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International Arbitration 2021

Turks & Caicos Islands
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TURKS AND CAICOS ISLANDS

Law and Practice

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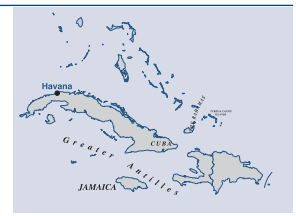

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1. GENERAL

1.1 Prevalence of Arbitration

International arbitration is not commonly used as a method of dispute resolution in the Turks and Caicos Islands (TCI). This is likely for many reasons, including the size of the country (the population is approximately 50,000), the antiquated legislation dealing with arbitration, and the fact that there are no recognised arbitral bodies operating here. As such, TCI is seldom if ever chosen as a seat for international arbitration.

Parties to international contracts might opt for, or be required to agree to, a submission to arbitration, but that will usually be seated in another jurisdiction.

As such, litigation tends to be the favoured method of dispute resolution for domestic parties.

1.2 Impact of COVID-19

Given the lack of international arbitration in TCI, the COVID-19 pandemic has had little, if any, effect; however, parties – and particularly local attorneys – have become used to conducting court hearings remotely either by Microsoft Teams or Zoom.

1.3 Key Industries

There are no particular industries in the TCI that are experiencing significant or even minimal international arbitration activity in 2020-21 and, as stated above, the COVID-19 pandemic has not impacted on the level of activity.

The principal industries in TCI are tourism and tourism-related development.

1.4 Arbitral Institutions

There are no particular arbitral institutions used for international arbitration in TCI given the lack of activity in the sector; however, from our own experience, and in light of the prevalence of US counterparties, we would say that the American Arbitration Association might be the institution most commonly referenced in arbitration clauses in international contracts with TCI businesses.

1.5 National Courts

There are no specialist courts in the TCI that are designated to hear disputes related to international and/or domestic arbitrations.

2. GOVERNING LEGISLATION

2.1 Governing Law

International and domestic arbitration in TCI is governed by the Arbitration Ordinance (Chapter 4.08) ("the Ordinance"). It is not based on the UNCITRAL Model Law, having come into force ten years before the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade.

There are significant differences between the two. Indeed, the Ordinance more clearly resembles the Arbitration Act 1889 of England and Wales with the result that the law in TCI remains much the same as it was in England and Wales before the Arbitration Act 1934.

2.2 Changes to National Law

There have been no significant changes to the national arbitration law in the TCI and there is no pending legislation of which we are aware that may change the arbitration landscape in the TCI within the next 12 months, though the current Chief Justice has indicated a strong desire to have the law modernised when it comes to alternative dispute resolution, with the immediate focus being on court-ordered mediation.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

The only real legal requirement for an arbitration agreement to be enforceable under the Ordinance is that it is in writing.

3.2 Arbitrability

The Ordinance does not contain any restriction on the subject matters that may be referred to arbitration.

The general approach to determine arbitrability of a dispute is one of contractual interpretation of the arbitration agreement. The arbitral tribunal must consider the dispute in question and then elicit from the arbitration agreement whether the parties intended a dispute of the kind in question to be resolved by arbitration. This is a matter of construction and ought to be resolved by arriving at the parties' presumed mutual intention using ordinary principles of construction.

In arriving at the parties' presumed mutual intention, the weight of modern authority supports a presumption in favour of a broad or liberal approach leading to "one-stop adjudication".

3.3 National Courts' Approach

The local courts utilise the common-law choice-of-law rules to determine the law governing the arbitration agreement and its enforceability. Until recently, there was no organised system for the reporting of judicial decisions in the TCI, so it has historically been difficult to research a body of case law; however, based on personal experience, the national courts are pro-enforcement of arbitration agreements.

The Ordinance provides (at Section 3) that an arbitration agreement (referred to therein as a "submission") shall, unless a contrary intention is expressed therein, be irrevocable except by leave of the court and shall have the same effect in all respects as if it had been made an order of court.

3.4 Validity

The rule of separability is applied in TCI to arbitration clauses with the result that an arbitration clause might be considered valid even if the rest of the contract is which it is contained is invalid.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

The Ordinance does not provide for any limits to the parties' autonomy to select arbitrators.

4.2 Default Procedures

The Ordinance provides for a default procedure such that, in the event that no arbitrator, umpire or third arbitrator is appointed within 21 days after the service of a written notice by a party on the other parties or the arbitrators, as the case may be, to appoint an arbitrator, umpire or third arbitrator, pursuant to Section 6 of the Ordinance, the Supreme Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he or she had been appointed by consent of all parties.

The procedure applies regardless of the number of parties involved.

4.3 Court Intervention

There is nothing contained in the Ordinance giving the local courts the power to intervene in the selection of arbitrators.

4.4 Challenge and Removal of Arbitrators

There are no particular provisions contained in the Ordinance governing the challenge or remove of arbitrators, save that – pursuant to Section 16 of the Ordinance – the court may remove an arbitrator, umpire or referee who has misconducted himself or herself.

4.5 Arbitrator Requirements

There are no requirements in the Ordinance as to arbitrator independence, impartiality and/or disclosure of potential conflicts of interest and there are no arbitration institutions within the jurisdiction. As such, the common law governs the position.

5. JURISDICTION

5.1 Matters Excluded from Arbitration

The Ordinance does not contain any restriction on the subject matters that may be referred to arbitration.

5.2 Challenges to Jurisdiction

There is nothing in the Ordinance dealing with an arbitral tribunal's ability to rule on its own jurisdiction to hear a matter; however, it is highly likely that the principle of competence-competence would be recognised in TCI, allowing the arbitral tribunal to rule on the question of its own jurisdiction.

5.3 Circumstances for Court Intervention

The Ordinance does not deal with circumstances in which the national courts can address issues of jurisdiction of an arbitral tribunal; however, pursuant to Order 73, rule 2(2) of the Rules of the Supreme Court 2000, a judge may declare that an award made by an arbitrator or umpire is not binding on a party to the award on the ground that it was made without jurisdiction.

5.4 Timing of Challenge

As stated above, the Ordinance does not provide for challenges to the jurisdiction of the arbitral tribunal or the court's ability to deal with same, save for after an award has been rendered, at which time a judge may declare the award is not binding because it was made without jurisdiction.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Save as stated above, the Ordinance does not deal with judicial review of questions of admissibility and/or jurisdiction.

5.6 Breach of Arbitration Agreement

See **3.3 National Courts' Approach**.

Further, Section 5 of the Ordinance provides that if a party to an arbitration agreement, or any person claiming through or under him or her, commences court proceedings in breach of an arbitration agreement, any party to those proceedings may at an time after entering an appearance and before delivering any pleadings or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the party bringing the application was, at the time when the court proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Based on experience, the courts in TCI are generally in favour of adhering to the arbitration agreement and thus reluctant to allow court proceedings brought in breach of an arbitration agreement from proceeding.

5.7 Third Parties

There is nothing in the Ordinance dealing with the ability of an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract in which the arbitration agreement is contained.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

There are no provisions in the Ordinance dealing with preliminary or interim relief.

6.2 Role of Courts

There are no provisions in the Ordinance giving the court power to grant preliminary or interim relief in support of arbitration proceedings; however, a party may be able to rely on judicial pronouncements that have been made suggesting that the court has a very broad inherent jurisdiction upon which it may rely for the purpose of granting interim relief.

Neither the Ordinance nor any other national legislation provides for the use of emergency arbitrators.

6.3 Security for Costs

Neither the Ordinance nor any other national legislation provides for the court and/or an arbitral tribunal to order security for costs. As stated above, the law in TCI is as it was in England and Wales before the Arbitration Act 1934.

7. PROCEDURE

7.1 Governing Rules

Section 4 of the Ordinance provides that: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set out in the Schedule, so far as they are applicable to the reference under the submission".

The Schedule contains nine short paragraphs dealing with, inter alia:

- the number of arbitrators;
- the timing of the making of the award;
- the examination of the parties by the arbitrators or umpire;
- the examination of witnesses on oath;
- the final and binding nature of the award; and
- the costs.

Apart from the above, there are no laws or rules governing the procedure of arbitration in the TCI.

7.2 Procedural Steps

Apart from as provided above, there are no particular procedural steps that are required by law.

7.3 Powers and Duties of Arbitrators

The powers of arbitrators are set out in Section 8 of the Ordinance, which provides: "Arbitrators or an umpire acting under a submission, unless the submission expresses a contrary intention, shall have power –

to administer oaths or to take the affirmations of parties and witnesses appearing;

to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and

to correct in any award any clerical mistake or error arising from any accidental slip or omission."

7.4 Legal Representatives

The Legal Profession Ordinance prohibits the practising of law by any person whose name is not entered on the Roll of Attorneys. Practising

law is defined as, inter alia: for or in expectation of gain or reward, appearing on behalf of any person in any court, tribunal or inquiry having jurisdiction in the Islands. Thus, the restriction arguably applies to arbitration proceedings in the TCI, whether domestic or international, and would prevent a legal representative having qualifications other than domestic ones from appearing in an arbitration in the TCI.

Further, the Immigration Ordinance prohibits any person from working in the TCI without a work permit.

That being said, there is provision in the Legal Profession Ordinance for a legal representative who possesses the requisite qualifications as set out in that ordinance, and who has come or intends to come to the TCI for the purpose of appearing, acting or advising in a suit or matter, to be admitted as an attorney by the Chief Justice for the sole purpose of appearing, acting or advising in that suit or matter.

8. EVIDENCE

8.1 Collection and Submission of Evidence

Apart for those matters referred to in **7.1Governing Rules**, there are no specific rules that apply in respect of the collection and submission of evidence, whether at the pleading or the hearing stage. Matters or discovery, disclosure, use of witness statements, etc, will therefore have to be agreed by the parties on an ad hoc basis unless the arbitration agreement contains reference to institutional rules.

8.2 Rules of Evidence

There are no rules of evidence that specifically apply to arbitral proceedings in the TCI.

8.3 Powers of Compulsion

The Ordinance makes no provision in respect of an arbitral tribunal's powers of compulsion or the ability of the court to assist in compelling the production of documents or attendance of witnesses. However, Section 9 provides the following.

"Any party to a submission may sue out a writ of subpoena ad testificandum or of subpoena duces tecum, but no person shall be compelled under any such writ to give any evidence or produce any document which he could not be compelled to give or to produce on the trial of an action".

Section 17 provides the following.

"For the purposes of compelling the attendance of any witness or the production of any document in proceedings before an arbitrator, umpire or referee, the court shall have the same powers as it possesses for these purposes in proceedings before the court".

Further, paragraphs 6 and 7 of the Schedule also provide the following.

"6. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, an oath or affirmation, in relation to the matters in dispute, and shall subject as aforesaid produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things relevant to the matter under reference which during the proceedings the arbitrator or umpire may require.

7. The witnesses on the reference shall, if the arbitrators or umpire so require, be examined on oath or affirmation."

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Neither the Ordinance nor any other legislation deals with privacy and confidentiality in the arbitration context. The relevant law is therefore the common law and the obligation of confidentiality is implied into the arbitration agreement as a matter of law, albeit subject to exceptions and the reservations expressed by the Privy Council in Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11 at [20].

10. THE AWARD

10.1 Legal Requirements

Arbitral awards are to be made in writing.

Paragraph 3 of the Schedule to the Ordinance provides that arbitrators shall make their award "within three months after entering on the reference or after having been called on to act by notice in writing from any party to the submission or on or before any later date to which the arbitrators by writing signed by them, may from time to time extend the time for making the award".

Section 15 of the Ordinance also gives a power to the arbitrators, umpire and the court to extend the time for the award.

Otherwise, there are no other legal requirements of an arbitral award.

10.2 Types of Remedies

There are no statutory provisions in the Ordinance or elsewhere dealing with the types or remedies available to a party in an arbitration in TCI or the limits on the arbitral tribunal; however, the general common law rules apply and so punitive damages would not be available in an arbitration governed by TCI law.

10.3 Recovering Interest and Legal Costs

The Ordinance contains no provisions dealing with the award of interest; however, assuming any award were to be enforced through the Supreme Court, statutory post-judgment interest at the rate of 6% per annum may be awarded pursuant to Section 20 of the Civil Procedure Ordinance (Chapter 4.01).

Section 19 of the Ordinance provides that any award made thereunder may be made on such terms as to costs, or otherwise, as the authority making the order thinks just. Paragraph 9 of the Schedule to the Ordinance provides the following.

"The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be paid or any part thereof, and may award costs to be paid as between attorney and client."

The general rule applied is that costs follow the event.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

There is no route of appeal against an award made in the TCI. The only provisions relate to

the setting aside of an award on the following limited grounds:

- by Section 16(2) of the Ordinance, the court may set aside the award where an arbitrator, umpire or referee has misconducted himself or herself, or the arbitration award has been improperly procured;
- pursuant to Order 73, rule 2(2) of the Rules of the Supreme Court 2000, an application may be made to a single judge in court for a declaration that an award is not binding on a party to the award on the ground that it was made without jurisdiction.

By Order 73, rule 4, an application to court to set aside an award under Section 16(2) of the Ordinance or otherwise must be made within six weeks after the award has been made and published to the parties. In the case of every such application, the notice of motion must state in general terms the grounds of the application and, where the motion is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with that notice.

11.2 Excluding/Expanding the Scope of Appeal

There being no means of appeal, the Ordinance does not provide for the possibility of the parties agreeing to exclude or expand the scope of any appeal. The national courts may, however, respect any contractual agreement to expand or reduce the scope of any challenge to the award.

11.3 Standard of Judicial Review

As previously stated, the scope for judicial intervention in an award is extremely limited and so there is no real standard of judicial review of the merits of a case.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

The TCI is not a contracting party to and has not ratified the New York Convention. It is, however, a party to the Geneva Protocol on Arbitration Clauses.

12.2 Enforcement Procedure

Until such time as there is any legislation dealing with the enforcement of arbitral awards (as to which, please see **12.3 Approach of the Courts**), the only way to enforce one in the TCI is to issue proceedings suing for the debt represented by the award. If the award has not been set aside or is not subject to any challenge, then the party seeking to enforce it can apply for summary judgment.

12.3 Approach of the Courts

Section 10 of the Ordinance provides that: "Any award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect".

In respect of foreign arbitration awards, Order 73, rule 6 provides the following.

"Where an award is made in proceedings on an arbitration in any country to which the Overseas Judgment (Reciprocal Enforcement) Ordinance extends, being a country to which the said Ordinance has been applied, then, if the award has, in pursuance of the law in force in the place where it is made, become enforceable in the same manner as a judgment given by a court in that place, the Overseas Judgments (Reciprocal Enforcement) Rules shall apply in relation to the award as they apply in relation to a judgment given by a court in that place, subject, however, to the following modifications –

(a) for reference to the country of the original court there shall be substituted references to the place where the award was made, and

(b) the affidavit required by rule 5 of the said Rules must state (in addition to the other matters required by that rule) that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

Unfortunately, the provisions of the Overseas Judgment (Reciprocal Enforcement) Ordinance have not yet been extended to any country with the result that any foreign award will have to be enforced at common law, which requires bringing proceedings on it. That is hopefully about to change with consultation currently taking place as to which countries reciprocal enforcement will be extended to.

13. MISCELLANEOUS

13.1 Class-Action or Group Arbitration

Given the limited and archaic nature of TCI's local arbitration legislation, it does not provide for class-action arbitration or group arbitration.

13.2 Ethical Codes

With regard to ethical codes and other professional standards applicable to counsel, the conduct of an attorney called to the Bar of the TCI is governed by the Legal Profession Code of Professional Conduct ("the Code of Conduct"). It applies to any court or tribunal, or any other person or body of persons before whom an attorney appears as an advocate. It only extends to attorneys admitted to practise in accordance with the Legal Profession Ordinance and thus would not govern the conduct of counsel from outside the jurisdiction in arbitral proceedings sited in the TCI.

There are no specific provisions dealing with arbitrators conducting proceedings in the TCI.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders in the TCI.

13.4 Consolidation

There are no provisions in the local legislation for an arbitral tribunal with its seat in the TCI or for the court in TCI to consolidate separate arbitral proceedings.

13.5 Third Parties

There are no legislative provisions dealing with the instances in which a third party can be bound by an arbitration agreement or award and so the common-law position applies.

GrahamThompson was founded in 1950 and is at the forefront in serving the principal economic sectors of the Bahamas and Turks and Caicos Islands, the tourism industry and the financial services and banking sectors. The firm's expertise in the offshore financial arena – including private client, trust and estates, and corporate, commercial and securities – is internationally recognised, as is the firm's expertise in real estate and development. GrahamThompson's litigators are highly sought-after experts who provide effective and specialised representation and advice across a wide spectrum of disciplines, including the following sectors: banking and finance; corporate and commercial; employment and labour; insurance; intellectual property; insolvency; regulatory; and manufacturing. GrahamThompson operates four offices: Nassau and Lyford Cay in New Providence; Freeport, Grand Bahama; and Providenciales, Turks and Caicos Islands.

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