Dispute Resolution 2019

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventeenth edition of *Dispute Resolution*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Kenya.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Martin Davies and Kavan Bakhda of Latham & Watkins, for their continued assistance with this volume.

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Getting The Deal Through

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Bermuda

Kai Musson and Nicole Tovey
Walkers Bermuda

LITIGATION

Court system

1 | What is the structure of the civil court system?

Bermuda's civil court structure comprises the Magistrates' Court of Bermuda (Magistrates' Court), the Supreme Court of Bermuda (Supreme Court) and the Court of Appeal for Bermuda (Court of Appeal), with a final appeal to the Judicial Committee of the Privy Council (JCPC).

The Supreme Court is the court of first instance in Bermuda for civil disputes with unlimited jurisdiction. The Supreme Court determines all civil disputes with a value in excess of Bda$25,000. The Supreme Court has various divisions including civil, commercial, divorce, criminal and appellate jurisdictions. The Supreme Court consists of five judges (including the Chief Justice) and disputed civil matters are tried by a single judge. Appeal from the Supreme Court lies to the Court of Appeal.

The Commercial Court division of the Supreme Court was established with effect from 1 January 2006 and determines disputes including, but not limited to, trade, commerce, insurance and reinsurance, banking and financial services and applications under the Companies Act 1981. The Commercial Court comprises specialist judges with extensive commercial experience both on the bench and in private practice.

The Court of Appeal consists of three judges and sits three times per year. The Court of Appeal also has subdivisions including civil, criminal, commercial, divorce and appellate jurisdictions. Appeals against decisions of the Court of Appeal may be made to the JCPC.

The JCPC sits in London. Typically, disputes are tried by a panel of five judges.

The Magistrates' Court determines all civil disputes with a value of Bda$25,000 or less and disputed civil matters are tried by a single judge. Appeal from the Magistrates' Court lies to the Supreme Court.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

In Bermuda, civil proceedings are heard by a single judge sitting without a jury except in claims for wrongful arrest, false imprisonment or defamation, where the right to jury trial exists. In civil proceedings, the judge generally has a passive role, rather than an inquisitorial role.

The Jurors in Civil Causes Act 1951 governs the selection process for juries in civil causes and provides that a jury shall (unless an effective challenge is made) consist of the eight jurors whose names are first drawn in open court. Jurors' names are drawn from the members of the whole panel of jurors who are liable to serve as jurors at the session of the Supreme Court during which the hearing of the civil cause takes place and who are liable and available to serve as jurors at the hearing of that particular civil cause. Any person drawn to serve on a jury in a civil cause may be challenged by either party to the cause before he or she is sworn as a juror upon the ground that he or she is not or may not be qualified in law to serve as a juror or he or she is not indifferent as between the parties to the cause.

Where a challenge to a juror is allowed, he or she shall be discharged from serving as a juror in the cause, a further name shall be drawn and that person shall, subject to effective challenge, serve as a juror in the place of the person discharged.

There are no current initiatives afoot to promote diversity among the judiciary in Bermuda.

Limitation issues

3 | What are the time limits for bringing civil claims?

The Limitation Act 1984 prescribes the limitation periods for various types of action, including:

- tort – six years from the date on which the cause of action accrued;
- contract – six years from the date on which the cause of action accrued;
- enforcement of arbitration award – 20 years;
- recovery of land – 20 years from the date on which the right accrued;
- breach of trust (other than fraudulent) – six years; and
- fraudulent breach of trust – no limitation.

The commencement date of a limitation period can be extended in certain circumstances for certain causes of action.

Although there does not appear to be any provision for parties to agree to suspend time limits under the Limitation Act 1984, the parties may enter into an agreement to suspend a limitation period, for example, by way of a standstill or tolling agreement.

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

The rules of court in Bermuda (the Rules of the Court of Appeal for Bermuda BX1/1965, the Rules of the Supreme Court 1981 (Rules) and the Magistrates' Court Rules 1973) do not contain any requirements for pre-action conduct.

When considering the issue of costs, without prejudice attempts to settle litigation are taken into account under Order 62, rule 9(c) of the Rules.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

Civil proceedings in the Supreme Court may be commenced by the issuance of a writ of summons (writ), originating summons, originating

motion or petition in the Supreme Court Registry pursuant to Order 5 of the Rules.

Writ

The writ can either state in general terms the nature of the claim and the relief sought, or include full particulars of the claim at the outset. If the former approach is adopted, a separate document containing the particulars of the claim must be served after the defendant has entered an appearance.

Proceedings appropriate to be commenced by writ are:

- most commercial claims;
- breach of contract;
- claims for negligence or other torts;
- claims for fraud; and
- claims relating to patent infringement.

Originating summons

Proceedings appropriate to be commenced by originating summons are:

- where the sole or principal question at issue is the construction of statutory provisions, instruments made under statutory provisions, deeds, wills, contracts, other documents or the determination of some question of law;
- in circumstances in which there is unlikely to be any substantial dispute of fact;
- where disclosure is not required; or
- in circumstances in which a quicker procedure is required.

Originating motion and petition

Civil proceedings may be commenced by originating motion or petition if the Rules or any other statute either requires or authorises it. Examples include winding-up applications, bankruptcy and minority shareholder oppression relief.

Parties to the proceedings are notified of the commencement of proceedings by service of the process upon the defendant. In the event that the defendant is an individual, personal service is required. Bermuda companies may be served by leaving the process at the company's registered office.

Where the defendant resides abroad, the claimant must file an application with the court for leave to serve the defendant overseas.

The Bermuda courts have continually demonstrated that they have ample capacity to handle their caseload and to list disputes in a timely manner. Since 28 September 2017, a panel of nine individuals has been available for part-time appointments as assistant justices in the civil and commercial jurisdiction of the Supreme Court on an as-needed basis. The establishment of this panel has significantly enhanced the judicial capacity of the civil and commercial divisions of the Supreme Court.

Timetable

6 | What is the typical procedure and timetable for a civil claim?

Actions commenced by originating summons

- Filing of originating summons with the Supreme Court Registry and return of sealed originating summons – approximately one week.
- Service of the sealed originating summons on the defendant or defendants – service time-frame will depend on the ease with which a defendant can be located and served. If the defendant has an attorney, the attorney may accept service and must endorse the originating summons. Service is deemed to occur on the date of the endorsement. Where the originating summons is not duly served on a defendant, but they enter an unconditional appearance in the action, service is deemed to have occurred on the date on which they entered the appearance.

Where required by the Rules, a defendant must enter a memorandum of appearance within 14 days of service (or other period as may be extended by the Rules) and submit to (or challenge) the jurisdiction of the Bermuda courts. Where no appearance is required, the claimant must file a notice of appointment to hear the originating summons.

A claimant files a notice of appointment to hear the originating summons either upon the entry of the defendant's appearance or upon the expiry of the time limited for entering an appearance. The Supreme Court Registry typically provides notice of the date fixed for the hearing within two weeks of filing of the notice of appointment. The claimant must serve a copy of the notice of appointment fixing the hearing date and any evidence intended to be adduced on any party that has entered an appearance.

Actions commenced by writ

- Filing of writ with the Supreme Court Registry and return of sealed writ – approximately one week.
- Service of the sealed writ on the defendant or defendants – as above for service of originating summons.
- Memorandum of appearance – the defendant must enter a memorandum of appearance in the action within 14 days of service (or other period as may be extended by the Rules) and submit to (or challenge) the jurisdiction of the Bermuda courts. If no appearance is filed within the applicable time frame, then the claimant can file an affidavit of service and enter judgment in default of appearance.
- Summary judgment – the claimant may file an application for summary judgment after the service of a memorandum of appearance, on the grounds that the defendant has no defence to a claim included in the writ. The claimant must show that there is no issue or question in dispute that ought to be tried or that there ought not for some other reason be a trial of all or part of that claim.
- Service of statement of claim by claimant – within 14 days of the defendant entering the memorandum of appearance (if the particulars of the claim were not indorsed on the writ).
- Service of defence by defendant on the claimant – before the expiry of 14 days after the time limited for appearing or after the statement of claim is served, whichever is the later.
- Service of reply by claimant on defendant – within 14 days of service of the defence, if required.
    - In practice, counsel in Bermuda typically agrees extensions of time for the filing and service for pleadings. The pleadings in an action are deemed to be closed either at the expiry of 14 days after the service of the reply or the defence to the counterclaim or, if neither a reply nor a defence to the counterclaim is served, at the expiry of 14 days after service of the defence.
    - The claimant may apply for judgment in default of service of the defence and a defendant may apply for an action to be dismissed in default of service of the statement of claim.
    - Although the Rules do not require pre-trial review hearings, they nonetheless serve as a useful and frequently used case management tool. Within one month after the pleadings are deemed to be closed, the claimant must take out a summons returnable in not less than 14 days for directions.
- Disclosure – within 14 days of the close of pleadings, the parties shall exchange lists of documents in their possession, custody or control. The list of documents must state a time within seven days of service at which the documents may be inspected.
    - The defendant must identify documents that are central to the case for inclusion in the court bundle 14 days prior to the trial date and must file hearing bundles at least two clear days prior to the hearing. Practically, orders are generally made at the directions hearing or at the pre-trial review providing a timetable for the filing of bundles and skeleton arguments.

- The time for the claimant to set down an action for trial will be fixed in the order for directions.

Case management

7 | Can the parties control the procedure and the timetable?

The parties can control the procedure and the timetable in civil proceedings to a limited extent.

Although the Rules govern the Supreme Court's procedure and timetable, parties can agree reasonable alternative timetables for meeting procedural requirements. However, any agreement will be subject to the approval of the court in its discretion.

As the court has a duty to actively manage cases justly and expeditiously, the directions hearing will typically be used by the court to set the timetable, as far as possible, addressing all procedural matters in the course of preparation and listing for trial.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

With respect to the existence of a duty to preserve documents and other evidence pending trial, where a party fails to preserve documents after the commencement of proceedings, then the defaulting party risks adverse inference being drawn from such 'spoilation' based upon the maxim *omnia praesumuntur contra spoliatorem* (everything is presumed against he who destroys) (*Infabricks Ltd v Jaytex Ltd* [1985] FSR 75).

The system of law in Bermuda is founded on the English legal system and English principles of common law and equity, even though a distinct body of Bermuda statutes and Bermuda case law has developed over time. Further, the Bermuda courts often treat English case law as being persuasive, particularly from the English Supreme Court and JCPC.

The Rules require parties to civil and commercial litigation to disclose all documents that are or have been in their possession, control or power relating to matters in question in the action, including those unhelpful to their case. This mutual disclosure obligation arises after the close of pleadings and continues until trial. However, the Rules do not prevent the parties to an action from agreeing to dispense with or limit the discovery of documents that they would otherwise be required to make.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Yes. The Bermuda courts have recognised that privilege may attach to various types of documents, including legal advice privilege, litigation privilege and common interest privilege (*Stiftung Salle Modulable v Butterfield Trust (Bermuda) Ltd* [2012] Bda LR 78). For example, legal advice privilege attaches to statements passing internally within an organisation, as well as to statements passing between a client and external attorneys. Litigation privilege extends to communications between a client and his or her lawyer and third parties for the purposes of litigation, including without-prejudice correspondence. Common interest privilege typically arises where a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence.

Whether advice from an in-house lawyer (whether local or foreign) is privileged has not been considered by the Bermuda courts. However, in *Three Rivers District Council and others v Governor and Company of the Bank of England* (No 5) [2004] UKHL, it was determined that advice will be privileged in this context where 'the advice relates to the rights, liabilities, obligations or remedies of the client under private law or public law'. As a result, work of in-house lawyers that is business advice or administration may not be privileged.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

Yes, the parties must exchange the witness statements of their respective witnesses prior to trial.

No party to an action may adduce expert evidence at trial without leave of the court. If leave is granted, typically the court will give directions for the timing of the exchange of written expert reports prior to trial.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

Evidence at trial of actions commenced by writ is generally presented by oral examination in open court by witnesses, with written witness statements usually standing as evidence in chief.

Evidence at trial of actions commenced by other originating process is usually presented by affidavit, without oral testimony.

An expert's report will stand as evidence-in-chief to be supplemented by oral testimony and subject to cross examination and re-examination.

Interim remedies

12 | What interim remedies are available?

The most common interim remedies that can be ordered include:

- default judgment;
- summary judgment;
- strike-out;
- want of prosecution;
- security for costs;
- interim injunctions;
- interim attachment orders; and
- interim search orders.

Both interim freezing injunctions and search orders are available in Bermuda pursuant to the Rules.

Interim free-standing freezing injunctions will be granted in support of foreign proceedings where the court has personal or territorial jurisdiction over the defendant and a good arguable case may be made for the relief under local law. In considering whether it is 'just and convenient' to grant an injunction, the court will consider whether the relief would properly assist the foreign court (*ERG Resources LLC v Nabors Global Holdings II Limited* [2012] Bda LR 30).

There does not appear to be any Bermuda case law in relation to search orders in support of foreign proceedings.

Remedies

13 | What substantive remedies are available?

The most common final remedies that can be ordered include:

- monetary judgments;
- damages;
- injunction;
- specific performance;

- specific delivery;
- rescission; or
- declaratory relief.

In certain circumstances, damages may be punitive (ie, aggravated and exemplary damages).

All sums of money due or payable under a money judgment shall carry interest at the statutory rate of 3.5 per cent per annum unless the court orders otherwise, from the time the judgment is given until the judgment is satisfied, and may be levied under a writ of execution or otherwise recovered by the same process as the principal.

Enforcement

14 | What means of enforcement are available?

The most common forms of enforcement of a judgment or order for the payment of money include:

- writ of fieri facias;
- garnishee proceedings;
- appointment of a receiver;
- order for committal; or
- writ of sequestration.

Additionally, section 2 of the Debtors' Act 1973 provides the court with the power to commit a person to prison who defaults in paying money adjudged or ordered to be paid by that debtor. The court has held that 'under section 5(2) of the Bermuda Constitution, civil arrest is only clearly permissible in the case of punishment for contempt and in execution of the order of a court made to secure the fulfilment of any obligation imposed upon him by law' (*Bank of NT Butterfield & Sons Ltd v Grenardo and Smith* [2006] Bda LR 10).

Public access

15 | Are court hearings held in public? Are court documents available to the public?

The Bermuda Constitution generally provides that all proceedings instituted in any court shall be held in public, save that the court may exclude persons other than the parties and their legal representatives to such extent: (i) as the court may be empowered or required by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interest of public morality, the welfare of persons under the age of 18 years or the protection of the private lives of persons concerned in the proceedings; or (ii) in the interests of defence, public safety or public order.

The legal principles governing private chamber hearings were considered in *Bermuda Casino Gaming Commission v Richard Schuetz* [2018] SC (Bda) 24 Civ.

The Bermuda courts have recognised that the granting of confidentiality orders (ie, the anonymising of proceedings and dealing with them as private) may be appropriate where there is no obvious public interest in knowing about the matter in dispute (*Re BCD Trust (Confidentiality Orders)* [2015] Bda LR 108). The legal principles governing confidentiality orders were recently considered *In The Matter [of] The E Trust* [2018] SC (Bda) 38 Civ.

The public may apply for copies of originating process, judgments and orders in civil and commercial matters save for any case whereby order of the court public access to such documents has been restricted, divorce proceedings and any other proceedings related to children, applications in relation to arbitration proceedings, applications for directions in relation to trusts, cases relating to the administration of deceased estates, winding-up proceedings and any other category of case that may be identified, from time to time, by way of circular by the Registrar of the Supreme Court (the Registrar).

The legal basis for members of the public to gain automatic access to court records where the member of the public is not a party to the proceedings is as follows:

- where a case is no longer pending or active because it is finally concluded, a member of the public can apply to the Registry for copies of documents under the Supreme Court (Records) Act 1955;
- where a case is pending, a member of the public can apply to the Registry for copies of any originating process or orders made in the case under Order 63, rule 4 of the Rules; and
- where reference is made in the course of a public hearing or in a public judgment to any documents on the court file, a member of the public has a common-law right to apply for copies of the relevant document or documents (*Bermuda Press (Holdings) Ltd v Registrar of Supreme Court* [2015] SC (Bda) 49 Civ).

Costs

16 | Does the court have power to order costs?

Yes. Order 62, rule 3(2) of the Rules provides that no party to any proceeding shall be entitled to recover any of the costs of those proceedings from any other party except under an order of the court. The award of costs is in the discretion of the court; however, the court typically makes an order for costs to follow the event (ie, the unsuccessful party pays the successful party's costs).

The matters to be taken into account by the court in exercising its discretion are:

- any offer of contribution brought to its attention in accordance with Order 16, rule 10;
- any payment of money into court and the amount of such payment;
- any written offer made under Order 33, rule 4A (2); and
- any written offer made under Order 22, rule 14, provided that the court shall not take such an offer into account if, at the time it is made, the party making it could have protected his or her position as to costs by means of a payment into court under Order 22.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Conditional and contingency fee arrangements are generally prohibited in Bermuda subject to limited exceptions. For example, lawyers who deal in undefended debt collections may enter into contingency fee arrangements pursuant to section 96 of the Barristers' Code of Professional Conduct 1981. Further, the Bermuda Bar Council may expressly permit such arrangements pursuant to section 96 of the Barristers' Code of Professional Conduct 1981.

Third-party funding in Bermuda is prohibited by the common-law rules against maintenance and champerty. However, the ruling of Kawaley CJ in *Stiftung Salle Modulable v Butterfield Trust* [2014] Bda LR 13 suggests that traditional common-law prohibitions against third-party funding are no longer good law in Bermuda, as he stated the following:

> *The constitutional protected right of access to the court which is implicit in the fair trial rights guaranteed of section 6(8) of the Bermuda Constitution as read with European Convention on Human Rights jurisprudence on article 6 of that Convention*

suggest that such funding arrangements should be encouraged rather than condemned.

However, it is unclear whether the costs of litigation funding can be recovered as part of the litigation (by a third party or otherwise), as the plaintiff's argument in *Stiftung Salle Modulable v Butterfield Trust* that litigation funding costs should be recovered as contractual damages was rejected by the court.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

The availability of insurance to cover legal costs is not prohibited in Bermuda as a matter of statute.

Nonetheless, because there are no reported Bermuda cases on such arrangements, the Bermuda courts' view of such arrangements is unknown.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Order 15, rule 12 of the Rules provides for litigants with the same interest in certain proceedings to bring a form of representative proceedings (ie, to sue or be sued in a representative capacity). However, leave must first be obtained to enforce a judgment rendered in the proceedings against any person who was not a party to the proceedings.

In proceedings concerning the estate of a deceased person, property subject to a trust or the construction of a written instrument including any type of enactment, the court may appoint one or more persons to represent any person or class who is or may be interested or affected in the proceedings, where:

- the person, the class or some member of the class cannot be ascertained or cannot readily be ascertained;
- the person, the class or some member of the class, though ascertained, cannot be found; or
- the person or the class and the members thereof can be ascertained and found, but it appears to the court expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power for the purpose of saving expense.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

The most common grounds of appeal include the following:

- the judge erred in law;
- the judge made a factual finding that is inconsistent with the evidence;
- the judge erred by failing to take into account matters that he or she should have; or
- the judge erred by taking into account matters that he or she should not have.

An appeal against a final judgment of the Supreme Court may be brought to the Court of Appeal by filing a notice of appeal in the Supreme Court Registry within six weeks of the delivery of the judgment. An appeal against an interlocutory decision of the Supreme Court requires one to apply for leave to appeal to the judge of first instance and, in the event that leave is refused, the application for leave to appeal may be refreshed before the Court of Appeal. An application for leave to appeal must be brought within 14 days of the date of the decision and, provided that the leave application is successful, a notice of appeal must be filed within seven days of the grant of leave. In interlocutory matters, leave to appeal is granted where the grounds of appeal demonstrate a reasonable chance of success.

The Appeals Act 1911 provides for three gateways to appeal a decision of the Court of Appeal to the JCPC in the following circumstances:

- from any final judgment of the Court of Appeal, where the matter in dispute on the appeal amounts to or is the value of Bda$12,000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or is the value of Bda$12,000 or upward or from the final determination of the Court of Appeal of an appeal from any determination of any application or question by the Supreme Court under section 15 of the Constitution ('an appeal as of right');
- an appeal by reason of permission granted by the Court of Appeal because of the general or public importance of the appeal therein; or
- 'special leave' having been granted by the JCPC in the event that leave has been refused by the Court of Appeal.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

There are two key procedures in Bermuda for the enforcement of a foreign judgment; namely, enforcement under the Judgments (Reciprocal Enforcement) Act 1958 (applicable only to judgments rendered by the countries listed in the Judgments Extension Order 1956) or enforcement at common law.

Under the Judgments (Reciprocal Enforcement) Act 1958, the Supreme Court will enforce the judgment of a foreign court with regard to in personam claim provided that the following conditions are met:

- the foreign judgment is final and conclusive as between the parties. A foreign judgment shall be deemed to be final and conclusive at common law notwithstanding that an appeal may be pending against it or that it may still be subject to appeal;
- the foreign judgment is for a certain sum of money, not being a sum in respect of taxes, fines, penalties or other charges of a similar nature; and
- the judgment must be from a foreign court that had jurisdiction to give the judgment.

Judgments from foreign countries that are not covered by the Judgments (Reciprocal Enforcement) Act 1958 can be enforced by a common-law action. The judgment creditor must issue proceedings in Bermuda replicating the foreign proceedings and then apply for summary judgment in accordance with Order 14 of the Rules with reliance upon the foreign judgment.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

Yes, the typical means of obtaining evidence from a Bermuda witness is by letters rogatory (ie, a request for judicial assistance from the foreign court addressed to the Supreme Court). An ex parte application is filed with the Supreme Court and supported by affidavit evidence, to which the letter of request issued by the foreign court is exhibited.

The court will usually make an order requiring the witness to appear before an examiner at a specific time and place to be examined under oath. The order must be personally served on the witness. Committal proceedings may be commenced to compel the witness to attend. The order is usually accompanied by an order that the witness

produce certain documents. However, the opposing party in the foreign proceedings may apply to the court to set aside these orders if there is some ground for believing the letter of request does not conform to Bermuda law requirements.

The legal principles governing the Bermuda Court's general approach to letters of request were considered in *Douglas Kelly v Steven G Stevanovich et al* [2018] SC (Bda) 69 Civ.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes, Bermuda has adopted the UNCITRAL Model Law pursuant to the Bermuda International Arbitration and Conciliation Act 1993 (1993 Arbitration Act). The 1993 Arbitration Act provides that the UNCITRAL Model Law applies to all international commercial arbitrations held in Bermuda unless the parties expressly agree that the Arbitration Act 1986 (1986 Arbitration Act) shall apply. Nonetheless, the 1993 Arbitration Act was intended for use in international arbitrations and the 1986 Arbitration Act was intended for use in domestic arbitrations.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

The arbitration agreement must be in writing (article 7 of the UNCITRAL Model Law).

Also, because Bermuda recognises the principle of separability of arbitration clauses from within a main contract, an arbitration clause within a main contract is sufficient for the arbitration agreement to be valid and enforceable (see article 16(1) of the UNCITRAL Model Law and *Soujuznefteexport v Joc Oil Ltd* [1989] Bda LR 11). This will be the case even if the validity of the contract in which the arbitration clause is incorporated is being challenged.

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The 1986 Arbitration Act provides default provisions for the appointment of arbitrators. Section 11 of the 1986 Arbitration Act states that every arbitration agreement shall, if no other mode of reference is provided, be deemed to include a provision that the reference shall be to a single arbitrator unless a contrary intention is expressed therein. Section 15(1)(a) of the 1986 Arbitration Act grants the court the power to appoint an arbitrator where an arbitration agreement provides that the reference shall be to a single arbitrator and, after differences have arisen, all the parties do not concur in the appointment of an arbitrator.

While the 1993 Arbitration Act also provides default provisions for the appointment of arbitrators, the parties are nonetheless free to determine the number of arbitrators and to agree on a procedure of appointing the arbitrator or arbitrators subject to the provisions of article 11(4) and article 11(5) of the UNCITRAL Model Law.

Article 11(4) provides that where, under an appointment procedure agreed upon by the parties, a party fails to act as required, or the parties (or two arbitrators) are unable to reach an agreement, or a third party fails to perform any function entrusted to it, any party may request the court or other authority specified in article 6 to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

Article 11(5) provides that a decision on a matter entrusted by article 11(3) or article 11(4) to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.

Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator. However, if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party or if the two arbitrators fail to agree on the arbitrator within 30 days of their appointment, the appointment shall be made upon request of a party by the court or other authority specified in article 6. If the parties are unable to agree on a sole arbitrator, he or she shall be appointed upon request of a party by the court or other authority specified in article 6.

With regard to restrictions on the right to challenge the appointment of an arbitrator under the 1986 Arbitration Act, the Supreme Court may remove an arbitrator where an arbitrator has misconducted him or herself or the proceedings.

With regard to restrictions on the right to challenge the appointment of an arbitrator under the 1993 Arbitration Act, article 12(1) of the UNCITRAL Model Law requires a person approached in connection with his or her appointment as an arbitrator to disclose 'any circumstances likely to give rise to justifiable doubts as to his impartiality or independence'. As a result, an arbitrator can only be challenged under the 1993 Arbitration Act if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence or if he or she does not possess the qualifications as agreed between the parties (article 12(1)). A challenge of the appointment of an arbitrator under the 1993 Arbitration Act must be made to the Supreme Court within 15 days of a party becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstances that give rise to the challenge.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

The pool of suitably qualified international arbitrator candidates that reside in Bermuda is very small, particularly in executive positions within the insurance and reinsurance industry. Because the latter is a common requirement for various arbitration clauses relied upon in Bermuda, foreign arbitrators are commonly appointed.

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

Yes. Although the general approach of the UNCITRAL Model Law is to allow the parties the autonomy to agree the procedure to be followed, failing such agreement the arbitral tribunal can conduct the arbitration as it thinks fit, subject to the requirement that the parties be treated with equality and each party be given a full opportunity of presenting its case (see article 18 of the UNCITRAL Model Law).

Court intervention

28 | On what grounds can the court intervene during an arbitration?

With regard to matters that are governed by the UNCITRAL Model Law under the 1993 Arbitration Act, article 5 of the UNCITRAL Model Law

provides that no court shall intervene except where so provided in the UNCITRAL Model Law. As a result, arbitral proceedings should generally be conducted without court intervention.

Article 9 of the UNCITRAL Model Law provides the court with jurisdiction to grant interim measures of protection during an arbitration. Section 35(5) of the 1993 Arbitration Act outlines the following various types of interim relief that the court may grant:

- examination on oath of any witness before an officer of the Supreme Court or the Court of Appeal or any other person, and the issue of a commission or request for the examination of a witness out of Bermuda;
- the preservation, interim custody or sale of any goods that are the subject matter of the arbitration;
- securing the amount in dispute;
- the detention, preservation or inspection of any property or thing that is the subject of the arbitration or as to which any question may arise, and authorising for any of these purposes any person to enter on or in any land or building in the possession of any party to the arbitration, or authorising samples to be taken or any observation to be made or experiment to be tried that may be necessary or expedient for the purpose of obtaining full information or evidence; and
- interim injunctions or the appointment of a receiver.

Under the 1986 Arbitration Act, section 30 grants the Supreme Court jurisdiction to determine any question of law arising in the course of the reference in certain circumstances. Also, section 34(1) grants power to the Supreme Court to remove an arbitrator where an arbitrator or umpire has misconducted him or herself or the proceedings.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes. Both article 9 of the UNCITRAL Model Law and section 36 of the 1993 Arbitration Act expressly provide an arbitral tribunal with the ability to grant interim, interlocutory or partial awards. Section 22 of the 1986 Arbitration Act expressly provides an arbitral tribunal with the ability to grant interim awards.

Examples of interim relief granted in this context include *Anton Pillar* orders, preservation of asset orders, interim protection orders, interim injunctions and *Mareva* injunctions.

Award

30 | When and in what form must the award be delivered?

Section 21(1) of the 1986 Arbitration Act provides that an arbitrator shall generally have power to make an award at any time; however, the 1986 Arbitration Act does not prescribe the proposed form of an award.

Under the 1993 Arbitration Act, article 31 of the UNCITRAL Model Law does not prescribe a time frame for the delivery of an award. However, article 31 outlines the following requirements with regard to the form of an award:

- the award must be in writing and signed by the arbitrator or arbitrators;
- the award must state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is on agreed terms under article 30; and
- the award must state its date and the place of arbitration as determined in accordance with article 20(1).

Appeal

31 | On what grounds can an award be appealed to the court?

Under the 1986 Arbitration Act, an award can be appealed to the Court of Appeal on any question of law arising out of an award made on an arbitration agreement. An appeal may be brought by any of the parties to the reference either with the consent of all the parties to the reference or with the leave of the Supreme Court subject to section 31. However, the Supreme Court will not grant leave unless it considers that the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement having regard to all the circumstances.

Under the 1993 Arbitration Act, article 34(2) of the UNCITRAL Model Law outlines the following six grounds upon which an arbitral award can be set aside by the Court of Appeal:

- a party to the arbitration agreement was under some incapacity, or the agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Bermuda;
- the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNICTRAL Model Law from which the parties cannot derogate or, failing such agreement, was not in accordance with the UNICTRAL Model Law;
- the subject matter of the dispute is not capable of settlement by arbitration under the law of Bermuda; or
- the award is in conflict with the public policy of Bermuda.

An application to set aside an arbitral award under the 1993 Arbitration Act must be made to the Court of Appeal within three months of the date of the award.

There is no right of further appeal from a decision of the Court of Appeal under article 34(2) of the UNCITRAL Model Law.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The procedure for the enforcement of foreign and domestic arbitration awards is set out in Order 73, rule 10 of the Rules. An application for leave to enforce an award either under section 37 of the 1986 Arbitration Act or under section 48 of the 1993 Arbitration Act may be made ex parte, or the court hearing the application may direct a summons to be issued. If the court directs a summons to be issued, the summons shall be an originating summons.

An application for leave to enforce an award must be supported by an affidavit that:

- exhibits either the original arbitration agreement and the original award or copies of the same;
- states the name and the usual or last known place of abode or business of the applicant and the person against whom it is sought to enforce the award respectively; and

- states either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

With respect to seeking to enforce a foreign award in Bermuda, an application must be made for leave to serve the originating summons out of the jurisdiction as outlined within Order 73, rule 7 to rule 10 of the Rules.

Costs

33 | Can a successful party recover its costs?

Yes. Section 32(1) of the 1993 Arbitration Act states that, unless the parties to an arbitration agreement otherwise agree, the following costs shall be recoverable at the discretion of the arbitral tribunal:

- fees and expenses of the arbitrator and the costs of expert advice and of other assistance required by the arbitral tribunal;
- legal fees and expenses of the parties, their representatives, witnesses and expert witnesses;
- administration fees and expenses of an arbitral institution; and
- any other expenses incurred in connection with the arbitral proceedings.

Section 26(1) of the 1986 Arbitration Act states that, unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to include a provision that the costs of the reference and award shall be in the discretion of the arbitrator.

There is no Bermuda case law relating to the recovery of third-party funding costs within an arbitration.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

Arbitration, mediation and conciliation are commonly used as a means of dispute resolution in Bermuda. Mediation, for example, is used regularly in relation to employment and trust disputes. Arbitration is the most popular ADR process in Bermuda.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

No. The English Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 is authority for the proposition that compulsory alternative dispute resolution would be an unacceptable constraint on the right of access to the court and therefore a violation of article 6 of the European Convention on Human Rights (ie, the right to a fair trial). Bermuda's equivalent provision would be section 6 of the Bermuda Constitution Order 1968. However, because Bermuda has not implemented the English Civil Procedure Rules relating to mediation, this authority should be considered cautiously.

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MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Not applicable.

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