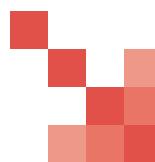


Bermuda

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TYPES OF DISPUTE RESOLUTION

1. Please give a brief overview of the main dispute resolution methods used in your jurisdiction to settle large commercial disputes, identifying any recent trends.

If large commercial disputes cannot be resolved by negotiation, the main methods for resolving them are litigation and arbitration. An increasing number are brought before the Bermuda courts. Recently, a Commercial Court was created, with specialist judges (see Questions 3 and 4).

COURT LITIGATION - GENERAL

2. What limitation periods apply to bringing a claim and what triggers a limitation period? Please briefly set out any different rules for particular areas of law relevant to large commercial disputes, for example contract, tort and land disputes.

The Limitation Act 1984 provides a six-year limitation period (from the date on which the action accrued) for:

- **Tort claims.** Here the limitation period is triggered by the date on which the claimant became aware of the loss.
 - **Actions founded on simple contract.** (A simple contract is a contract not made under seal. It includes actions for money received and actions based on foreign judgments at common law.) The date of accrual of the cause of action for sums due under a contract will usually depend on the terms of the contract itself. However, the starting point is the established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided.
3. Please give a brief overview of the structure of the court where large commercial disputes are usually brought. Are certain types of dispute allocated to particular divisions of this court (for example, IP, competition or maritime disputes)?

The Supreme Court of Bermuda (Supreme Court) is the court of first instance in civil matters where the sum in dispute exceeds Bd\$25,000 (about US\$25,000). A Commercial Court has been in effect since 1 January 2006, as part of the Supreme Court (*Order 73, Rules of the Supreme Court of Bermuda (RSC)*). It hears commercial actions, as defined in Order 72 RSC. This defi-

nition derives from the UK Civil Procedure Rules (CPR), but also includes any action brought under the Companies Act 1981.

The answers to the following questions relate to procedures that apply in the Commercial Court.

4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought and what requirements must they meet? Can foreign lawyers conduct cases in these courts?

As a general rule, only barristers and attorneys of the Supreme Court can appear before the Commercial Court. In exceptional cases of considerable difficulty or public importance, the Bermuda Bar Council may grant permission to seek the leave of the Supreme Court for the special admission of UK Queen's Counsel (*section 51(3), Supreme Court Act, 1905*). Junior counsel from the UK are not admitted to practise in Bermuda as a matter of Bar Council policy.

FEES AND FUNDING

5. What legal fee structures can be used? For example, hourly rates, task-based billing, and conditional or contingency fees? Are fees fixed by law?

The Bermuda Bar's Code of Professional Conduct prohibits conditional or contingency fees (apart from in uncontested debt collecting, where a percentage of the recovery can be charged).

In commercial litigation, fees are typically charged on the basis of hourly rates. Fees are not fixed by law. There are broad guidelines for the court registrar to follow to determine a reasonable hourly rate for taxation of costs purposes (depending on the seniority of the lawyer and the complexity of the matter), although they state that costs and fees that exceed the guidelines may be appropriate in complex cases, at the discretion of the court (*Chief Justice's Practice Direction: Guideline Figures for Hourly Rates (7 July 2006)*).

6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?

Funding

The parties usually fund litigation themselves. The traditional common law prohibition on third-party funding of litigation (champerty)

probably applies, although it is uncertain whether there is such a prohibition in the light of comments expressed in the Privy Council case of *Kellar v Williams [2004] UKPC 30*. Third party funders, however, may be liable to an order for security for costs.

Insurance

Insurance is not typically available for litigation costs.

COURT PROCEEDINGS

7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?

The court file is not open to public inspection and only the parties can access it while a case is pending.

Civil trials are held in public. Proceedings in chambers are held in private, although rulings made following chambers hearings are often published in the Bermuda Law Reports. Court proceedings relating to international commercial arbitrations are heard in private and the court gives directions as to what information can be published.

8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?

The court does not impose rules relating to pre-action conduct. However, it is customary for Bermuda counsel to follow the spirit of pre-action protocols (that is, by sending letters before action).

9. Please briefly set out the main stages of typical court proceedings, including the time limits (if any) for each stage, any penalties for non-compliance and the role of the courts in progressing the case. In particular:

- How a claim is started.
- How the defendant is given notice of the claim and when the defence must be served.
- Subsequent stages.

Starting proceedings

Commercial Court proceedings are typically started by one of the following:

- Writ of summons. This is the usual way of starting proceedings in a large case where there are substantial disputes of fact.
- Originating summons.
- Notice of motion.
- Petition. This applies to certain proceedings under the Companies Act 1981, including a winding up.

Notice to the defendant and defence

The claimant gives notice by serving the writ of summons on the defendant. It is sufficient for the writ to contain a general statement of the nature of the case, rather than a statement of claim. However, if a generally-indorsed writ is served (that is, without a statement of claim), a statement of claim must be served within 14 days of service. If the claimant fails to do this, the defendant can apply for an order dismissing the action. The defendant also has 14 days (from the date of service of the statement of claim) to file and serve its defence.

Subsequent stages

If the writ is served in Bermuda, the defendant must enter a memorandum of appearance (similar to an acknowledgment of service) within 14 days of service of the writ. If it is served outside Bermuda, an appearance must generally be entered within 28 days. If the defendant fails to enter an appearance, the claimant can enter a default judgment for either:

- Final judgment for the sum being claimed (in a liquidated damages claim).
- An interim judgment against the defendant, with damages to be assessed, and costs (in an unliquidated damages claim).

Once the defendant enters an appearance, it must serve a defence within 14 days, although the time limit for service of a defence is often extended by agreement or court order. If the defendant fails to serve a defence, the claimant can enter either:

- A final judgment (in a liquidated damages claim).
- An interim judgment, with damages to be assessed (in an unliquidated damages claim).

INTERIM REMEDIES

10. What actions can a party bring for a case to be dismissed before a full trial (for example, summary judgment or for a claim to be struck out)? On what grounds must such a claim be brought? Please briefly outline the procedure that applies.

Summary judgment

Once the defendant has entered an appearance, the claimant can apply for summary judgment on the grounds that the defendant has no defence to the claim (*Order 14, RSC*). Typically, a claimant applies for this summary judgment before a defence has been served. The defendant then tries to raise triable issues of fact or law by filing witness statement evidence (which may include a draft defence). The court then grants the defendant unconditional leave to defend the case, or imposes a condition (this is typically the payment of all or part of the claim to court).

Strike-out

The court can order, at any stage of the proceedings, for a pleading or writ indorsement to be struck out, on the grounds that it:

- Discloses no reasonable cause of action or defence.

- Is scandalous, frivolous or vexatious.
- May prejudice, hinder or delay the fair trial of the action.
- Is otherwise an abuse of court process.

11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?

The main reason for a court to order a claimant to provide security for costs is if it is resident outside Bermuda. There is no authority to order a moneyless claimant resident in Bermuda (including an insolvent company incorporated in Bermuda) to provide security for costs.

The previous practice of Bermudian courts was to order foreign claimants to provide substantial security. However, in view of the Bermuda Constitution, the courts have adopted the current English practice under the Human Rights Act 1998 of not discriminating unfairly against foreigners, so that in principle, security is awarded in an amount which reflects the additional expense of enforcing a Bermuda costs order in a jurisdiction where the claimant has assets. The courts however retain a wide discretion to order security for costs.

12. In relation to interim injunctions granted before a full trial:

- Are they available and on what grounds are they granted?
- Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
- Are mandatory interim injunctions to compel a party to do something available in addition to prohibitory interim injunctions to stop a party from doing something?

Availability of Interim Injunctions

The Bermudian courts follow English practice and apply the guidelines established in the case of *American Cyanamid Co v Ethicon Ltd [1975] AC 396*. These include:

- Whether there is a serious question to be tried. The claimant must show that it has a real prospect of succeeding in its claim.
- Whether the balance of convenience lies in favour of granting or refusing the interim relief.
- The relative strength of the case.
- Whether the defendant would be adequately compensated by a later award of damages if the injunction is wrongly granted.

Prior notice to the defendant

Interim injunctions can be obtained without notice in urgent cases where the court is satisfied that giving notice will prejudice the claimant. This generally applies to an application for a Mareva injunction (see Question 13). However, apart from Mareva applications, the court generally requires notice to be given and

urgent applications are typically heard *ex parte* (that is, on the request and for the benefit of one party) on short notice. Subject to judicial availability, it is possible for the court to grant an order on the same day as an application.

Types of injunctive relief

Mandatory injunctions (although typically more difficult to obtain) are equally available as prohibitory injunctions.

13. In relation to interim attachment orders to preserve assets pending judgment or a final order (or equivalent):

- Are they available and on what grounds must they be brought?
- Can they be obtained without prior notice to the defendant and on the same day in urgent cases?
- Do the main proceedings have to be in the same jurisdiction?
- Does attachment create any preferential right or lien in favour of the claimant over the seized assets?
- Is the claimant liable for damages suffered as a result of the attachment?
- Does the claimant have to provide security?

The Bermudian courts will generally grant a Mareva injunction (that is, a freezing order) to preserve assets pending judgment, if the claimant can establish a:

- Good arguable case for monetary relief.
- Real risk that the defendant will dissipate its assets so that any judgment against it will not be satisfied.

Interim injunctions can be obtained without notice in urgent cases where the court is satisfied that giving notice will prejudice the claimant. This generally applies to an application for a Mareva injunction.

Generally, for a Bermudian court to grant additional injunctive relief, it must have jurisdiction over a substantive cause of the action. However, a Bermudian court can grant interim protection measures within the meaning of Article 9 of the UNCITRAL Model Law on International Commercial Conciliation 2002 (UNCITRAL Model Conciliation Law) to support an international commercial arbitration which does not have its seat in Bermuda, provided it has *in personam* jurisdiction over the defendant (that is, it has jurisdiction over the defendant as a specific person, wherever its location).

A Mareva injunction does not create any preferential right or lien over the assets that it freezes. The claimant must give an undertaking to the court to pay any damages that the defendant suffers if it turns out that the injunction should not have been granted. The court can require the claimant to provide security for this undertaking.

14. Are any other interim remedies commonly available and obtained? If yes, please give brief details.

Generally, there are no other interim remedies commonly available and obtained, apart from those already discussed (see Questions 10 to 13).

FINAL REMEDIES

15. What remedies are available at the full trial stage (for example, damages and injunctions)? Are damages just compensatory or can they also be punitive?

In large commercial litigation, the typical remedies sought at trial are damages and permanent injunctive relief. Declaratory relief may also be granted and, where necessary, orders transferring title to assets. Damages tend to be compensatory; punitive damages are not available in Bermuda.

EVIDENCE

16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?

Each party must disclose to the other party the documents that relate to matters in issue, as defined in the pleadings. There are detailed rules governing the procedure for discovery (exchanging lists of documents and inspection) (*Order 24, RSC*).

17. Are any documents privileged (that is, they do not need to be shown to the other party)? In particular:

- Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances?
- If privilege is not recognised, are there any other rules allowing a party not to disclose a document (for example, confidentiality)?

Privileged documents

Privileged documents fall into two categories:

- **Legal advice privilege.** Documents containing legal advice are privileged.
- **Litigation privilege.** Documents that come into existence with the dominant purpose of obtaining legal advice on actual or anticipated litigation are privileged.

Legal advice from in-house lawyers (local or foreign) is privileged.

Other non-disclosure situations

Generally, confidentiality is not a valid ground for objecting to the disclosure of a document. However, government departments

and regulatory authorities may resist disclosure on the grounds of public interest immunity.

18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?

The usual practice is for a written statement containing the evidence of a witness of fact to be served in advance of the trial. The witness is then called to give evidence at the trial and is cross-examined. However, if the witness is not resident in Bermuda, written statements may be admitted in evidence without the witness being called and cross-examined. In such a case, the court has discretion as to the weight to be given to this written evidence.

19. In relation to third party experts:

- How are they appointed (for example, are they appointed by the court or by the parties)?
- Do they represent the interests of one party or provide independent advice to the court?
- Is there a right to cross-examine (or reply to) expert evidence?
- Who pays the experts' fees?

Appointment procedure

The parties typically appoint experts.

Role of experts

Experts must be independent and objective.

Right of reply

Typically, the court orders a meeting of experts to seek to agree on as many of the issues as possible. The parties can serve reports in reply and cross-examine the experts.

Fees

The experts' fees are paid by the parties appointing them.

APPEALS

20. In relation to appeals of first instance judgments in large commercial disputes:

- To which courts can appeals be made?
- What are the grounds for appeal?
- Please briefly outline the typical procedure and timetable.

Appeals against final Commercial Court judgments can be made, as of right, to the Bermuda Court of Appeal. The Court of Appeal

consists of three judges (who are not ordinarily resident in Bermuda) and sits in periodic sessions, three times a year.

The party appealing must file a notice of appeal, setting out the grounds of appeal (these are usually errors of law, but it is possible to appeal findings of fact) within six weeks of the judgment. An appeal may take between three to six months to be heard.

The party can make a further appeal to the Judicial Committee of the Privy Council in London, although it must have the leave of the Court of Appeal to do so. Leave is generally granted in large commercial disputes. An appeal to the Privy Council may take over a year to be heard.

COSTS

21. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors do the court consider when awarding costs (for example, any pre-trial offers to settle)?

An award of costs is at the discretion of the court, but the general rule is that costs follow the event, that is, the unsuccessful party is ordered to pay the successful party's costs. The court will usually take into account payments into court and Calderbank offers (that is, a specific type of offer to settle) when awarding costs.

22. Is interest awarded on costs? If yes, how is it calculated?

Interest on costs is payable at the statutory rate of 7%, or at such other rate as the court may prescribe.

ENFORCEMENT

23. What are the procedures to enforce a local judgment in the local courts?

A judgment or order for the payment of money (not into court) can be enforced by one or more of the following means:

- A writ of *fieri facias* (that is, ordering a levy on the belongings of the debtor to pay the judgment amount).
- Garnishee proceedings (that is, an order on a person such as the debtor's bank or employer to pay funds directly to the successful party).
- The appointment of a receiver.
- An order for committal (in appropriate cases).
- A writ of sequestration (that is, the court appoints sequestrators to take charge of all the defendant's real and personal assets until the defendant complies with the judgment).

CROSS-BORDER LITIGATION

24. Do local courts respect the choice of law in a contract (that is, if the parties agree that the law of a foreign jurisdiction will govern the contract)? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?

As general rule, the court respects party autonomy. Therefore, if the parties have chosen a foreign law to govern a contract, the court applies that law.

25. Do local courts respect the choice of jurisdiction in a contract (that is, if the parties agree that claims will be brought in the courts of a foreign jurisdiction)? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?

Where the parties have contractually agreed on a foreign court as the forum to hear disputes, a Bermudian court usually gives effect to that agreement. In exceptional cases, where the interests of justice require it, a Bermudian court can still assume jurisdiction. A valid arbitration clause is always enforced.

26. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, please briefly outline the procedure to effect service in your jurisdiction. Is your jurisdiction party to any international agreements affecting this process?

Service of foreign process is possible if a foreign tribunal sends a letter of request to the Deputy Governor requesting service on a person in Bermuda. The letter of request must be accompanied by:

- A translation of the letter into English.
- Two copies of the process to be served.
- Two copies of a translation of the process into English.

The Deputy Governor then sends the process to court and generally suggests that it should give effect to the request. The court then serves the process by leaving a copy of it and its translation with the party to be served, subject to any order for alternative methods of service and any rule on how documents must be served on corporate bodies.

27. Please briefly outline the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction. Is your jurisdiction party to an international convention on this issue?

Evidence can be taken from a witness in Bermuda for a trial in another jurisdiction (*Order 39, RSC*). Specific documents can also be obtained. This is usually done by issuing a letter of re-

quest from a foreign court to the Bermuda court seeking the examination of a witness. Fishing expeditions (where the claimant tries to obtain information to produce something out of which it could form a case) and pre-trial discovery (gathering evidence to support a case) are not permitted.

28. What are the procedures to enforce a foreign judgment in the local courts?

There are two basic procedures for the enforcement of foreign judgments in Bermuda:

Enforcement at common law

The Supreme Court enforces the judgment of a foreign court in an *in personam* claim if all the following conditions are satisfied:

- The foreign judgment is for a debt or definite sum of money, which is not for taxes or in relation to a fine or other penalty.
- The foreign judgment is final and conclusive on the merits of the case. This can be the case even when the judgment is subject to appeal or an appeal is pending before a foreign court.
- The foreign court has jurisdiction over the judgment debtor under Bermudian private international law rules, that is, the judgment debtor was:
 - present in the foreign country at the time the proceedings were started;
 - the claimant or counterclaimant in the foreign court proceedings;
 - the defendant and submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings and contesting them on the merits of the case; or
 - the defendant and the judgment debtor agreed, before the start of the proceedings, to submit to the jurisdiction of the foreign court in relation to the subject matter of the proceedings;
- The foreign judgment was not:
 - procured by fraud;
 - given in breach of natural justice; or
 - otherwise contrary to Bermudian public policy.

Enforcement by statute

The Judgments (Reciprocal Enforcement) Act 1958. This Act is derived from the English Foreign Judgments (Reciprocal Enforcement) Act 1933 and applies to judgments of courts in Australia, the Bahamas, Barbados, British Guiana, Gibraltar, Grenada, Hong Kong, the Leeward Islands, St Vincent, Jamaica, Nigeria, Dominica, St. Lucia and the UK. It provides that a foreign judgment can be enforced by registration at the Supreme Court if it is both:

- Final and conclusive as between the parties.
- For a sum of money that is not payable for taxes or charges of a similar nature, or for a fine or other penalty.

Registration means that the foreign judgment has the same force and effect as a judgment of the Supreme Court, from the date of registration. Registration of the foreign judgment is liable to be set aside if the foreign court did not have jurisdiction over the judgment debtor. In an *in personam* claim, the foreign court is deemed to have jurisdiction if the judgment debtor:

- Is a defendant in the proceedings and submitted to the foreign court's jurisdiction by voluntarily appearing in the proceedings other than to:
 - protect or obtain the release of property seized or threatened with seizure; or
 - contest the court's jurisdiction;
- Was a claimant, or counterclaimed, in the proceedings;
- Is a defendant in the proceedings and had, before the start of the proceedings, agreed to submit to the foreign court's jurisdiction;
- Is a defendant in the proceedings and was resident in (or if a body corporate had its principal place of business in) the foreign jurisdiction when the proceedings were started; or
- Is a defendant in the proceedings and had an office or place of business in the foreign jurisdiction and the proceedings concern a transaction effected through or at this office or place.

ALTERNATIVE DISPUTE RESOLUTION

29. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Please briefly outline the procedures that are typically followed, and any rules that apply.

Arbitration is the most common ADR method.

Large commercial disputes are generally subject to the Bermuda International Conciliation and Arbitration Act 1993 (Arbitration Act 1993), which gives effect to the UNCITRAL Model Conciliation Law. This gives the parties freedom to agree on procedural rules and, in the absence of agreement, confers broad powers on the arbitral tribunal. A court has very limited powers to interfere with these arbitrations. However, a disadvantage is that it is not possible to appeal an award given by the arbitral tribunal on the grounds of error of law.

Parties can opt out of this regime and conduct arbitrations under the Arbitration Act 1986, which applies to domestic arbitrations, such as construction disputes, and derives from UK legislation. An appeal on error of law is possible in these arbitrations.

30. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?

The parties must agree to ADR, and the courts have no power to compel it.

31. Is ADR confidential?

Due to the private and confidential nature of arbitrations, there is an implied confidentiality obligation in relation to arbitration proceedings which, by extension, applies to mediation or conciliation proceedings held under Part II of the Arbitration Act.

32. How is evidence given in ADR? Can documents or admissions made or produced in (or for the purposes of) the ADR later be protected from disclosure by privilege?

The conduct of a mediation or conciliation, including the manner of giving evidence, is at the discretion of the mediator or conciliator. Documents or admissions made or produced in (or for the purposes of) mediation or conciliation proceedings cannot be used in any arbitral or judicial proceedings (*section 10, Arbitration Act 1993*).

33. How are costs dealt with in ADR?

The parties must bear the costs of mediation or conciliation proceedings equally, unless the settlement agreement provides for a different costs allocation (*section 16, Arbitration Act 1993*).

34. Is ADR used more in certain industries? If yes, please give examples.

Arbitration is the most common form of dispute resolution in the Bermudian insurance and reinsurance industry (which includes over 1,600 companies). Most insurance and reinsurance contracts entered into by Bermuda market companies contain arbitration clauses.

Bermuda is often chosen as the venue for arbitration, although contracts under the Bermuda Form of liability insurance (insurance for serious incidents such as serious explosions or mass tort litigation, which often covers claims of US\$100 million (about EUR75.5 million)) are governed by New York law and typically provide for arbitration in London. Arbitration is also widely used in conjunction with large construction disputes.

Mediation is becoming more popular, but is less frequently used than in London.

35. Please give brief details of the main bodies that offer ADR services in your jurisdiction.

The Bermuda Branch of the Chartered Institute of Arbitrators maintains a list of qualified arbitrators and mediators. Details can be obtained from the President of this organisation, Jeffrey Elkinson (jpelkinson@cdp.bm).

REFORM

36. Please summarise any proposals for dispute resolution reform and state whether they are likely to come into force and, if so, when.

The RSC were amended on 1 January 2006. The most important new provisions are as follows:

- The RSC have the overriding objective of enabling the court to deal with cases justly. Dealing with cases justly and case management provisions are defined as in the English CPR (*Order 1, Rule 1A*).
- A Commercial Court has been set up as part of the Supreme Court (*Order 72*).
- Provisions on service out of the jurisdiction have been amended to essentially follow Order 11 of the CPR (*Order 11*).
- Witness statements can now be exchanged, as in the CPR (*Order 38 Rule 2A*).
- Party and party costs has been replaced with taxation on a standard basis, allowing the successful party to recover a reasonable amount in respect of all costs reasonably incurred (*Order 62*).
- The applications procedure concerning arbitrations under the Arbitration Act 1986 and the Arbitration Act 1993 has been amended (*Order 73*).

Further substantial revisions of Bermudian dispute resolution procedures are not likely to occur in the immediate future.



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