

# Litigating in the Cayman Islands and the British Virgin Islands (BVI): Important considerations before commencing proceedings

GUIDE

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The benefits of using Cayman Islands and BVI domiciled entities are well known, and many investment structures have, at their core, at least one Cayman Islands or BVI vehicle. As a consequence, when issues arise within the structure's business, which require resolution by the court, proceedings may well be required to be brought in the courts of the Cayman Islands or the BVI.

The legal systems of the Cayman Islands and the BVI are based largely on that in England, and in general terms, each apply English common law, to the extent which it is not inconsistent with its own laws. However, the unique and integral role the Cayman Islands and the BVI play in the global economy, coupled with the highly complex nature of many investment structures, gives rise to a number of specific matters a party to any potential litigation ought to fully consider before embarking on litigation before the courts of either jurisdiction. These matters include:

## **Governing law/Choice of forum**

Most contracts and other commercial agreements will include both a choice of law provision, by which the parties agree to the laws of a particular country as governing the agreement itself, and a choice of forum provision, by which the parties agree to the courts of a particular country in which any disputes between them will be determined. Usually both provisions nominate the same country, but this is not always the case.

Both the Cayman Islands and BVI courts will recognise these provisions, and with respect to a choice of forum provision, will consider that a submission by each party to the jurisdiction of that court. In the event that proceedings are commenced in the BVI or Cayman Islands notwithstanding that a different jurisdiction has been nominated in which disputes will be determined, the court will likely stay or dismiss those proceedings. The court does retain a discretion to allow proceedings to continue, notwithstanding the existence of a foreign choice of forum provision (subject to the court being satisfied that it would have jurisdiction over the matter, discussed below), on the basis that parties cannot agree as between themselves to oust the jurisdiction of the court, but it would only be in the rarest of situations that the courts would do so.

Absent an express choice of forum provision, it will be necessary to ensure that the BVI or Cayman Islands court has jurisdiction under its own laws. Both jurisdictions recognise the doctrine of *forum non conveniens*, and it is necessary to ensure that, in commencing proceedings, the BVI or Cayman Islands court is both best placed to deal with the dispute, and that it will be the venue most convenient for the particular matter to be resolved.

In addition, where it is intended to commence proceedings against a non BVI or Cayman Islands resident or entity, it is necessary to pay particular attention to the specific grounds on which the court will grant 'leave to serve out'. As a matter of both Cayman Islands and BVI law, before serving proceedings on a party outside of the jurisdiction, it is first necessary to obtain permission from the court to do so. The court will only grant permission if the claim falls within (at least) one of the specific grounds set out within the governing rules; for example, that the relevant contract in question was made within the jurisdiction. These lists are exhaustive and if the claim does not meet with this threshold test, permission will not be

granted by the court, and the proceedings will effectively be brought to an end. Importantly, even if the proceedings do meet with this test, the court may still nonetheless refuse permission based on *forum non conveniens* considerations.

## **Standing**

As a corollary to the complex nature of many structures, care must be taken to ensure that the proposed plaintiff for claimant is the entity in whom the particular cause of action vests. This is particularly relevant where investors in investment funds, who invest through a nominee or custodian, wish to take action against the fund. In this instance, it would be the custodian or nominee, as the registered shareholder, who would have standing, and not the underlying investor. Likewise in corporate structures with many layers; care should be taken to ensure that the correct entities are identified and that those who wish to commence proceedings are authorised to do so on behalf of the particular entity or entities.

## **Purpose and result sought**

Before any proceedings are commenced (or defended, for that matter) it is necessary to ask the question 'what do I seek to achieve?'. For example, there is little point in commencing proceedings in damages against a company within a complex structure if the assets within the structure are held elsewhere, thus leaving nothing to enforce a judgment against. When dealing with complex structures it is best to work backwards, starting with identifying the result sought, and working back through each stage of the proposed proceedings, mapping out the desired result at each stage, and how that can be achieved. Hurdles invariably exist when seeking to commence proceedings against a company or companies within complex structures, and a prudent litigant will know precisely what those hurdles are, and how they will be overcome (if in fact they can be), before commencing litigation.

## **Interrelationship with onshore proceedings**

In many instances, proceedings before the Cayman Islands or BVI court are in furtherance of, or run parallel with, proceedings in other jurisdictions. Careful consideration as to how both sets of proceedings will interplay with one another is vital, including what effect the decisions and rulings of one court will have on the other. Both Cayman Islands and BVI law recognise the principle of *issue estoppel*, meaning that the Cayman Islands and BVI courts will not allow parties to (re)litigate matters which have already been determined by another court of competent jurisdiction, and thus if proceedings are to be run in parallel, it is essential that both sets of proceedings are carefully planned, and that steps are not taken in the foreign court which will effectively bind the hands of the Cayman Islands or BVI court. Care must also be taken to ensure that where the same entity is involved in multiple sets of proceedings, it adopts a consistent position on questions which are common to each set of proceedings. Inconsistencies can be fatal, and given the general need to engage separate legal advisors in each jurisdiction (who are largely responsible for the preparation of court papers, including witness statements and evidence) care must be taken to ensure no inconsistencies arise, no matter how inadvertent or unintentional they may be.

## **Recognition and enforcement of orders**

Obtaining a judgment or order is, of course, only half the battle; enforcement can, in many instances, take even longer and be more costly. Most structures hold very few (if any) assets within the Cayman Islands or the BVI, thus unless enforcement is sought at the corporate structure level (for example, by the appointment of a liquidator), it will likely be necessary to seek to enforce the decision of the BVI or Cayman court in a different jurisdiction. Generally this will be those jurisdictions in which the target entity holds assets. Identifying those jurisdictions before proceedings are commenced is important, as whether the Cayman or BVI judgment will be recognised, and enforced, is a question which falls for determination in accordance with the local laws of the relevant jurisdiction. Again, there is little point in commencing proceedings, and obtaining an award, against a company with assets in jurisdiction X, if jurisdiction X will not, in turn, recognise the award.

Recognising, and properly considering, each of these matters before setting out on any litigation will ensure not only the best possible start to proceedings, but that the proceedings will be able to, and will, achieve that which is sought.

## Contacts

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