公报文章

# Illegality as a defence under Cayman Islands, British Virgin Islands, and Bermuda law: a comparison with English law and Hong Kong law

# 违法行为在开曼群岛、英属维尔京群岛和百慕大法律下作为辩护理据：与英国和香港法律的比较

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**The general doctrine of 'illegality', in commercial litigation, is based on two related principles:**

- **Firstly, that no person should benefit from his or her own illegal act or wrong; and**
- **Secondly, that the law (and the Court) should not condone, reward, or enforce, illegal behaviour.**

**在商业诉讼中，"违法行为"的信条基于两个相关原则：**

- **第一，任何人都不应从他或她自己的违法行为或错误中获益；**
- **第二，法律（和法院）不应容忍、奖励或强制违法行为。**

In jurisdictions such as Bermuda, the British Virgin Islands, and the Cayman Islands, the alleged 'illegality' of one party or another is often relied upon, in practice, as a defence to a claim, whether the claim is asserted in contract, tort, equity, or restitution.

在百慕大、英属维尔京群岛和开曼群岛等司法管辖区，当事一方或另一方被指的"违法行为"常常被用作对索赔的辩护理据，无论索赔是在合同、侵权、衡平法还是补偿中提出的。

It is quite often asserted, for example, that a claim should be dismissed because the claimants (or, in the case of a company in insolvent liquidation, the company's former directors and officers) have allegedly been guilty of some fraud, dishonesty, breach of statute (such as an immigration or tax law), or regulatory non-compliance (such as a breach of Anti-Money Laundering, Beneficial Ownership, or Sanctions regulations).

例如，被告常会主张因为索赔人（或者，在公司破产清算的情况下，公司的前任董事和高管）涉嫌欺诈、不诚实、违反法规（例如移民法或税法），或不合规（例如违反反洗钱、实益所有权或制裁等规定），所以其主张索赔应被驳回。

The application of the 'illegality' doctrine is not straightforward, however, and it requires careful consideration in every case, not least in cross-jurisdictional cases where different governing laws might potentially apply to the issue.

然而，应用"违法行为"的信条并非是一件简单的事情，需要在每个案件中加以仔细考虑，尤其是在跨辖区的案件中，因为不同的管辖法律很可能均适用于该案件。

In *Patel v Mirza* [2016] UKSC 42, Lord Toulson and a majority of the United Kingdom Supreme Court noted that the application of the doctrine of 'illegality' had caused a good deal of uncertainty, complexity, and inconsistency, in earlier English case law.

在 *Patel v Mirza* [2016] UKSC 42 一案中，Toulson 法官和英国最高法院多数法官指出，在早期的英国判例法中，"违法行为"信条的应用造成了大量的不确定性、复杂性和不一致性。

In attempting to offer clarity and some degree of

为了给英国法律下的"违法行为"信条提供明确性和某种程

consistency to the doctrine of 'illegality' under English law, Lord Toulson concluded in *Patel v Mirza* [2016] UKSC 42, that "the essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system".

In doing so, the majority of the United Kingdom Supreme Court rejected the 'reliance' approach reflected in the earlier House of Lords' decision in *Tinsley v Milligan* [1994] 1 AC 340, whereby the courts would, somewhat inflexibly, refuse relief to a party that was obliged to rely on its own illegality to plead or to establish its case: but not in other cases.

In assessing whether the public interest would be harmed in such a way as to affect the integrity of the legal system, Lord Toulson held that the English courts were obliged to adopt a more flexible approach, on the facts of any given case, by considering:

- the underlying purpose of the legal prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;
- any other relevant public policy on which the denial of the claim may have an impact; and
- whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

The United Kingdom Supreme Court has re-affirmed the *Patel v Mizra* approach in three more recent English cases, including Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd [2019] UKSC 50, *Stoffel and Co v Grondona* [2020] UKSC 42 and *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43.

The modern, flexible English approach has also been followed and applied at first instance in the Grand Court of the Cayman Islands, in the lengthy judgment of Chief Justice Smellie in the case of *Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited (In Official Liquidation) (SICL) and Others*, Grand Court of the Cayman Islands, 31 May 2018.

In his judgment in that case (at page 1201), Chief Justice Smellie also noted that the following considerations provided 'useful benchmark' guidance for the resolution of any dispute in which the defence of 'illegality' is raised, as a matter of Cayman Islands law:

- how seriously illegal or contrary to public policy the conduct was;
- whether the party seeking enforcement knew of, or intended, the conduct;
- how central to the contract or its performance the conduct was;
- how serious a sanction the denial of enforcement

度的一致性，Toulson 法官在 *Patel v Mirza* [2016] UKSC 42 一案中断定，"违法行为信条的基本原理是，如果执行一项索赔会损害法律制度的廉正，那么执行这项索赔就违背了公共利益"。

英国最高法院多数法官对此的做法是驳回了以往上议院在 *Tinsley v Milligan* [1994] 1 AC 340 案的裁决中反映的"依赖"做法，这种做法使法院颇为硬性地拒绝向必须依靠其自身的违法行为来申辩或确立其案件的当事方提供救济：但在其他案件中则不然。

在评估公共利益是否会受到损害从而影响法律制度的廉正时，Toulson 法官认为，英国法院有义务基于案件的事实采取更加灵活的方法，要考虑以下因素：

- 法律禁令的根本目的（已违反）以及拒绝索赔是否会强化这一目的；
- 拒绝索赔可能会影响到的任何其他相关公共政策；以及
- 拒绝索赔是否是对违法行为的适当回应，需紧记惩罚是刑事法庭的事宜。

英国最高法院在最近的三宗英国案件中再次肯定了 *Patel v Mizra* 一案的做法，这三宗案件是 Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd [2019] UKSC 50 案、*Stoffel and Co v Grondona* [2020] UKSC 42 案以及 *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43 案。

开曼群岛大法院的一审也遵循并采用了这种现代的、灵活的英国做法，这反映在 2018 年 5 月 31 日开曼群岛大法院首席法官 Smellie 对 *Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited (In Official Liquidation) (SICL) and Others* 一案篇幅甚长的判决书中。

在其对该案的判决书中（第 1201 页），首席法官 Smellie 从开曼群岛法律角度提以下考量为解决任何出现"违法行为"辩护的争议作为提供了"有用的基准"指引：

- 该行为违反法律的严重性或违反公共政策的严重性；
- 寻求强制执行的一方是否知道或有意实施该行为；
- 该行为对合同或履行合同的重要性；
- 拒绝强制执行对寻求强制执行一方的惩罚有多严重；

is for the party seeking enforcement;

- whether denying enforcement will further the purpose of the rule which the conduct has infringed;
- whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy;
- whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; and
- whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system.

- 拒绝强制执行是否会进一步实现该行为所违反的规则的目的；
- 拒绝强制执行是否会对违法行为或违反公共政策的行为起到威慑作用；
- 拒绝强制执行是否会确保寻求强制执行的一方无法从该行为中获利；以及
- 拒绝强制执行是否会避免法律上的不一致性从而维护法律制度的廉正。

The modern, flexible English approach has also been followed in the Bermuda Courts in three recent cases decided under Bermuda law: *Lydia Caletti v Ralph DeSilva* [2017] Bda LR 102, *X Limited v Y* [2019] SC Bda Civ 58, and *Samann Ltd v Just Add Bermuda Ltd* [2019] SC Bda 83 Civ.

百慕大法院在最近根据百慕大法律裁决的三宗案件中也采用了这种现代的、灵活的英国做法，这三宗案件是：*Lydia Caletti v Ralph DeSilva* [2017] Bda LR 102 案、*X Limited v Y* [2019] SC Bda Civ 58 案以及 *Samann Ltd v Just Add Bermuda Ltd* [2019] SC Bda 83 Civ 案。

In the *Samann* case, the Supreme Court of Bermuda expressly acknowledged the importance of the public policy in a creditor-friendly, international financial centre such as Bermuda that "where a lender contracts with a borrower to lend money then, absent illegality, the courts will enforce the terms of the contract".

在 Samann 一案中，百慕大最高法院明确肯定了公共政策在百慕大这样一个对债权人友好的国际金融中心的重要性，从而"如果贷款人与借款人签订合同放款，则在没有违法行为的情况下，法院会强制执行合同条款"。

In practice, international businesses doing business in Bermuda, the British Virgin Islands, and the Cayman Islands should take a measure of comfort from the judicial flexibility associated with the doctrine of 'illegality' in the commercial context, having regard to the range of public policy considerations involved in every case.

在实践中，在百慕大、英属维尔京群岛和开曼群岛开展业务的国际企业可从商业环境下与"违法行为"信条相关的司法灵活性中获得一定程度的安心，因为每个案件所涉及的公共政策考量范围都会顾及到。

Given the obvious importance of the local Court's assessment of the commercial, public policy, and regulatory considerations associated with an 'illegality' defence, it will be apparent that a successful outcome in any given commercial dispute usually depends, to a considerable extent, on the quality of analysis, evidence, and submissions put before the local Court at first instance, having regard to the law governing the cause of action or defence, as well as the law that is said to be applicable to the allegedly illegal act.

鉴于地方法院对与"违法行为"辩护相关的商业、公共政策和监管考量因素的评估意义重大，很显然，任何商业纠纷的胜诉通常在很大程度上取决于提交给当地法院一审的分析、证据和陈词的质量，并且要考虑到管辖诉讼理由或辩护理由的法律，以及据说适用于所指违法行为的法律。

There is some scope for technical legal argument as to the precedential status of *Patel v Mirza* [2016] UKSC 42 in the British Overseas Territories of Bermuda, the British Virgin Islands, and the Cayman Islands, having regard to certain earlier decisions of the Privy Council, such as *Chetty v Servai* (1908) LR 35, *Singh v Ali* [1960] AC 167, and *Chettiar v Chettiar* [1962] AC 294. This was a point noted, in passing, by Mr. Justice Adrian Jack of the BVI High Court in two recent interlocutory decisions at first instance in the BVI: *Ganjaei v Sable Trust Ltd* [2021] ECSCJ No 466 and *Briefline Assets Ltd v Falin* [2021], unreported, 17 June 2021.

至于 *Patel v Mirza* [2016] UKSC 42 一案在英国海外领土百慕大、英属维尔京群岛和开曼群岛的先例地位，技术性的法律论证还存在一定的争论空间，这主要考虑到枢密院一些较早的裁定，例如对 *Chetty v Servai* (1908) LR 35 案、*Singh v Ali* [1960] AC 167 案以及 *Chettiar v Chettiar* [1962] AC 294 案的裁定。英属维尔京群岛高等法院 Adrian Jack 法官先生在英属维尔京群岛最近两项一审案件中间裁决中顺便指出了这一点，这两个案件是 *Ganjaei v Sable Trust Ltd* [2021] ECSCJ No 466 和 *Briefline Assets Ltd v Falin* [2021]，未报道，2021 年 6 月 17 日。

In practice, however, the Bermuda, BVI, and the Cayman

然而，在实践中，预期百慕大、英属维尔京群岛和开曼群岛

courts would be expected to treat the recent English case law (now set out in four separate decisions of the United Kingdom Supreme Court, and followed by the Supreme Court of Bermuda and the Grand Court of the Cayman Islands) as highly persuasive, whether at first instance or (if that were to become necessary) on appeal.

法院将最近的英国判例法（目前在英国最高法院的四项不同裁决中有所阐明，随后由百慕大最高法院和开曼群岛大法院跟进）视为具有高度说服力，无论是一审还是（如有必要）上诉。

The legal position in Hong Kong, however, has not yet developed in the same way as in England and Wales, Bermuda, or the Cayman Islands, and it remains somewhat inflexible, on the current authorities.

可是，香港有关的判例法还没有像英国、百慕大或开曼群岛一般进化，就目前的当局而言，仍有些刻板。

The Hong Kong judiciary have repeatedly noted, for example, that, pending appellate review by the Hong Kong Court of Final Appeal, both the Hong Kong Court of First Instance and the Hong Kong Court of Appeal remain bound to apply the older, more inflexible approach to the issue of 'illegality' under Hong Kong law, as set out in *Tinsley v Milligan* [1994] 1 AC 340: see, in particular, *Kan Wai Chung v Hau Wun Fai* [2016] 5 HKC 585, *Arrow ECS Norway AS v M Yang Trading Ltd & Ors* [2018] 5 HKC 317, and *Idemitsu Chemicals (Hong Kong) Ltd v Brilliant One Shipping Co Ltd* [2021] HKCFI 1175.

例如，香港法庭一再指出，对于香港法律下的"违法行为"问题，在香港终审法院进行上诉复审之前，香港原讼法庭和香港上诉法庭仍须采用较旧的、较不灵活的做法，这反映在 *Tinsley v Milligan* [1994] 1 AC 340 案件中，尤其参阅 *Kan Wai Chung v Hau Wun Fai* [2016] 5 HKC 585 案、*Arrow ECS Norway AS v M Yang Trading Ltd & Ors* [2018] 5 HKC 317 案以及 *Idemitsu Chemicals (Hong Kong) Ltd v Brilliant One Shipping Co Ltd* [2021] HKCFI 1175 案。

The current divergence between Hong Kong law on the one hand, and English, Bermuda, Cayman Islands, and British Virgin Islands law on the other hand, means that, in cross-border cases where the doctrine of 'illegality' might arise, careful consideration should be given to the most appropriate jurisdiction, and the appropriate governing laws, as well as the manner in which any claim, or defence, is presented to the Court.

香港法律这一边与另一边的英国、百慕大、开曼群岛和英属维尔京群岛法律之间目前存在的差异意味着在可能出现"违法行为"信条的跨境案件中，应仔细考虑最适当的管辖权、适当的管辖法律以及向法院提出索赔或进行辩护的方式。

*The authors are members of Conyers' **Asia Disputes & Restructuring Group (ADRG)** which is tasked with providing sophisticated Bermuda, British Virgin Islands and Cayman Islands litigation advice to clients connected to our multi-lingual (Cantonese, English and Mandarin) team based in Asia. The ADRG integrates the most experienced and highly rated partner-led litigation teams in Asia, Bermuda, the British Virgin Islands and Cayman Islands and delivers seamless and comprehensive services across jurisdictions round the clock. Our advocates in these jurisdictions are leaders in their fields and recognised by all leading independent directories. Our greater depth and range of expertise in the region distinguishes us from our competition and ensures that our clients receive comprehensive, reliable and thorough advice.*

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