



The Cayman Islands Law Reform Commission

The Enforcement of Foreign Judgments and Interim Orders

Issues Paper

6th March, 2012

The Cayman Islands Law Reform Commission

Chairman: **Mr. Ian Paget-Brown**

Members: **Cheryll Richards, QC**
Mrs. Eileen Nervik
Ms. Vicki Ellis
Mr. Kenneth Farrow, QC

Director: **Ms. Cheryl Ann Neblett**

Legislative Counsel: **Mr. José Griffith**

Executive Officer: **Mrs. Kimberly Allen**

Table of Contents

	Page
Introduction	4
<i>The concept of enforcement of foreign judgments</i>	4
(a) The process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom	5
<i>Origin of the common law rules</i>	5
<i>Statutory scheme for enforcement of judgments in the UK</i>	5
(i) <i>The UK Administration of Justice Act, 1920</i>	6
(ii) <i>Foreign Judgments (Reciprocal Enforcement) Act, 1933</i>	7
(b) The process through which judgments of the United Kingdom superior courts are enforceable in the Cayman Islands	7
(i) <i>Common law enforcement</i>	7
(ii) <i>Statutory enforcement</i>	8
<i>Analysis of the common law approach to enforcing UK judgments</i>	10
(i) <i>The Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923, Judgments (Foreign) (Reciprocal Enforcement) Act, 1936, Reciprocal Enforcement of Foreign Judgments Order, 1936 and their implications for the Cayman Islands</i>	11
(ii) <i>Enforcement of UK judgments in the Cayman Islands post 1962</i>	12
Foreign and Commonwealth Office advice on the reciprocal obligations of the Cayman Islands	13
Primary reform options to deal with the enforcement of judgments	14
Secondary reform options to enhance the enforcement of judgments process	15
(c) The enforcement of foreign superior court non-monetary judgments in the Cayman Islands	18
<i>Foreign non-monetary judgments</i>	18
<i>Recognition of foreign non-monetary judgments</i>	19
Reform option for dealing with non-monetary judgments	21
(d) Facilitating the enforcement of foreign interim orders in the Cayman Islands	22
Reform options to facilitate interim proceedings	26
<i>UK Civil Jurisdiction and Judgments Act, 1982</i>	26
<i>Isle of Man High Court Act, 1991</i>	27
<i>Hong Kong Ordinance, 2009</i>	27
<i>Bahamas Supreme Court Act, 1996</i>	28
<i>Bermuda Supreme Court Act, 1989 Revision</i>	28
<i>Choice of Legislative approach and other issues for consideration</i>	28
Conclusion	29
Appendices 1 - 13	30

The Enforcement of Foreign Judgments and Interim Orders

The Law Reform Commission (LRC) is seeking to examine the following issues-

- (a) the process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom;
- (b) the process through which judgments of the United Kingdom superior courts are enforceable in the Cayman Islands;
- (c) the enforcement of foreign superior court non-monetary judgments in the Cayman Islands; and
- (d) facilitating the enforcement of foreign interim orders in the Cayman Islands.

Introduction

The concept of enforcement of foreign judgments

1. The concept of enforcement of foreign judgments has always been and from all indications, will continue to be an area of significant legal practical importance.¹ Generally, the rules and processes that touch and concern the enforcement of judgments are regulated by the common law, statute, bilateral treaties and multinational international conventions.
2. When reference is made to enforcing a foreign judgment, for all intents and purposes, we are dealing with the exercise of a domestic court's jurisdiction to give effect to a foreign court's decision.
3. The rules on enforcement of foreign judgments were developed to respond to the absconding debtor. The process envisaged that if a judgment debtor left the jurisdiction in which a judgment had been delivered, a judgment creditor could take the judgment to the jurisdiction to which the debtor relocated and attempt to have it enforced in that jurisdiction. The exercise of such power removes the burden from the plaintiff to once again litigate the merits of the dispute in light of the fact that the court would treat the foreign judgment as evidence of a debt and allow the judgment creditor to bring proceedings to recover the debt.
4. The judicial process of enforcing a foreign judgment has seemingly become more complex and has increasingly become an area of growing concern. Often times courts are called upon to interpret the meaning or ambit of certain grounds for resisting a request to enforce a foreign judgment while at the same time being required to respond to the modern needs of international commerce to expand the rules concerning the enforcement of foreign judgments.

¹ Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Law' (2004) 25 Australian Bar Review 205.

5. In the Cayman Islands, the enforcement of foreign judgments concept has gained prominence through judicial dicta emerging from several leading cases². In these cases, the Court demonstrated a willingness to recognise that modern-day cross-border legal problems require the adoption of novel or innovative approaches to addressing the issues of enforcement of foreign judgments.

(a) The process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom

Origin of the common law rules

6. The common law rules addressing the recognition and enforcement of foreign judgments in the UK were developed in the courts during the 17th Century. One of the main principles underlying enforcement of foreign judgments is comity. Comity essentially means co-operation, goodwill, courtesy and mutual respect among States. That is, English Courts would facilitate the recognition and enforcement of foreign judgments in England with the expectation that English judgments would be similarly enforced by the jurisdiction on whose behalf England extended the enforcement courtesy.

7. In *Hilton v Guyot*³ it was stated that “*comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens.*”⁴

8. The rationale for comity was replaced by the doctrine of obligation during the 19th century. This doctrine espoused mandatory principles in that it recognised that the defendant had an obligation to satisfy a debt which in turn meant that the English courts were obliged to enforce the obligation imposed on the defendant.

Statutory scheme for enforcement of judgments in the UK

9. In the UK there are three statutory schemes providing for the enforcement of foreign judgments. These are:

- (i) the Administration of Justice Act, 1920;
- (ii) the Foreign Judgments (Reciprocal Enforcement) Act, 1933; and
- (iii) the Civil Jurisdiction and Judgments Act, 1982.

10. The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act, 1933 will be the focus of our discussion in this part. Under these laws

² See *post*, *Masri and Manning v. Consolidated Contractors International Company Sal, Gillies-Smith v Smith and VTB Capital Plc v Malofeev*.

³ *Hilton v Guyot* (1895) 159 US 113.

⁴ *Hilton v Guyot, supra*.

English Courts have had jurisdiction to recognise money judgments of courts of Commonwealth countries.

(i) *The UK Administration of Justice Act, 1920*

11. The UK Administration of Justice Act, 1920 (“AJA 1920”)⁵ mainly covers UK territories and former and current commonwealth countries.

12. Part II, section 9 of the “AJA 1920” provides for the enforcement in the UK of judgments obtained in the superior courts of other British dominions by way of registration. It is left to the discretion of the High Court in England or Northern Ireland or to the Court of Session to have the judgment registered if in all the circumstances of the case it is thought just and convenient that the judgment should be enforced in the United Kingdom.

13. Under section 13 of the “AJA 1920” [Her]⁶ Majesty may by Order in Council declare that Part II of the Act shall apply to any territory which is under Her Majesty’s protection, or in respect of which a mandate is being exercised by the Government of any part of [Her] Majesty’s dominions.

14. Section 14 seeks to qualify section 13 by permitting [Her] Majesty by Order in Council to declare that Part II shall extend to that part of the dominions, provided there is satisfaction that reciprocal provisions have been made by the legislature of any part of the dominions outside the United Kingdom for the enforcement of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Northern Ireland.

15. It is to be noted that under the “AJA 1920” the expression “judgment” is restricted to monetary judgments arising from civil proceedings.

16. By way of the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984 (“REJ Order 1984”)⁷ an order was made extending Part II of the “AJA 1920” to several countries and territories specified in Schedule 1 to the Order. Jamaica was identified as one of those countries.

17. Later, Schedule 1 to the “REJ Order 1984” was amended by the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985 (“REJ Order 1985”)⁸ to include the Cayman Islands.⁹

18. The practical effect of the “REJ 1985 Order” was that its extension to the Cayman Islands meant that judgments arising from the Grand Court of the Cayman Islands were

⁵ See Appendix 1.

⁶ Actual text “His Majesty”- interpreted for modern purposes.

⁷ See Appendix 2.

⁸ See Appendix 3.

⁹ British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Montserrat, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus and the Turks and Caicos Islands.

enforceable in the UK. The “REJ Order 1985” was accordingly published in the Cayman Islands Gazette Supplement No. 4 Gazette No. 9 of 1986¹⁰.

19. An issue of contention, which will be examined later, is whether the “REJ Order 1985” also signalled that the Cayman Islands was obligated to enforce UK judgments.

(ii) *Foreign Judgments (Reciprocal Enforcement) Act, 1933*

20. Like the “AJA 1920”, the Foreign Judgments (Reciprocal Enforcement) Act 1933 (“FJA 1933”) covers former and current Commonwealth countries. Under Part I, section 1, judgments obtained in the courts of specified foreign countries may be registered in the UK provided substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom.¹¹

21. “Judgment” under the “FJA 1933” has been defined to mean a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. In essence, the “FJA 1933” extended the definition of judgment to include compensation arising out of criminal proceedings.

22. Against the background of the “REJ Order 1985” it is clear that the judgments arising from the Grand Court are enforceable in the UK through the rules and conditions governing the registration process stipulated in the “AJA 1920”.

(b) The process through which judgments of the United Kingdom superior courts are enforceable in the Cayman Islands

23. Generally in the Cayman Islands foreign judgments may be enforced by way of-

- (i) common law enforcement; or
- (ii) statutory enforcement.

(i) *Common law enforcement*

24. At common law, a foreign judgment is considered to create an implied contract to pay specified sums of money. This obligation may be judicially enforced subject to the defences of fraud, being contrary to public policy or that the relevant foreign proceedings were contrary to natural or substantive justice.

25. The existing rule is that the common law will apply in countries where there is no statutory scheme for enforcing the judgment. In such circumstances, enforcement will

¹⁰ See Appendix 4.

¹¹ The countries falling under this Act include Australia, Canada, Guernsey, India, Isle of Man, Jersey, Israel, Bailiwick of Jersey, Pakistan, Surinam & Tonga.

depend on the law of the country in which the judgment is to be enforced and will entail issuing fresh proceedings.

26. In the Cayman Islands a party seeking to enforce a judgment at common law would therefore have to issue fresh originating proceedings for a declaration and then seek summary judgment in the amount of the foreign judgment. This process tends to lend itself to expense, it can be time consuming and may not always be successful.

27. Successful enforcement of a judgment through common law proceedings would require that the foreign court has jurisdiction over the defendant, the judgment of the foreign court be conclusive on the merits and the claim be for a definite sum or an amount ascertainable by calculation.

28. The execution options available when a Grand Court judgment has been obtained at common law include:

- (a) the seizure and sale of the judgment debtor's goods and chattels sufficient to satisfy the debt and costs of the execution;
- (b) garnishee proceedings;
- (c) providing to the judgment creditor security over the judgment debtor's assets;
- (d) the appointment of receivers; and
- (e) attachment of earnings orders.

(ii) *Statutory enforcement*

29. The statutory regime for the recognition and enforcement of foreign judgments commenced with the Foreign Judgments Reciprocal Enforcement Law (Revised)¹² which was originally enacted in 1967. That law has since been amended and revised and the basis for the enforcement of foreign judgments is currently reflected in the Foreign Judgments Reciprocal Enforcement Law (1996 Revision)¹³ ("FJRE 1996").

30. Part II of the "FJRE 1996" deals with the registration of foreign judgments. Under section 3, the Governor, if he is satisfied that substantial reciprocity of treatment will be assured in a foreign country as it relates to the judgments given in the Grand Court, may, by order, direct that Part II extend to that foreign country.

31. For purposes of the "FJRE 1996" "foreign" includes "Commonwealth" and "judgment" means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.¹⁴

¹² See Appendix 5.

¹³ See Appendix 6.

¹⁴ For historical purposes it is worthy to note that section 3 in particular of the Cayman "FJRE 1996" is similar in formulation to the UK "FJE 1933". This law seems to have reflected the UK 1933 Act in terms of the circumstances under which a court would reciprocate in the enforcement of a foreign judgment. Like the UK 1933 Act "judgment" means a judgment or order given or made by a court in any civil proceedings,

32. Rules of the Grand Court were formulated under the then Foreign Judgments Reciprocal Enforcement Law (Revised). These rules were encapsulated in the Grand Court (Foreign Judgments) Reciprocal Enforcement Rules, 1977 which established the rules for the registration and enforcement of a foreign Judgment.

33. The Grand Court Rules, 1995 (Revised Edition), Order 71, now more substantively sets out the Rules for registration and enforcement of a foreign judgment. The fact that these rules were made pursuant to the Foreign Judgments Reciprocal Enforcement Law (Revised) 1967 would mean that consequential amendments are required to reflect that “the Law” means the current Foreign Judgments Reciprocal Enforcement Law (1996 Revision).

34. The Cayman Islands Foreign Judgment Reciprocal Enforcement (Australia and its External Territories) Order 1993¹⁵ was made under Part I section 3(1) of the Foreign Judgments Reciprocal Enforcement Law (Revised). This Order facilitated the enforcement of the judgments of the superior courts of Australia and its External Territories. It further identified the courts that would be regarded as superior courts for purposes of enforcing a judgment.

35. It is surmised that the extension of that order by the Cayman Islands prompted Australia to reciprocate in kind. It is in this regard that the Australia Foreign Judgments Regulations (Amendment), 1993 identifies the Grand Court for purposes of enforcing the judgments arising from that court.

36. What perhaps is interesting to note is that under the Australia Foreign Judgments Act, 1991 both monetary and non-monetary judgments are recognised. The import of such a recognition is that whereas Australia will enforce the non-monetary judgments of the Grand Court, the Grand Court, by virtue of the definition of judgment under the “FJRE 1996”, in theory, is not obligated to enforce the non-monetary awards of Australia. This seems to be an anomaly. The issue of non-monetary judgments will be discussed later.

37. In essence, the only country with which Cayman has reciprocal arrangements as they relate to enforcement of judgments via the statutory registration process is Australia. The enforcement of a superior court judgment emerging from any other country would have to be pursued in the Cayman Islands through the common law procedure. That is, initiating new proceedings by using the judgment as evidence of the debt.

38. By extension, it would therefore seem to follow that a judgment emerging from a UK superior court has to be enforced by way of common law proceedings even though the UK “REJ 1985 Order” permits Cayman judgments to be enforced in the UK.

or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

¹⁵ See Appendix 7.

39. This view has been confirmed in the recent case of *Masri and Manning v. Consolidated Contractors International Company Sal*¹⁶ (*Masri case*). The *Masri* case concerned the enforcement of a decision of the UK Court stipulating that the plaintiff be awarded damages for a specific sum and for the appointment of a receiver to collect debts owed to the plaintiff. Justice Jones found that the payment of money imposed a final and conclusive obligation on the defendant and as such the decision was enforceable in the Cayman Islands but only at common law through an action commenced by writ in the Grand Court.

40. Accordingly, the salient point for current purposes is that legal authority contends that monetary judgments emerging from UK superior courts are enforceable at common law by issuing new proceedings in the Cayman Islands.

Analysis of the common law approach to enforcing UK judgments

41. In analysing whether we have been adopting the right approach to enforcing UK judgments in the Cayman Islands, it might first be useful to delve into the history as it relates to the relationship between the Cayman Islands and Jamaica.

42. The Cayman Islands Act, 1863 stipulated the constitutional arrangement between the Cayman Islands and Jamaica. That Act made the Cayman Islands a dependency of Jamaica and as a result, it was competent for Jamaica to make laws for the governance of the Cayman Islands. Consequentially, Cayman Islands institutions became subject to the jurisdiction of the Governor, legislature and Supreme Court of Jamaica and all the laws of Jamaica applied generally to the Cayman Islands.

43. Jamaica became fully independent in 1962 while the Cayman Islands opted to remain a British colony, now officially referred to as a British overseas territory. The Cayman Islands Act, 1958 repealed the Cayman Islands Act, 1863 and provided for the Cayman Islands to have a new constitution granted by The Cayman Islands (Constitution) Order in Council 1959 (SI 1959 No. 863). This order provided for the Governor of Jamaica to be ex-officio the Governor of the Cayman Islands. Limited legislative powers were conferred concurrently on the Governor with the advice and consent of the Cayman Legislative Assembly and the legislature of Jamaica, with power being reserved to Her Majesty in Council to amend or vary the Order in Council.

44. The 1959 Order in Council was revoked by the Cayman Islands (Constitution) Order in Council 1962 (SI 1962 No. 1646), which was intended to take effect on 6 August, 1962, simultaneously with Jamaica's attainment of full independence under the Jamaica Independence Act 1962. The 1962 Order in Council was however brought into force retrospectively by the Cayman Islands (Constitution) Order 1965 (SI 1965 No. 1860).

45. The 1962 Constitution conferred law-making power "for the peace, order and good government of the Islands" on the Administrator, later the Governor, with the

¹⁶ [2010 (1) CILR 265].

advice and consent of the Legislative Assembly, with power reserved to Her Majesty in Council.

46. These constitutional instruments sought to keep in force the existing Laws of the Cayman Islands. However, with Jamaica's independence it was appropriate for the Cayman Islands to develop its independent body of statute law. This statutory independence was facilitated by the Revised Edition (Laws of the Cayman Islands) Law 1960. It provided in section 3 for the Governor to appoint Commissioners to prepare a revised edition of the laws of the Cayman Islands and to prepare under section 8 a table of the Acts and Laws in force on 31 December, 1963.

(i) *The Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923, Judgments (Foreign) (Reciprocal Enforcement) Act, 1936, Reciprocal Enforcement of Foreign Judgments Order, 1936 and their implications for the Cayman Islands*

47. Following upon the enactment of the UK "AJA 1920", Jamaica enacted the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923¹⁷. This Act provided for the enforcement of UK superior court Judgments in Jamaica. Under section 3 of the Act, a judgment creditor who has obtained a judgment in a Superior Court in the United Kingdom may apply to the Supreme Court of Jamaica to have the judgment registered and enforced in Jamaica.

48. Further, the Governor-General may declare that judgments obtained in any part of the Commonwealth outside the United Kingdom are enforceable. However, he will only do so if satisfied that the relevant Commonwealth country has made reciprocal provisions for the enforcement of judgments obtained from the Jamaican Supreme Court. For these purposes, Commonwealth includes any country under section 9 of the Constitution of Jamaica which currently identifies the United Kingdom and its colonies.

49. The UK in response made an Order in Council reflected in Statutory Instrument Judgments 1924 No. 254, extending Part II of the Administration of Justice Act, 1920, to Jamaica. It will be recalled that in the UK, the primary basis for the extension of Part II of the "AJA 1920" was reciprocity. The enactment of the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923 seemed to have signaled such reciprocity to the UK and hence Part II of the "AJA 1920" was extended to Jamaica.

50. Later, the Jamaica Judgments (Foreign) (Reciprocal Enforcement) Act, 1936¹⁸ was enacted. Part I dealt with the registration of foreign judgments. In particular, section 3 permitted the Governor-General to make an order extending reciprocity for the enforcement of a foreign judgment if the jurisdiction from which the judgment originated would reciprocate in the case of Jamaica judgments.

¹⁷ See Appendix 8.

¹⁸ See Appendix 9.

51. The Reciprocal Enforcement of Foreign Judgments Order, 1936¹⁹ was in fact made under the Judgments (Foreign) (Reciprocal Enforcement) Act, 1936. That order provided that Part I of the 1936 Act extended to the superior courts of the United Kingdom.

52. Having traced the historical progression, and if we reflect on the UK “REJ 1985 Order” which was extended to the Cayman Islands, it can be argued that that order did not originate the reciprocal arrangements between UK and Cayman as they relate to the UK enforcement of Cayman judgments. Rather, by virtue of Cayman being a dependent of the colony of Jamaica at the time, it was the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923 and the UK 1924 order in Council extending to Jamaica which commenced the enforcement of judgment reciprocal arrangements between the UK and the Cayman Islands.

53. If we further analyse the Jamaica Judgments (Foreign) (Reciprocal) Enforcement, Act 1936 and the Jamaica Reciprocal Enforcement of Foreign Judgments Order, 1936 we can equally argue that those laws applied to the Cayman Islands insofar as they facilitate reciprocal arrangements between UK and Jamaica. There is however uncertainty as to why it was thought necessary to make an order under this Act to identify the UK given that the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923 already dealt with the issue.

54. This notwithstanding, from all indications, prior to 1962 and as a consequence of the relationship between Jamaica and the Cayman Islands there was in fact legislation which permitted UK judgments to be enforced in the Cayman Islands through the process of registration. Therefore, resort to the common law procedure would not have been necessary at the time.

(ii) *Enforcement of UK judgments in the Cayman Islands post 1962*

55. As pointed out earlier, Jamaica achieved independence in 1962 and at that time the Cayman Islands opted to remain under the British Crown. In recognition of this separation, section 4 of the Jamaica Independence Act, 1962²⁰ expressly excluded Cayman as a dependent of the colony of Jamaica.

56. The question is what happened to the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923, the Jamaica Judgments (Foreign) (Reciprocal Enforcement) Act, 1936 and the Reciprocal Enforcement of Foreign Judgments Order, 1936. Should these laws have properly applied to the Cayman Islands?

57. Under Volume 1 of the Laws of the Cayman Islands, Revised Edition 1963, neither the 1923 nor the 1936 Jamaica Acts featured amongst those Laws that were saved for Cayman purposes. Logically this meant that though the UK recognised Cayman

¹⁹ See Appendix 10.

²⁰ See Appendix 11.

superior court judgments, the Cayman Islands no longer had a statutory obligation to reciprocate given that it removed itself as dependent of Jamaica.

58. The issue of what law applies to the Cayman Islands becomes obfuscated when we reflect on the UK “REJ Order 1984” which extended Part II of the “AJA 1920” to Jamaica and the UK “REJ Order 1985” which amended the “REJ Order 1984 Order” to include the Cayman Islands as a territory for which judgments will be enforced.

59. There appears to be no literature explaining the basis for the UK amendment. It is however theorized that the amendment was introduced in recognition of the fact that the UK took note that the Cayman Islands had changed its status, so that reference to Jamaica as obtained in the “REJ Order 1984” would not have properly included the Cayman Islands. In that regard, there was a need to expressly identify the Cayman Islands in a subsequent order.

60. As earlier pointed out, the basis for the UK enforcing judgments as provided under Part II of the “AJA 1920” is reciprocity. However, it would seem that UK did not seek to ensure during the change in status of Cayman as a Jamaica dependent that either the Judgments and Awards (Reciprocal Enforcement) Act, 1923 or the Jamaica Judgments (Foreign) (Reciprocal Enforcement) Act, 1936 was saved in the Cayman 1963 Revised Laws or in the alternative, that Cayman enacted legislation similar to that of the Jamaican 1923 Act reflecting that Cayman would continue to enforce UK Judgments. This perhaps may have been an oversight.²¹

61. Therefore, to reiterate earlier views, it would seem that UK superior court judgments can only be enforced in the Cayman Islands via the common law process. This would commence by way of initiating new proceedings and using the judgment debt as evidence for the proceedings.

Foreign and Commonwealth Office advice on the reciprocal obligations of the Cayman Islands

62. The LRC sought advice from the Foreign and Commonwealth Office (FCO)²² on the obligations of the Cayman Islands in light of the UK “REJ Order 1985”. It was confirmed that section 9 of Part II of the Administration of Justice Act 1920 deals with enforcement in the UK of judgments obtained in superior courts in “British Dominions” where Part II of the Act has been extended to that Overseas Territory. The FCO pointed to the fact that the 1985 Order lists the States and Overseas Territories to which Part II of the Act has been extended – where there will be reciprocal enforcement of judgments with the UK and that the 1985 order extended Part II to the Cayman Islands. The FCO concluded that this allows Cayman Judgments to be enforced in the UK.

²¹ It is to be noted that Justice Jones in the MASRI case commended counsel on seeking to apply the Jamaica (Foreign) (Reciprocal Enforcement) Act 1936.

²² Legal Adviser, Shehzad Charania, 19th February, 2012 via email.

63. However, it was confirmed that it is within the sole purview of the Cayman Islands to determine whether it wishes to recognise judgments arising from a superior court in the UK or a superior court in any other jurisdiction. In other words, the UK “REJ Order 1985” does not impose reciprocal obligations upon the Islands.

64. **Primary reform options to deal with the enforcement of judgments**

The ultimate objective is to facilitate a far more simplified process for the enforcement of judgments arising from the UK and by extension other foreign jurisdictions. To deal with this issue there are several possible options for consideration:

- (a) The first option would be to amend the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) in order to expressly identify the UK as a jurisdiction for which Cayman would enforce its superior court judgments.
- (b) The second option is to recommend that the Governor in Cabinet make an appropriate order under the “FJRE 1996” recognising the judgments of UK superior Courts.

However, the difficulty with this option and the first option is that the short title of the “FJRE 1996” contains the word “foreign”. This reference points to the fact that the law purports to deal only with foreign jurisdictions. The question is whether we can properly refer to the UK as “foreign” given the constitutional relationship that exists between the Cayman Islands and the UK.

It is arguable that within the context of the “FJRE 1996” recognition of the UK is appropriate in light of the definition of “foreign” under the law. “Foreign” is defined to include Commonwealth which would mean that the UK, being a Commonwealth jurisdiction, would fall within the scope of the “FJRE 1996”.

Additionally, if we reflect on the Jamaica Judgments (Foreign) (Reciprocal Enforcement) Act, 1936 and the Jamaica Reciprocal Enforcement of Foreign Judgments Order, 1936 which were made under the 1936 Act recognising the judgments of UK superior courts, it is equally arguable that we do have precedent for treating the UK as a foreign jurisdiction. In other words, despite Jamaica’s relationship with the UK, it was still thought appropriate to legislate in the UK’s favour under a law dealing with “foreign” jurisdictions. It seems that this could be treated as a sound basis for applying the same principles to the Cayman Islands.

If that argument is accepted, we may be able to facilitate UK judgments by way of an order made by the Governor in Cabinet which is perhaps the simpler of the two legislative methods identified.

- (c) The third option could be to amend the short title of the “FJRE 1996” by deleting the word “foreign” and referring to the law as one which deals with the enforcement of judgments, awards and, as will later be discussed, interim orders.

This approach would be similar to that of the Jamaica Judgments and Awards (Reciprocal Enforcement) Act, 1923, the Montserrat Reciprocal Enforcement of Judgments Act, 1984²³ and the Bermuda (Judgment Reciprocal Enforcement) Act, 1958²⁴. Of significance is the fact that in all these laws there is no reference to foreign in the short title, the UK is expressly identified as a jurisdiction for which its judgments will be enforced by way of registration and there is provision for the enforcement of the judgments of other Commonwealth and foreign jurisdictions.

Such an approach may remove any concern over the appropriateness of identifying the UK in legislation which deals with foreign jurisdictions. It may also lead to an expansion of the scope of the law in order to assist the court to more efficiently facilitate the enforcement of foreign judicial proceedings in their various forms.

- (d) The fourth option and perhaps the least practical if we are seeking to enhance the judgment enforcement process could be to retain the current “FJRE 1996” regime and formulate a separate law dealing with the enforcement of UK judgments having regard to the significance of the relationship between the UK and the Cayman Islands.

65. **Secondary reform options to enhance the enforcement of judgments process**

- (a) The first option may be to increase the number of jurisdictions to be recognised for enforcement purposes. From a policy perspective, the LRC questions whether the opportunity should now be taken to increase the number of jurisdictions recognised under Part II of the “FJRE 1996” by way of an order made by the Governor in Cabinet.

In the alternative, should a schedule be appended to the “FJRE 1996” to reflect designated jurisdictions with which the Cayman Islands is prepared to enter into reciprocal relations as they relate to the enforcement of foreign judgments?

In this regard, a recommendation can be made to consider discussing this issue with selected jurisdictions in order to improve the competitive judicial standing of the Islands.

Accordingly, the LRC believes that an issue for consideration is the extension of the scope of the Law to more jurisdictions perhaps commencing with those with which the Islands have enjoyed good relations in mutual legal assistance matters.

²³ See Appendix 12.

²⁴ See Appendix 13.

Alternatively, the jurisdictions identified in the UK “REJ Oder 1985” may be used as a starting basis.

- (b) A second option which would also have the general effect of expanding the number of jurisdictions recognised by the Islands for the purpose of facilitating the enforcement of judgments is to make the appropriate request to have the Brussels I Regulation and Lugano Convention extended to the Islands. These instruments govern the mutual recognition and enforcement of judgments amongst European states.

The Brussels I Regulation replaced the Brussels Convention and applies to all Member States of the European Union . The Brussels Convention²⁵ on jurisdiction and the enforcement of judgments in civil and commercial matters limited duplicate legal proceedings within the European Community, simplified the recognition and enforcement of judgments and strengthened the legal protection afforded to citizens of Member States. It included rules dealing with the circumstances under which the courts in the Member States might exercise jurisdiction and rules addressing specific civil and commercial legal areas including contract, tort and maintenance. Effect was given to this Convention in the United Kingdom by the Civil Jurisdiction and Judgments Act, 1982.

The Brussels I Regulation which came into force on 1st March, 2002 lays down uniform rules to settle conflicts of jurisdiction and facilitates the mutual recognition and enforcement of judgments, court settlements and authentic instruments within the EU in civil and commercial matters.

The Lugano Convention²⁶ extended the scope of the Brussels Convention regime in 1988. The Lugano Convention requires contracting states to recognise and enforce judgments of other contracting states with limited grounds for refusal. The grounds for refusal are similar to those under the Brussels Regulation. These include enforcement being manifestly contrary to public policy, allowing insufficient time to defend the proceedings, the judgment being obtained in breach of various provisions of the Brussels Regulation. The Lugano Convention was given effect in the UK in 1991.

Having these treaties extended to the Islands would in the first instance widen the scope of jurisdictions with which Cayman is willing to facilitate reciprocal judicial proceedings and ultimately place the Islands in a competitive advantage when it comes to the resolution of disputes.

- (c) The third option may be to remove the requirement for the Governor in Cabinet to identify the jurisdictions which will be recognised. Is there a need to retain the Governor in Cabinet as the person who first determines which jurisdictions should be permitted reciprocal treatment in the enforcement of judgments? As stated in

²⁵ It came into force on 27th September, 1968

²⁶ Concluded 16th September, 1988

our introductory remarks, at common law, a foreign judgment is considered to create an implied contract to pay specified sums of money which may be enforced by the courts.

The court therefore has a discretion to enforce a judgment subject to the defences of fraud, being contrary to public policy or that the relevant foreign proceedings were contrary to natural or substantive justice. The common law method for recognising and enforcing foreign judgments is therefore a critical adjunct to the statutory procedure available under the “FJRE 1996”.

In practice, it seems that the issue of reciprocity in deciding whether to enforce a foreign judgment at common law is not usually at the fore when a court is making a decision. Rather, that decision is made based on principles of comity.

Under the conflict of laws rules followed by the Grand Court, it is neither sufficient nor necessary to establish that the jurisdiction whose judgment is sought to be enforced in the Islands will afford reciprocal treatment to Cayman judgments. For example, while the Grand Court may grant leave to serve proceedings out of the jurisdiction pursuant to the Grand Court Rules, Order 11, it will not as a matter of course enforce the judgment of a foreign court whose only jurisdiction over the judgment debtor depends upon a similar provision.²⁷

The principle of reciprocity seems to have been entrenched through policy and as such our laws have reflected that the Court may act in respect of a specific jurisdiction provided that it is identified by order of the Governor in Cabinet.

Reciprocity therefore is a necessary prerequisite for registration of a foreign judgment under the “FJRE 1996” but not in the application of the common law. This means that the same country which was not recognised by order because it did not have in place similar reciprocating legislation may still have its judgment enforced through the court by way of common law procedure.

Accordingly, the LRC queries whether the time has come for us to remove the requirement of identifying by order of the Governor in Cabinet jurisdictions whose judgments will be enforced in the Cayman Islands. It seems practical to place more independent jurisdiction in the hands of the Courts to determine which judgments will be enforced by the registration process based on existing criteria and rules.

However, at the same time and in the interest of not totally excluding the Executive from acting in the best interests of the justice system, it may be prudent to retain section 10 of the “FJRE 1996”. This provision will continue to reserve to the Governor in Cabinet the power to order that the provisions of the FJRE shall not extend to the judgments of the courts of a country specified in the order. This power may be exercised if it appears that the treatment in respect of recognition

²⁷ See, for example, *Societe Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828.

and enforcement accorded by the courts of any foreign country to judgments given in the Grand Court is substantially less favourable than that accorded by the Grand Court to judgments of the superior courts of that country.

- (d) A fourth option may entail reform of the common law procedure. If it is determined that we should continue to apply the common law procedure to jurisdictions not identified by statute, are amendments to the common law necessary?

The procedure under the common law of initiating new proceedings seems to be unduly lengthy. Practicality would dictate that a less onerous process should require the foreign plaintiff to first establish that the court had jurisdiction and then permit him to make an application for summary judgment. The burden would then pass to the defendant to dispute finality or to show fraud or breaches of natural justice.²⁸

It seems reasonable for litigants to be afforded certainty in legal proceedings and not be obligated to incur the high costs of litigation in order to establish the grounds for or defence of an action. Further, from an equality of arms stand point reform of the common law procedure is even more critical.

66. While these options may be viewed as a substantive departure from the current legal and policy positions, reform along the lines of any or a combination of all options could go a long way towards enhancing the jurisdiction of the court and making the Islands more attractive for the enforcement of judgments and resolution of disputes.

(c) The enforcement of foreign superior court non-monetary judgments in the Cayman Islands

Foreign non-monetary judgments

67. Foreign non-monetary judgments such as an order for specific performance or an injunction have traditionally been regarded as unenforceable. The classical rule as regards the enforcement of non-monetary foreign judgments arose from the case of *Sadlar v. Robins*²⁹ in which it was stated that a judgment must be for a debt or definite sum of money or capable of becoming definite by a simple arithmetical calculation.

68. This rule was reflected as Rule 35(1) of Dicey Morris & Collins³⁰ which provides that “*for a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs...if, however, the judgment orders him to do anything else, for example, specifically perform a contract, it will not support an action, though it may be res judicata.*”

²⁸ Collins, Conflict of Laws 2000.

²⁹ *Sadler v Robins* (1808) 170 ER 948.

³⁰ The Conflict of Laws, 14th Edition.

69. As a result of this rule, foreign non-money judgments were not historically³¹, enforceable. This presumably is due to the challenges that a court may face in exercising supervisory control over the execution of non-money orders and the enforcement process. Further, the situation could become exacerbated when third parties are affected by a foreign non-money judgment. These difficulties are in contrast to the foreign money judgment.

70. The Cayman Islands Foreign Judgments and Reciprocal Enforcement Law, (1996 Revision) is consistent with the established Rule 35(1). The “FJRE 1996” only provides for the enforcement of money judgments and in that regard defines “judgment” as a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

Recognition of foreign non-monetary judgments

71. The issue that has arisen is whether enforcement of foreign judgments should remain within the monetary confines of the definition of judgment as reflected in the “FJRE 1996” or should Cayman legal jurisprudence keep pace with modern legislative and business trends by facilitating remedies in respect of enforcement of foreign judgments which go beyond monetary judgments and are in the interests of justice.³²

72. These questions have been the subject of several judicial pronouncements in recent times. Perhaps one of the more celebrated cases which led to fundamental changes in the approach of the courts in the enforcement of non-monetary judgments is the Canadian case of *Pro Swing Inc v Elta Golf Inc*³³.

73. In this case, the court was required to consider whether the common law should be extended to permit the enforcement of foreign non-money judgments and, if so, in what circumstances. It was held that non-monetary judgments were enforceable. The court reasoned that recognition should be given to important changes in international commerce, labour mobility and technology, and that the common law principle in Canada preventing a litigant from enforcing foreign non-monetary judgments should be reversed.³⁴

74. However, the *Pro Swing* case developed several factors to be considered by the court before permitting the enforcement of foreign non-monetary orders. First, the enforcing court should be sure that jurisdiction was properly assumed by the issuing court and that there are no general fairness considerations that would require the court to hesitate before enforcing the foreign judgment.

³¹Yeow-Choy Choong, *Enforcement of Foreign Judgments: The Role of the Courts in Promoting (or Impeding) Global Business*.

³²*Brunei and Bandone v. Fidelis and Others* [2008] JRC152.

³³[2006] 2 SCR.

³⁴Peter N. Mantas, *Canada Opens the Door to U.S. Injunctions: The Impact of the Supreme Court of Canada Decision in Pro Swing Inc. v. Elta Golf Inc.*

75. Second, the foreign order should be clear and specific so as to enable the domestic court to ascertain what rights, duties and obligations the foreign order imposes on the defendant. It was pointed out that while a court will not enforce a monetary judgment if it is for an undefined or unascertainable sum, the issue of clarity and specificity is even more critical in the case of a non-monetary judgment given that it is not merely for an amount, but specifies the obligations of the defendant. The courts will only limit its function to enforcing obligations and will not seek to encourage the re-litigation of the issues considered by the issuing court.

76. Third, the foreign order should not contain penal consequences.

77. Fourth, the foreign order should be clear about whether it was intended to apply outside the jurisdiction in which it was made given that not all non-monetary orders will be intended to regulate a defendant's behaviour extra-territorially.

78. Finally, the proceedings should be sufficiently connected to the local forum. The Court argued that the domestic court should consider whether the harm that the plaintiff is likely to suffer as a result of non-enforcement is enough to warrant the involvement of the domestic court and the expenditure of its judicial resources.³⁵

79. Cayman judicial jurisprudence has generally followed the approach of *Pro Swing*. In the case of *Miller v Gianne*³⁶, the Hon. Chief Justice referred to the decision of the Privy Council in *Pattni v Ali*³⁷, holding that it was “*highly arguable*” that the Cayman Islands court would be able to recognise and enforce non-money judgments in personam.

80. In the *Pattni* case the court envisaged direct enforcement of in personam declaratory judgments concerning contractual rights. Their Lordships stated that “where a court in state A makes against persons who have submitted to its jurisdiction, an in personam judgment regarding contractual rights to either movables or intangible property situate in state B, the courts of state B can and should recognise the foreign court's in personam determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B.”

81. The later case of *Bandone v Sol Properties*³⁸, involved an application for rectification of the register of a Cayman Islands company before the Cayman court

³⁵ These requirements perhaps can be best summarised as follows and perhaps could be used to inform rules of court for Cayman purposes:

Foreign non-monetary judgment can be enforced in Canada provided that:

- (i) the terms are clear and certain;
- (ii) the territorial scope is limited and well-defined;
- (iii) the judgment is final in the original jurisdiction;
- (iv) the judgment is not penal or quasi-criminal;
- (v) comity requires enforcing the foreign judgment; and
- (vi) that enforcement of the judgment would not unreasonably burden the courts.

³⁶ *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

³⁷ *Pattni v Ali* [2007] 2 AC 85 (Isle of Man).

³⁸ 2008 CILR 301.

following a foreign judgment. Henderson J reasoned that “*the ability to enforce directly foreign judgments and orders made in personam is no longer confined in the Cayman Islands to judgments for a debt or definite sum of money*”. It was made clear, however, that the ability to enforce foreign non-money judgments was accompanied by a judicial discretion to ensure that it did not jeopardize the integrity of the Cayman judicial system. Further, in his reasoning the judge stated that the court should have regard to general considerations of fairness and ensure that domestic law was not extended to suit foreign litigants, when deciding whether or not to enforce non-money judgments.

82. It seems clear that both the Canadian and the Cayman Courts support the view that modern judicial practice requires that Rule 35(1) be amended to allow enforcement of non-money judgments in appropriate cases, subject to a cautious, discretion based judicial approach.

83. The fact that an argument is being put forward to recognize non-money judgments does not mean that all forms of foreign non-money judgments should be recognised and enforced. We should not dispense with the requirement of due care to ensure that recognition is restricted to cases where it is appropriate and does not create undue problems for the legal system of the enforcing state or unfair results for the litigants.

84. Ultimately, however, the ability to enforce foreign non-money judgments by way of legislation would represent another important change in the common law of the Cayman Islands. Although the justifications for refusing to enforce a foreign non-money judgment may be valid, it would seem that the advances in technology and international commerce dictate that the conventional legal approach should be re-examined.

Reform option for dealing with non-monetary judgments

85. If it is accepted that we should move towards enforcing non-monetary judgments, a legislative model from which we could benefit in terms of approach is that of the Canadian Enforcement of Judgments Act, 2002.³⁹ It provides for the registration and enforcement of Canadian money and non-money judgments among the provinces and territories that do not require reciprocity or court supervision as a prerequisite to enforcement. The term “non-money judgments” includes orders that are made in a court, such as injunctions and specific performance orders. It also includes orders that operate to define certain rights and relationships such as adult guardianship orders or orders that are purely declaratory in nature.

86. Another law which could inform the formulation of appropriate provisions is the United States Foreign Money-Judgments Recognition Act, 2005.⁴⁰ This Act provides for the enforcement of non-U.S. court judgments which grant or deny the recovery of a sum of money.

³⁹The Act implements the *Investments Ltd. v. de Savoye* [1990] 3 S.C.R. 1077 decision of the Supreme Court of Canada. [1990] 3 S.C.R. 1077.

⁴⁰ This Act was initially promulgated in 1962.

87. The finality and conclusiveness of a non-U.S. court judgment is an essential prerequisite for the recognition of that judgment. The Act does not extend recognition to judgments for taxes, fines or penalties. Neither does it facilitate judgments in matrimonial and family matters. However, the Act allows for the recognition of matters not covered by its provisions based on principles of comity.

88. To this end, a savings clause⁴¹ makes it clear that the Act is not intended to limit recognition of non-U.S. court judgments to those judgments falling within the scope of the Act. For example, the California Code⁴² which adopted its provisions stipulates that *“this chapter does not prevent the recognition or non-recognition of a foreign judgment in situations not covered by this chapter.”* Implicit in this provision is the recognition of non-money judgments.⁴³

89. Accordingly, the LRC is inclined to support the view that the restriction against the enforcement of foreign non-money judgments should be removed. In that regard, the “FJRE 1996” could be amended to include non-monetary judgments in the definition of “judgment”⁴⁴.

90. It may also be prudent to adopt a holistic formulation which brings within the scope of the definition foreign money and non-money arbitral awards. This would be consistent with a later option to include in a revised FJRE, awards of the court. As would be expected, the courts will be invited to exercise its prerogative to make the appropriate rules to take into account the legislative provisions.

91. On a point for academic discussion, if we reflect on the UK “AJA 1920” which restricted enforcement to money judgments arising out of civil proceedings, then the UK “FJA 1933” which then extended the definition of judgment to money arising out of criminal proceedings, one can perhaps argue that during that period there were signs of change toward expanding the types of enforceable judgments, though the position remained stagnant for sometime thereafter.

(d) Facilitating the enforcement of foreign interim orders in the Cayman Islands.

92. Another interrelated issue which has also gained prominence in recent times is whether Mareva injunctions can be enforced in the Cayman Islands without their being substantive proceedings in the Cayman Islands. This issue can however be expanded to

⁴¹ Section 10.

⁴² Civ. Proc. § 1713.7

⁴³Chapter contribution in Proskauer on International Litigation and Arbitration by Margaret A. Dale, Recognition & Enforcement of Judgments, 2011. One of the areas dealt with is that the Act provides a statute of limitations on enforcement of a foreign-country judgment. If the judgment cannot be enforced any longer in the country of origin, it may not be enforced in a court of an enacting state. Additionally, if there is no limitation on enforcement in the country of origin, the judgment becomes unenforceable in an enacting state after 15 years from the time the judgment is effective in the country of origin.

⁴⁴In the Australia Foreign Judgments Act, 1991 “ non-money judgment” means a judgment that is not a money judgment.

one of whether Cayman Islands courts can enforce interim remedies to facilitate proceedings that may have commenced in foreign courts.

93. A Mareva injunction is an interlocutory injunction. Historically, the courts regarded this equitable remedy as draconian in nature and showed reluctance in granting it unless certain safeguards were present.

94. However, it has now been accepted that a Mareva injunction and similar equitable remedies are appropriate and a necessity in the context of modern realities. The advances achieved in the field of information technology allow large amounts of money to be transferred out of jurisdiction and for intellectual property rights to be breached within minutes of their creation.⁴⁵ Courts have therefore demonstrated that they will grant a Mareva injunction even though the assets or accounts to be frozen are outside their jurisdiction.

95. The issue which has surfaced within the Cayman context is whether such Mareva orders and by extension all interlocutory orders can be enforced in the jurisdiction where the asset or account is situated.

96. Two leading cases highlight the issues surrounding this area. These are *Gillies-Smith v Smith*⁴⁶ and *VTB Capital Plc v. Malofeev*⁴⁷. These cases together with the legal commentary⁴⁸ have all pointed to the need for reform in this area of the law.

97. The judgment in *Gillies-Smith* is regarded as landmark legislation for Cayman purposes. In this case the defendant won CDN\$15 million in a lottery and acquired property in the Cayman Islands, bank accounts with Cayman National Bank and other assets. The defendant filed for a divorce and sought to migrate to the Cayman Islands.

98. The plaintiff argued successfully in Canada that under Ontario law, assets acquired during the marriage were matrimonial property, and that the defendant had moved assets out of Canada and into the Cayman Islands. The plaintiff obtained an injunction in Ontario freezing the defendant's assets, including the Cayman Islands property and bank accounts. She then sought and obtained *ex parte* a freezing order in the Cayman Islands in relation to the Cayman Islands property and bank accounts.

99. The court reasoned that the plaintiff had a justiciable cause of action in the Cayman Islands - namely, to give effect to the injunction issued in Ontario and to obtain

⁴⁵ Y.C. Choong, "Contra Bonos Mores: Religious Tenets and National Philosophy as the Yardstick for Determining Policy", (2007) Volume 9(1) Australian Journal of Asian Law, pp 176-185.

⁴⁶ Unreported, Quin J, May 12 2011.

⁴⁷ Unreported, Cresswell J, August 18 2011. Later decisions are reflected in *VTB Capital Plc v Malofeev & Two others* (unreported, CICA, Cause No. 9 of 2011, 30 November 2011) and *VTB Capital Plc v Malofeev & Two others* (unreported, Grand Court, Cause No. FSD 141 of 2011, 16 January 2012)

⁴⁸Rupert Coe, Free-Standing Freezing Orders: Now Available In The Cayman Islands? 26th August, 2011 and Rupert Coe, 29th Normal Service Resumed? Another Look at Cayman Freezing Orders, November, 2011, Nigel K. Meeson, Q.C. Judge calls for law change on free-standing freezing injunctions in Cayman - August 2011.

a freezing order in the Cayman Islands until the final determination of the Ontario proceedings.

100. The Grand Court, in arriving at its decision considered the jurisprudence from the Privy Council and several leading Cayman Islands decisions.⁴⁹ However, particularly instructive in the *Gillies-Smith* case was the dicta of Lord Nicholls referred to in *Mercedes-Benz AG v Leiduck*⁵⁰) where he stated that: "*They (practicing [sic] lawyers) do not always appreciate that the range of causes of action already extends very widely, into areas where identification of the underlying 'right' may be elusive...If ... where the court is seized only of a claim for interim relief, that claim must bear the burden of being labeled a cause of action if intervention by the court is to be justified, let that be so. The law continues to adapt and develop.*"

102. Further Lord Nicholls states: "*The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today 's conditions and standards, not those of yesteryear.*"

103. Finally he states "*...his assets are in Hong Kong, so the Monaco court cannot reach him; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. This is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.*"

104. Reference was also made to Henderson J's decision in *Deloitte and Touche v. Felderhof* where he states: "*The Trustee says that its intention has always been to convert the Cayman action into one which is ancillary to and in aid of the actions in Canada. It says that the Mareva Injunction here is needed to render more efficacious the Canadian proceedings and any judgments he may obtain in Canada*"

105. Henderson J. referred to the House of Lords case of *Channel Tunnel Group Ltd. v. Balfow Beatty Construction Ltd.*⁵¹ and added, "*It has been clear that the Grand Court has jurisdiction to issue Mareva injunctions in aid of foreign proceedings even though the parties have no intent to litigate the substance of their dispute in this jurisdiction.*"

106. The case of *VTB Capital plc v Malofeev*⁵², involved three defendants, "D1" a resident of Russia, "D2", a fund and the fund's manager "D3". The plaintiff, an English

⁴⁹ *Bass v Bass*, 2001, CILR 317, *International Wireless Inc v CVC/Opportunity Equity Partners LP*, 2002, CILR note 22.

⁵⁰ [1996] 1 AC 284.

⁵¹ [1993] A.C. 334.

⁵² Unreported, Cresswell J, August 18 2011.

bank sued the defendants in England on the basis that fraudulent misrepresentations were made by the defendants. Consequently, an ex parte application was made by the plaintiff seeking a freezing injunction in the Cayman Islands against the defendants.

107. The Hon. Sir Justice Cresswell refused to grant leave to serve D1 out of the jurisdiction holding that an injunction in support of proceedings abroad was “interlocutory” and accordingly Order 11 of the Grand Court Rules specifically prohibited the granting of permission to serve out of the jurisdiction a writ seeking only such an injunction. He however granted a temporary freezing injunction against D2 and D3 until such time as he was able to hear full arguments.

108. On appeal⁵³, the Court upheld the decision to refuse leave for the plaintiff to serve out of the jurisdiction. Sir John Chadwick PC⁵⁴ found that the Grand Court Rules did not permit the grant of leave to serve a defendant out of the jurisdiction if the primary relief sought was a freezing injunction in support of foreign proceedings. The Court of Appeal argued that, while in the *Gillies Smith* case Quin J sought to facilitate the expansion of the *Mareva* jurisdiction, steps in that direction “*should be taken by the rulemaking body, or perhaps the legislature, in this jurisdiction*”. On that basis it was felt that Quin J had erred.

109. In allowing the challenge of D2 and D3 in relation to the freezing order made against them, Cresswell J found that the Court had no such jurisdiction⁵⁵. It was reasoned that, a freezing order could be granted in aid of a foreign proceedings only if substantive proceeding were to be commenced against the defendant in the Cayman Islands.

110. Cresswell J noted that in England, section 25 of the English Civil Jurisdiction and Judgments Act 1982 aids proceedings in other jurisdictions by facilitating the grant of free-standing freezing orders. The Act permits in clear terms the grant of freezing orders in England. Cresswell J supported the public policy considerations for permitting free-standing freezing orders in the Cayman Islands but found that if the jurisdiction of the Court was to be expanded, then this was properly a matter for the legislature.⁵⁶

111. These series of cases reflect a plethora of clear judicial principles and approaches to this issue and signal a willingness on the part of the court to facilitate interim proceedings of foreign jurisdictions. This facilitation would obviously be subject to the usual tests in freezing order cases, such as the necessity for a good arguable case, a real risk of the dissipation of assets, a consideration of the balance of convenience and whether the grant of a freezing order would render the foreign proceedings more efficacious.

⁵³ *VTB Capital Plc v Malofeev & Two others* (unreported, CICA, Cause No. 9 of 2011, 30 November 2011)

⁵⁴ President of the Court of Appeal.

⁵⁵ *VTB Capital Plc v Malofeev & Two others* (unreported, Grand Court, Cause No. FSD 141 of 2011, 16 January 2012).

⁵⁶ Case summary informed by article authored by Maples and Calder, Freezing Orders in the Cayman Islands – Anything But Frozen, February, 2012.

112. In advancing our judicial process it seems appropriate for legislation to build upon the foundation laid by the common law in clarifying and bringing certainty to this issue.

Reform options to facilitate interim proceedings

UK Civil Jurisdiction and Judgments Act, 1982

113. The UK Civil Jurisdiction and Judgments Act, 1982 (“1982 Act”) has been suggested as the model that should be adopted to facilitate interim proceedings in the Cayman Islands.

114. It is useful to note that prior to the coming into force of the Civil Jurisdiction and Judgments Act, 1982 the courts of England and Wales had previously been reluctant to grant interim or provisional relief where the substantive proceedings were not or were not about to be instituted in England and Wales.⁵⁷

115. However, now, section 25 of the “1982 Act” empowers English courts to grant interim relief in aid of foreign proceedings provided (i) proceedings have been or are about to be commenced in a Brussels, Lugano or Regulation state and (ii) the subject matter is within the scope of the legislation.

116. Section 25 of the “1982 Act” has also been extended by Order in Council⁵⁸ so that it now permits the High Court to grant interim relief in aid of any proceedings, within or without the Conventions, and wherever in the world an action has been commenced.

117. Under the “1982 Act” “interim relief” is defined to mean interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than: (a) a warrant for the arrest of property; or (b) provision for obtaining evidence.

118. The courts in England have a wide range of interim remedies primarily listed under Part 25 of the Civil Procedural Rules (CPR)⁵⁹. These powers include:

- An interim injunction.
- An interim declaration.
- An Order referred to as a freezing injunction.
- An Order known as a search order.
- An Order:
 - for the detention, custody or preservation of relevant property;
 - for the inspection of relevant property;
 - for the taking of a sample of relevant property;

⁵⁷ Foreign Judgments- Attachment of Assets in England, Chris Millar, Partner, Dispute Resolution, September, 2011.

⁵⁸ The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997 No 302.

⁵⁹ Practice Direction 25A – Interim Injunctions This Practice Direction supplements CPR Part 25 and Practice Direction 25B – Interim Payments This Practice Direction supplements CPR Part 25.

- for the carrying out of an experiment on or with relevant property;
 - for the sale of relevant property which is perishable, or where there is good reason to sell quickly;
 - for the payment of income from relevant property;
 - authorising any person to enter any land or building in order to execute a court order;
 - under section 4 of the Torts (Interference with Goods) Act 1977 to deliver up goods;
 - directing a party to provide information about the location of relevant property or assets or to provide information about the relevant property or assets which are, or may be, the subject of a freezing injunction;
 - for pre-action disclosure of documents or inspection of property;
 - for disclosure (in certain circumstances) or inspection of property against a non-party;
 - for a specified sum to be paid into court, or otherwise secured, where there is a dispute over a party's right to the fund;
 - that a party pay money into court when a party is claiming an order for the delivery up of personal property pending the outcome of proceedings and directing that the property be given up to him, if payment is made;
 - directing a party to prepare and file accounts relating to the dispute; and
 - for the lodging of guarantees in intellectual property proceedings as a condition to the continuation of an alleged infringement.
- An interim payment.

Isle of Man High Court Act, 1991

119. The position in the Isle of Man is that the court will in certain circumstances grant injunctive relief in the absence of local proceedings. The position derives from the common law⁶⁰ and from statute. In particular, section 56B of the High Court Act, 1991-

- (i) empowers the High Court to grant interim relief where proceedings have been or are to be commenced in a country or territory outside the Island; and
- (ii) provides the High Court with a discretion to refuse to grant relief if, in the opinion of the Court, it is inexpedient for the Court to grant relief.

120. For purpose of the Act “interim relief” means interim relief of any kind which the High Court has power to grant in proceedings relating to matters within its jurisdiction, other than a warrant for the arrest of property or provision for obtaining evidence.

Hong Kong High Court Ordinance, 2009

121. The Hong Kong High Court Ordinance, section 21M makes provision for interim relief in the absence of substantive proceedings. Under the section the High Court may appoint a receiver or grant other interim relief in relation to proceedings that have been or

⁶⁰ *Re Securities & Inv. Ed* on September 16, 1997.

are to be commenced in a place outside Hong Kong and are capable of giving rise to a judgment which may be enforced in Hong Kong.

Bahamas Supreme Court Act, 1996

122. The Bahamas Supreme Court Act, 1996 provides for the grant of interim relief. In particular, section 21 provides for the court by order conditionally or unconditionally to grant an injunction in all cases in which it appears just and convenient to do so.⁶¹

Bermuda Supreme Court Act, 1989 Revision

123. The Bermuda Supreme Court Act, provides for the grant of an injunction by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient for the order to be made.

Choice of Legislative approach and other issues for consideration

124. The legislation cited reflects the various legislative approaches to dealing with this issue. As to which one is more appropriate will depend on which model is viewed as more comprehensive and addresses the concerns.

125. An issue that needs to be addressed, however, is the appropriate law into which a provision dealing with foreign interim proceedings should be placed. Should it be reflected in the Grand Court Law or the Judicature Law?

126. In the alternative and in keeping within the general nature of the several interconnected issues which have been discussed, should the appropriate provisions form part of a revised “FJRE 1996” which will take into account money and non-money judgments, awards and interim orders?

127. Another issue that warrants consideration is whether the basis for granting interim relief to a foreign jurisdiction should be predicated on the countries identified by the Governor in Cabinet by order, or should the power to decide when to grant interim relief fall within the sole purview of the Courts as seems to be contemplated under UK, Isle of Man, Bahamian, Hong Kong and Bermudian laws?

128. Whichever approach is adopted, the crux of the matter is that if the Grand Court were to adopt the position of unwillingness to assist the courts of other jurisdictions by temporarily freezing the assets of defendants sued in those jurisdictions such a position may be seen as tantamount to a breach of the duty of comity.

⁶¹It is also useful to note that similar to the section 44(3)(e) of the UK Arbitration Act, 1996 which enables the High Court to grant interim relief in aid of arbitration proceedings, the LRC made similar proposals for the consideration in its Final Report on the Review of the Arbitration Law of the Cayman Islands, 4th January, 2012.

129. There is a need to expressly avoid any notion that the Cayman Islands can be viewed as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject.⁶² The pronouncements of the court should be and have been ones which reflect creativity and a liberal attitude to ensure that legal activities are not impeded through the application of obsolete rules and principles.⁶³

Conclusion

130. The recognition and enforcement of foreign judgments and interim relief measures remains primarily an issue of judicial discretion based on growing precedent and reliance on general principles of comity and common law. From all indications it is an issue which calls for legislative intervention. Such intervention will have the effect of facilitating certainty in the application of the law and ultimately assist in development of a business friendly environment for the recognition and enforcement of foreign judgments and other remedies.

The Law Reform Commission invites comments, views and recommendations from stakeholders and the general public on the issues and options identified in relation to-

- (i) the primary reform options to deal with the enforcement of judgments - para. 64;**
- (ii) the secondary reform options to enhance the enforcement of judgments process – para. 65;**
- (iii) the reform option for dealing with non-monetary judgments - paras. 85 – 90;**
- (iv) the reform options to facilitate interim proceedings paras. 113 – 123; and**
- (v) the choice of legislative approach and other issues for consideration- paras. 124 – 127.**

Submissions should be posted no later than 26th March, 2012 to the Director of the Law Reform Commission, c/o Government Administration Building, P.O. Box 1999 George Town, KY1-1104 or delivered by hand to the offices of the Commission on 3rd Floor Anderson Square or emailed to cheryl.neblett@gov.ky.

⁶² Solvalub Limited v Match Investments.

⁶³ Y.C. Choong, Enforcement of Foreign Judgments: The Role of the Courts in Promoting or Impeding Global Business, World Academy of Science, Engineering and Technology 30 2007.

APPENDICES 1 to 13