

Latest Cayman disputes from the Middle East

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There has been a marked increase in the volume of mandates for Ogier either originating from or involving structures with investment activities in the Middle East^[1]. Regional market drivers alongside a number of substantial fraud cases have propelled this growth. Much of the work is oil related given the abundant natural resources in the region and thus the need for (and the needs of) Cayman entities and structures connected to oil production are a leading source of work. However, the successful ongoing diversification of the economies of the Middle East and their increasing sophistication has also led to a greater flow and variety of non-oil related Cayman mandates and Cayman disputes concerning investment funds are particularly prominent.

On the non-contentious side there is strong demand for Cayman investment funds and private wealth structures. In respect of the former, Cayman is one of the world's leading jurisdictions for the formation of alternative investment funds. Private equity, hedge and hybrid Cayman funds are managed from around the globe and there are around 24,000 funds established here. Ogier regularly provides Cayman vehicles and structures that deploy Middle Eastern capital both into the region's economies, and elsewhere. On the private client side, Cayman is a leading domicile for offshore trust structures and that demand is growing. Ogier has seen more Middle Eastern families and high net worth individuals utilise private Cayman wealth solutions or require the restructuring of maturing structures in light of evolving family and economic circumstances.

The contentious work Ogier sees emanating from the Middle East and coming before the Cayman courts is both substantial and extremely varied in nature. In this article we set out a selection of recent Cayman cases connected to the Middle East which illustrate the nature of that work.

Litigating in Cayman is reliable, predictable and efficient. This is because the Cayman Islands is a British Overseas Territory and its legal system is based on English common law as amended by domestic legislation with appeals from the decisions of lower courts ultimately being decided by Judges from the English Supreme Court. The Financial Services Division of the Grand Court,

which was established in 2009, has highly experienced specialist Judges presiding over substantial and complex financial services and trust litigation.

Recent Cayman litigation emanating from the Middle East includes the following:

Private client

1. **AA v BB** (unreported 14 February 2020). The Plaintiff in this application was the current trustee of a very substantial discretionary trust governed by the laws of the Cayman Islands from its inception (confidentiality and anonymisation orders were made on the basis that the disclosure of identities of the individuals involved would be harmful to the interests of the beneficiaries). The Settlor and his family were nationals of a Middle Eastern country where the Islamic law of inheritance applied. By this application the Trustee sought the approval or *Public Trustee v Cooper* 'blessing' of the Court for a proposed plan of liquidation and distribution of the all of the assets of the trust amongst certain members of the discretionary class of beneficiaries, and afterwards the winding up of the trust. The trustee proposed, in the exercise of its discretionary powers to distribute the assets, to make dispositions only to heirs as determined in accordance with Islamic law rather than to the wider beneficial class identified in the trust deed. The court held that the trustee was not obligated to inquire into and consider the circumstances of each and every member of the wider class of beneficiaries with a view to benefiting them, instead the trustee could, in keeping with the 'rationality test' (and in this case compliant with the wishes of the Settlor), reasonably decide to benefit only those beneficiaries who were also heirs under Islamic law.

Funds Disputes/Fraud

1. In the recent judgment of ***In the Matter of Gulf Investment Corporation et al v. The Port Fund LP et al*** (unreported 16 June 2020), certain limited partners from the Middle East (namely the Gulf Investment Corporation, the Kuwait Ports Authority and the Public Institution for Social Security) were successful in their application to compel the general partner of a Cayman private equity fund established as an exempted limited partnership to provide them with substantial information about the affairs of the fund pursuant to section 22 of the Exempted Limited Partnership Act. An exempted limited partnership is a popular Cayman investment fund structure; it consists of a general partner and one or more limited partners and does not possess a corporate personality separate to the partners. In this case, the limited partners had numerous concerns about the conduct of the fund's business by the general partner and wanted information in order to investigate those concerns. The Cayman court found that the limited partners were entitled to "full information" about the fund and that the contractual terms between the limited partners and the general partner (which is the only significant basis on which access to fund information may be refused) did not impede that access in this instance. Accordingly, the general partner was ordered to provide the information sought.

2. **Abraaj litigation:** there are currently several set of proceedings going through the Cayman Islands courts arising out of the collapse of the Abraaj group (said at one time to be the largest private equity group in the Middle East with up to US\$14 billion of assets under management). *Mr Jafar v Abraaj Holdings and Others* (unreported 20 August 2021) is a fraud claim that has been brought by the Plaintiff, Mr Abdulhameed Jafar for damages, the repayment of monies, and other relief in respect of three loans which he alleges were made to certain entities in the Abraaj group in late 2017. This recent Judgment was the determination of security for costs applications made by three of the defendants (investment funds). The applications for security were made on the basis that the Plaintiff is ordinarily resident outside of the jurisdiction (being domiciled in the UAE) so that the jurisdictional threshold set out in O.23, r.1(1) (a) is satisfied. The funds had sought security to protect their ability to later compel Mr Jafar to pay their costs of the proceedings if his claims ultimately do not succeed. The dispute related to two main questions (i) whether there are objectively justified grounds for concluding there are obstacles to or burdens on the enforcement of a costs order against the Plaintiff, such that there is a real and serious risk of non-enforcement and (ii) whether if there are such real risks, it is "just" in the circumstances to order that Mr Jafar provide security. As to the first question, the Judge concluded that the evidence of UAE law showed that those with substantial experience of practising in the area considered that past and recent experience demonstrated that there were realistic and substantial risks of non-enforcement of the judgment at the Plaintiff's place of residency (notwithstanding recent changes to the relevant regime in the UAE). As to the second question – the circumstances of the case – the Judge gave weight in particular to the following additional matters (amongst other points): (a) the prejudice to the Defendants resulting from the failure to award security for costs would be substantially greater than that suffered by the Plaintiff in being required to provide it; (b) the Plaintiff had declined to provide details of the location of his assets and to show that he has valuable assets in jurisdictions against which a costs order could clearly be enforced; and (c) the Plaintiff is well able to afford the cost of giving security and such cost will not stifle or inhibit his conduct of these proceedings. Therefore, the Judge granted the applications and ordered Mr Jafar to provide security for costs.

Applications to appoint liquidators

1. *In the Matter of Adenium Energy Capital, Ltd* (unreported 29 July 2020) concerned an application by a creditor to appoint official liquidators over Adenium in order to wind up its affairs and distribute its assets to interested stakeholders. The background to the dispute was that Adenium agreed to purchase the rights of the Petitioner in a solar energy project established by the Government of Egypt. In defence of the application, the company (Adenium) argued that (i) the petitioner (Bareeq Capital) was not properly identified in the legal papers (on the basis that it had used its trading name in the English language rather

than its Arabic registered name in Egypt); (ii) this issue amounted to a "bona fide dispute on substantial grounds" (and if that is right then the petition would be dismissed or stayed); (iii) that dispute should be referred to arbitration in the DIFC given the arbitration agreement between the parties. The Cayman court rejected these arguments characterising them as a tactical "smokescreen" intended to delay the inevitable appointment of official liquidators. Official liquidators were therefore appointed over Adenium reliant on the debt created by an unpaid DIFC arbitral final award as the basis for establishing the company's insolvency.

2. ***In the matter of Rasia*** (unreported 28 July 2021). This was another case concerning investment funds and an application to appoint official liquidators. Rasia was a mutual fund structured as a Cayman exempted company, with an investment programme managed from Dubai, as part of a group that makes investments into distressed companies and turnaround situations in the mining and infrastructure sectors. Here the applicant was a party claiming to be a shareholder of Rasia who sought the appointment of liquidators on the basis that it was "just and equitable" to order the liquidation of the company. [A "just and equitable" petition is a discretionary remedy available to shareholders in a broad range of circumstances normally involving a breakdown in trust and confidence between shareholders and the board and leading to a detrimental impact on the company.] In this case the company filed a summons seeking to strike out the petition and argued that the applicant was no longer a shareholder because it was said the Petitioner's subscriptions for shares were conditional on certain conditions provided for in a December 2018 'Transaction Agreement'. If the Petitioner was no longer a shareholder that would mean that it was not economically interested in the company and therefore not entitled to make the application. In light of the company's position, the Cayman court decided to decide the issue of the applicant's status as a shareholder. Applications to appoint liquidators are not designed or intended to resolve complex factual disputes but in appropriate cases the court will do so in order to avoid injustice caused by the delay involved in bringing other legal proceedings. In resolving that dispute the Cayman court found that the company's primary witness had been dishonest and had made a false allegation that the applicant had fabricated a number of emails. The Cayman court was assisted by forensic technology experts to decide this issue. Ultimately the court found the company's evidence to be dishonest and ordered the appointment of liquidators. The decision shows the willingness of Cayman court to prevent unnecessary litigation and safeguard the protection afforded to shareholders in Cayman companies by the ability to appoint liquidators on just and equitable grounds.
3. ***In the Matter of Al Najah Education Limited*** (unreported 9 August 2021). The Company has investments in schools and nurseries in the Middle East and South East Asia. This case involved an application to appoint provisional liquidators ("PLs") over the company pursuant to section 104(3) of the Cayman Companies Act. The appointment of the PLs (which would have the effect of displacing the Company's board of directors) was sought on an urgent

basis in advance of the court considering its substantive application to appoint official liquidators over the company on the just and equitable basis. In support of its application to appoint the PLs, the petitioners argued there had been a proven fraud against certain key persons involved in the management of the Company. However the Cayman court found that there was no evidence that the Company was being run in a way that made it necessary to address the risk of dissipation or misuse of the Company's assets or oppression of minority shareholders or mismanagement or misconduct in its affairs by giving control of the Company to the PLs. In the court's view, no real questions were raised as to the integrity of the Company's management and there was no need for an independent investigation. In reaching its decision the Cayman court: (i) clarified that the jurisdiction to appoint PLs was only engaged if it is found to be necessary to prevent one or more of risks set out in the statute (with strong evidence to that effect); and (ii) found that the need for an independent investigation is not enough by itself to satisfy the applicable statutory test. It was also relevant to the court's analysis that independent directors had been appointed and the impugned directors were no longer directors and thus controlling the Company. Further, the court was concerned to avoid the likely detrimental impact the appointment of PLs might have on the Company's apparently successful and profitable business.

It is clear from the above summary that Cayman vehicles and structures are extremely popular with clients in the Middle East. We expect that this recent popularity will continue to grow. In addition to providing any necessary structuring assistance (given our substantial investment fund, banking, corporate and private wealth teams), Ogier is also well placed to assist with any disputes that might arise. Ogier is acting in a number of the above cases and has 32 dispute resolution fee earners providing Cayman law assistance across the globe and across time zones.

[1] By which term we mean Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, Turkey, United Arab Emirates (UAE), and Yemen.

About Ogier

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