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International Comparative Legal Guides

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

All persons carrying on or desiring to carry on insurance business (including reinsurance business) in or from within the Cayman Islands need to be licensed under the Insurance Act (As Revised) ("Insurance Act"). In addition, provision is made for the licensing of insurance agents and brokers and those providing insurance management. Applications for licences are reviewed in detail and granted by the Cayman Islands Monetary Authority ("Authority"), which is generally responsible for the supervision and regulation of financial services. Information filed with the Authority pursuant to the Insurance Act is not generally a matter of public record.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Insurers are licensed by the Authority as follows:

(a) "Class A insurer" licence, for the carrying on of domestic business (i.e. the provision of insurance in respect of insurable interests of persons ordinarily resident in the Cayman Islands, or of property or vehicles, vessel or aircraft or other moveable property ordinarily based in the Cayman Islands) or limited reinsurance business.

(b) "Class B insurer" licence, for the carrying on of insurance business other than domestic business (however, a Class B insurer may carry on domestic business where such business forms less than five per cent of net premiums written, or where the Authority has otherwise granted prior approval).

(c) "Class C insurer" licence, for the carrying on of insurance business involving the provision of reinsurance arrangements in respect of which the insurance obligations of the Class C insurer are limited in recourse to, and collateralised by, the Class C insurer's funding sources or the proceeds of such funding sources, which includes the issuance of bonds or other instruments, contracts for differences and such other funding mechanisms approved by the Authority.

(d) "Class D insurer" licence, for the carrying on of reinsurance business and such other business as may be approved in respect of any individual licence by the Authority.

The organisational requirements for licensees are as follows:

(a) Only companies incorporated in the Cayman Islands may be licensed as Class A or D insurers and only companies incorporated as "exempted companies" (including segregated portfolio companies) may be licensed as Class B or C insurers.

(b) Directors: every applicant must have a minimum of two directors who are approved by the Authority.

(c) Physical presence: Class A and D insurers are required to have a place of business in the Cayman Islands.

(d) Requirement to appoint a local insurance manager: a Class B insurer or a Class C insurer (unless it permanently maintains a place of business in the Cayman Islands) is required to appoint an insurance manager licensed by the Authority.

(e) Business plan: every applicant is required to file a business plan with the Authority.

(f) Capital and solvency requirements: every applicant is required to comply with the prescribed level of capital requirements under the Insurance Act and the Regulations made under the Insurance Act, which differ depending upon the class of licence sought.

(g) Auditor: every applicant (unless exempted by the Authority) is required to appoint an auditor approved by the Authority.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

In general, only a foreign insurer licensed as a Class A insurer is able to write domestic insurance business. In certain circumstances, the Attorney General or the Governor in Cabinet may permit an unlicensed foreign insurer to carry on domestic business.

A local insurer is free to contract for reinsurance with a foreign reinsurer (subject to the Authority's consent).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are no statutory provisions that restrict the parties' freedom of contract. However, the Authority needs to approve all insurance contracts entered into by a licensed insurer.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes. Cayman Islands companies are not prohibited from indemnifying and exculpating their directors and officers from personal liability for wrongful conduct in the performance of their fiduciary and common law duties.

However, the "irreducible core" of a fiduciary's duty, which has been held to comprise at least the duty to act honestly and in good faith, will remain despite the terms of any indemnity or exculpation provision. Accordingly, such provisions may not operate to indemnify or release a director or officer from liability for conduct which amounts to wilful default, fraud or dishonesty in the carrying out of their fiduciary duties.

1.6 Are there any forms of compulsory insurance?

There are a wide variety of statutory provisions in the Cayman Islands that impose obligations to maintain insurance coverage. Examples of the sectors and the parties to whom such provisions apply include:

(a) Parties involved in the provision of professional services in the financial services industry such as auditors, attorneys, professional directors, liquidators, insurance brokers, persons licensed to carry on business under the Securities Investment Business Act (As Revised) and persons licensed to carry on business under the Banks and Trust Companies Act (As Revised).
(b) Employers are required to maintain health insurance on behalf of each employee.
(c) Operators of healthcare facilities are required to maintain malpractice insurance and liability insurance coverage for the facility.
(d) Parties involved in transport operations, including operators of scheduled air services, ships registered in the Cayman Islands and users of port facilities. There are also requirements for road users to insure their vehicles.
(e) Property owners and operators are required to maintain property insurance in certain circumstances.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Cayman Islands insurance laws are mainly regulatory in nature and do not generally deal with consumer protection rights.

2.2 Can a third party bring a direct action against an insurer?

Cayman Islands law recognises privity of contract. Accordingly, it is not generally possible for a third party to enforce contractual terms without being a party to the relevant contract. However, pursuant to the Contracts (Rights of Third Parties) Act (As Revised), parties to a contract governed by Cayman Islands law may expressly confer on a third party a statutory right of enforcement in respect of any provision or provisions of the contract.

2.3 Can an insured bring a direct action against a reinsurer?

The existence of any such right would depend upon the terms of the contracts between the insured and the insurer, and the insurer and the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Pursuant to the Cayman Islands Contracts Act (As Revised) and the common law principles of misrepresentation, where an insurer has entered into a contract of insurance in reliance upon a misrepresentation by the insured, or where there has been non-disclosure of a material fact by the insured which, had it been disclosed, would have led the insurer not to enter into the contract at all, or enter into the contract on different terms, the insurer may have a right to rescind the contract.

Further or alternatively, the insurer may have a claim for damages against the insured where it has suffered loss due to misrepresentation or non-disclosure by the insured.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Contracts of insurance are based upon the principle of utmost good faith. That principle imposes a positive duty on each contracting party to disclose all circumstances material to the risk to the other contracting party.

Accordingly, an insured will generally be under a positive duty to disclose to the insurer all circumstances material to the risk to be insured regardless of whether the insurer has specifically asked about those matters. A circumstance is material for these purposes if it would influence the judgment of a prudent insurer in either fixing the premium or determining whether to insure the risk at all. Any failure to make such disclosure could provide grounds for the insurer to void the contract.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Decisions of the English courts that have confirmed that a right of subrogation exists in respect of all contracts of non-marine insurance that are contracts of indemnity should be followed in the Cayman Islands.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Any action for breach of a contract of insurance, including an application for a declaration, where the amount claimed exceeds $1 million, is required to be commenced in the Financial Services Division of the Grand Court. Whilst the Court does have the power, on the application of any party, to order that a civil cause of action be tried before a jury of seven persons, in practice all insurance and other commercial proceedings are heard by a judge alone.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The filing fee to commence proceedings involving a commercial insurance dispute in the Financial Services Division of the Grand Court is $5,000.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

As much of the commercial litigation before the Grand Court

is complex, cross-border and involves heavy interlocutory applications, cases can take up to two years to come to trial. However, a relatively simple coverage dispute may take a shorter period of time.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

The Cayman Islands courts had procedures in place for conducting remote hearings in appropriate cases prior to the COVID-19 pandemic. During the height of the pandemic in 2020 it became the default position that all hearings were conducted by video-link. Since then, the approach has returned to the position before the pandemic and COVID-19 is no longer having any significant effect on the way the courts operate. Nevertheless, a number of innovations introduced at or around the time of the pandemic have been kept and enhanced to streamline the courts' processes. As well as conducting remote hearings where appropriate, this includes procedures for the filing of court documents electronically, the payment of court fees remotely, the use of electronic bundles during hearings and improved arrangements for access to publicly available court filings, orders and judgments through the Cayman Islands Judicial website.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The discovery obligations on parties to Cayman Islands proceedings are broad. The parties are required to give discovery of all documents that are or have been in their possession, custody or power relevant to the issues in dispute. Documents are considered relevant for these purposes if they would either advance or damage a party's case or lead to a train of enquiry that would have that result. A party is also required to disclose relevant documents held by others which are under their control, or where the party has a right to obtain relevant documents from a non-party to the proceedings.

Any party may issue a subpoena on a third-party witness located in the Cayman Islands requiring them to come to court to produce specific documents. Only documents that are directly relevant to the issues in the case can be sought in this way. The court may also issue letters of request to foreign judicial authorities and make orders for the appointment of examiners to facilitate the examination of witnesses and the production of documents by witnesses located outside the Cayman Islands.

Where a party is required to disclose documents in proceedings that contain confidential information belonging to another person falling within the Confidential Relationships (Preservation) Act (As Revised), unless the person to whom the duty of confidence is owed consents to the disclosure, the party is required to apply to the court for directions. The court will permit the disclosure where it is satisfied that doing so will serve the interests of justice.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Yes. The recognised categories of privilege that entitle a party to withhold documents from disclosure in proceedings include:

(a) Legal professional privilege, which comprises:
  (i) legal advice privilege, which applies to documents recording communications between lawyers and clients for the purpose of obtaining or providing legal advice; and
  (ii) litigation privilege, which applies to documents created for the dominant purpose of litigation which is in contemplation or in progress at the time the document is created.

(b) Without prejudice privilege, which applies to communications between the parties or between their lawyers, comprising negotiations to settle a dispute.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

In addition to the power referred to in the answer to question 4.1 above, to serve a subpoena upon a witness to produce documents, a party may issue and serve a subpoena upon a witness located in the Cayman Islands requiring their attendance to give oral evidence at the trial.

The court also has the power to order the pre-trial examination of witnesses by deposition. Whilst that power is not used particularly frequently, it is available for use in appropriate cases.

4.4 Is evidence from witnesses allowed even if they are not present?

Parties in commercial proceedings generally have the right to require witnesses to attend the trial in person to give oral evidence and be cross-examined, but where they do not exercise that right, the case will be decided on the basis of a written affidavit or witness statement evidence alone.

Where a witness cannot attend the trial in person, the court may permit the use of video-conferencing facilities to enable the witness to give their evidence remotely. Such arrangements are permitted where they will facilitate the efficient, fair and economic disposal of the proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

A party who wishes to adduce expert evidence for use at trial may do so with the permission of the court, or with the agreement of the other parties. In insurance and other commercial cases, the parties' attorneys will often in the first instance seek to agree whether expert evidence is to be permitted and, if so, the number of experts and the issues on which they are to give evidence. Alternatively, or in the absence of agreement, any party may seek directions from the court in relation to expert evidence at a case management hearing during the interlocutory stage of the proceedings.

As an alternative to the parties engaging separate experts, the court may, on the application of any party, appoint an independent expert or experts to enquire and report upon any relevant questions of fact or opinion. If possible, such a court-appointed expert should be a person agreed between the parties, and the questions for the expert are to be agreed between the parties. Where the parties cannot agree on those issues, the court may nominate the expert and settle the questions for the expert.

4.6 What sort of interim remedies are available from the courts?

The most common interim remedies are:

(a) injunctions preventing a party from carrying out, or requiring a party to carry out, specified actions;
(b) freezing injunctions restraining a party from disposing of or dealing with certain assets and requiring the party to disclose information about its assets;
(c) search orders requiring a party to permit persons to enter its premises and search for documents or other moveable property;
(d) disclosure orders; and
(e) orders appointing a receiver in relation to particular property.

These remedies can generally be granted both in support of Cayman Islands proceedings and in support of proceedings in another jurisdiction.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Appeals from the Grand Court lie to the Cayman Islands Court of Appeal. Subject to certain restrictions, there is an automatic right of appeal to the Court of Appeal from any final decision of the Grand Court. In general, leave of the Grand Court or the Court of Appeal is required to appeal an interlocutory decision of the Grand Court. A further appeal from the Court of Appeal may then lie to the Privy Council in London. There is an automatic right of appeal to the Privy Council in civil proceedings from a final decision of the Court of Appeal where the matter in dispute is of the value of GBP 300 or more. Leave from the Court of Appeal or the Privy Council would generally be required in other types of cases.

In general, the role of the appellate court is to determine whether the lower court erred in reaching its findings of fact, made an error of law or erred in the exercise of judicial discretion, by reference to the specific grounds of appeal identified by the appellant. The appeal does not involve a rehearing of the entire matter by the appellate court.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes. The Grand Court may award both pre-judgment and post-judgment simple interest on judgments for debt and damages. Pre-judgment interest may be awarded at a rate not exceeding the prescribed rate for the currency in which the judgment is given set out in the Judgment Debts (Rates of Interest) Rules 1995, and post-judgment interest is awarded at the prescribed rate on the principal amount of the judgment debt. At the time of publication, the prescribed rate of interest in relation to US dollar judgments was 2.375 per cent.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The court has wide discretion to make costs orders, both in relation to particular interlocutory applications and the proceedings overall. Whilst the successful party can generally expect to have a costs order made in its favour, the court will consider all the circumstances of the case in deciding on the appropriate costs order, including:

(a) the conduct of the parties;
(b) any payment into court: a defendant that admits liability for a sum less than that claimed by the plaintiff can elect to pay the sum admitted into court. Where the plaintiff fails to recover at trial more than the sum paid in, the court may order the plaintiff to pay the defendant's costs from the date of the payment into court; and
(c) any written settlement offer: where a payment into court cannot be made, a party may make a written offer to settle the proceedings which is expressed to be "without prejudice save as to costs". The court will take such an offer into consideration in making a costs order.

Costs are usually quantified at the conclusion of the proceedings. Unless the parties agree on the amount of costs payable by the unsuccessful party, the amount will be determined through a separate procedure known as taxation.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

No. The majority of commercial disputes in the Cayman Islands are resolved by litigation. There is no requirement for parties to attempt mediation prior to commencing proceedings and parties will not be compelled to do so after commencing proceedings.

Nevertheless, where the parties wish to attempt mediation, the court is likely to facilitate their wishes by, for example, adjourning proceedings for a period of time to enable a mediation to take place.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

The court could in theory take a refusal to mediate into account as part of its overall assessment of the parties' conduct in the litigation when making a costs order at the conclusion of the proceedings. However, a refusal to mediate alone is unlikely to be sufficient to warrant a costs order being made against a party.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Cayman Islands has a modern arbitral framework for arbitrations with their seat in the Cayman Islands set out in the Arbitration Act 2012 ("Arbitration Act"), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") has been incorporated into Cayman Islands law pursuant to the Foreign Arbitral Awards Enforcement Act (As Revised).

The Arbitration Act is based upon the UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act 1996. The principles on which the Arbitration Act is founded (as set out in section 3(3)) are:

(a) the fair resolution of disputes by an impartial tribunal without undue delay or expense;
(b) the freedom of the parties to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(c) limits on the scope for court intervention in arbitral proceedings.

The Act allows parties the freedom to tailor arbitral proceedings according to their needs but also provides a set of default provisions that apply in the absence of agreement. There are certain mandatory provisions designed to protect the integrity of the arbitration process; for example, by ensuring that the tribunal maintains its impartiality and is not subject to any conflict of interest. However, the court's powers are limited to supporting and assisting with the arbitration process and it is not otherwise permitted to intervene in the conduct of an arbitration.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The Cayman Islands legislation relating to both domestic and foreign arbitrations contains provisions concerning the recognition of arbitration agreements which mirror those in the New York Convention.

The minimum requirements are that there is an agreement in writing contained in a document signed by the parties, or in an exchange of letters, electronic communications or another means of communication, that provides a record of the agreement. No particular form of words is mandatory. The parties simply need to signify their intention to bind themselves to refer a particular dispute or a class of disputes to arbitration.

Beyond the minimum requirements, parties normally choose to include certain additional details in the arbitration clause such as the seat of the arbitration, the language of the arbitration and the number of arbitrators. There is a model arbitration clause that parties can use or adapt in the Schedule to the Arbitration Act.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The grounds on which the court will refuse to enforce an arbitration clause by staying proceedings allegedly brought in breach of the clause, whether the clause provides for domestic or foreign arbitration, are the same as those set out in the New York Convention. The court will refuse enforcement of an arbitration clause if it finds that the clause is null and void, inoperative or incapable of being performed.

In some cases, there can be a question as to whether the subject matter of the dispute or the relief sought by a party is capable of being referred to arbitration. In the recent Privy Council decision in *FamilyMart China Holding v Ting Chuan* [2023] UKPC 33, the court had to consider the effect of an arbitration clause on the statutory jurisdiction to wind up companies on just and equitable grounds. The court held that it is necessary to look at the substance of the dispute and apply judgment and common sense in determining whether the dispute gives rise to any issues that are not arbitrable, and in general the courts will respect the parties' freedom to choose how they want their disputes to be resolved.

Claims arising under or in relation to contracts of insurance will not normally raise such issues. Even if the contract is avoided for material non-disclosure or misrepresentation, the arbitration clause may still be enforced, as it is regarded as a separate agreement that is not invalidated simply because the contract in which it is found is held to be void.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

In relation to arbitrations with a seat in the Cayman Islands, the court's powers exercisable in support of arbitration include the power to make orders:

(a) for security of costs;
(b) for discovery of documents;
(c) compelling witnesses to attend for oral examination and to produce documents; and
(d) to secure the amount in dispute and prevent the dissipation of assets.

In urgent cases, the court may grant orders preserving evidence or assets on the application of a party to arbitral proceedings. In non-urgent cases, the court may grant other forms of relief, but only where the application has been made with the permission of the tribunal or the agreement of all parties. In either case, the court may only act to the extent that the tribunal has no power or is unable to act.

In relation to arbitrations with a seat in the Cayman Islands or elsewhere, the court has the same power of issuing interim measures relating to, for example, the preservation of evidence or assets, as it has in relation to court proceedings. In exercising that power, the court is required to have regard to the specific principles of international arbitration.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The Arbitration Act requires that an arbitral award be made in writing, signed by the tribunal and contain the reasons upon which the award is based, unless the parties have agreed that reasons are not to be stated, or the award is an agreed award which records the terms of a settlement reached by the parties during the arbitration.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There are two avenues that may be open to a party to challenge an arbitral award made in the Cayman Islands.

First, a party may apply to the court to set aside the award on the grounds set out in section 75 of the Arbitration Act. This right may not be excluded by agreement. The grounds include those found in Article V of the New York Convention and cover matters such as:

(a) proper notice of the appointment of the tribunal or the arbitration proceedings was not given or a party was unable to present its case;
(b) the composition of the tribunal was not in accordance with the parties' agreement or the Arbitration Act; and
(c) the subject matter of the dispute was not capable of settlement by arbitration, or the award is contrary to public policy.

Secondly, a party may, with the permission of the court, appeal on a question of law arising out of an arbitral award under section 76 of the Arbitration Act. This right may be excluded by agreement. Before it grants permission, the court must be satisfied of certain matters including that: (i) the determination of the question will substantially affect the rights of one or more

of the parties; (ii) the decision of the tribunal on the question is obviously wrong on the basis of its findings of fact or, in the case of a question of general public importance, the decision is at least open to serious doubt; and (iii) it is just and proper for the court to determine the question in spite of the parties' agreement to arbitrate.

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