
THE DISPUTE RESOLUTION REVIEW

SECOND EDITION

EDITOR
RICHARD CLARK

LAW BUSINESS RESEARCH

THE DISPUTE RESOLUTION REVIEW

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THE DISPUTE RESOLUTION REVIEW

Second Edition

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Chapter 5

BERMUDA

*Kiernan Bell **

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Lawyers in Bermuda are members of a fused profession, meaning that no distinction is made, as in England, between barristers and solicitors. All practising lawyers in Bermuda (subject to a residency requirement for non-Bermudians) are called to the Bar and all have rights of audience before the courts. Most lawyers practise in law firms and recent changes in the law are seeing some law firms restructuring into limited liability companies.

Parties to disputes in Bermuda have considerable choice as to how they will resolve the matter. Disputes may be litigated, arbitrated or mediated, or resolved through other consensual means.

Arbitration is a popular dispute resolution mechanism for reinsurance companies and as Bermuda is a leading offshore jurisdiction with the second-largest world reinsurance market (second only to New York), arbitration is quite common and the jurisdiction is very ‘arbitration-friendly’.

The Arbitration Act 1986 governs domestic arbitration proceedings and non-commercial international arbitration proceedings. The Bermuda International Conciliation and Arbitration Act 1993 governs international commercial arbitration and enforcement of foreign arbitral awards. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration.

So far as litigation is concerned, Bermuda’s principal trial court is the Supreme Court of Bermuda, which has since 2006 included a specialist Commercial Court division. The Supreme Court is bound by decisions of the Court of Appeal of Bermuda, which in turn is bound by decisions of Bermuda’s highest appellate court, the Judicial Committee of the Privy Council, which sits in London, England.

* Kiernan Bell is a partner at Appleby.

While the Bermuda courts are not hierarchically subordinate to the English House of Lords or other English courts, the Bermuda courts will generally accept the decisions of the House of Lords on common law matters as binding. In addition, Bermuda courts are referred to and rely upon decisions from other Commonwealth jurisdictions such as Hong Kong and Australia.

II THE YEAR IN REVIEW

*i Phoenix Global Fund Ltd v. Citigroup Fund Services (Bermuda) Ltd*¹

The Supreme Court considered a case brought by two private hedge funds against their custodian and fund administrators, alleging that the service providers were liable for the large losses made by the funds. The allegation was that the service providers had failed to stop the funds from making investments in breach of the liquidity and quality restrictions contained in the prospectuses. The funds sought to impose liability on the service providers on the theory that the Bermuda Monetary Authority (Collective Investment Scheme Classification) Regulations 1998 impose a statutory duty upon the administrators to manage the funds in accordance with the terms of each of the prospectuses that had been incorporated by reference into the by-laws of each of the funds. The court rejected this interpretation of the regulations.

In addition, the court affirmed the principle that contractual and tortious liability must be analysed in the context of the contractual duties assumed and refused to imply additional duties that would conflict with the terms that the parties had actually agreed. Furthermore, the court held that the funds could not rely upon their own breaches of the prospectuses, which triggered the principle *ex turpi causa non oritur actio*. Further findings on the scope of indemnification provisions and definition of an ‘officer’ under the Bermuda Companies Act are also of interest.

*ii Guardian Limited v. Bermuda Trust Company Limited*²

In this Bermuda trusts case, the court considered the appropriate practice as to the publication of judgments in chambers’ applications and privacy in trust cases in general. The substance of the case was an application by the protector to construe the trust deed as to whether the widow of the settlor was an ‘excluded person’ (as defined in the trust deed). The settlor was an excluded person as were ‘the spouses of persons who are excluded persons’. The question was whether the status of the wife as an excluded person continued beyond the settlor’s death. The court held that as a matter of construction ‘excluded persons’ did not apply to a widow.

Regarding publication of judgments, the court held that the 2006 Practice Direction of the court was consistent with the Bermuda Constitution Order. Where, in a trust case, a ruling was necessary, the public interest was served by publication without

1 *Phoenix Global Fund Ltd. v. Citigroup Fund Services (Bermuda) Ltd* (Bell J) Sup Ct, 4 December 2009.

2 *Guardian Limited v. Bermuda Trust Company Limited* [2009] SC (Bda) 54 Civ (Kawaley J) 1 December 2009.

revealing the identities of the trust and the beneficiaries concerned. The court declined to make an order restraining publication but the judge drafted the ruling in such a way that the identity of the trust and the beneficiaries was not revealed.

*iii Jennings v. Jennings*³

The court reconsidered its approach to letters of request directed to Bermuda trustees from the English Family Court. In so doing, the Bermuda court reversed its December 2005 decision in *Charman v. Charman*, where the court, acting on a Bermuda trustee's application, set aside an order for document production made pursuant to a letter of request from the English Family Court.

iv In the matter of the liquidation of Founding Partners Global Fund Ltd and in the matter of a letter of request of the Grand Court of Cayman (Kawaley J) 29 July 2009

The court extended the principles previously applicable with respect to recognition of foreign office holders of foreign insolvent companies in Bermuda.

*v Validus Holdings Ltd v. IPC Holdings Ltd*⁴

Validus had made a hostile offer for IPC, which was proposing to merge with another Bermuda-based reinsurance company. While the court declined to grant the relief sought by Validus, it was required to consider the novel issues of whether hostile schemes of arrangement were possible and concluded that they were.

III COURT PROCEDURE

i Overview of court procedure

Effective as of 1 January 2006, the Rules of the Supreme Court 1985, which govern the way in which civil litigation is conducted in Bermuda, were changed by the Supreme Court Amendment Rules 2005 ('the Rules'). The Rules now include what is known as the 'overriding objective', which directs that the court must deal with a case 'justly' including so far as is practicable to:

- a* ensure that the parties are on an equal footing;
- b* save expense;
- c* deal with the case in ways that are proportionate to:
 - the amount of money involved;
 - the importance of the case;
 - the complexity of the issues; and
 - the financial position of each party.

The Supreme Court of Bermuda must ensure that the matter is dealt with expeditiously and fairly, and allot to the case an appropriate share of the court's resources. At any time

3 *Jennings v. Jennings* [2009] SC (Bda) 62 Civ (Bell J), 23 December 2009.

4 *Validus Holdings Ltd v. IPC Holdings Ltd* (Ground CJ), 29 May 2009.

the court exercises its powers under the Rules, it must do so in order to give effect to the overriding objective.

Bermuda now has a Commercial Division of the Supreme Court. Commercial cases are allocated to specialist commercial judges, thus ensuring that commercial matters are dealt with by judges with the appropriate expertise and are dealt with expeditiously.

ii Procedures and time frames

The Rules provide for the time frames and procedures for the various types of claims that may be brought.

As a matter of good practice, before commencing a claim, the plaintiff (the claimant) should generally write a letter before action, setting out the basis of the claim and giving the recipient a reasonable period in which to respond.

Proceedings are generally commenced by way of a writ, although there are other types of originating process, for example, an originating summons or petition. This summary sets out the procedure for those claims brought by writ and that are defended.

A plaintiff can initially file either a generally endorsed writ – which simply provides a short summary of the cause of action and must be followed within 14 days by a statement of claim – or can file a specially endorsed writ, which includes the statement of claim. The statement of claim sets out the facts and basis for the claim together with the relief sought.

Fourteen days after service of the statement of claim, the defendant should generally file his or her defence, although this time frame can be extended by agreement of the parties or by direction of the court.

Following service of the defence, the plaintiff then has the right to reply within 14 days to any new matters raised in the defence. In the event that the defendant has also asserted a counterclaim, the plaintiff also has the right to file a defence to the counterclaim.

Thereafter, the parties typically seek directions from the court on matters such as discovery and the timetable for discovery, witness statements and exchange of expert reports. In complex matters, there may be an additional directions hearing before the matter is set down for trial.

Regarding interim and interlocutory remedies, such as injunctive relief and interim preservation of property, if the circumstances require, such applications can be made without notice to the other side, for example, if there is a risk of dissipation of assets or destruction of documents would occur if notice of the application were given.

The applicant for such emergency relief is under a strict obligation to give full and frank disclosure of all material facts to the court and, depending on the nature of the relief sought, may be required to provide an undertaking in damages in the event that the applicant was not entitled to the emergency relief granted.

iii Class actions

The Rules in Order 15, Rules 12 and 13 set out the procedure applicable to representative proceedings. The Rules require that the persons represented (whether as plaintiffs or defendants) should ‘have the same interest in any proceedings’.

Representative actions in Bermuda are relatively rare.

iv Representation in proceedings

There is no requirement that a litigant, other than an infant or person with a disability, have professional legal representation. Order 80 of the Rules governs the procedure when a person is an infant or has a disability, and provides that such a person must not bring or make a claim except by his next friend and may not defend, make a counterclaim or intervene in any proceedings except by his or her guardian *ad litem*.

Litigants (who are not persons with a disability) frequently appear in person before Bermudan courts.

v Service out of jurisdiction

The 2005 amendments to the Rules made changes in respect of those documents capable of being served out of the jurisdiction. While it used to be that only proceedings begun by way of writ could be served out of the jurisdiction, the Rules now allow the court to grant permission to serve out of the jurisdiction any summons, notice or order issued by the court. This naturally provides litigants with more choices when faced with pursuing a person or company located outside Bermuda's jurisdiction.

An application for leave to serve out of the jurisdiction is made to the Supreme Court under Order 11 of the Rules. In making the application, the applicant will first need to satisfy the court that they have a good arguable case in relation to one of the categories of case listed in Order 11, Rule 1 (for example, the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract that was made within the jurisdiction). The case is required to fall within the spirit as well as the letter of Order 11, Rule 1.

Once the court is satisfied that it has jurisdiction to grant leave to serve out, it should also consider whether, in its discretion, it should do so. The court will consider whether there is a serious issue to be tried and whether the facts show that Bermuda is the *forum conveniens*.

vi Enforcement of foreign judgments

There are two possible mechanisms by which a judgment creditor can seek to enforce a foreign judgment in its favour.

The first is by statute, and if the judgment creditor comes from a Commonwealth country, it is likely that the court has the power under the Judgments (Reciprocal Enforcement) Act 1958 to enforce the foreign judgment. The Act applies to judgments of the courts of the UK and certain Commonwealth territories.

In order to qualify for registration under the Act, the foreign judgment must be final and conclusive between the parties, and for a sum payable that is not in respect of taxes or similar nature and not in the nature of a fine or penalty.

A judgment creditor may apply to the court at any time within six years of the date of the judgment. Once registered it can be enforced in the same manner as any judgment issued by the Bermuda court.

A party can apply to set aside a registered judgment if:

- a* the judgment is not a judgment to which the Act applies or that was registered in contravention of the Act;
- b* the foreign court had no jurisdiction in the circumstances of the case;

- c* the judgment debtor did not receive sufficient notice of the proceedings to enable him or her to defend the proceedings and he or she did not appear;
- d* the foreign judgment was obtained fraudulently; or
- e* the rights under the foreign judgment are not vested in the person by whom the application for registration was made.

Judgments from all other jurisdictions (including the United States) may be enforced at common law through what is known as the ‘doctrine of obligations’. This requires the judgment creditor to issue a claim in debt (based on the judgment itself) and then apply for summary judgment. In order to recover in this manner:

- a* the judgment debt will need to be final and conclusive;
- b* the judgment debt will need to be for a debt or definitive sum of money, and is not in the nature of a fine or penalty.
- c* the foreign court will have to have been competent to make the judgment according to Bermuda’s rules of private international law;

vii Assistance to foreign courts

The Rules of the Supreme Court, in particular Orders 69 and 70, make provision for assistance in relation to foreign proceedings.

Order 69 provides for service of process in connection with civil or commercial proceedings pending before a court or other tribunal of a foreign country. Order 70 provides for courts of foreign countries to request the assistance of the Bermuda courts to obtain evidence for the foreign proceedings. The Bermuda courts will, in appropriate cases, grant assistance for the examination of witnesses as evidence for trial and order production of documents. The court will not look favourably upon requests for assistance if it appears to the court that the request is in the nature of pretrial discovery or a fishing expedition.

viii Access to court files

There is limited public access to court files and papers. The fact that an action has been filed is entered in the cause book and is a matter of public record. At the conclusion of the matter the cause book will enter a note as to the judgment delivered.

Records of the pleadings themselves – that is the statement of claim, defence and other documents – are not publicly available.

Judgments and rulings are public unless there are compelling reasons not to make the decisions public in accordance with a 2006 Practice Direction.

ix Litigation funding

While there have not been many recent cases in Bermuda on maintenance and champerty, it is likely that the Bermuda Courts will consider and apply the recent common law developments in England and Wales where the restrictions against third-party funding of litigation have become more permissive.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The Barristers' Code of Professional Conduct 1981 governs conflict of interest. A barrister or firm of barristers must neither advise nor represent both sides to a dispute.

Regarding non-contentious matters, a barrister or the firm should not act or continue to act in a matter when there is or there is likely to be a conflict of interest unless there has been adequate disclosure to both clients and the clients have consented to the firm continuing to act. In doing so, the firm is likely to need to create an information barrier, or 'Chinese wall' by implementing internal arrangements and procedures to prevent confidential information belonging to one client being accessed by the legal team acting for a different client.

In the event that a law firm in Bermuda decides, with appropriate client consent, to act notwithstanding a potential conflict of interest between the clients, the firm will need to implement such measures and procedures. Such measures may include identifying all members of the firm able to advise on a particular matter or for a particular client, segregating and protecting confidential information and files and providing for limited and secure access to documents. In the event that the firm cannot take internal measures that can effectively protect the confidential information, even with the client consents, the firm should not act.

ii Money laundering, proceeds of crime and funds related to terrorism

The statutory framework in Bermuda to address money laundering has been in place since 1940 with the Defence (Finance) Regulations 1940, which requires persons to provide information on those benefiting from such activities. Bermuda has had subsequent enhancements to its money-laundering legislation, beginning with the Exchange Control Act Regulations 1973 and an Anti-Money Laundering Code of Conduct issued by the Bermuda Regulator (the Bermuda Monetary Authority) in 1991.

The primary statutory framework governing money laundering, terrorist financing and proliferation financing is now found in the Proceeds of Crime Act 1997 (as amended), the Proceeds of Crime (Supervision and Enforcement) Act 2008, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, the Anti-Terrorism (Financial and Other Measures) Act 2004 (as amended), and the guidance on these matters issued by the Bermuda Monetary Authority.

The Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the Regulations) have not yet been made effective for 'independent professionals', which includes law firms, though this is expected to occur in the first half of 2010. This is purely with reference to the money-laundering regulatory and supervisory structure with respect to the provision of certain professional legal and accounting services.

While strengthening Bermuda's anti-money laundering and anti-terrorist financing (AML/ATF) regime, the Bermuda authorities have also increased the responsibilities expected of AML/ATF-regulated financial institutions, to detect and prevent money-laundering and terrorist-financing operations using a risk-based approach (with the exception of any Directions/Orders issued by the Minister to combat proliferation financing of nuclear weapons). It is, however, a matter for each institution to make its

own assessment of its obligations in line with the AML/ATF regime. This results in the regulated sector meeting certain criteria with respect to, among other things: (1) customer due diligence, (2) enhanced due diligence, (3) reliance on third parties, (4) the time period for which records must be held, (5) training of staff, (6) policies and procedures being in place, (7) having systems to undertake ongoing monitoring of customers and (8) the reporting of suspicious activities to the Financial Intelligence Agency (FIA).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

The Bermuda courts will generally follow and apply English common law on privilege and recognise the categories of privilege that may be claimed by a party as regards classes of documents and communications that do not have to be disclosed to third parties. These are as follows:

- a* Legal advice privilege: this covers communications between a lawyer and client made for the dominant purpose of receiving or giving legal advice. This can apply to communications with in-house legal advisers, though it needs to be clear that the communication or document was for the purposes of legal advice as opposed to the general business affairs of the company.
- b* Litigation privilege: this is wider than legal advice privilege and applies to certain communications and documents created when litigation is contemplated or pending. Attorney client communications are clearly covered if for the purpose of legal advice. In addition communications between a non-professional agent or third party (such documents are privileged if they came into existence for the dominant purpose of obtaining legal advice in existing or anticipated proceedings), as are communications between attorney and non-professional agent or third party.

Generally communications that come into existence after litigation is contemplated or commenced and are created with a view to such litigation, either for the purpose of obtaining or giving advice in regards to the same (or of obtaining or collecting evidence to be used in it), or obtaining information that may lead to the obtaining of such evidence, are privileged.

Further, documents obtained by an attorney with a view to enabling him or her to prosecute or defend a claim, or give advice with reference to existing or contemplated litigation, are also privileged, as are documents that come into existence as materials under the attorney's instructions.

In addition, Bermuda courts recognise that in certain circumstances, two or more persons can be entitled to assert joint or common interest privilege.

Joint interest privilege arises where there is either a joint retainer or joint interest in the subject matter of a privileged document. Similarly, common interest privilege arises when a third party shares a common interest in the subject matter of the privileged document. It can only exist where two or more parties hold the same interest and enables disclosure of the document to that party without waiver or loss of privilege.

The Bermuda courts will also recognise and enforce the privilege attached to without prejudice communications – namely, communications made between parties to

a dispute in an effort to settle a dispute or claim. Such communications are protected from disclosure.

ii Production of documents

Order 24 of the Rules requires that parties to civil litigation give discovery of all relevant documents that are or have been in their possession, custody or control. This means that parties must disclose every document that could help or adversely affect either their own case or that of the other side.

The category of what constitutes a ‘document’ is quite wide and is not restricted to paper writings, but extends to anything upon which evidence or information is recorded. Tape recordings, computer databases, emails, text messages and voicemails are all considered ‘documents’ for the purposes of discovery.

Privileged documents do not have to be produced, although they must be disclosed as existing and relating to the matters in question in the action.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

The two primary forms of alternative dispute resolution in Bermuda are arbitration and mediation.

ii Arbitration

The Arbitration Act 1986 governs domestic arbitration proceedings and non-commercial international arbitration proceedings. The Bermuda International Conciliation and Arbitration Act 1993 governs international commercial arbitration and enforcement of foreign arbitral awards. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration.

The courts regularly enforce arbitration agreements. Repudiation, frustration or rescission of a contract will not prevent the enforcement of an arbitration agreement, as the arbitration agreement itself would survive. Accordingly, the Bermuda court would recognise the jurisdiction of the arbitral tribunal to determine for itself whether the contract relating to the underlying dispute had been repudiated, rescinded or frustrated. The arbitration agreement itself can be repudiated if both parties litigate the dispute before the courts and take no steps to stay the proceedings,

Arbitrations may be institutional or *ad hoc* arbitrations and there is a Bermuda Branch of the Chartered Institute of Arbitrators.

Arbitration awards are enforceable by the courts as if they were judgments or orders of the court. The Bermuda Courts will also enforce foreign arbitral awards. Bermuda is a party to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (‘the New York Convention’). Awards made in a country that is a signatory to the New York Convention are recognised as binding in Bermuda and may, with the court’s permission, be enforced in Bermuda.

iii Mediation

Mediation is a voluntary and non-binding process by which parties try and settle their disputes. Mediations have been increasing in frequency in Bermuda and the parties to mediation are entirely free to agree the process. Mediations are ‘without prejudice’ and the parties will not be in a position to use material provided in the course of a mediation in litigation or arbitration should the mediation effort fail.

iv Other forms of alternative dispute resolution

Parties are always free to agree to other forms of consensual dispute resolution such as neutral evaluations or binding determination by a neutral expert.

VII OUTLOOK AND CONCLUSIONS

Bermuda over the past four years has become known for having a strong dispute resolution framework. Bermuda enjoys a strong judiciary, an experienced commercial court and a procedural framework, which encourages cost-effective and fair resolution of civil disputes.

KIERNAN BELL

Appleby

Kiernan Bell is a partner in the litigation and insolvency practice group, local leader of the fund disputes team and a member of the commercial dispute resolution team at Appleby in Bermuda. Ms Bell specialises in complex commercial disputes, and has practice experience in shareholder disputes, derivative actions, professional negligence, M&A, contentious insolvency, insurance and reinsurance disputes.

She has experience working with multi-jurisdictional teams of lawyers on complex cases and deals and has prepared cases for hearing at every level, including before the Judicial Committee of the Privy Council, Bermuda's highest appellate court.

Ms Bell joined the group in 1994 and became a partner in 2002. She is currently President of the Bermuda Bar Council, which is the governing body of the Bermuda Bar Association. She has been an elected member of the Bermuda Bar Council since 2000. She is a former member of Professional Conduct Committee, and is the former chair of the Continuing Legal Education Committee of the Bar. Ms Bell is a member of the International Bar Association and the Chartered Institute of Arbitrators.

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