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Contents

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1. General

1.1 General Characteristics of Legal System

Bermuda is a self-governing colony; its head of state is the head of state of the United Kingdom. Bermuda has a written constitution which has been in operation since 21 February 1968. The Bermuda Constitution Order 1968 is an Order made by Her Majesty in Council under the Bermuda Constitutional Act 1967, an enactment of the UK Parliament. The majority of local laws are enacted by the Bermuda Parliament. The Bermuda legal system is based on English common law, the doctrines of equity and the Acts of Parliament of England of general application which were in force in England as of 11 July 1612, along with such further Acts as have been made applicable to Bermuda and the local laws enacted by the Bermuda Parliament. The courts hear cases based primarily on the adversarial model, and cases are conducted through a combination of written submissions and oral argument.

1.2 Structure of Country's Court System

Bermuda's superior court of record is the Supreme Court, established under the Supreme Court Act 1905. The Chief Justice and three puisne judges, together with designated assistant judges, make up the judges of the Supreme Court, which possesses and exercises all of the jurisdictions formerly (ie, before 1905) exercised by the English courts of general assize, chancery, exchequer, probate, ordinary, bankruptcy and admiralty. There are presently two puisne judges assigned to the Commercial Court, where commercial and arbitration matters are dealt with. Appeals from the Supreme Court are made to the Court of Appeal, which is made up of three Justices of Appeal drawn from among senior judges who will have sat either in the United Kingdom or the Caribbean area. The Court of Appeal is in session three times a year, in March, June and November, with each session lasting between three and four weeks. Appeals from the Court of Appeal go to the Judicial Committee of the Privy Council pursuant to the Appeals Act 1911. The Bermuda Supreme

Court has been operating continually since it first sat on 15 June 1616. Below the Supreme Court lies the Magistrates' Court, a court with jurisdiction limited to matters in controversy with a value of up to BMD25,000. Appeals from this court, which exercises both civil and criminal jurisdiction are made to the Supreme Court.

1.3 Court Filings and Proceedings

The general rule in Bermuda is that litigation is conducted in public and that all proceedings are available for the public to observe. There are some circumstances in which certain civil actions may be held in camera and the public excluded – for example, matters concerning national security, minors and other persons with a disability, certain matters concerning trusts and other matters involving confidential information where the court determines that the public interest is not served by an open court hearing. An application can be made to seal the court file where the court thinks it appropriate, so that the public will not have the access they would otherwise have had to review the court file under the Supreme Court (Records) Act 1955.

1.4 Legal Representation in Court

Parties can represent themselves in the Bermuda courts, although a corporate entity must be represented by an attorney. The Bermuda Bar comprises lawyers who are described as 'barristers and attorneys' and are admitted on application to the Supreme Court under Section 51 of the Supreme Court Act 1905. The primary qualification is that the person who seeks to be admitted as a barrister and attorney in Bermuda has rights of audience before the Courts of England or one of Her Majesty's dominions. For admission on the permanent roll of barristers, the applicant must be a resident of Bermuda and be either a Bermudian or have rights to work in Bermuda, which can include holding a valid work permit. Foreign attorneys who otherwise fulfil the requirements of Section 51 can be admitted on a temporary basis where it is demonstrated that they have a level of expertise that is not available on the Island, or that the matter in dispute involves a point of great public significance or otherwise warrants the services of that foreign attorney. Foreign attorneys require a work permit, the application for which would be made on their behalf by the local law firm which engages their services. The Bermuda Bar Council, the governing body of barristers and attorneys, is consulted by the Minister of Labour regarding this application and expresses its view as to the appropriateness of the application, having received representations from the applicant and any other interested parties. A work permit or Bar admission is not required for work involving international commercial arbitration.

2. Litigation Funding

2.1 Third-party Litigation Funding

There is no express prohibition or sanction relating to third-party funding. A review of the case law in Bermuda shows that third-party funding does take place, a fact which is highlighted by the debate in certain cases surrounding whether or not third-party funders should have a liability to pay the costs of a losing party that they have funded. In cases where a third party is the real party in interest in the litigation, it runs the risk that an adverse costs order may be made against it; the court's jurisdiction for this lies both in the Rules of the Supreme Court 1985, Order 62, and on a statutory basis under the Supreme Court Act 1905. The jurisdictional gateway test, based on which the court will exercise its discretion to make an order, is whether or not it can be shown that the third party was either controlling the proceedings by the fact of the funding, or otherwise financially benefitting from them.

2.2 Third-party Funding of Lawsuits

The nature of a suit would appear to be irrelevant to the issue of third-party funding, and the question of how much funding a party may receive. This would appear to be a matter to be decided between the litigant and the funder.

2.3 Third-party Funding for Plaintiffs and Defendants

The absence of specific rules concerning third-party funding seems to indicate that the Bermuda courts would not be concerned whether or not either a plaintiff or a defendant was in receipt of it.

2.4 Minimum and Maximum Amounts of Third-party Funding

The amount of funding to be provided by a third party is a matter to be decided between the funder and the plaintiff or defendant.

2.5 Third-party Funding of Costs

What costs a third party will fund is a matter to be decided between the funder and the plaintiff or defendant.

2.6 Contingency Fees

There is a prohibition against barristers and attorneys acting on a contingency basis. The basis for this is found in the Professional Code of Conduct 1981, Rule 96, which provides that no barrister or attorney may enter into a contingent fee arrangement where his or her fees depend upon the results of a case, or consist of a prearranged share of money to be recovered by the client.

2.7 Time Limit for Obtaining Third-party Funding

There are no time limits within which a party to litigation should obtain third-party funding – this is a matter to be decided between the litigant and the funder alone.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

It is usual in civil litigation to see correspondence between the disputing parties prior to the initiation of any court proceedings. However, in the absence of a contractual obligation, eg, mediation as a condition precedent, or in relation to defamation, a party would generally have no obligation to take any steps prior to issuing the originating process with which an action commences. Similarly, there is no obligation imposed by the court that requires a defendant to respond to any pre-litigation correspondence.

3.2 Statutes of Limitations

The Limitation Act 1984 sets out the limitation periods applicable in respect of different causes of action. For a claim for breach of a simple contract, and for a tort, it is six years. However, for a claim based on a contract which is under seal, it is 20 years. A limitation of 20 years applies for claims relating to the recovery of land, proceeds of the sale of land or monies secured by a mortgage or charge.

Limitation periods tend to run from the date on which a contract was breached or the negligent act causing the damage occurred. In defamation cases, it commences from the date of publication.

The burden is on a defendant to raise the Limitation Act as a defence. There is no automatic bar on recovery. Parties may agree to vary or exclude limitation periods and in certain instances, such as in relation to infants or other persons under a legal disability, the periods may not be applicable to them until they have either achieved the age of majority or the legal disability has been removed.

3.3 Jurisdictional Requirements for a Defendant

The court applies its common law rules to determine whether or not a party is subject to the jurisdiction of the Bermuda courts. At its simplest, the issue is whether the proposed defendant can be validly served within the jurisdiction of the court (ie, the Islands of Bermuda) and/or submits to the jurisdiction of the Bermuda court or, alternatively, can be validly served pursuant to the matters set out in Order 11 Rules 1(1) and 2 of the Rules of the Supreme Court 1985.

3.4 Initial Complaint

There are different forms of process which can be used to initiate a lawsuit. A party is entitled to commence proceedings by the use of a generally endorsed writ of summons, a process that names a party or parties to the lawsuit and has the briefest of details concerning the claim and the relief sought endorsed on it. If the defendant is contesting the proceedings, this is subsequently supplemented by means of the service of the statement of claim, a more detailed document. In certain forms of statutory relief, the process used is an originating summons, in which the claim is set out in the summons and supplemented by a detailed affidavit. In relation to matters concerning companies, process is usually initiated in the form of a petition. A party is permitted to amend its initiating pleading at any time before it is served on the other party, but even subsequent to service it can be amended with the permission of the court or the written consent of the defendant(s).

3.5 Rules of Service

A party can initiate a lawsuit against a defendant and, in the case of a writ of summons, has a year in which to serve the proceeding, although one should keep the Limitation Act 1984 in mind. It is the obligation of the party that has initiated the suit to serve the defendant. Service on a company is at its registered office, by leaving a copy there; in the case of service on an individual defendant, that defendant must in ordinary circumstances receive a copy personally. If the defendant proves difficult or elusive as regards service, an order for substituted service can be obtained from the court. Upon receipt of the originating process, a defendant usually has a limited time to acknowledge that he or she has received the originating process and that there is an intention to defend it. This is referred to as an 'appearance' and the usual time for filing this at the Registry of the Supreme Court, where all the court records are retained, is 14 days. A party who is outside the territorial jurisdiction of the court can be served outside the jurisdiction if the circumstances set out in Order 11, Rules 1 and 2 of the Supreme Court 1985 are applicable. Application must be made to the court for service out of the jurisdiction, which would be done by issuing a summons in the action supported by an affidavit setting out how it is that the defendant comes within the terms of Order 11, Rules 1 or 2, and that it is appropriate for the proceedings to be served outside of the jurisdiction. Upon making this order, the court will direct the time for entering an appearance, and also the form of service outside the jurisdiction. It may be that the parties had previously contractually provided for matters concerning service where one of the parties is outside the jurisdiction, and made a provision for a designated agent for service within the given jurisdiction.

3.6 Failure to Respond to a Lawsuit

Failure to respond in the designated way to service of originating process within the time provided, or at all, would mean that the plaintiff would be able to apply to the court for summary judgment of its claim. This process involves filing the application with the court and setting out that service had been effected as required by the rules or by the order of the court under Order 11.

If a judgment is entered against a defendant who has not responded within the designated time, it may be subsequently set aside if the defendant is able to show that it was wrongly entered, or it is able to show some good reason why it should be able to defend the claim. In these circumstances, the court can exercise its discretion to set aside the default judgment.

3.7 Representative or Collective Actions

There is no specific provision providing for collective actions (sometimes referred to as class actions) in Bermuda. Parties are confined to representative actions, in which the plaintiff has to establish that the cause of action raises common or related interests of either fact or law where more than one person has the same interest in the claim and shares a common grievance. Such actions come within Order 15, Rule 12 of the Rules of the Supreme Court 1985. Each party would have to signify its consent to be part of the representative action, and to allow one or more persons to represent them all.

3.8 Requirement for a Costs Estimate

There is no legal obligation on a barrister or attorney to provide their client with an estimate of costs for the litigation.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

A party always retains the ability to make application for an interim remedy pending the hearing of the substantive action, and the court retains the discretion to grant such an interim remedy. Remedies can include striking out a claim which is bound to fail by reason of it not disclosing a cause of action, or being frivolous or vexatious. Other remedies which may be granted include interim injunctions, interim payments or interim declarations. A party may also apply for an expedited hearing if the circumstances of the case warrant it.

4.2 Early Judgment Applications

A plaintiff may apply for summary judgment on the basis that the defendant has no defence to all or part of a claim included in the statement of claim, except in relation to the amount of any damages sought. There are conditions precedent for the employment of this summary process under Order 14 of the Rules of the Supreme Court 1985: namely that the defendant must have entered an appearance to the claim, that a statement of claim must have been served on the defendant, and that an affidavit in support of the application must have been sworn which verifies the facts on which the claim or part of the claim is based. This must state that, in the deponent's belief, there is no defence to the claim or the part of it on which judgment is sought, except possibly in relation to the amount of damages claimed.

On the other side of this the defendant may themselves make an application for some aspect of the pleading to be struck out, on the basis that it discloses no reasonable cause of action, is scandalous, frivolous or vexatious, could prejudice, embarrass or delay the fair trial of the action or is otherwise in abuse of the process of the court. Actions can also be struck out if a party has failed to comply with an Order of the court.

These applications can be defeated if, in the case of the application for summary judgment, the defendant is able to show that there is an issue or question in dispute which ought to be tried. In striking out an aspect of the pleading under Order 18, Rule 19, if a defendant seeks to show that the pleading discloses no reasonable cause of action, he or she must do so by reference to the pleadings on their face value, indicating that he or she is in some way prejudiced by the irregularity. If the only grounds on which the application is made are that the pleading discloses no reasonable cause of action or defence, no evidence is admitted. However, if the matter is within the limitation period, the court will likely allow an amendment. In relation to matters that are described within the rule as 'scandalous', the sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material to the relief sought. If allegations of dishonest conduct are made, but no relief is sought on that basis, then the allegations become immaterial and are struck out as scandalous and embarrassing. A plaintiff can also obtain early judgment where the claim has been validly served and a defendant then fails to enter an appearance, or does so but then fails to defend the claim by filing and serving a defence.

4.3 Dispositive Motions

Summary judgment applications under Order 14 and the striking out of pleadings under Order 18, Rule 19 of the Rules of the Supreme Court 1985 are some of the dispositive motions available before trial. Equally, there may be applications to the court if a party has failed to comply with an order of the court, and continuous delay in prosecuting a claim can be a basis for striking out under the inherent jurisdiction of the court.

4.4 Requirements for Interested Parties to Join a Lawsuit

Third parties can be joined in proceedings by a defendant who has entered an appearance in the action, in circumstances where the defendant seeks a contribution or indemnity from a person not already a party to the action. This can include circumstances in which claims against such a person relate to the original subject matter of the action, or the relief being claimed is substantially the same as the relief being claimed by the plaintiff, or if some question or issue relating to the original subject matter of the action requires this person to be a party. A defendant may not issue a third-party notice without the leave of the court unless the action was begun by a writ of summons and the defendant issues the notice before serving his defence on the plaintiff. The court will generally allow a party to be added to the proceedings where it is appropriate to do so in order for resolution of all matters in dispute. Interested parties may also intervene in proceedings in which they have not been joined in order to make submissions.

4.5 Applications for Security for Defendant's Costs

A request for security for costs can arise in substantive actions and on appeal. In an action before the Supreme Court, an application can be made for the plaintiff to give security for the costs if the plaintiff is ordinarily resident out of the jurisdiction, or is a nominal person suing for the benefit of some other person and the defendant is able to establish that the plaintiff may be unable to pay the costs of the defendant if ordered to do so. Additional grounds for ordering security are that the plaintiff's address is not correctly stated in the writ or other originating process, or that the plaintiff has changed his or her address during the course of proceedings with a view to avoiding the consequences of an adverse result in the litigation.

Any appeal to the Court of Appeal, other than where the applicant is impecunious and is able to establish this as fact, requires security for costs to be given based on an estimate of the costs of the respondent in the appeal. This security can be effected by way of payment to a particular account or, more usually, by the attorney for the party that is required to give the security giving an undertaking.

4.6 Costs of Interim Applications/Motions

Any award of costs is made at the discretion of the court, and the usual rule is that the winner gets their costs. Interim applications and motions which involve obtaining the administrative directions that advance the matter to trial usually have an order attached to them saying that the costs are 'in the cause'. This simply means that whoever ultimately wins will receive their costs for those applications. Where there are applications, such as Order 14 applications for summary judgment, which fail, the successful defendant is entitled to an award of their costs. These costs are usually assessed at the end of the full trial in the matter, but it is open to a party to request that they be paid 'forthwith', meaning that the successful defendant is entitled to have his or her costs taxed and paid at any time after the successful defence of the application. Where there are discovery applications that fail, the usual practice would be to order the payment of costs to the successful party, but in these circumstances those costs will not usually be taxable or payable until the end of the proceedings.

4.7 Application/Motion Timeframe

The Bermuda courts are responsive to urgent scenarios, and an application for an injunction can be obtained, if the circumstances warrant it, even by way of a telephone application to the court. The seriousness and complexity of the situation are factors that are relevant to how quickly the court will be able to deal with the matter. It may be that the applying party will wish to set out the case in detail in an affidavit, together with relevant exhibits. The registry of the Supreme Court is responsive to requests for urgent applications, and even a half-day hearing can be accommodated quite promptly once a party requests it and provides a certificate of urgency. Bermuda courts sit year round and do not close other than on weekends and public holidays.

5. Discovery

5.1 Discovery and Civil Cases

Discovery is very much a part of the litigation process in Bermuda and requires no order, as it is a requirement that once there has been a close of the pleadings (ie, once all the required documents setting out the party's case, whether as plaintiff or defendant, have been filed and served) the parties must then make discovery by list of the documents which are or have been in their possession, custody or power relating to matters in question in the action. The parties are at liberty to agree to dispense with or limit the discovery of the documents which would otherwise be required under Order 24 of the Rules of the Supreme Court 1985.

Discovery is usually by way of exchanging the lists of documents, which should take place within fourteen days of the close of the pleadings.

Once the documents are on the list, the other party is entitled to inspect them. The list specifies those documents that are available for inspection and those that are no longer in the control of the disclosing party, or which are protected by legal privilege.

As a matter of practice, attorneys will provide copies of the documents on the list that are disclosable on request.

If there are additional documents required, or if a party is not satisfied that the list is complete, it may make application to the court for the specific documents or category of documents required. The party can also ask the court to order the disclosing party to make an affidavit verifying that the list is correct. The nature of the disclosure is that a party is required to disclose the documents on which it relies for its case, as well as all documents which adversely affect its case. The parties are expected to be diligent in producing all documents which are or have been in their custody, possession or power which are relevant to the action, and must conduct a reasonable search for these. Discovery includes not only documents but also e-mails, telephone recordings and anything else that is in a recordable form and is in the possession of the disclosing party.

It is not usual for any witness testimony to be taken prior to a hearing, but there are exceptions, including in particular the letter of request procedure where a witness is located out of the jurisdiction. In this situation, a letter of request may be issued to the judicial authority of the foreign country in question requesting that the evidence of the witness be taken before either a court of that country or a special examiner, who may be from the British Consulate in the country in

which the evidence is to be taken. There is also a procedure available for taking the evidence of a witness who may be unwell or suffering an illness precluding them from attending the trial. In this case, the trial judge may accede to the request of a party in advance of the hearing to take that witness's evidence and possibly to cross-examine them.

5.2 Discovery and Third Parties

It is possible to obtain discovery from third parties not named as a plaintiff or a defendant in the proceedings if the documents sought are likely to support the case of one party and adversely affect the case of the other. For this to be permissible, the disclosure must be necessary in order to dispose fairly of the claim or to save costs. The process involves serving the relevant witness with a subpoena which is confined to compelling the witness to attend with the documents which are required. This can sometimes be arranged so that it happens in advance of the full trial, in order that court time is not wasted during the trial by the parties only then being able to review the documentation that has been disclosed.

A Norwich Pharmacal Order can also be obtained from the court, which requires the third party to disclose relevant documents or information. Applications can also be made against banks to produce their records where these are relevant to the proceedings.

5.3 Discovery in this Jurisdiction

There are specific rules in the Rules of the Supreme Court 1985 which set out the obligations of the parties in litigation in connection with:

- discovery;
- the fact that lists must be exchanged within 14 days after the close of pleadings and the form of such a list; and
- how a party, at any time, may apply to the court for further documents and the responding party must set out in an affidavit its response to that request, stating whether any specified document has at any time been in that party's possession, custody or power and, if not, when the party parted with it and what has become of it.

The rules also specify how inspection of documents will take place, and that any document referred to in a pleading or affidavit must also be available for inspection. The rules also provide for what may happen in the event that a party fails to comply with a requirement for discovery. This includes the possibility that the action may be dismissed or, on the other side, that the defence be struck out and judgment entered against the defendant.

5.4 Alternatives to Discovery Mechanisms

Documents that had not previously been on the list of documents for disclosure may be produced during the trial in circumstances where such evidence may be used to impeach a witness's testimony, or where documents have recently come into the possession of the party seeking to rely on them. In these circumstances, the party will have to explain to the court the provenance of the document and it will remain at the discretion of the court whether to allow the document to be entered into the evidence and to be produced as an exhibit in the trial record.

5.5 Legal Privilege

Documents to which legal professional privilege attaches must be disclosed in the list of documents as 'relating to matters in question in the action', but are nevertheless privileged from production and inspection. The Rules of Court summarise these documents as:

- documents protected by legal professional privilege;
- documents tending to incriminate or expose to forfeiture the party that produced them; and
- documents privileged on the grounds of public policy.

Legal professional privilege claimed for documents is divided into two classes, namely:

- those that are privileged whether or not litigation was contemplated or pending; and
- those that are only privileged if litigation was contemplated or pending when they were made or came into existence.

The first of these two classes includes letters and other communications passing between a party or its predecessors in title and its attorneys; these are privileged from production provided they are confidential and written to or by the attorney in his or her professional capacity and for the purpose of getting legal advice or assistance for the client.

The second class is more obviously privileged, as it relates to communications between the attorney and a third party which come into existence after litigation is contemplated or commenced and for the purpose of obtaining or giving advice in regard to the litigation or obtaining or collecting evidence to be used in it.

Generally, legal professional privilege extends to in-house counsel, provided that this counsel is acting in the capacity of a lawyer and not as a business adviser. The general principle set out above would apply to the nature of the communication which was exchanged with the in-house counsel.

5.6 Rules Disallowing Disclosure of a Document

One sub-category of legal privilege is the right of a party not to be compelled to discover any document which would tend to incriminate or expose that party to proceedings which would involve a criminal penalty for that party or its legal partner under the law of Bermuda. There may also be legislation which requires a party to withhold a document on the grounds that the disclosure of it would be injurious to the

public interest. In trust litigation, a party that has received a confidentiality order from the court would, in respect of a particular aspect of the trust application, be entitled to withhold those documents that are the subject of the confidentiality order.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

An application for an injunction may be made by any party to a matter before or after the trial, whether or not the claim for the injunction was included in that party's originating process. The application can even be made before the originating process has been filed in the court if the case is one of urgency, and the court has wide inherent jurisdiction to make such orders where it appears to the court to be just or convenient to do so. An order may be made either unconditionally or upon such terms and conditions as the court thinks just, while having regard to settled reasons or principles.

The types of injunctive relief that can be obtained include the following:

- an order prohibiting a person from doing something, or requiring that person to do something (these are known respectively as prohibitory and mandatory injunctions);
- an order freezing a party's assets;
- an order requiring a party to provide certain information;
- an order permitting a party's property to be searched in order to preserve evidence (these are sometimes referred to as Anton Pillar orders);
- an order preventing a party from commencing or continuing with proceedings outside of the jurisdiction, referred to as anti-suit injunctions; and
- an order restraining a defendant from removing assets from the jurisdiction pending the trial of the action (the Mareva injunction).

The injunction can either be an interlocutory injunction, granted to preserve a state of affairs until the party's rights are determined at trial or granted after trial to preserve the state of affairs pending an appeal.

An interim injunction can be granted in respect of conduct until a specified day and is usually granted where the court is persuaded that the applicant would otherwise suffer irreparable harm. Such interim injunctions can be granted ex parte, but on making such an application the applying party has the burden of full and frank disclosure. The failure to give full and frank disclosure can itself be a basis for discharging the injunction in due course.

A permanent injunction is usually a form of relief sought which, upon determination, will settle the party's rights and will be in place indefinitely unless it is either restricted by the terms of the order or is subsequently removed by a further order of the court. The party seeking a permanent injunction will have to demonstrate that not only are the present actions of the other party infringing the plaintiff's rights, but also that it is likely that there will be continuing conduct and consequential damage if the conduct is not restrained permanently by the court.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Injunctive relief can be obtained promptly where circumstances are urgent. A phone call to the registry of the Supreme Court during working hours would secure an appointment before a judge. If there are papers to be filed, these could be transmitted by e-mail; otherwise, in circumstances of extreme urgency, the attorney could make the ex parte application to the judge over the phone. This would be the case outside of the registry's hours. In less urgent circumstances where injunctive relief is required, the attorney with conduct of the case would draft the appropriate papers, namely a generally endorsed writ of summons setting out the nature of the claim against the defendant, an ex parte summons seeking the injunctive relief, an affidavit sworn on behalf of the plaintiff setting out why the relief is being sought and the urgency involved and a draft order that it would be hoped the judge would sign.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief can be sought on an ex parte basis. There is no notice given to the defendant and the attorney goes forward making the application without the defendant being present or even aware of the application. If it is appropriate, and time allows it, the ex parte application may be notified to the defendant to give the defendant an opportunity to attend. If the defendant attends or is represented at the application for the injunction, they have no obligation to say anything, which is usually the wiser course, but they may make representations if they think that it will assist the their case in defeating the application for the injunction.

6.4 Applicant's Liability for Damages

The usual course when considering applications for injunctive relief is that the applicant must give an undertaking as to damages, in which they essentially agree to submit to any order that the court may consider to be just for payment of compensation to any person adversely affected by the operation of the injunction, if it should ultimately be shown that the injunction should not have been granted.

Damages for which the person who is the subject of the injunction would be compensated include any loss suffered by their being temporarily prevented from doing what they were legally entitled to have been doing. The intent of the award of damages is to put that person in the same position

he or she would have been in if the injunction had not been granted.

When an applicant gives the undertaking mentioned above, particularly on an ex parte basis, it is usually sufficient that it is given without any fortification, ie without actual funds being made available by their being placed, for example, in the account of the law firm representing the applicant. In this connection it is relevant to note that in considering whether or not to grant an injunction, the court will often consider whether sufficient funds will be available to recompense the party that is the subject of the injunction if it should ultimately be set aside.

6.5 Respondent's Worldwide Assets and Injunctive Relief

The court can grant an injunction extending to the worldwide assets of the respondent, particularly if the respondent is within the jurisdiction and the court is able to deliver a sanction on the defendant if its order should be breached.

To obtain such an order, an applicant must satisfy the court that there is a risk of the respondent dissipating its assets. The court will usually impose a condition that its permission be sought before any enforcement proceedings are commenced overseas.

6.6 Third Parties and Injunctive Relief

Injunctive relief can be obtained against third parties, and is usually obtained in order to support an injunction already granted against the defendant. Circumstances in which relief may be granted include where there is reason to believe that the third party holds or controls assets which are the property of the defendant, and which are relevant to the proceedings being brought against the defendant. It is difficult to obtain such orders against third parties who are outside the jurisdiction, as the court tends to only want to make orders that are effective and that can be enforced.

6.7 Consequences of a Respondent's Non-compliance

The terms of any injunction that is obtained will be set out in an order that will include an endorsed penal notice. It is a necessary condition for the enforcement of the order that its service copy include endorsed language indicating that failure to comply with the order will incur a sanction of some kind. Such an endorsement can be put on the order before or after the judge signs it, and must be in language clearly stating that if the respondent disobeys the order, they will be liable to process of execution for the purpose of compelling them to obey it. If the respondent is a company, the order may be directed to a director or officer of the company, and this director or officer may be named in the penal notice as the person who will be liable to the process of execution. Ancillary to this are the ordinary rules concerning contempt of court. Third parties who have knowledge of an injunction and assist the respondent in breaching its terms are also liable to be held in contempt of court.

7. Trials and Hearings

7.1 Trial Proceedings

In the normal course of a trial in Bermuda parties will arrange to have their witnesses attend the trial on the appointed day, but will have exchanged the written evidence of their witnesses in advance. At the trial, that witness evidence is taken to be the evidence in chief, meaning that the process of putting the witness in the witness box and hearing their evidence for the first time is done away with., The judge and the opposing counsel having read that evidence in advance, the witness is put up for cross-examination. The adversarial system prevails, and the evidence of the witness is tested by examination. Once all the evidence has been heard by the court, each party is entitled to make their legal submissions and closing statements in respect of the respective merits of their cases. Submissions can be reduced to writing in advance and submitted to the court, with some oral submissions still allowed to supplement them.

7.2 Case Management Hearings

Case management hearings are usually heard in order to ensure better control of a trial when it does take place, and also to ensure that all relevant information is before the court in advance of the trial. Parties may file summons in the court which may or may not be heard by the ultimate trial judge. These hearings are usually quite short, and an order can often be reached by agreement between the attorneys. This is particularly so regarding directions for the hearing of the trial. Summonses are filed making clear what order is sought, often providing a draft order relating to what the judge is being asked to consider and asking the judge to make the order in terms.

The Bermuda court has general powers of case management, following the overriding objective as set out in Order 1A/1 of the Rules of the Supreme Court 1985. This sets out that the Rules have the overriding objective of enabling the court to deal with cases justly, which includes ensuring that the parties are on an equal footing, saving expense, and dealing 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 court strives to ensure that the case is dealt with fairly and expeditiously and that the case is allotted an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. To this extent, Rule 1A/4 requires the court to pursue the overriding objective by actively managing cases. Active case management includes encouraging the parties to co-operate with each other in the conduct of the proceedings, identifying the issues at an early stage, deciding promptly which issues need full investigation

and trial and accordingly disposing summarily of the others. The court should consider deciding the order in which issues are to be resolved at the trial, encouraging the parties to use alternative dispute resolution if appropriate (and facilitating the use of such a procedure) and even helping the parties settle all or part of the case. The court should be involved in fixing timetables or otherwise controlling the progress of the case and considering whether or not the likely benefits of taking a particular step justify its cost. To this extent, the court will not simply rubber stamp directions proposed by the parties, but will consider the overriding objective. The court may wish to deal with as many aspects of the case at the trial as it can and, where appropriate, even to deal with the case without the parties needing to attend court. The court is effectively giving directions to ensure that the trial of the case proceeds quickly and efficiently.

7.3 Jury Trials in Civil Cases

An order for trial by jury is rarely made, although technically still available in actions relating to personal injuries. Trial by jury is also possible where there is a claim of fraud or in respect of defamation, malicious prosecution or false imprisonment. A deciding factor against allowing any jury trial would be if there were need for a detailed examination of documents or accounts or a scientific or local investigation which cannot conveniently be conducted with a jury.

7.4 Rules That Govern Admission of Evidence

Bermuda has statutory guidelines in respect of evidence which is admissible at trial. In principle most evidence can be admissible, although the weight given to it may be negligible depending on the circumstances. The court will not admit prejudicial evidence where to do so is unfair to the other party. To that extent, hearsay evidence is divided into different classes and can usually be adduced by the service of requisite notice and counter-notice. As far as practicable, all questions concerning the giving of hearsay evidence should be dealt with and disposed of before the trial, but it would ultimately remain at the discretion of the court whether to allow such evidence if it does arise at the trial.

Opinion evidence is usually only to be given by experts who are called as such, whose credentials are accepted by the court and whom the court rules to be experts. The ability to call expert evidence is dependent on the court's permission and is usually determined in advance of the trial at a direction's hearing. Applications for the admission of expert testimony are considered under Order 38 of the Rules of the Supreme Court 1985. These rules also deal with the admission of hearsay evidence. The rules also make provision for the introduction of any evidence taken by deposition. Evidence that has been excluded during the discovery process would still remain excluded for the purpose of any trial, so documents protected by legal professional privilege and statements made on a without prejudice basis would not be admissible.

7.5 Expert Testimony

As mentioned in **7.4 Rules That Govern Admission of Evidence**, above, expert testimonyis permitted at trial. Witness statements of the experts and their reports would be exchanged well in advance of the trial. The court will have determined how many experts are appropriate, and in what fields, during the directions stage. Experts are subject to cross-examination at trial on their expert report. If the expert is located overseas and is unable to travel, the court can deal with the expert evidence via video link by agreement.

7.6 Extent to Which Hearings are Open to the Public

Whilst the general rule is that court hearings are open to the public, there are circumstances in which a civil action may be held in camera and the public excluded. The test is whether public access would defeat the ends of justice, such as in cases in which particulars of a secret process must be disclosed. An application for the trial to be heard in camera because of privileged and confidential information which may arise in the evidence can be denied if the court, in the course of exercising its inherent jurisdiction, forms the view that the case is of fundamental importance and should be held in public. The court may give directions with a view to avoiding unnecessary reference to information which could be commercially damaging and where there would be no interference with the presentation of the case. Further, in relation to trusts, the Bermuda court takes the view that if the case is essentially to do with the internal management and administration of the trust then there is no reason why a confidentiality order should not be made and so prevent unnecessary publicity of what is essentially a private matter. Once the proceedings have concluded, the public can apply to review the file, which can include any transcripts that are on the file, by making application under the Supreme Court (Records) Act 1955 and paying the appropriate fee. Files that have been sealed by the court or have confidentiality orders applicable to them are not available.

7.7 Level of Intervention by a Judge

Given the overriding objective of ensuring that the trial is dealt with expeditiously and fairly, and the allocation of an appropriate share of the court's resources, judges can and should intervene where it is appropriate to maintain focus on the issues and to ensure that valuable court time is not wasted. Judges may feel it appropriate in certain circumstances to raise questions and issues with the counsel for the parties, whether during a preliminary hearing or trial, so that counsel are mindful of the relevance of the questions they raise and the areas that they focus on. Equally, it can be important for the judge to raise questions with witnesses and/or experts during a trial to ensure that they fully understand the evidence that is being given or where there has been an omission of evidence relating to facts that are relevant to the determination of the case.

Decisions, whether final judgments or interim orders, are generally given at the time. However, if it is not possible to make an ex tempore ruling, the judge will reserve judgment to consider the factual issues and the law that has been presented. At the conclusion of the case, even if the judge is not prepared to give an ex tempore judgment, the issue of costs may well be raised and submissions made. Alternatively, if judgment is to be reserved, the issue of costs may well be reserved until after judgment is delivered.

7.8 General Timeframes for Proceedings

If parties are diligent and follow the timeframes within the rules of the court, the trial of an action could take place within eight months of the commencement of the action. The more typical scenario is a year to trial, although this can be cut shorter if the issue is relatively straightforward and the parties are desirous of an early hearing. It could be much longer if many interlocutory hearings are required before reaching trial.

8. Settlement

8.1 Court Approval

Parties are always at liberty to resolve their lawsuit at any time and do not necessarily need court approval, save in specific circumstances where a child or protected party is involved. A plaintiff in an action begun by a writ may, without the leave of the court, discontinue the action or withdraw any particular claim not later than 14 days after service of the defence. However, if a party wishes to discontinue an action, claim or counterclaim at a later stage, ie, after 14 days have passed, the leave of the court is required. The discontinuance of an action is not a defence to a subsequent action save that the parties have agreed and obtained an order that the discontinuance is with prejudice.

If parties wish to maintain the confidentiality of their agreed terms of settlement, the usual course is to obtain a Tomlin Order. A Tomlin Order expressly states (in the body of the order) that the relevant proceedings have been stayed and that the settlement terms agreed between the parties are recorded in a confidential attachment which is not made publicly available.

8.2 Settlement of Lawsuits and Confidentiality

If the parties agree outside of the court to resolve the dispute, they may enter into their own agreement and either obtain a Tomlin Order or simply ask the court to discontinue or dismiss the proceedings with no further order. To that extent, the settlement of the lawsuit will remain confidential. If the settlement is recorded in a judgment or order, the parties could request the court for a confidentiality order in respect of the judgment, but would have to set out cogent and compelling reasons why the judgment (at the end of what would otherwise be a public hearing) should not be available to the public. These reasons may involve sensitive issues that the court in its discretion may consider appropriate to be protected, eg paternity.

8.3 Enforcement of Settlement Agreements

A settlement agreement is effectively a contract, breach of which would give rise to a claim for enforcement by way of fresh proceedings. The advantage of a settlement agreement which is a schedule to a Tomlin Order is that the terms of the settlement may be enforced by the court that gave the order; this would simply be a summons in the original action.

8.4 Setting Aside Settlement Agreements

A settlement agreement, being a contractual arrangement, may be set aside on the same basis as any other contract. For example, allegations of fraud or undue influence could be made, but unless the settlement agreement was part of a Tomlin Order, a new action would need to be commenced seeking the declaration of invalidity.

9. Damages and Judgment

9.1 Awards Available to a Successful Litigant

The most common remedy sought by a plaintiff is damages, but there are many other awards that may be sought depending on the nature of the dispute and the issues between the parties. Bermuda courts can award relief appropriate to the nature of the case, although as indicated the most common form of relief sought is restitutionary. The calculation of restitutionary damages can be straightforward. In commercial matters, it can be calculated with regard to the amount of money due and owing to a plaintiff or the amount of money which can put the plaintiff back into the position in which they would have been but for the breach. In relation to personal injuries, the court is guided by previous awards: there are various guideline materials available for the calculation of an appropriate amount to compensate an injured plaintiff.

Awards made on a restitutionary basis are essentially the return of the monies paid by one party to the other. Alternatively, if the claim is for reasonable remuneration not expressly fixed by contract, it may be on a quantum meruit basis.

Parties may agree in advance on what should happen in the event of a breach of contract. Where a sum of money is stipulated as being payable by way of damages, and that sum represents a genuine pre-estimate of the loss, it is treated as 'liquidated damages'. In circumstances where the sum of money does not represent a genuine pre-estimate but is in fact a penalty, it is not recoverable.

Equitable remedies, in particular specific performance, declaratory relief, rectification and rescission, can be given by the court. Specific performance is given where the court

orders that one party performs its contractual obligations to the other. Declaratory relief establishes the right and obligations of the parties and can also extend to matters of fact or issues of law. Rectification allows the court to amend the terms of a written agreement where it has been demonstrated that the agreement does not properly reflect the intention of the parties, possibly because one or other or both had been acting upon a mistake. The remedy of rescission gives a successful party the right to be restored to their pre-contractual position. This remedy is usually available in a case where misrepresentation is alleged. Other remedies include, but may not be limited to, an enquiry and an account of the actions of the defendant. As regards trustees, this could take the form of an account of profits where the trustee has acted in breach of his or her obligations and ownership of the trust assets may need to be traced.

Statutory relief arises pursuant to actions taken under specific statutes (eg, the Companies Act 1981), and so a petition issued seeking to wind up the company on the basis of its insolvency may result in an order that the company be wound up or, in the case where just and equitable relief is sought, an order for the sale of a party's shareholding in the company.

9.2 Rules Regarding Damages

The general rule on damages is that they should be awarded to compensate a party for its loss and to put the party into the same position, or as near to it as possible, if, in the case of a contract, there had not been a breach or, in the case of a tort, the wrongful act had not been committed or the proper act omitted. There is no limit on the amount of damages that may be awarded unless the parties have, by way of contract, agreed a maximum amount that can be claimed.

In order for damages to be recoverable, a party has to demonstrate that the loss was caused by the defendant's action and was foreseeable. Added to this, a plaintiff always has an obligation to mitigate the loss and to take reasonable steps to do so.

Punitive damages are not available and Bermuda law, like English law, has always rejected the notion that any damages payable should be paid as a penalty. However, a claim for exemplary damages can be specifically pleaded together with the facts relied upon, and if the judge forms the view that defendant's acts were flagrant, then this exceptional form of award can be made. It is only made in three categories of cases, as set out by the House of Lords in the case of Rookes v Barnard [1964] AC 1129 at pages 1226-1227. The three categories are:

- oppressive, arbitrary or unconstitutional actions by the servants of government;
- where the defendant's conduct was calculated to make a profit for himself; and
- where a statute expressly authorises the same.

9.3 Pre- and Post-judgment Interest

Both pre- and post-judgment interest are available, and the usual basis on which a Bermuda court will award pre-judgment interest is the simple basis. The period for which it is awarded is usually that between the date on which the cause of action arose and the date of judgment. The court's task in relation to calculation of interest or the period for which it may be awarded can be simplified if the parties have specified how interest is to be dealt with in their contract. Post-judgment interest is a statutory right pursuant to the Interest and Credit Charges Regulation Act 1975. It is presently 3.5%, and normally accrues from the date of judgment until payment.

9.4 Enforcement Mechanisms for a Domestic Judgment

The best way to avoid paying a debt is to not have any assets. However, where the successful plaintiff, now the judgment creditor, has a judgment for a sum of money, this judgment may be enforced by several means, which are cumulative and not alternatives (for a sum of money payable on a certain date). A writ of fieri facias (sometimes referred to as a writ of fi fa) is expressed in the general form as a direction to the court-appointed bailiff to seize in execution such goods of the judgment debtor that may be sufficient to satisfy the amount of the judgment debt, together with interest and the costs of execution, including the bailiff's costs and charges. The relative priority of writs of fi fa depends upon the time when each is delivered to the Provost Marshal General for execution. A second means of enforcement is by garnishee proceedings, whereby proceedings are issued against a third party who owes a debt to the judgment debtor. This can include money held by a financial institution for the judgment debtor.

There is also the possibility of a charging order, which creates a charge in favour of the judgment creditor over certain of the judgment debtor's assets. In Bermuda, a money judgment entered against a party in the Supreme Court acts as a charge against that party's real property. Application can be made for the appointment of a receiver by way of equitable execution. The court has to determine whether it is just or convenient that the appointment should be made with regard to the amount claimed by the judgment creditor, the amount likely to be obtained by the receiver and the probable costs of his or her appointment, and make direct enquiry before finally making the order for the appointment. This order is serious for the judgment debtor, as all debts due to the judgment debtor must now be paid to the receiver.

An additional remedy is one where the failure to comply with the order of the court amounts to contempt and, with the leave of the court, a writ of sequestration can be issued against the property of the person or, where the person is a corporate body, against the property of any director or other officer of it.

9.5 Enforcement of a Judgment From a Foreign Country

The normal course for enforcement of a foreign judgment in Bermuda is to issue proceedings on the basis that judgment has been obtained in the foreign jurisdiction, and then to proceed in the course of the action to seek summary judgment on the further basis that there is no defence to the claim, not least on the principle of res judicata.

In relation to judgments from the superior courts of the United Kingdom Bermuda has enacted the Judgments (Reciprocal Enforcement) Act 1958, which allows the judgment creditor to apply to the Supreme Court at any time within six years after the date of the judgment in the court of the United Kingdom to have the judgment registered in the Supreme Court. The Governor can extend the effect of this statute if he or she is satisfied that reciprocal provisions have been made by the legislature of any part of Her Majesty's dominions, outside the United Kingdom, for the enforcement within that part of Her Majesty's dominions of a judgment obtained in the Bermuda Supreme Court. The Governor can declare that the application of the 1958 Act shall extend to the judgments obtained in such courts in that part of Her Majesty's dominions. An example of such a statute is the Judgments (Reciprocal Enforcement) Act (Australia) Order 1988, by which it was ordered that the 1958 Act extended to judgments obtained in the superior courts of each part of the Commonwealth of Australia.

10. Appeal

10.1 Levels of Appeal or Review Available to a Litigant Party

Appeals are usually from a lower court to a higher court. Appeals relating to judgments of the Magistrates Court, which has jurisdiction up to BMD25,000, may be made to the Supreme Court. Decisions of the Supreme Court may be appealed to the Court of Appeal, leave to appeal having been obtained if it is required.

From the Court of Appeal, where the issue is of great general or public importance, it is at the discretion of the Court of Appeal to grant leave to appeal to Her Majesty in Council.

If the amount in dispute is greater than BMD12,000, appeals can be brought to Her Majesty in Council as of right.

Similarly, as of right, any appeal from the Court of Appeal which involves Section 15 of the Bermuda Constitution (which concerns fundamental rights), is made to Her Majesty in Council.

There is also the right to apply for judicial review. This is the exercise by the Supreme Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies which perform public duties or functions. This remedy replaces the former prerogative remedies of certiorari, prohibition and mandamus, and in judicial review the applicant may apply for any of the prerogative orders without having to select any particular one appropriate to his or her case.

10.2 Rules Concerning Appeals of Judgments

When a party in a civil process is dissatisfied with a judgment, they have a general right of appeal in relation to final orders made against them. However, if the order is interlocutory or interim, the usual process is that the party wishing to appeal must obtain leave to do so. If a lower court refuses permission, an application for permission to appeal may be made to a higher court.

Permission to appeal will generally only be granted if the court is of the view that the appeal would have a real prospect of success, or if some other compelling reason exists for why the appeal should be heard.

10.3 Procedure for Taking an Appeal

The Rules of the Supreme Court 1985 specify the time a party has in which to make an appeal. In the case of appeals to the Court of Appeal, the relevant rules are found in the Court of Appeal Act 1964 and the rules of that court. Leave to appeal is normally sought at the same level at which a judgment has been made. No leave to appeal is required were the appeal is from the registrar of the Supreme Court. Such an appeal would go straight to a judge of the Supreme Court. Applications for leave to appeal from the Supreme Court to the Court of Appeal require leave to be granted by a judge of the Supreme Court, and application should be made within 14 days. If leave is refused by the Supreme Court, the party may apply to the Court of Appeal instead, but must do so within seven days. Where leave is not required, a party has six weeks from the date on which the judgment or order was perfected.

In making appeals from the Supreme Court to the Court of Appeal, the normal course is to provide the Supreme Court with the grounds of the appeal set out in a draft of the notice of appeal.

10.4 Issues Considered by the Appeal Court at an Appeal

The Appellate Court is usually constrained to have before it only the evidence that was before the lower court, and essentially reviews the decision of the lower court to see if the trial judge erred in such a way that it is appropriate to either alter the trial judge's decision or send the matter back down for re-hearing.

If the judge in the lower court has been given a discretion and has exercised it, the exercise of that discretion cannot be overturned simply because the Appellate Court might

exercise its discretion in a different way. The appellant has to demonstrate that the exercise of the discretion was unreasonable and that the trial judge took into account something that he or she should not have taken into account, or failed to take into account something that he or she should have. Procedural errors can be the basis of an appeal. Where a party wishes to raise new evidence, they face the burden of establishing to the Appellate Court that the evidence that they now wish to raise was not available at the time of the trial, or could not have been obtained with reasonable diligence, and would have had an important bearing on the outcome of the case. New arguments on the law may be allowed at the discretion of the Appellate Court.

10.5 Court-imposed Conditions on Granting an Appeal

The court can impose conditions on granting an appeal. If there is money due and owing to a party, the court can require the party that is seeking to appeal to pay the money into court. The court can make orders preventing the sale or disposal of property pending the hearing of the appeal. The usual conditions for the granting of an appeal are that the party appealing make a payment of security for costs, which is normally dealt with by an undertaking from its attorney.

10.6 Powers of the Appellate Court After an Appeal Hearing

Appellate courts have the jurisdiction to confirm, set aside or vary the judgment of a lower court. If an appeal raises issues that were never determined at trial, or were determined wrongly and in such a way that the Appellate Court is not able to substitute its own judgment so as to do justice between the parties, it may refer the matter back to the trial court for determination. This may involve ordering a new trial. The Appellate Court may also, at the time of its decision, make any orders relating to the payment of costs and interest that may have the effect of reversing any previous orders made in the course of the litigation.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

As parties progress through litigation, each party normally pays its own costs in relation to court fees, expenses and attorney fees. If there are interlocutory hearings during the course of the litigation, the usual order is to preserve the status quo until the end of the litigation. However, it can be the case that an order is made in the course of the litigation which awards costs to be payable to one party 'forthwith'. The effect of such an order is that the party in whose favour the judgment has been given can apply to have these costs taxed and paid without waiting for the litigation to finish.

The usual rule regarding costs is that the winning party is awarded all the costs expended by it in the course of the litigation. However, a successful party with a costs order will not necessarily recover every cent of the money spent, as this can depend on the nature of the order made when the court awards costs. Indemnity costs usually allow a party to recover the full amount expended, with jurisdiction to the registrar of the Supreme Court to deduct amounts unnecessarily spent if it is proved before him or her (in a process called 'taxation') that such expenditure was unnecessary or extravagant. On a normal order for costs, a party can expect to get back approximately 75% of the money spent after taxation. The parties draw up bills of costs, itemising the attorney's time, disbursements and expenses for the purpose of the taxation. Often parties will agree on an amount in order to save the additional costs of taxation.

11.2 Factors Considered When Awarding Costs

The winner normally gets an order for costs, but the court always has discretion. If there are any factors on which a judge can exercise his or her discretion so as not to give the winner their costs, these must have arisen in the course of the trial. This may relate to how the successful party conducted itself. Failure of a judge to properly exercise this discretion and not to make the normal order is appealable with the leave of the court.

11.3 Interest Awarded on Costs

Once costs have been agreed or an order on taxation has been made, the costs form part of the judgment and are subject to the same benefit of interest as the judgment sum. This is a relatively simple calculation. The present statutory interest rate on this sum is 3.5%, calculable from the date that it becomes due until payment.

12. Alternative Dispute Resolution

12.1 Views on Alternative Dispute Resolution in this Jurisdiction

Until 1993, Bermuda essentially followed English law in relation to alternative dispute resolution. In 1993, the Bermuda International Conciliation and Arbitration Act was passed, which brought the UNCITRAL Model Law on Arbitration into force. This was an impetus for mediation and arbitration in Bermuda, and both are well accepted alternative forms of dispute resolution. A branch of the Chartered Institute of Arbitrators was established in Bermuda in 1996. Courses are run annually relating to either mediation or arbitration. Many employment, construction and reinsurance disputes are resolved by one or other of these methods. Overall, arbitration is the more popular of the mechanisms of alternative dispute resolution.

12.2 ADR Within the Legal System

Mediation is mainly promoted in the family division of the Supreme Court. It is not compulsory save where ordered by the court. The present system is not yet fully developed, but it is anticipated that in the near future that there will be

more references to mediation and that where a party unreasonably refuses to comply, there may well be sanctions in relation to costs.

12.3 ADR Institutions

The principle institution for alternative dispute resolution in Bermuda is the Chartered Institute of Arbitrators, which is at the forefront of organising courses and promoting the use of ADR. The Institute has localised rules for mediation and arbitration and has an appointments system, as well as the ability to act as an administrator of an arbitration. The Human Rights Commission seeks to promote mediation in matters that come before it, and makes regular appointments of mediators in the hope of avoiding a matter being sent to a commission of inquiry.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitrations

Bermuda has two systems of arbitration:

- the Arbitration Act 1986; and
- the Bermuda International Conciliation and Arbitration Act 1993.

The 1986 Act is effectively Bermuda's domestic legislation in respect of arbitration and is a combination of four previous English statutes: the Administration of Justice Act 1970 and the Arbitration Acts 1950, 1975 and 1979. Whilst the 1986 Act does make provision for international as well as domestic disputes, the 1993 Act provides only for international disputes which are of a commercial nature. In enacting the 1993 Act, the Model Law (ie, the Model Law on Arbitration put forward by the United Nations Trade Law Commission, which at the time of writing has been enacted in 99 jurisdictions) has had the force of law in Bermuda since the 29 June, 1993. The Model Law provides for the enforcement of arbitration awards on the same basis as the New York Convention, which is also applicable in Bermuda.

13.2 Subject Matter not Referred to Arbitration

The concept of what is capable of being arbitrated is usually circumscribed by the notions of what constitutes public justice and cannot be dealt with privately. Certainly, it is not permissible to arbitrate any matter which would violate Bermuda's most basic notions of morality and justice. The determination of what is arbitrable would ultimately be made either by the local court on an application to set aside the arbitration award, or by a foreign court at the place of enforcement.

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13.3 Circumstances to Challenge an Arbitral Award

Under the Model Law, a party can seek to set aside an award. In order to do so, the party must furnish proof that:

- as a party to the arbitration agreement it was under some incapacity, or the agreement was not valid under the law to which the parties had subjected it to;
- it was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by the terms of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitration tribunal or the procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute was not capable of settlement by arbitration under the law of Bermuda; and/or
- the award is in conflict with the public policy of Bermuda.

A party wishing to set aside the arbitration award must apply to the court within three months from the date of receipt of the award.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Leave to enforce an award is obtained by means of applying to the court to enforce the award in the same manner as a judgment. An originating summons would be issued, ex parte, supported by an affidavit. The affidavit would set out the basic facts of the arbitration, that there had been an arbitration agreement and a hearing, and that an award had been made. The relevant exhibits would be the arbitration agreement and the original award. If made in a foreign language, there would be a certified translation. The affidavit would set out the names and addresses of the successful party and the losing party. If there had been any attempt made to have the award enforced, this should be set out in the affidavit. The application is for leave to enter judgment, and once the order granting leave has been made, a copy of the order is served on the losing party. The order will normally contain the time which the losing party may have if it wishes to set aside the order. If an application is made to have it set aside, there is a hearing. If there is not, then the award can be enforced after the expiration of the period set out in the order as if it were a judgment of the court itself. In these circumstances, the successful party will be able to call upon all the enforcement procedures of the local court in favour of a judgment creditor.