



Arbitration

in 50 jurisdictions worldwide

2010

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Law

Business

Research

Introduction Gerhard Wegen and Stephan Wilske <i>Gleiss Lutz</i>	4
The new Bahrain Arbitration Law and the Bahrain 'Free Arbitration Zone' John Townsend <i>Bahrain Chamber for Dispute Resolution</i>	6
CAS Bernd Ehle and Guillaume Tattevin <i>Lalive</i>	10
CEAC Eckart Brödermann and Justus Jansen <i>Brödermann & Jahn Rechtsanwalts-gesellschaft mbH</i>	14
DIS Renate Dendorfer <i>Heussen Rechtsanwalts-gesellschaft mbH</i>	18
ICC José Rosell and María Beatriz Burghetto <i>Hughes Hubbard & Reed LLP</i>	22
ICDR Richard C Lorenzo <i>Hogan & Hartson LLP</i>	26
LCIA Colin Y C Ong <i>Dr Colin Ong Legal Services, Advocates & Solicitors</i>	30
The Swiss Chambers of Commerce Matthias Scherer and Domitille Baizeau <i>Lalive</i>	33
Argentina Pablo Manili <i>Martelli Abogados</i>	36
Austria Christian Hausmaninger and Michael Herzer <i>Hausmaninger Kletter Attorneys at Law</i>	43
Belarus Maryia Yahorava <i>Arzinger & Partner</i>	50
Bermuda Kiernan Bell <i>Appleby</i>	56
Brazil Maurício de Almeida Prado, Adriana Braghetta, Silvia Julio Bueno de Miranda and Cristina Saiz Jabardo <i>L O Baptista Advogados Associados</i>	62
Bulgaria Lazar Tomov and Sylvia Steeva <i>Tomov & Tomov</i>	68
Cayman Islands Jeremy Walton and Chris Easdon <i>Appleby</i>	74
China Brenda Horrigan, Felix Hess and Jeff Xu <i>Salans LLP</i>	81
Colombia Germán Marín <i>Cavelier Abogados</i>	88
Czech Republic Alexander J Bělohávek <i>Law Offices Bělohávek</i>	95
Denmark Niels Schiersing <i>Nordia Advokatfirma</i>	101
Dominican Republic Marcos Peña Rodríguez and Laura Medina Acosta <i>Jiménez Cruz Peña</i>	108
Egypt Tarek F Riad <i>Kosheri, Rashed & Riad</i>	115
England & Wales George Burn and Smeetesh Kakkad <i>Salans LLP</i>	120
Finland Petteri Uoti and Eva Storskrubb <i>Dittmar & Indrenius</i>	129
France Tim Portwood <i>Bredin Prat</i>	135
Germany Stephan Wilske and Claudia Krapfl <i>Gleiss Lutz</i>	144
Greece Stelios H Gregoriou <i>Gregoriou & Associates Law Offices</i>	151
India Shreyas Jayasimha <i>AZB & Partners</i>	158
Israel Eric S Sherby <i>Sherby & Co, AdvS</i>	167
Japan Shinji Kusakabe <i>Anderson Mōri & Tomotsune</i>	174
Kazakhstan Yuliya Mitrofanskaya and Bakhyt Tukulov <i>Salans LLP</i>	181
Kenya Esther Kinyenje and Cosima Wetende <i>Kaplan & Stratton Advocates</i>	188
Korea Byung-Chol Yoon, Jun Hee Kim and Kyo-Hwa (Liz) Chung <i>Kim & Chang</i>	194
Latvia Aivis Dzenis <i>Skrastiņš & Dzenis</i>	201
Lebanon Abdel Hamid El Ahdab <i>Ahdab Law Firm</i>	208
Lithuania Ramūnas Audzevičius, Tomas Samulevičius and Mantas Juozaitis <i>Motieka & Audzevičius</i>	216
Malaysia Ooi Huey Miin <i>HM Ooi Associates</i>	223
Mauritius Gilbert Noel <i>Appleby</i>	<i>Please see www.gettingthedealthrough.com</i>
Mexico Darío U Oscós <i>Oscós Abogados</i>	231
Morocco Azzedine Kettani <i>Kettani Law Firm</i>	239
Netherlands Nathan O'Malley and Thabiso van den Bosch <i>Conway & Partners, Advocaten & Attorneys-at-law</i>	246
Nigeria George Etomi, Efeomo Olotu and Ivie Omorhirhi <i>George Etomi & Partners</i>	253
Poland Justyna Szpara and Paweł Chojecki <i>Łaszczuk & Partners</i>	261
Portugal Carlos Aguiar and Vanessa dos Santos <i>Carlos Aguiar, Ferreira de Lima & Associados, RL</i>	268
Qatar Chadia El Meouchi, Karen Malek and Grace Alam <i>Badri and Salim El Meouchi Law Firm LLP</i>	274
Romania Adrian Roseti and Claudia Hutina <i>Drakopoulos Law Firm</i>	283
Russia Dmitry Kurochkin <i>Herbert Smith CIS LLP / Marcel Barth Gleiss Lutz</i>	289
South Africa Tania Siciliano <i>Bell Dewar</i>	297
Spain Calvin A Hamilton, Luis Capiel, Gabriela M Torres, Alina Bondarenko and Guillermo Cano Guerrero <i>Hamilton Abogados</i>	304
Sudan Mohamed Ibrahim M Adam <i>Dr Adam & Associates</i>	310
Sweden Eric M Runesson and Simon Arvmyren <i>Sandart & Partners</i>	317
Switzerland Thomas Rohner and Nadja Kubat Erk <i>Pestalozzi</i>	323
Tanzania Karel Daele <i>Mkono & Co Advocates</i>	330
Thailand Sally Veronica Mouhim and Kornkieat Chunhakasikarn <i>Tilleke & Gibbins International Ltd</i>	335
Turkey Ismail G Esin <i>Esin Law Firm</i>	343
Ukraine Tatyana Slipachuk <i>Vasil Kisil & Partners, Attorneys & Counsellors at Law</i>	350
United Arab Emirates Habib Al Mulla, Karim Nassif and Gordon Blanke <i>Habib Al Mulla & Co</i>	359
United States Daniel E González and Richard C Lorenzo <i>Hogan & Hartson LLP</i>	367
Venezuela Ramón J Alvins Santi and Pedro Saghy <i>Despacho de Abogados miembros de Macleod Dixon SC</i>	376

Bermuda

Kiernan Bell

Appleby

Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Yes. Bermuda is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The New York Convention was, by Order in Council, extended to Bermuda on 14 November 1979. Bermuda will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state.

Bermuda is not a party to any other multilateral conventions relating to arbitration.

2 Bilateral treaties

Do bilateral treaties relating to arbitration exist with other countries?

There are no bilateral agreements relating to arbitration between Bermuda and any other countries.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Arbitration Act 1986 (the 1986 Act) governs domestic arbitration proceedings and non-commercial international arbitration proceedings.

The Bermuda International Conciliation and Arbitration Act 1993 (the 1993 Act) governs international commercial arbitration and the enforcement of foreign arbitral awards. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration. The 1993 Act provides for the recognition and enforcement of a 'Convention award', namely, an award made in pursuance of an arbitration agreement in a state or territory other than Bermuda that is a party to the New York Convention.

In addition, there is case law derived from decisions of the Supreme Court of Bermuda, or appellate courts, relating to arbitration and applying the Bermuda legislation.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The 1986 Act is not based on the UNCITRAL Model Law but is derived from the English arbitration acts in force from 1950 to

1979. Major differences between the Arbitration Act 1986 and the UNCITRAL Model law primarily relate to the greater scope for judicial intervention and appeals to the Supreme Court of Bermuda on points of law that may result in either confirming, varying or setting aside of the arbitral award, or remitting the award for reconsideration by the panel.

As stated above, the 1993 Act has been enacted in Bermuda and does incorporate the UNCITRAL Model Law on International Commercial Arbitration; this applies to arbitrations that are considered to be international commercial arbitrations.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The 1986 Act provides that unless the contrary is agreed by the parties, where an arbitration is to be held in Bermuda the arbitration proceedings shall be governed by the procedural law of Bermuda.

Almost all procedural requirements may be otherwise agreed by the parties in the arbitration agreement.

So far as the 1993 Act is concerned, the parties to an arbitration agreement may agree that any dispute that has arisen or that may arise is not to be settled in accordance with the Model Law and in such a case, unless otherwise agreed in writing the 1986 Act shall apply.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Under the 1986 Act Bermuda law will apply unless:

- the agreement out of which the dispute arises expresses the contrary intention;
- there is a subsequent agreement between the parties to the disputes evidencing a contrary intention; or
- the parties agree to leave the arbitrator to determine the proper law.

There is no express provision in the 1993 Act and in the absence of agreement the arbitral tribunal will need to determine the governing law in accordance with accepted principles of private international law.

7 Arbitral institutions

What are the most prominent arbitral institutions in your country?

The Chartered Institute of Arbitrators, Bermuda Branch.

Clarendon House
2 Church Street
Hamilton, HM11
Bermuda
www.ciarb.bm

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are no legal impediments to arbitrating any kind of dispute, save where statute prescribes that the only relief available is by order of the Supreme Court of Bermuda.

For example, pursuant to the Companies Act 1981 certain relief in respect of Bermuda-registered companies may only be granted by the Supreme Court.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

For both domestic and international commercial arbitrations, the arbitration agreement is required to be in writing. The 1993 Act requires that the arbitration agreement provides for submitting disputes that may arise between the parties in respect of a defined legal relationship, whether contractual or not.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Repudiation, frustration or rescission of a contract will not prevent the enforcement of an arbitration agreement, as the arbitration agreement itself would survive. Thus, the arbitral tribunal would be in a position to determine for itself whether the contract relating to the underlying dispute has 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.

Death does not invalidate an arbitration agreement.

If a party to an arbitration is insolvent, the arbitration agreement may still be enforced against the liquidators or trustee in bankruptcy.

11 Third parties

In which instances can third parties or non-signatories be bound by an arbitration agreement?

An arbitration agreement may not validly confer any powers on an arbitral tribunal to bind non-parties, unless there is some special provision in the governing law that might enable the tribunal to do so. Otherwise, there is no basis upon which the arbitration tribunal can properly direct a non-party to pay a cash award or to do a specific act. The only limited exception is in the context of consolidation of arbitrations under section 9 of the 1986 Act in which the power is reserved to the Supreme Court to consolidate separate arbitration proceedings where:

- there is some common question of law or fact,
- the rights to relief are in respect of or arise out of the same transaction or series of transactions; or
- for some other reason it is desirable to make such an order.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration such as joinder or third-party notice?

See question 11 on consolidation. Except as stated above, there is no power to join non-parties to arbitrations.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

There is no decided case in Bermuda that recognises or refers to the 'group of companies' doctrine.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no specific requirements for a valid multiparty arbitration agreement.

Constitution of arbitral tribunal

15 Appointment of arbitrators – restrictions

Are there any restrictions as to who may act as an arbitrator?

There are no restrictions as to who may act as an arbitrator. The 1986 Act specifically provides that judges may accept appointments as long as the chief justice of the Supreme Court has informed the judge that he or she may be made available to do so. As a matter of policy and good practice, the same procedure applies for international arbitrations under the 1993 Act.

16 Appointment of arbitrators – default mechanism

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For arbitrations under the 1986 Act:

- if one party fails to appoint an arbitrator then, upon compliance with the notice provisions, the other party may appoint its appointed arbitrator to act as the sole arbitrator, though the court may set this appointment aside; or
- the court may appoint an arbitrator or an umpire where, for example, the parties do not agree on the sole arbitrator, when appointed the arbitrator refuses to act, or dies, and the parties do not supply an arbitrator to fill the vacancy.

For arbitrations under the 1993 Act, the parties are free to agree on the procedure for appointing arbitrators, failing which:

- in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall appoint the third;
- if a party fails to appoint an arbitrator in the requisite time frame or the arbitrators fail to agree, a party can apply to the court or some other recognised authority; and
- in an arbitration with a sole arbitrator, if the parties cannot agree, either party can apply to the court or other recognised authority.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced?

Under the 1986 Act an arbitrator may be challenged on the ground that he or she is not impartial or the dispute involves a question of fraud. In addition, an arbitrator may be removed where there has been misconduct of the arbitrator or the proceedings themselves have been misconducted.

Under the 1993 Act, a party may challenge an arbitrator on the grounds of justifiable doubts as to the impartiality and independence of an arbitrator, or on the ground that the arbitrator does not have the requisite qualifications.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators?

Arbitrators are in a contractual relationship with the parties so far as their fees and expenses are concerned. So far as their duties as an arbitrator are concerned, they are to be independent and neutral and not partial in any way to the party that appointed them or to any party.

Jurisdiction**19 Court proceedings contrary to arbitration agreements**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Under the 1986 Act after a submission to arbitration or with respect to litigation when there is an arbitration agreement, the party must apply for a stay of the court proceedings at any time after entering an appearance but before taking any step or delivering any pleadings.

In the case of an arbitration agreement in what would be an international commercial arbitration, the Supreme Court shall, if a party requests it no later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under the 1986 Act there is no specific provision allowing the arbitral tribunal to rule on its own jurisdiction to determine the matter in dispute. Accordingly, it will be up to the Supreme Court to be the final arbiter of objections made to the jurisdiction of the arbitral tribunal. However, the Supreme Court would also probably recognise the doctrine of *Kompetenz-Kompetenz*, such that the tribunal would have the power to rule on jurisdiction, subject to court review, thus avoiding delays or efforts to obstruct the arbitral proceedings.

Under the 1993 Act, there is express provision for the arbitral tribunal to rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction should be raised no later than the submission of the statement of defence, though the tribunal does have the discretion to extend the period if delay is justified. The parties have the right within 30 days of receipt of the ruling to ask the Supreme Court to decide the matter. The arbitration may proceed pending that application.

Arbitral proceedings**21 Place and language of arbitration**

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

For domestic and non commercial international arbitration, while there is no default provision, the seat would be Bermuda, and the place would be determined by the arbitral tribunal. The language of the arbitration would be English.

Under the 1993 Act, the parties are free to agree the location. Failure to agree results in the tribunal making the decision, having regard to the circumstances of the case, including the convenience of the parties. Similarly, the parties are free to agree the language or languages to be used in the arbitral proceedings. Failing agreement the tribunal shall determine the language.

22 Commencement of arbitration

How are arbitral proceedings initiated?

Under otherwise agreed, for domestic and non-commercial international arbitrations an arbitration is deemed to be commenced either when one party serves on the other party a notice appointing an arbitrator, requiring the appointment of an arbitrator or concurring in the appointment of an arbitrator.

For international commercial arbitrations, the arbitral proceedings, unless otherwise agreed, commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

23 Hearing

Is a hearing required and what rules apply?

The 1986 Act contemplates, unless otherwise agreed, a hearing. Failing agreement to use particular institutional rules or to use ad hoc rules, the arbitration proceedings are governed by the procedural law of Bermuda.

Under the 1993 Act and the Model Law, a hearing is not required and it is up to the tribunal to determine whether a hearing shall be held, though a hearing will be held if requested by a party to the arbitration. In the absence of the agreement of the parties, the procedure set out in the Model Law applies.

24 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the 1986 Act, and unless otherwise agreed by the parties, the arbitration proceedings are governed by the procedural law of Bermuda. Witnesses are to be examined by the arbitrator under oath or under affirmation in relation to the matters in dispute and shall produce all documents within their possession and power that may be called for.

The Supreme Court can make orders in respect of discovery of documents and the giving of evidence by affidavit.

Under the 1993 Act, unless otherwise agreed, the arbitral tribunal can administer oaths and affirmations and examine witnesses. The Supreme Court can order the examination of any witness before an officer of the court or request examination of a witness outside the jurisdiction.

25 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

For both domestic and international commercial arbitrations the court can preserve property, secure amounts in dispute and grant interim injunctions and appoint receivers.

For both domestic and international commercial arbitrations the court can assist by making orders for the examination of witnesses, make requests for the examination of witnesses overseas, give orders for discovery and the giving of evidence by affidavit.

Under the 1986 Act there is scope for invoking judicial assistance to remove an arbitrator or umpire; to determine any preliminary question of law (with the consent of the parties or the tribunal); to revoke the authority of a designated arbitrator; or to injunct or restrain a party from proceeding with the arbitration on the basis the arbitrator is not impartial or capable of impartiality.

Under the 1993 Act other than as set out above, the scope of judicial intervention during the course of the arbitration is limited to appointing an arbitrator in default of the appointment procedure under the arbitration clause or when an arbitrator for some reason can no longer act, and determining a challenge to the appointment of an arbitrator.

26 Confidentiality

Is confidentiality ensured?

There is no statutory obligation of confidentiality, though any express or implied term of confidentiality in the arbitration agreement would be recognised and enforced. Arbitral proceedings are held in private.

Interim measures**27 Interim measures by the courts**

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

See question 25.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the 1986 Act, unless otherwise agreed, the tribunal may make an interim award. The power of the arbitrators generally to grant interim measures is limited to what may have been agreed by the parties and the tribunal would need to rely on the courts.

Awards**29 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Yes, a majority decision is sufficient and is considered binding.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

A majority decision is all that is required. If the dissenter does not sign the decision the reasons for the failure to sign should be stated.

31 Form and content requirements

What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

There is no form and content prescribed for decisions in the 1986 Act. However, failure to give reasons could result in a successful application to the Supreme Court to have the award remitted to the tribunal for reasons to be provided.

Under the 1993 Act, unless otherwise agreed, the award of the tribunal should be in writing, with reasons, stating the date and place, and signed.

32 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the 1993 Act an application to set aside may not be made after three months have elapsed from the date the party making the application received the award.

Under the 1986 Act the Rules of the Supreme Court of Bermuda require an application to remit or set aside the order be made and the summons served within 21 days of the making and publishing of the award.

33 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the 1986 Act the tribunal may make a final award, an interim award or order specific performance of a contract (other than a contract related to land).

Under the 1993 Act, the tribunal may make final, interim, interlocutory, and partial awards.

34 Termination of proceedings

By what other means than an award can proceedings be terminated?

The parties may agree to settle the dispute. Under the 1993 Act a settlement is treated as if it were an award.

35 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Costs are generally at the discretion of the arbitral tribunal. Under the 1986 Act costs may be taxable by the court and any agreement that the parties are to pay their own costs in any event is void. If no provision is made in the award for costs any party may, within 14 days of publication, apply to the tribunal for an order for costs.

36 Interest

May interest be awarded for principal claims and for costs and at what rate?

Unless otherwise directed, under the 1986 Act any sum directed to be paid by the award shall carry interest from the date of the award at the same rate as for a judgment debt. Under the 1993 Act, unless otherwise agreed by the parties, the tribunal may include in the sum for which the award is made interest, at such reasonable rate as the tribunal directs. Interest shall also be payable on the award itself at such reasonable rate as the tribunal determines.

Proceedings subsequent to issuance of award**37 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under the 1986 Act the arbitral tribunal can, unless a contrary intention is stated in the arbitration agreement, correct any clerical mistake or error in the award.

Under the 1993 Act, within 30 days of receipt of the award (unless otherwise agreed by the parties) a party may, on notice to the other side, request the arbitral award to correct any errors in computation or clerical or typographical errors in the award.

A party may also request an interpretation of a specific point or part of an award.

If justified, the arbitral tribunal will make the correction or give the interpretation within 30 days of the receipt of the request. It may also correct any error in computation, or clerical or typographical error of its own initiative within 30 days of the award.

38 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Under the 1986 Act, an appeal shall lie to the Court of Appeal for Bermuda on any point of law arising out of an award either with the consent of the parties to the reference or by leave of the Supreme Court of Bermuda. Leave to appeal will not be granted unless the Supreme Court considers that the determination of the question of

law could substantially affect the rights of one or more of the parties to the arbitration agreement.

In addition, if the award does not or does not sufficiently set out the reasons for the award, the court may order the arbitrator to state the reasons for the award in sufficient detail to enable the Court of Appeal, should an appeal be brought, to consider any question of law that might arise.

Under the 1993 Act the only grounds upon which an award may be set aside by the Court of Appeal are incapacity; the arbitration agreement itself was not valid under the governing law or, if silent, Bermuda law; a party did not receive proper notice of appointment of arbitrator, the arbitral proceedings themselves or was otherwise unable to present its case; the award deals with a dispute not falling with the terms of reference or beyond the scope of the submission to arbitration; the composition of the tribunal was not in accordance with the agreement of the parties unless the agreement was in conflict with a provision of the Model Law from which the parties cannot derogate; the subject matter of the dispute was not capable of settlement by arbitration under the law of Bermuda; or the award is in conflict with the public policy of Bermuda. An award induced or affected by fraud or corruption is specifically identified as being contrary to public policy.

39 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

For arbitrations under the 1993 Act there is no further right of appeal from a decision of the Court of Appeal. An appeal to the Court of Appeal could be determined within three to six months.

Under the 1986 Act, it is possible to appeal the points of law up to Bermuda's final appellate court, the Judicial Committee of the Privy Council, which sits in London, England.

It can take a further 12 to 24 months to have the appeal determined by the Privy Council. B\$12,000 security for costs needs to be lodged for a Privy Council appeal and the costs incurred by the parties are higher due to the administrative costs of preparing the appeal record and hire privy council agents (a firm of London solicitors).

Costs are typically in the appeal (ie, the party succeeding in the appellate court will have their costs awarded, which will then be taxed by the court if not agreed).

40 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Arbitral awards, may, by leave of the Supreme Court, be enforced in the same manner as a judgment or order; this is irrespective of the country in which the award is made. If necessary the Bermuda court will grant leave for service of the order granting leave to the debtor outside the jurisdiction. The procedure is set out in order 73 rule 10 of the Rules of the Supreme Court of Bermuda.

41 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Bermuda courts are unlikely to enforce an arbitral award that is not final or that has been set aside by a competent authority such as a court at the place of arbitration.

The Bermuda courts generally look favourably on enforcement of foreign arbitral awards, particularly if the award was made under an arbitration agreement in the territory of a state that is a party to the New York Convention. Under the 1993 Act the only reasons for which the Bermuda court can refuse to enforce a Convention award is: if the person against whom the award is invoked provides that the party to the arbitration agreement was under some incapacity; if the arbitration agreement was not valid under the law to which the parties subject it or, failing any indication thereon, under the law of the country in which the award was made; that he or she was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; the award deals with matters that cannot be subject to arbitration; the composition of the arbitral tribunal was not in accordance with the agreement of the parties; or the award has not yet become binding on the parties or has been set aside or suspended by a competent authority in the country where it was made or under the law of which it was made. In addition, the court may refuse to enforce a foreign award if it would be contrary to Bermuda's public policy to do so.

42 Cost of enforcement

What costs are incurred in enforcing awards?

The costs of enforcement are the fees incurred in drawing up the summons and affidavit and supplying the supporting evidence (for example, an authenticated arbitral award, the arbitration agreement), appearing on the application for leave to have the award enforced as a judgment of the court, and then executing the judgment against the assets of the judgment debtor.

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Other

43 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Bermuda's judicial system and system of jurisprudence would influence a Bermuda arbitrator indirectly in so far as a Bermuda arbitrator would expect to be independent and neutral as between the parties and would conduct him or herself accordingly.

44 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Bermuda facilitates international arbitration and encourages the use of Bermuda as an appropriate seat for international arbitration. Bermuda has favourable immigration policies enabling arbitrators and foreign counsel to come to Bermuda for the purpose of international arbitration.



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