insurance business.

4.9 Representations Made by Brokers

Under Cayman Islands law, an insured is ordinarily bound by representations made by its broker, when acting as an agent for the insured.

When acting as an agent for the insured, the broker must disclose to the insurer every material circumstance which it knows to itself, and an agent is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, it, and every material circumstance which the insured is bound to disclose, unless it comes to his/her knowledge too late to communicate to the agent.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Delegated underwriting and claims handling authority arrangements are common in practice in the Cayman Islands, particularly in the captive insurance context.

These do not often give rise to litigated issues (and very few such issues have been publicly reported in Cayman Islands court judgments), although there have been a number of reinsurance coverage disputes, as between captive insurers and commercial reinsurers, in which

there has been considerable disagreement as to the meaning and effect of claims control, claims co-operation, and “follow the settlements” clauses, in circumstances where captive insurers are sometimes perceived to underwrite or renew policies, or settle claims, having regard to the commercial interests of their shareholder insureds. Such disputes are ordinarily resolved by way of settlement, or in private, confidential arbitrations.

5. CLAIMS AGAINST INSURED

5.1 Main Areas of Claims where Insurers Fund the Defence of Insureds

The main areas of claims where insurers fund the defence of insureds are directors’ and officers’ liability claims; professional liability claims; management liability claims; employment practices liability claims; motor vehicle liability; and public liability claims.

There have been a number of high-profile liability claims brought before the Cayman Islands courts in recent years, a number of which have been defended with the benefit of insurance funding.

5.2 Likely Changes in the Future

There continue to be an increasing number of large-value claims asserted against the directors, officers, trustees, and professional and corporate service providers to companies, trusts and partnerships established in the Cayman Islands.

In the circumstances, the demand for defence costs funding, including advancement of defence costs, is likely to remain strong.

5.3 Trends in the Cost or Complexity of Litigation

There have been an increasing number of high-value and complex claims to come before the Cayman Islands courts in recent years, which have been pursued all the way to full trial, and then to appeal before the Court of Appeal of the Cayman Islands and then the Privy Council.

Although many such claims were derived from the global financial crisis of 2007/2008, and high-profile Ponzi schemes in the investment fund industry, the COVID-19 pandemic has the potential for causing similar litigation and associated insolvencies.

There have also been a number of IPOs, special purpose acquisition companies (SPACs), M&A, and privatisation transactions in recent years involving Cayman Islands companies, which have resulted in substantial, complex litigation, both in the USA and in the Cayman Islands.

In early 2021, the Cayman Islands Private Funding of Legal Services Act 2020 was enacted. This has introduced a new framework for contingency fee agreements and litigation funding agreements (even though some such agreements were available in the Cayman Islands already, for certain types of claims, particularly in the insolvency context). It is anticipated that this will have only a modest effect on the volume, and potential costs associated with, litigation in the Cayman Islands, while facilitating access to justice and offering litigants a greater degree of choice regarding the funding of litigation.

5.4 Protection against Costs Risks

There are a number of international litigation funders and after the event (ATE) insurers that are willing to fund litigation in the Cayman Islands on commercial terms, and to provide ATE insurance (and security for costs) in connection with Cayman Islands litigation.

6. INSURERS' RECOVERY RIGHTS

6.1 Right of Action to Recover Sums from Third Parties

As a matter of common law and equity, insurers have similar rights of subrogation in the Cayman Islands as exist under English law. The Cayman Islands Merchant Shipping Act also provides for certain subrogation rights as a matter of statute. Regulations under the Insurance Act, including the Insurance (Reporting) Regulations 2013, also recognise subrogation rights on the part of insurers.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

Subrogation rights are well-recognised as a matter of common law and equity; they are also recognised in the Insurance Act, the Insurance (Reporting) Regulations 2013, and the Merchant Shipping Act.

In practice, most insurance contracts normally contain express contractual terms addressing insurers' rights of subrogation and/or assignment.

7. IMPACT OF COVID-19

7.1 Type and Amount of Litigation

Since the COVID-19 pandemic, litigation and arbitration have remained busy in the Cayman Islands. There have been an increasing number of insolvency-related and insurance-related claims, although the principal change has related to the use of video-link technology and electronic filing for the conduct of litigation on a remote basis. The Cayman Islands courts and arbitration tribunals, and the Cayman Islands legal profession, have demonstrated an ability to conduct complex and urgent litigation by video-link technology to a very high standard.

7.2 Forecast for the Next 12 Months

The next 12 months are likely to witness an increasing number of insolvency-related and insurance-related disputes, and a continuing use of remote video-link technology for complex and urgent hearings.

There are also likely to be an increasing number of disputes between majority and minority shareholders of Cayman Islands companies, as well as coverage disputes between policyholders and parent companies, captive insurers, and commercial reinsurers.

7.3 Coverage Issues and Test Cases

The COVID-19 pandemic has generated a number of business interruption insurance claims that are pending before loss adjusters, claims handlers, and arbitration tribunals.

Although the Cayman Islands courts and arbitration tribunals are likely to treat the UK Supreme Court decision in *Financial Conduct Authority v Arch Insurance (UK) Limited* [2021] UKSC 1 as persuasive, each case will turn on its own facts and specific policy wording, in circumstances where most Cayman insurance policies have been drafted with bespoke wording for international policyholders, rather than standard policy wordings of the sort that were issued by UK insurers to domestic UK insureds.

7.4 Scope of Insurance Cover and Appetite for Risk

The pandemic has not materially affected the scope of insurance cover available, nor has it materially changed appetites for risk, other than in the context of business interruption insurance.

8. CLIMATE CHANGE

8.1 Impact on Underwriting and Litigating Insurance Risks

The Cayman Islands, like other parts of the Caribbean, are prone to hurricane and tropical storm damage locally.

Parametric insurance has become increasingly popular as a risk management tool for hurricane-related risk and other catastrophe risk. For example, the Caribbean Catastrophe Risk Insurance Facility Segregated Portfolio Company (CCRIF SPC) was founded in 2007 as the world's first regional fund utilising parametric insurance to cover catastrophe-related losses. This followed the devastating impacts of Hurricane Ivan in 2004, which resulted in the Cayman Islands and Grenada suffering economic losses of 200% of their annual GDP. CCRIF SPC is a segregated portfolio company, owned, operated and registered in the Cayman Islands.

The CCRIF currently covers 22 member countries or jurisdictions (19 governments in the Caribbean and North Atlantic, including BOTs such as Bermuda, the Cayman Islands, the British Virgin Islands, and the Turks and Caicos Islands, and three in Central America). Each nation benefits from the right to receive prompt payments even before actual damages are assessed, providing much-needed financial liquidity that is critical for recovery efforts.

The immediate liquidity that CCRIF provides (within 14 days of catastrophic events triggering a parametric insurance policy) fills an important protection gap and allows governments to begin initial recovery efforts.

CCRIF was the world's first regional fund utilising parametric insurance, giving member governments the opportunity to purchase earthquake,

hurricane and excess rainfall catastrophe coverage at the lowest-possible pricing.

Since 2007, CCRIF has made at least 45 payments to 14 member governments totalling USD163 million, with respect to 23 catastrophic events, including earthquakes, tropical cyclones, and excess rainfall events.

9. SIGNIFICANT LEGISLATIVE AND REGULATORY DEVELOPMENTS

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

The Cayman Islands continues to remain a major centre for international business, with particular

expertise in the incorporation and management of investment funds, public companies, limited partnerships, and international insurers, both captive insurers and commercial insurers and reinsurers.

Although there is an increasing amount of regulatory and compliance legislation that is now in force in the Cayman Islands, this is unlikely to affect insurance coverage or insurance litigation materially.

The introduction of the Cayman Islands Private Funding of Legal Services Act 2020 will, in principle, offer litigants with meritorious claims a wide variety of litigation funding options and opportunities, but this is unlikely to have a material effect on insurance coverage or insurance litigation, or on defence costs.

Contributed by: Alex Potts QC, Jonathon Milne, Ben Hobden and Erik Bodden, Conyers

Conyers has a Litigation and Restructuring practice consisting of 42 attorneys in the key global locations of Bermuda, the British Virgin Islands (BVI), the Cayman Islands, Hong Kong, London and Singapore advising on the laws of Bermuda, BVI and the Cayman Islands. The firm's expertise includes commercial litigation, insurance and reinsurance, insolvency, trust

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