A 21-square mile archipelago, Bermuda has become the domicile of choice for thousands of multi-nationals who have benefited from the commercial responsiveness of the island.

Recent Trends
As you can imagine, Bermuda has had its fair share of arbitration disputes. Arbitration clauses are commonly included in insurance and reinsurance contracts. While some re/insurance companies provide for arbitration of disputes in London under New York substantive law (the so-called ‘Bermuda form’) arbitration in Bermuda, under Bermuda substantive and procedural law, is increasingly becoming the industry standard.

Arbitration
Arbitration is a discrete specialisation. Users approach this prospect with an air of relief at not having to drag their Kenneth Cole’s through the mud of litigation. From a Bermudian perspective, there are essentially two separate legal regimes that have been tailored to serve both the domestic and international markets. The first, the Arbitration Act 1986, governs domestic arbitrations – all those arbitrations that do not fall within the scope of Article 1 of the UNCITRAL Model Law. The Model law is a bespoke commandment, drafted by a working group of representatives from over 40 countries, specifically designed to achieve a uniform UN standard for international commercial arbitration. The second, the Bermuda International Conciliation and Arbitration Act 1993, (BICA 1993) enacts the UNCITRAL Model Law and applies to any “international commercial arbitration” held in Bermuda, unless the parties agree otherwise. Where the parties have agreed that the Model Law should not apply, and they have not chosen an alternative regimen to govern the arbitral proceedings, the 1986 Act will apply in default.
An advantage of BICA 1993 over the 1986 Act is that arbitral awards obtained under BICA 1993 are not prone to judicial review as in the case of awards under the 1986 Act. The latest English legislation (the Arbitration Act 1996) is merely a but-for by-product of the Model Law, essentially a hybrid adoption of the Model Law, in part, which ultimately preserves the right of appeal. There go the Kenneth Cole’s!

The Seat of the Arbitration

If we were playing ‘musical chairs’, the fundamental question in the context of arbitration would be, where does a multi-million dollar corporate entity want to be when the music stops? And why? First, let’s examine what is meant by the ‘seat’ of an arbitration. Immediately, a distinction must be drawn between the ‘geographical seat’ and the lex arbitri or rather ‘procedural seat’, a dichotomy that, depending on jurisdictional-specific terminology, can be the source of some confusion. The geographical seat, as it suggests, refers to the actual physical location where the arbitration is held and typically prescribes the procedural law of the arbitration. Arbitration clauses in reinsurance contracts between one party which has a place of business in Bermuda and one which has not will be subject to the Model Law if the arbitration is held in Bermuda, even though the contract may have been made before the enactment of the 1993 Act. As always, it is open for the parties to opt-out of the Model Law by subsequent written agreement, even after a dispute has arisen. The lex arbitri acknowledges the procedural rules that are to govern arbitration. An arbitral tribunal must apply the procedural law of a particular country to determine any preliminary questions that may arise, for example, as to its jurisdiction or as to the place of arbitration. Where the arbitration clause does not specify that the arbitration is to be held in Bermuda, any arbitral tribunal will have to determine where the seat of the arbitration is to be. If the Model Law is the lex arbitri, the parties are at liberty to choose the place of the arbitration.

When the music stops, and inevitably it will, potential users will ultimately benefit from the practical consequences of the following:

• The existence of a user-friendly international arbitration law whose provisions provide the requisite flexibility needed to resolve complex arbitration disputes.
• Bermudian arbitration awards are readily enforceable in other countries by virtue of the extension of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Bermuda.
• Bermuda Government operates an ‘open-door’ policy that waives the requirement for work permits in relation to persons entering Bermuda to participate in an international arbitration, whether as counsel or as arbitrators. There is no requirement to use local counsel.
• Arbitral proceedings are private. However, the extent to which these proceedings remain confidential appears to be dependant on the express agreement between the parties. (See: Associated Electric & Gas Services v European Reinsurance of Zurich [2003] UKPC 11)

The Conduct of Arbitral Proceedings

Flexibility and party autonomy is key – as can be surmised from the respective ‘opt-in’ and ‘opt-out’ provisions of the Model Law. The general principle is that the Model Law gives the parties the freedom of choice of procedure, but provides minimal rules in default of agreement between the parties. The idea is simple – keep judicial interference to a minimum. After all, one of the many allures of arbitration in Bermuda is the respective finality of the reward. In a similar vein, the existence in Bermuda of multi-jurisdictional expertise, in a variety of business sectors helps to support the use of arbitration and also to preserve the key advantages of the arbitral process. On balance, it could be said that the Bermudian Courts prefer to adopt a laissez-faire approach, interceding only when the occasion requires. In this respect, the key provisions of the Model Law provide that:

Article 10 – The parties are free to determine the number of arbitrators. (The Model Law provides that three arbitrators shall constitute the tribunal, in
default of such an agreement)

**Article 11** – The parties are free to determine the procedure for appointing the arbitrator(s).

**Article 18** – The tribunal is to treat the parties “with equality” and to give each party full opportunity to present his/her case.

**Article 19** – The parties are free, subject to the Model Law, to agree upon the procedure to be followed in the arbitration proceedings. Failing such agreement, Article 19(2) provides that:

“...the arbitral tribunal may, subject to the provisions of the law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of the evidence.”

**Article 30** – if the parties request, and the arbitral tribunal does not object, any settlement arrived at may be given in the form of an award.

**Separability of an Arbitration Clause**

An arbitration clause is a species of its own and is treated as a separate subset of an underlying contract. It follows that an arbitration clause, by virtue of it being an independent agreement, will generally survive the termination of its ‘host’ contract. Article 16(1) sets out the doctrine of separability as follows:

“(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

Similarly, Article 16(3) allows the arbitral tribunal to rule on its own jurisdiction, either as a preliminary issue, or in an award on the merits. A ruling by the tribunal under Article 16(3) that it has jurisdiction may be challenged in the Supreme Court of Bermuda whose decision is final – there is no appeal.

**The Finality of Arbitration Awards**

It is not possible to challenge an award on the ground of error of law (unlike the 1986 Act, which adopts the system of judicial review in the English Arbitration Act 1979). The grounds upon which an award may be challenged under the Model Law are very narrow under Article 34, and are derived from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For example, parties are precluded from appealing on the grounds of a mistake as to fact or law (unlike the UK Act which stopped shy of the Model Law by retaining the right of appeal on points of law).

It is reassuring to note that under the Model Law, Arbitrators are required to furnish the reasons upon which an award is based. For those who trust in the arbitral process, this is especially important given the respective finality of the award. (Avenues of recourse are limited to very exceptional circumstances for example fraud or collusion). For these reasons, et al, finality is conferred on the arbitral process.

Under the Model Law there are limited circumstances in which a party may make such an application for example, appointment of an arbitrator in default of the appointment procedure agreed to by the parties; a challenge to the appointment of the arbitrator; and failure or impossibility of an arbitrator to act. Again there is no right of appeal.

On balance, it could be said that the Bermudian Courts prefer to adopt a laissez-faire approach, interceding only when the occasion requires.