



**The Cayman Islands
Law Reform Commission**

**The Enforcement of Foreign
Judgments and Interim Orders**

**Part II
Final Report**

**Enforcement of Foreign
Judgments**

8th March, 2013

The Cayman Islands Law Reform Commission

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The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contribution leading up to the formulation of legislative proposals intended to modernise the approach towards the enforcement of foreign judgments.

THE ENFORCEMENT OF FOREIGN JUDGMENTS

1. The Law Reform Commission submits for consideration “The Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2013 (*see Appendix 1*) and “The Foreign Judgments Reciprocal Enforcement (Scheduled Countries and Territories) Order, 2013 (*see Appendix 2*).
2. The primary objective of these legislative proposals is to facilitate the enforcement, through the registration process, of judgments from other jurisdictions without the need for parties to pursue the common law procedure which requires a judgment creditor to commence new proceedings in the Cayman Islands Grand Court.

BACKGROUND

3. The Law Reform Commission (LRC), in August 2011, commenced research into 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.
4. An examination of these issues was later called for by the Hon. Chief Justice who pointed out that the power to enforce foreign judgments continues to be based almost exclusively on foreign judgment holders having to sue again on their judgments at common law. It was queried whether the opportunity should now be taken to modernise our law in order to remove this requirement.¹
5. In Part I of our Final Report we dealt with the enforcement of foreign interim orders within the Cayman Islands. This Report focuses on the enforcement of foreign judgments, both monetary and non-monetary and the issues relating to reciprocity.

RESEARCH AND CONSULTATION PROCESS

6. The research of the LRC into the concept of the enforcement of the foreign judgments encompassed the examination of (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

¹ Email dated 29th September, 2011 to the Hon. Attorney General

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

7. The research findings of the LRC were relied upon in the formulation of an Issues Paper entitled "The Enforcement of Foreign Judgments and Interim Orders" 6th March 2012". This paper was published for public comment generally and specifically forwarded to the-

- Hon. Chief Justice;
- Cayman Islands Law Society;
- Caymanian Bar Association;
- Cayman Islands Society of Professional Accountants;
- Society of Trust & Estate Practitioners;
- Cayman Islands Chamber of Commerce;
- Cayman Islands Bankers' Association; and
- Cayman Islands Compliance Association.

8. The consultation period on the Issues Paper was originally set to expire on 26th March, 2012. However, based on two separate requests² to extend the time for consultation period, the deadline for submissions was extended respectively to 16th April, 2012 and then to 30th April, 2012. By the end of the consultation period, the LRC received responses from Justice Creswell³, the joint committee of the Cayman Islands Law Society⁴ and the Cayman Islands Bar Association (CILS/CBA) and Bermudian attorney, Mr. Alex Potts⁵.

DISCUSSION OF THE ISSUE OF FACILITATING THE ENFORCEMENT OF FOREIGN JUDGMENTS IN THE CAYMAN ISLANDS

9. In the Issues Paper it was pointed out that 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.⁶ 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.

10. 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.

² Mr. Nigel Meeson, Chair of the Cayman Islands Law Society and Bar Association joint committee.

³ Response forwarded via email 27th January 2012- Sir Justice Cresswell's comments were in relation to the accuracy of the summation of the case *VTB Capital plc v Malofeev*.

⁴ Response forwarded via email 27th April, 2012

⁵ Response forwarded via email 23rd March, 2012

⁶ Richard Garnett, 'The Internationalisation of Australian Jurisdiction and Judgments Laws' (2004) 25 Australian Bar Review 205.

11. The rules on enforcement of foreign judgments were developed to respond to the absconding debtor and 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 removed 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.

12. 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.

13. In the Cayman Islands, it was noted, that the enforcement of foreign judgments concept had gained prominence through judicial dicta emerging from several leading cases⁷. 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

14.. In addressing the issue of the process through which judgments of the Cayman Islands Grand Court are enforceable in the United Kingdom we examined the common law rules dealing with the recognition and enforcement of foreign judgments in the UK. One of the main principles underlying enforcement of foreign judgments is comity. Comity⁸ 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.

15. 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.

⁷See *post*, *Masri and Manning v. Consolidated Contractors International Company Sal, Gillies-Smith v Smith and VTB Capital Plc v Malofeev*.

⁸In *Hilton v Guyo* (1895) 159 US 113 ⁸ 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."

16. In the UK there are three statutory schemes providing for the enforcement of foreign judgments. For purposes of this issue we examined the Administration of Justice Act, 1920. Under this law English Courts have jurisdiction to recognise money judgments of courts of specified Commonwealth countries.

17. The UK Administration of Justice Act, 1920 ("AJA 1920") mainly covers UK territories and former and current commonwealth countries.

18. 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.

19. Under section 13 of the "AJA 1920" [Her]⁹ 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.

20. By way of the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984 ("REJ Order 1984") 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.

21. 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") to include the Cayman Islands.¹⁰

22. 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 enforceable in the UK. The "REJ Order 1985" was accordingly published in the Cayman Islands Gazette Supplement No. 4 Gazette No. 9 of 1986.

Conclusion

23. Against the background of the "REJ Order 1985" it was concluded 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".

⁹ Actual text "His Majesty"- interpreted for modern purposes.

¹⁰ 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.

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

24. In relation to the process through which judgments of the United Kingdom superior courts are enforceable in the Cayman Islands it was determined that 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

25. 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.

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

27. 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 can be expensive, time consuming and may not always be successful.

28. 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.

(ii) Statutory enforcement

29. The statutory regime for the recognition and enforcement of foreign judgments commenced with the Foreign Judgments Reciprocal Enforcement Law (Revised) 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) ("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.¹¹

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 1993 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.

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.

39. This view has been confirmed in the recent case of *Masri and Manning v. Consolidated Contractors International Company Sal*¹² (*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

¹¹ 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, 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.

¹² [2010 (1) CILR 265].

Cayman Islands but only at common law through an action commenced by writ in the Grand Court.

Conclusion

40. Accordingly, it was concluded that that monetary judgments emerging from UK superior courts are enforceable at common law by issuing new proceedings in the Cayman Islands.

DETERMINATION OF WHETHER UK JUDGMENTS SHOULD IN FACT BE ENFORCEABLE IN THE CAYMAN ISLANDS BY REGISTRATION

41. The LRC analysed the common law approach to enforcing UK judgments in order to determine whether the Islands have been adopting the right approach when seeking to enforce UK judgments.

42. To this end, the LRC examined the Cayman Islands Act, 1863 which 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 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, 1923. 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, 1936 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.

51. The Reciprocal Enforcement of Foreign Judgments Order, 1936 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. We further analysed the Jamaica Judgments (Foreign) (Reciprocal) Enforcement, Act 1936 and the Jamaica Reciprocal Enforcement of Foreign Judgments Order, 1936 and determined that it can be equally argued 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.

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

54. 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, 1962 expressly excluded Cayman as a dependent of the colony of Jamaica.

55. The LRC questioned 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 and whether these laws have properly applied to the Cayman Islands?

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

57. 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.

58. The LRC was unable to identify any literature explaining the basis for the UK amendment. It was 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.

59. 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.¹³

60. The LRC felt that the question of which laws applied to the Islands prior to 1962 and which laws were saved after the status of Cayman changed is a critical factor in guiding our approach to the issue of reciprocal enforcement of judgments. It seemed that at the time when a decision was made not to save the Jamaica Judgments (Foreign) (Reciprocal Enforcement) Act, 1936 and the Reciprocal Enforcement of Foreign Judgments Order, 1936 it may not have been fully appreciated that those laws were critical in the scheme of reciprocal arrangements with other jurisdictions and should have formed a part of our current body of laws by way of saving or the enactment of new legislation. The effect is that all the jurisdictions that were covered under the Jamaica 1936 Order¹⁴ very likely extended to Jamaica similar reciprocity and would have not have revoked any order as a result of the change in status of the Cayman Islands.

61. The LRC sought advice from the Foreign and Commonwealth Office (FCO)¹⁵ on the obligations of the Cayman Islands in light of the UK "REJ Order 1985". It was indicated 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.

62. 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.

63. The joint sub-committee of the Cayman Islands Law Society and the Caymanian Bar Association in its response¹⁶ to the Issues Paper shared the sentiments of the LRC by indicating that it is an anomaly that judgments from the UK are not enforceable by registration in the Cayman Islands. It however posited that in practice this situation has not given rise to any difficulties as the procedure of issuing a writ and seeking a summary

¹³ 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.

¹⁴ These jurisdictions include Barbados, Bahamas, Bermuda and Leeward Islands

¹⁵ Legal Adviser, Shehzad Charania, 19th February, 2012 via email.

¹⁶ Comment forwarded via email 27th April, 2012.

judgment so as to enforce a foreign judgment in the Cayman Islands is a simple procedure.

64. Mr. Alex Potts¹⁷ in providing comments on the Issues Paper correctly observed that Bermuda Judgments Extension Order 1956 recognised Jamaica for the purposes of the enforcement of judgments. This recognition would have been based on the fact that the Jamaica 1936 Order included Bermuda. By extension therefore the Bermuda order would have applied to Cayman by virtue of its dependency on Jamaica. However, since the change in status of Cayman, Bermuda judgments will have to be enforced by common law.

65. Mr. Potts however pointed out that in Bermuda it has never been tested or explored in the Supreme Court of Bermuda as to whether by virtue of the Bermuda 1956 Order judgments from the Cayman Islands can be enforced by way of registration as obtained in the case of Jamaica or by way of the common law. He noted that there are no reported cases of Cayman judgments being enforced in Bermuda, either at common law or by registration, even though there is certainly potential for such a situation arising and there have been many recent cases in which, for example, BVI or Caymanian liquidators have sought judicial recognition and assistance in Bermuda. In keeping with the thinking of the LRC, he viewed this position of uncertainty as untenable and suggested that legislative certainty be brought to the position.

Conclusion

66. It was concluded that 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. However, after 1962 UK superior court judgments can only be enforced in the Cayman Islands via the common law process and this would commence by way of initiating new proceedings and using the judgment debt as evidence for the proceedings.

REFORM OPTIONS PROPOSED IN THE ISSUES PAPER

67. Several reform options were identified in the Issues Paper to deal with the enforcement of foreign judgments in order to facilitate a far more simplified process for enforcing judgments arising from the UK and by extension other foreign jurisdictions.

- (a) The first option suggested was 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 suggested that the Governor in Cabinet make an appropriate order under the "FJRE 1996" recognising the judgments of UK superior courts.

¹⁷ Special Counsel at the Bermuda Law firm Sedgwick Chudleigh - 23rd March, 2012

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. We may be able to facilitate UK judgments by way of an order made by the Governor in Cabinet.

The CILS/CBA expressed support for this option on the primary basis that it is anomalous that UK judgments are not enforced in the Cayman Islands by registration, when Cayman Islands judgments are enforced in UK by registration. However, in their comments the view was not shared that the title of the "FJRE 1996" Law had any material bearing on the issue.

- (c) The third option was 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.

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 is 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.
- (e) The fifth option may be to increase the number of jurisdictions to be recognised for enforcement purposes. From a policy perspective, we questioned 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, a schedule could 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?

The CILS/CBA supports this option. It was however recommended that extension of reciprocity to any particular jurisdiction should be granted on an individual and targeted basis taking into account the following factors to jurisdictions which satisfy the following criteria:

- (i) that the legal system and administration of the jurisdiction is beyond reproach such that we have no doubt that their judgments are the product of a fair process;
- (ii) that their legal system is based upon the English common law; and
- (iii) that they have proven provisions in place for the reciprocal enforcement by registration of judgments from the Cayman Islands.

In this regard, the CILS/CBA recommended as a starting point that we consider the following jurisdictions provided that those jurisdictions have or will enact a legislative framework which would recognise Cayman Islands Grand Court judgments. These jurisdictions are as follows-

- (i) Republic of Ireland;
- (ii) Singapore;
- (iii) Canada;
- (iv) New Zealand;
- (v) British Virgin Islands;
- (vi) Bermuda;
- (vii) Guernsey;
- (viii) Bahamas;
- (ix) Jersey; and
- (x) Isle of Man

The LRC has noted that the jurisdictions identified by the CILS/CBA do have legislation¹⁸ in place to deal with the registration of money judgments, similar to

¹⁸ Singapore – Singapore Reciprocal Enforcement of Foreign Judgments Act 2001 and Singapore Reciprocal Enforcement of Commonwealth Judgments Act 1921; Bermuda – Bermuda Judgments (Reciprocal Enforcement) Act 1958; BVI- Reciprocal Enforcement of Judgments Act (Cap 65) 1922 and Foreign Judgments (Reciprocal Enforcement) Act (Cap 27) 1964 ; Jersey - Judgments (Reciprocal Enforcement) (Jersey) Law 1960 and Judgments (Reciprocal Enforcement) (Jersey) Act 1973 (2011 Revision); Isle of Man - Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968; Bahamas- Reciprocal Enforcement of Judgments Act; Canada Ontario - Reciprocal Enforcement of Judgments Act; Guernsey - Judgments (Reciprocal Enforcement) Ordinance, 1973; New Zealand - Reciprocal Enforcement of Judgments Act 1934 and the Judicature Act 1908.

the Cayman "FJRE 1996". However, none of those jurisdictions have identified the judgments from the Grand Court of the Cayman Islands as being enforceable through the registration process provided in the respective statutes. Arguably, if we seek to recognize the judgments of these jurisdictions it would be at the risk of knowing that those jurisdictions may not reciprocate.

- (f) A sixth 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.

It was felt that 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.

The CILS/CBA are however opposed to the extension of the Brussels I Regulation and the Lugano Convention to the Cayman Islands. The view expressed was that it would not be in the interests of the Cayman Islands for provisions of European Law to be extended to the Islands as this would have the potential for serious harm.

It was pointed out that the European regime covers questions of jurisdiction as well as enforcement, and would represent a radical and fundamental shift in the ability of the Grand Court to exercise jurisdiction in international disputes which involved European businesses or individuals. Also, such an extension would introduce a whole body of European case law which would conflict with the common law system applied by our courts and by the courts of our competitor offshore jurisdictions.

- (g) The seventh option is to remove the requirement for the Governor in Cabinet to identify the jurisdictions which will be recognised. The LRC questioned whether there was 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? 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.¹⁹

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.

The LRC queried whether the time has come 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, 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 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.

- (h) An eighth option may entail reform of the common law procedure. 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.²⁰ 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.

¹⁹ See, for example, *Societe Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828.

²⁰ Collins, *Conflict of Laws* 2000.

CONSULTATION FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT
(AMENDMENT) BILL, 2012

68. Following upon the views of stakeholders on this matter and based on the assessment of the options the LRC formulated for stakeholder comments, a draft Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012.

69. The Foreign Judgments Reciprocal Enforcement (Amendment) Bill, 2012 sought to remove the requirement for reciprocity in determining which foreign superior court judgments may be enforced in the Cayman Islands. This proposal sought to bring our Law in line with the common law under which reciprocity is not a prerequisite for enforcement of a foreign judgment.

70. Under the Bill, it was proposed that a judgment from any foreign superior court may be enforceable by way of the registration process provided under the Foreign Judgment Reciprocal Enforcement Law (1996 Revision).

71. This Bill was forwarded to the Hon. Chief Justice and the Cayman Islands Law Society and the Caymanian Bar Association on 10th July, 2012. A joint response from the associations was received on 13th August, 2012. The Chief Justice has offered no response on the provisions of the Bill.

72. The CILS/CBA having reviewed the Bill continued to express the view that the principle of reciprocity should be maintained and that the addition of countries by way of orders made by the Governor in Cabinet under FJRE 1996 would be the more appropriate option. They cautioned against a "blanket approach" to recognition, and instead urged extension on an individual and targeted basis.

73. The LRC in responding to these concerns indicated that the CILS/CBA may be adopting a position that suggests that the more difficult it is to enforce a foreign judgment, the better it is for the Cayman Islands. In fact, the reverse is true. Cayman Islands' attorneys are frequently asked to provide opinions in connection with a transaction which a foreign entity is proposing to enter into with a Caymanian entity.

74. One of the matters on which the attorneys will be asked to give an opinion is the enforceability of a foreign judgment against that Caymanian entity. The more difficult it is to enforce the judgment the less likely the foreign entity is to enter into the proposed transaction. It is no doubt common ground between the CILS/CBA and the LRC that a statutory regime for the recognition and enforcement of foreign judgments should continue to exist in the Cayman Islands and that that regime should, subject to suitable safeguards, provide an efficient, expeditious and inexpensive service to foreign judgment creditors. The only issues between the CILS/CBA and the LRC relate to how these objectives are best achieved.

75. The propositions advanced by the CILS/CBA and which we accept are that the Grand Court is held in the highest esteem in terms of the quality of its decisions and its

adherence to fundamental principles of procedural fairness and judicial impartiality and that there are some jurisdictions which are either corrupt or, at all events, do not comply with those principles.

76. What does not seem to follow is that a system of registration involves a tacit acceptance that all other jurisdictions are equal in this respect. The existence of the grounds for setting aside based on fraud and enforcement contrary to public policy would seem to contradict this.

77. The draft Bill is similar to the US Uniform Foreign Money-Judgments Recognition Act of 1962. The Uniform Act does not depend on reciprocity. The possibility that permitting registration of any foreign judgment would involve a tacit acceptance that all foreign jurisdictions are equal has not deterred the majority of the States of the Union from adopting the Act.

78. Nor does the LRC believe that it is correct to say that the process of registration is "largely by way of an administrative act" or "automatic". Although that process is commenced by way of an ex parte originating summons notice the Court may direct service on the judgment debtor. Given that, as the CILS/CBA pointed out, the Grand Court has no discretion to refuse registration of a judgment which satisfies the statutory criteria, it is difficult to see what purpose is served by giving notice of the application for registration to the judgment debtor unless it be for the extremely limited purpose of enabling him to demonstrate that the statutory criteria are not satisfied.

79. If the Court harbours concerns as to the process whereby the foreign judgment was obtained, whether because of the identity of the particular foreign jurisdiction or otherwise, it will no doubt direct service on the judgment debtor and give him an opportunity to be heard at the pre-registration stage.

80. The LRC does not accept the view of the CILS/CBA that a foreign judgment registered in the Cayman Islands has the same status as a judgment of the Grand Court given in the course of exercising its domestic jurisdiction. Unlike a domestic judgment, it is liable to be set aside by a court of co-ordinate jurisdiction, namely, the Grand Court itself. This is particularly the case if in fact an application to set the registration aside has already been made. An order for registration would not be recognised as a final order by any jurisdiction which follows the same conflict of laws rules relating to recognition and enforcement as does the Grand Court.

81. The CILS/CBA asserted that the UK 1933 Act was not intended materially to change the common law and that it adopted a basis for recognition, reciprocity, which the common law courts had abandoned in the previous century. However, since then, foreign judgments have been recognized and enforced not on the basis of comity or reciprocity but on the basis that a foreign money judgment of a court of competent jurisdiction gave rise to an obligation on the part of the judgment creditor to honour that judgment. In any event, it is agreed that a statutory system of registration should be maintained- the issue is what system of registration is appropriate for the Cayman Islands in the 21st Century.

82. The CILS/CBA expressed concern with the prospect that registration may be relied upon by the judgment creditor to support proceedings in the courts of a third country. The assumption appears to be that the status of those courts is such that judicial comity would be shown as between those courts and the Grand Court. We question whether, in the circumstances postulated, the courts of the third country would attach the same significance to the registered foreign judgment as they would to a domestic judgment of the Grand Court.

83. It is the view of the CILS/CBA that the Bill may encourage those with claims against Cayman Islands domiciled persons and entities to litigate those claims in another jurisdiction and, having obtained a judgment, register that judgment here. The LRC believes that this will be a high-risk strategy. Assuming that the foreign court was prepared to accept jurisdiction, the chances are that any registration would be liable to be set aside on jurisdictional grounds. In those circumstances, the foreign claimant would have expended significant sums and achieved nothing. We cannot imagine that any Cayman Islands attorney – or, indeed, any foreign attorney with his client's best interests at heart - advising the foreign claimant would recommend such a course.

84. Additional concern is expressed, namely, that establishing grounds for setting aside the registration may be difficult and costly. This is particularly the case where there is anecdotal evidence that the judicial system of a particular country is corrupt and the judgment debtor needs to establish that the judgment obtained against him was tainted by that corruption. But this is equally true of enforcement at common law. The LRC does not believe this to be an additional concern, although expressed as such, but a repetition of the point that, in some way, the system of registration may give a false perception of the status of the registered judgment.

85. The CILS/CBA's preferred option is that the existing FJRE 1996 regime should be used to add other jurisdictions to the one jurisdiction, Australia, that currently enjoys the benefits of the statutory scheme. The difficulty with this option is that the extension to other jurisdictions depends on executive action which may never be taken. The history of the "FJRE 1996" itself gives little scope for confidence in this regard.

86. The "FJRE 1996" was originally enacted in 1967. It was not until 1993 that the Australia Order was made. Since then no further orders have been made. Nor does the power to make such orders depend on matters exclusively within the control of the Governor. He must first be satisfied that reciprocal arrangements exist or will be implemented. Even in respect of those jurisdictions, such as BVI, Jersey and Guernsey, which have similar legislation, the Governor would need to be satisfied that appropriate orders have been or will be made naming the Cayman Islands. None of these jurisdictions have thus far named the Cayman Islands no doubt for the very simple reason that they themselves have not been named pursuant to the "FJRE 1996".

87. It is the view of the LRC that the extension of the "FJRE 1996" will require executive interface between the Governor and the relevant jurisdictions and this is

unlikely to take place not so much on account of unwillingness but more likely through the exigencies of modern governmental business.

REFORM RECOMMENDATIONS

88. Accordingly, in order to modernise and simplify the process of enforcing foreign judgments and to extend the jurisdictional reach of the application process, the LRC recommends that two options be considered. These are-

- (a) amendment of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision); or
- (b) increasing, by order, the number of jurisdictions recognised under Part II of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision).

It is to be noted that the LRC is in support of option (a) which contemplates amendments to the "FJRE 1996" to remove the issue of reciprocity in determining whether to enforce a foreign judgment.

- (a) **Amendment of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision).**
 - (i) We propose the removal from section 3 of the requirement for reciprocity in determining which foreign superior court judgments may be enforced in the Cayman Islands.

This amendment contemplates a provision which empowers the court and not the Governor to apply the registration process under the law to a judgment of a superior court of a foreign country other than a judgment given on appeal from a court which is not a superior court. The judgment is required to be final and conclusive between the parties and there should be payable a sum of money under the judgment other than taxes, a fine or a penalty.

Consequential amendments will be required to the short title by deleting the word "reciprocal". Additionally, the definition of "foreign" will need to be amended to include any country other than the Islands and also the definition of "superior court" will need to be amended to mean any court other than a court of summary jurisdiction.

It is important to note that the proposed amendment will not affect the current registration process under section 6 of the "FJRE 1996" which includes safeguards requiring the court to be satisfied that it is appropriate to register a foreign judgment. Section 6 provides that on an application by any party against whom a registered

judgment may be enforced, the registration of the judgment shall be set aside if the registering court is satisfied-

- (a) that the judgment is not a judgment to which this Part applies or was registered in contravention of the provisions of the Law;
- (b) that the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- (c) that the judgment debtor, being a defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- (d) that the judgment was obtained by fraud;
- (e) that the enforcement of the judgment would be contrary to public policy in the country of the registering court; or
- (f) that the rights under the judgments are not vested in the person by whom the application for registration was made.

Further, section 10 of the Law remains applicable in that if it appears to the Governor that the treatment in respect of recognition 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, the Governor may, by order, make the judgments of that jurisdiction unenforceable.

- (ii) Additionally, it is proposed to amend section 4(1) of the Law by deleting the word "shall" from the penultimate line of that section and substituting "may". The objective of such an amendment is to remove any notion that by providing the court with a power to determine which judgments will be enforced by registration, it implies that registration is an automatic process in the sense that it only requires proof of a final money judgment.

While the court does have jurisdiction to set aside a judgment if certain criteria under the Law are not satisfied, providing the court with a discretion at the application stage will strengthen the integrity of the registration process and further enhance the power of the court to determine which applications for registration of a foreign judgment should be favourably considered.

- (iii) Further, we propose the introduction of a provision in section 6 of the Law which prohibits a party from taking any steps to enforce a foreign judgment in circumstances where an application has been

made by a judgment debtor to set aside an application for registration. While the court does have an inherent jurisdiction to entertain applications to stay proceedings, in the interest of removing any doubt as to the court's power and perhaps to save the costs in making such applications, we believe that a provision of this nature would strengthen the registration process.

- (iv) In section 6, we also propose the insertion of a provision which places the burden of proof on the judgment creditor to satisfy the Grand Court that the circumstances relied upon by the judgment debtor do not justify the setting aside of a foreign judgment.

Neither the "FJRE 1996" nor the Grand Court Rules deal with the issue of burden of proof. In contemplation is a provision which stipulates that on an application to set aside registration, the burden would be on the judgment creditor to establish, on a balance of probabilities, that the matters relied on by the judgment debtor in support of his application do not constitute a basis for proceeding in the manner requested.

An amendment of this nature would prevent any reversal of the burden of proof that one may perceive likely to occur if the existing common law procedure is replaced with a compulsory statutory procedure.

(b) Increasing by order the number of jurisdictions recognised under Part II of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision)

This recommendation contemplates an increase in the number of jurisdictions recognised under Part II of the "FJRE 1996" by way of an order made by the Governor in Cabinet. It is proposed that the judgments arising from the following jurisdictions be made enforceable by registration in the Cayman Islands pursuant to section 3(1). These jurisdictions are as follows-

- (i) Bahamas;
- (ii) Bermuda;
- (iii) British Virgin Islands;
- (iv) Canada;
- (v) Guernsey;
- (vi) Isle of Man;
- (vii) Jersey;
- (viii) New Zealand;
- (ix) Republic of Ireland;
- (x) Singapore; and

(xi) the United Kingdom.

As section 3(1) requires reciprocity, it is important to note that these jurisdictions, while they have equivalent enforcement of foreign judgment laws, those laws, other than the UK legislation, do not identify Cayman Islands judgments as being enforceable through the registration process.

Reciprocity is a critical element of the provisions under the "FJRE 1996" and as such a policy decision will have to be made as to whether these jurisdictions should be accorded recognition without there being the appropriate reciprocal provisions contained in their legislation.

If it is felt that this option is the more appropriate but uncertainty remains as to whether all the identified jurisdictions should be accorded recognition, the LRC would urge that the "FJRE 1996" be extended to the United Kingdom to address the anomaly of the UK recognising Grand Court judgments by way of the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985 without there being similar legislative reciprocity on the part of the Cayman Islands.

FOREIGN NON-MONETARY JUDGMENTS

89. The LRC examined in its Issues Paper the enforceability of non-monetary judgments under the Foreign Judgments and Reciprocal Enforcement Law, (1996 Revision). It was pointed out that 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*²¹ 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.

90. This rule was reflected as Rule 35(1) of Dicey Morris & Collins²² 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.*"

91. As a result of this rule, foreign non-money judgments were not historically²³, enforceable. This presumably was 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

²¹ *Sadlar v Robins* (1808) 170 ER 948.

²² *The Conflict of Laws*, 14th Edition.

²³ Yeow-Choy Choong, *Enforcement of Foreign Judgments: The Role of the Courts in Promoting (or Impeding) Global Business*.

are affected by a foreign non-money judgment. These difficulties are in contrast to the foreign money judgment.

92. The "FJRE 1996" 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.

93. The issue is whether enforcement of foreign judgments should remain within the monetary confines of the definition of judgment as reflected in the "FJRE 1996" or whether Cayman legal jurisprudence should 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.²⁴

94. These questions have been the subject of several judicial pronouncements and 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*²⁵.

95. 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.²⁶

96. Cayman judicial jurisprudence has generally followed the approach of *Pro Swing*. In the case of *Miller v Gianne*²⁷, the Hon. Chief Justice referred to the decision of the Privy Council in *Pattni v Ali*²⁸, holding that it was "highly arguable" that the Cayman Islands court would be able to recognise and enforce non-money judgments in personam.

97. 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."

²⁴ *Brunel and Bandone v. Fidells and Others* [2008] JRC152.

²⁵ [2006] 2 SCR.

²⁶ Peter 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.*

²⁷ *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

²⁸ *Pattni v Ali* [2007] 2 AC 85 (Isle of Man).

98. The later case of *Bandone v Sol Properties*²⁹, involved an application for rectification of the register of a Cayman Islands company before the Cayman court 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.

99. 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.

100. The fact that an argument is being put forward to recognise 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.

REFORM OPTION FOR DEALING WITH NON-MONETARY JUDGMENTS

101. The LRC proposed that we move towards enforcing non-monetary judgments and that a legislative model from which we could benefit in terms of approach is that of the Canadian Enforcement of Judgments Act, 2002.³⁰ 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.

102. Another law which the LRC believed could inform the formulation of appropriate provisions is the United States Foreign Money-Judgments Recognition Act, 2005.³¹ This Act provides for the enforcement of non-U.S. court judgments which grant or deny the recovery of a sum of money.

103. Accordingly, the LRC in the Issues Paper supported the view that the restriction against the enforcement of foreign non-money judgments should be removed. In that

²⁹ 2008 CILR 301.

³⁰ The 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.

³¹ This Act was initially promulgated in 1962.

regard, the "FJRE 1996" could be amended to include non-monetary judgments in the definition of "judgment"³².

104. The CILS/CBA in responding to this issue expressed opposition to legislative reform in this area. The view expressed is that the common law continues to develop in this area and that the potential consequences for the enforcement of non-monetary judgments are complex and raise issues which require careful consideration. This, it was stated, is particularly so given the potential risk to the financial services industry if there was the prospect that the enforcement of foreign non-monetary judgments by the Cayman Islands courts would set aside or undermine structures or transactions which are governed by Cayman Islands law, and which are valid as a matter of Cayman Islands law.

105. It was pointed out that other legal structures and transactions could also be vulnerable if foreign non-monetary judgments become generally enforceable here without adequate safeguards. As the core business of the financial centre is to supply useful legal structures to the world and facilitate transactions it was argued that it is essential that their validity be beyond question, in this jurisdiction at least, and not dependent on the exercise of a novel regime to enforce foreign non-monetary judgments.

REFORM RECOMMENDATION

106. The LRC is of the view that the ability to enforce foreign non-money judgments by way of legislation would represent an important change in the common law of the Cayman Islands. Modern judicial practice requires that we allow enforcement of non-money judgments in appropriate cases, subject to a cautious, discretion based judicial approach. However, given that this area of the law continues to develop, we do not recommend any changes at this time and believe it to be more prudent to wait until the common law principles become generally settled.

FINAL REPORT CONCLUSION

107. The enforcement of foreign judgments is an issue which calls for legislative intervention in order to modernise the process through which judgments of foreign jurisdiction are enforced in the Cayman Islands. 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.

108. Against the background of the issues identified, the reform options presented, the legislative precedents examined and the comments of stakeholders, the Law Reform Commission submits for the consideration of the Hon. Attorney General its Final Report on the enforcement of foreign judgments including a draft Foreign Judgments Reciprocal

³²In the Australia Foreign Judgments Act, 1991 "non-money judgment" means a judgment that is not a money judgment.

Enforcement (Amendment) Bill, 2013 and the "The Foreign Judgments Reciprocal Enforcement (Scheduled Countries and Territories) Order, 2013.

A handwritten signature in black ink, appearing to read 'Ian Paget-Brown', with a long horizontal flourish extending to the right.

Ian Paget-Brown
Chairman

8th March, 2013

APPENDIX 1

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT (AMENDMENT) BILL,
2013**

CAYMAN ISLANDS



Supplement No. published with Gazette No. dated
,2013.

**A BILL FOR A LAW TO AMEND THE FOREIGN JUDGMENTS
RECIPROCAL ENFORCEMENT LAW (1996 REVISION); AND TO
MAKE PROVISION FOR INCIDENTAL AND CONNECTED MATTERS**

DRAFT

DRAFT

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT
(AMENDMENT) BILL, 2013**

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to amend the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) ("the principal Law") in order to apply the provisions of Part II to the judgments of a superior court of a foreign country without the added requirement of reciprocity.

Clause 1 of the Bill provides the short title and commencement.

Clause 2 amends the short title of the principal Law in keeping with the removal of the requirement for reciprocity in the enforcement of a foreign judgment.

Clause 3 amends the definition of "foreign" in order to remove any limitation in determining which jurisdiction would fall within the scope of the Law. It also introduces a definition of "superior court" in order to remove the need to specifically identify a court in a country or territory as being superior.

Clause 4 amends section 3 of the principal Law by removing the requirement for reciprocity in the enforcement of a judgment of a superior court and it extends the application of Part II to judgments of the superior court of a foreign country.

Clause 5 amends section 4 of the principal Law to make it clear that the court has a discretion in determining whether to register a foreign judgment.

Clause 6 amends section 6 of the principal Law by introducing provisions to prohibit enforcement of a judgment until an application to set aside that judgment has been determined. It also places the burden of proof on the judgment creditor to provide reasons why an application to set aside has no merit.

Clause 7 provides for the savings and transitional provisions.

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT
(AMENDMENT) BILL, 2013**

ARRANGEMENT OF CLAUSES

1. Short title and commencement
2. Amendment of section 1 of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) - short title
3. Amendment of section 2- definitions and interpretation
4. Amendment of section 3- power to extend Part II to foreign countries giving treatment
5. Amendment of section 4- application for, and effect of registration of foreign judgment
6. Amendment of section 6- cases in which registered judgments must or may be set aside
7. Savings and transitional provisions

DRAFT

CAYMAN ISLANDS

**A BILL FOR A LAW TO AMEND THE FOREIGN JUDGMENTS
RECIPROCAL ENFORCEMENT LAW (1996 REVISION); AND TO
MAKE PROVISION FOR INCIDENTAL AND CONNECTED MATTERS**

ENACTED by the Legislature of the Cayman Islands.

1. (1) This Law may be cited as the Foreign Judgments Reciprocal Enforcement (Amendment) Law, 2013.

Short title and commencement

(2) This Law shall come into force on such date as may be appointed by order made by the Governor in Cabinet.

2. The Foreign Judgments Reciprocal Enforcement Law (1996 Revision), in this Law referred to as "the principal Law", is amended in section 1 by repealing the word "Reciprocal".

Amendment of section 1 of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) - short title

3. The principal Law is amended in section 2-

Amendment of section 2- definitions and interpretation

(a) by deleting the definition of the word "foreign" and substituting the following definition-

“ “foreign” includes any country other than the Islands;” and

(b) by inserting in the appropriate alphabetical sequence the following definition-

“superior court” means any court other than a court of summary jurisdiction.”

Amendment of section 3- power to extend Part II to foreign countries giving treatment

4. The principal Law is amended in section 3-

- (a) by deleting the marginal note thereto and substituting the following-

“Judgments to which Part II applies”;

- (b) by repealing subsection (1);
(c) by repealing subsection (2) and substituting the following subsection-

“(2) A judgment of a superior court of a foreign country other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies, if-

- (a) it is final and conclusive between the parties; and
(b) there is payable a sum of money under the judgment, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty.”; and

- (d) by repealing subsection (4).

Amendment of section 4- application for, and effect of registration of foreign judgment

5. The principal Law is amended in section 4-

- (a) by repealing subsection (1) and substituting the following subsection-

“(1) A person, being a judgment creditor under a judgment to which this Part applies, may apply to the Grand Court at any time within six years after the date of the judgment, or where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the Grand Court, and on any such application the court may, subject to proof of the prescribed matters and to this Law, order the judgment to be registered.”; and

- (b) by inserting after subsection (1), the following subsection-

“(1A) A judgment shall not be registered if at the date of application-

- (a) it has been wholly satisfied; or

- (b) it could not be enforced by execution in the country of the original court.”.

6. The principal Law is amended in section 6 by inserting after subsection (3), the following subsections-

Amendment of section 6- cases in which registered judgments must or may be set aside

“(4) Where a judgment debtor makes an application to set aside a registered judgment, no proceedings shall be commenced to enforce that judgment before a final determination of the judgment debtor’s application.

(5) The court shall make an order staying any proceedings commenced to enforce a registered judgment until a final determination of the judgment debtor’s application.

(6) The judgment creditor shall be required, on a balance of probabilities, to satisfy the court that the circumstances relied upon by the judgment debtor do not justify setting aside the registration and enforcement of a foreign judgment.”.

7. (1) The amendment of section 3 of the former Law by this new Law shall not affect the validity of an order made under that section which was in force immediately before the commencement of the new Law and the order may be varied by a subsequent order made under and in accordance with that former Law as if section 3 of that former Law had not been amended by the new Law.

Savings and transitional provisions

(2) Any common law proceedings which have commenced in relation to the enforcement of a superior court judgment before the new Law comes into force shall continue to be dealt with in all respects as if the new Law had not come into force.

(3) In this section -

“new Law” means the principal Law as amended by this Law; and

“former Law” means the principal Law in force immediately before the date of commencement of this Law.

Passed by the Legislative Assembly the day of , 2013.

Speaker.

Clerk of the Legislative Assembly.

DRAFT

CAYMAN ISLANDS



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2013.

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT LAW
(1996 REVISION)**

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT
(SCHEDULED COUNTRIES AND TERRITORIES) ORDER, 2013**

DRAFT

CAYMAN ISLANDS

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT LAW
(1996 REVISION)**

**THE FOREIGN JUDGMENTS RECIPROCAL ENFORCEMENT
(SCHEDULED COUNTRIES AND TERRITORIES) ORDER, 2013**

The Governor in Cabinet, in exercise of the powers conferred by section 3(1) of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), makes the following Order -

1. (1) This Order may be cited as the Foreign Judgments Reciprocal Enforcement (Scheduled Countries and Territories) Order, 2013. Citation and commencement
(2) This Order shall come into force on the day of _____, 2013.
2. Part II of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), shall apply to the countries and territories specified in the Schedule. Application

SCHEDULE

Bahamas
Bermuda
British Virgin Islands
Canada
Guernsey
Isle of Man
Jersey
New Zealand
Republic of Ireland
Singapore
United Kingdom.

Made in Cabinet the _____ day of _____, 2013.

Clerk of the Cabinet.

