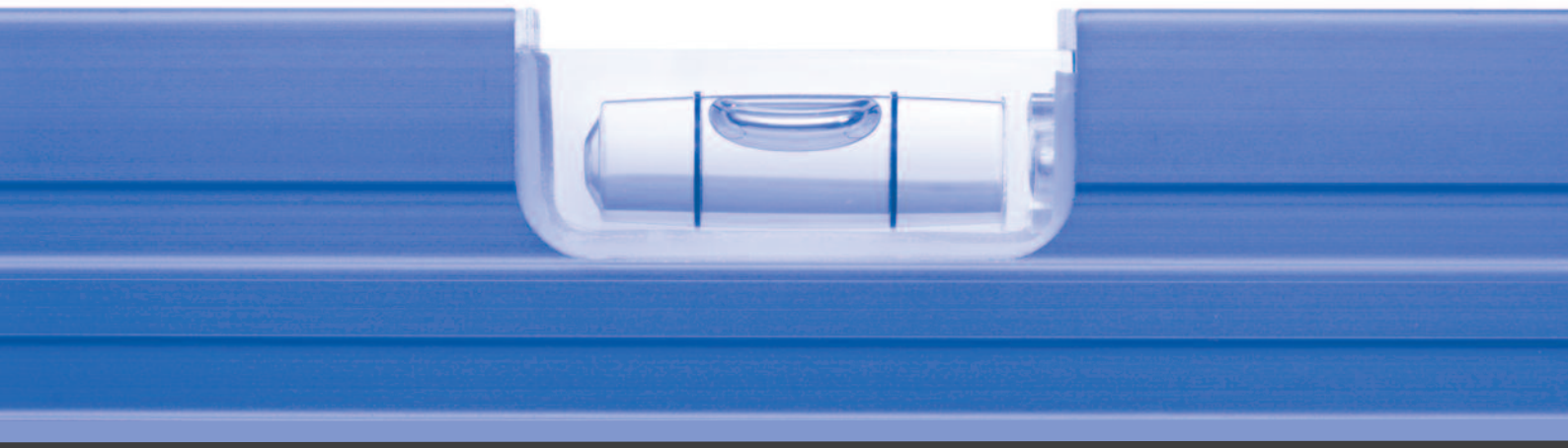

ICLG

The International Comparative Legal Guide to:

International Arbitration 2014

11th Edition

A practical cross-border insight into international arbitration work

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Bermuda?

Other than requiring that it must be in writing, Bermuda's arbitration statutes do not require any specific form or format for an arbitration agreement. It may take the form of a clause contained in a contract or in a separate agreement signed by the parties or evidenced by an exchange of letters or other means of communication. Article 7(2) of the Model Law (which applies in Bermuda – see question 2.1 below) expressly provides that an arbitration clause contained in another document may be incorporated by reference to it.

1.2 What other elements ought to be incorporated in an arbitration agreement?

There are no other elements that must be incorporated in an arbitration agreement, but, given the existence of two arbitration regimes in Bermuda (see the response to question 2.1 below), it is advisable that the arbitration agreement specify which statute is to apply. For example, an arbitration clause in a reinsurance agreement between Bermuda companies (including a captive insurer) may be deemed to be subject to Bermuda's domestic statute – despite the contract having an "international flavour" – unless the parties stipulate that the international statute is to apply.

The arbitration agreement will dictate the scope of the arbitral panel's jurisdiction. Accordingly, although there are no rules regarding the contents of the agreement, care should be taken to ensure it is broad enough to encompass all matters of dispute that may potentially arise between the parties, for example rescission, tortious and "bad faith" claims.

In addition, the parties may wish to consider including provisions in the agreement relating to the number of arbitrators, their qualifications, and the procedure for appointing them. The parties may also wish to consider whether to adopt a particular set of procedural rules to govern any arbitrated dispute. As we discuss in relation to section 7 below, it is open to the parties to include in the arbitration agreement provisions relating to interim measures that may be sought, including jurisdiction for the arbitral tribunal to order security for costs.

It is common for Bermuda arbitration clauses to include a provision regulating awards of costs (e.g. "the costs of the arbitration shall be at the sole discretion of the arbitral tribunal, who may direct to whom and by whom and in what manner they shall be paid").

Arbitration clauses in Bermuda insurance policies may contain provisions designed to bind to arbitration third parties asserting rights in relation to the policy (e.g. subrogating insurers, liquidators or direct claimants) or to require the insured to cooperate in obtaining the dismissal of court proceedings brought against the insurer by other insurers seeking a contribution or indemnity.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

There is a well-established body of Bermudian authority affirming the strong policy grounds upon which arbitration agreements will be upheld in Bermuda and that the Bermuda court will act "robustly" where necessary, including by issuing an anti-suit injunction to restrain a party from acting in violation of an arbitration clause. As Kawaley J (now Chief Justice) observed in *Robinson v Somers Isles Shipping Ltd* [2008] Bda LR 5, the Bermuda court "*has frequently recognised the importance of holding parties to their contractual dispute resolution bargains*".

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Bermuda?

There are two different regimes for commercial arbitration in Bermuda – under the Arbitration Act 1986 ("the 1986 Act") and under the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), which incorporates into Bermuda law the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The 1993 Act applies to "international commercial arbitrations" held in Bermuda and this chapter will focus on arbitrations under this statute.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The 1986 Act governs domestic arbitrations and the 1993 Act governs international arbitrations. In general terms, the statutes differ in that the 1986 Act is similar to the English Arbitration Acts 1950-1979, whereas the 1993 Act adopts the Model Law. A notable difference between the two statutes relates to the scope for appeal, which is very narrow under the 1993 Act (see section 10 below), but broader under the 1986 Act. Other differences include a prohibition in the 1986 Act against provisions that purport to fetter the arbitral tribunal's jurisdiction to award costs (no such restriction applies to

the 1993 Act) and the 1986 retains the traditional concept of an "umpire" as being a passive observer who participates only where the two "arbitrators" cannot agree.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes. Section 23 of the 1993 Act adopts the Model Law in its entirety (save for certain differences as regards the enforcement of arbitration awards).

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Bermuda?

There are no mandatory rules governing international arbitration proceedings, save that Article 18 of the Model Law requires that the parties must be treated equally and given a full opportunity to present their respective cases. Article 19 of the Model Law provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceeding and that, failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Bermuda? What is the general approach used in determining whether or not a dispute is "arbitrable"?

There are generally no restrictions on the subject matters for arbitration in Bermuda, save that there is some scope for argument as to the arbitrability of insolvency, minority shareholder, and partnership disputes. Both arbitration statutes provide that they shall apply to any arbitration to which the Crown is a party. Whether a dispute is "arbitrable" is a question of the scope and terms of the arbitration agreement (*Lenihan v LSF Consolidated Golf Holdings Ltd* [2007] Bda LR 49).

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The arbitral tribunal has jurisdiction to rule on whether some or all of the disputes referred to arbitration are within its mandate. Additionally, the tribunal is competent to rule on whether there is an arbitration agreement at all. The doctrine of the "separability" of the arbitration agreement, a pragmatic fiction treating the arbitration agreement as an agreement independent of the transactional agreement in which it is embedded, means that challenges to the status of the transactional agreement do not impair the competence of the arbitral tribunal, pursuant to the arbitration agreement, to rule on jurisdiction. The fact that the transactional agreement may prove to be void or to have been terminated do not deprive the tribunal of jurisdiction. Limits to the doctrine are discussed in the response to question 3.4 below.

3.3 What is the approach of the national courts in Bermuda towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As noted in question 1.3, the Bermuda court will act robustly to enforce an arbitration agreement, including by granting an anti-suit injunction against a party who commences proceedings in breach of an arbitration agreement. The Bermuda court has the power to grant injunctive relief regardless of whether the litigation has been commenced in Bermuda or outside Bermuda, and any party who takes steps in connection with the court proceedings in violation of the anti-suit order may be held in contempt of court. An action commenced before a court in Bermuda in breach of an arbitration agreement will be stayed by the court at the request of a party to the action who has not submitted to the court's jurisdiction (for example, by entering a defence). Proceedings were stayed pursuant to Article 8 of the Model Law in *Raydon Underwriting Management Co Ltd v North American Fidelity & Guarantee* [1994] Bda LR 65. Article 8 of the Model Law disapplies the requirement to refer the matter to arbitration if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. There have been many other cases in which anti-suit injunctions or stays have been granted, including: *ACE Bermuda Insurance Ltd. v Continental Casualty Co* [2007] Bda LR 8, [2007] Bda LR 38; *Starr Excess Liability Insurance Company v General Reinsurance Corp* [2007] Bda LR 34; *IPOC International Growth Fund Ltd v OAO "CT-Mobile"* [2007] Bda LR 43; *Buchanan v Lawrence [2012] Bda LR 47*; and *Carnival Corporation v Estibeiro* [2013] Bda LR 20.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

In common with many other jurisdictions, the doctrine of separability (see the answer to question 3.2 above) does not apply to arbitration agreements embedded in non-existent contracts. Accordingly, the court has jurisdiction to determine the competence of tribunals purportedly constituted pursuant to non-existent contracts.

The arbitral tribunal can address jurisdiction as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, that the Bermuda Supreme Court decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Alternatively, where the tribunal rules on questions of jurisdiction and competence in an award, it is open to a party to apply to the Bermuda Court of Appeal to have that award set aside on grounds that it deals with a dispute not contemplated by the arbitration agreement, contains decisions on matters beyond the scope of the submission to arbitration, or that either the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement.

3.5 Under what, if any, circumstances does the national law of Bermuda allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Parties can only be compelled into arbitration by consent, and subject to the terms of the arbitration agreement in place. Non-parties to that agreement cannot be compelled to arbitrate, no matter how relevant they may be to the dispute.

This question often arises in the context of insurance coverage disputes, where the policy-holder enters into separate insurance

policies (each containing a separate arbitration agreement) with multiple insurers within a "tower" of insurance. Where multiple coverage disputes arise between the policyholder and its insurers, the policyholder is unable to compel the insurers into a single consolidated proceeding even if the disputes involve common questions of fact and law. Likewise, a policy-holder wishing to pursue an alternative claim against its insurance broker (e.g. for negligence in negotiating the policy) will not be able to join the broker to arbitration proceeding with the insurer unless the broker is also a party to the arbitration proceedings.

It is not uncommon for a third party to assert rights under an insurance policy that contains an arbitration clause even though such party is not a party to the policy or to the arbitration clause. Examples include a claimant asserting a "cut through" right directly against the insurer (e.g. pursuant to a "direct action" statute), assignees of the policy-holder (including liquidating trusts in bankruptcy proceedings), an insurer exercising rights of subrogation or a co-insurer seeking a contribution from another insurer. In all of these cases, the target insurer will, generally, be able to insist that its rights under the policy be determined through arbitration notwithstanding that the third party was not an original party to the arbitration clause (see, for example, *ACE Bermuda Insurance Ltd. v Continental Casualty Co* [2007] Bda LR 8, [2007] Bda LR 38).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Bermuda and what is the typical length of such periods? Do the national courts of Bermuda consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Section 35 of the Limitation Act 1984 ("the 1984 Act") prescribes that the limitation provisions which apply for commencing court proceedings in Bermuda also apply to arbitrations.

Time stops running for limitation purposes once arbitration proceedings are commenced. Under Article 21 of the Model Law, arbitral proceedings are deemed to commence on the date when one party to the arbitration serves on the other party a notice requiring it to appoint or agree to the appointment of an arbitrator. Where the arbitration agreement provides that reference is to be made to a person named or designated in the agreement, the proceedings are deemed to commence when one party to the arbitration serves on the other party a notice requiring it to submit the dispute to the person so named or designated.

The limitation period for cases founded on a contract or in tort is six years.

The courts of Bermuda have not addressed whether questions as to limitation are questions of substance or of procedure. However, this issue often arises in arbitration proceedings involving the "Bermuda Form" insurance policy where the substantive law is that of New York and the procedural law is that of Bermuda. Section 51 of the 1993 Act expressly refers to and sets out the part of the 1984 Act dealing with foreign limitation periods, the effect of which is that (subject to certain exceptions) the law relating to the limitation of actions is treated as a matter of substance rather than as a matter of procedure, and is thus ordinarily governed by the *lex causae*.

3.7 What is the effect in Bermuda of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Where a winding-up order is made against a company under the Bermuda Companies Act 1981, no arbitration can be commenced or proceeded with against it without the court's express permission.

In the insurance context, it is possible that the insolvency of the policy-holder will give rise to a statutory assignment to a third party claimant of the policyholder's rights under the Third Parties (Rights Against Insurers) Act 1963 with the result that the third party becomes subject to any arbitration clause.

A moratorium imposed by foreign insolvency proceedings involving a party to a Bermuda arbitration has no automatic effect on the Bermuda arbitration (although it may be contended in the foreign jurisdiction that pursuing the Bermuda arbitration or seeking anti-suit relief from the Bermuda court is a breach of the moratorium). The Bermuda court may have jurisdiction to assist the foreign proceedings, exercisable at the request of foreign insolvency officeholders, by imposing a moratorium in Bermuda on actions brought by or against the party subject to the foreign proceedings, including the arbitration. Where foreign court proceedings engage the insolvency jurisdiction of the foreign court, the Bermuda court will limit its interference to matters arising under the contract and is unlikely to seek to restrain resolution of insolvency questions (e.g. priority, proof of claim, subordination, etc.) by the foreign court.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Article 28 of the Model Law prescribes that the arbitral tribunal will determine the dispute between the parties in accordance with the rules of law chosen by the parties. It provides that any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state, and not its conflict of law rules. Where the parties do not expressly identify the law applicable to the substance of the dispute, the tribunal will do so having regard to the conflict of laws rules it considers applicable. This will generally involve the application of the conflict of law rules of Bermuda which involve inferring the parties' intentions as regards governing law from the circumstances or by applying an objective test of which system of law has the closest and most real connection with the subject matter of the contract.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The parties to an arbitration agreement have broad scope to agree the law that will govern their dispute. There are no Bermuda laws that specifically prohibit the arbitration of disputes, such as statutes in certain U.S. states that purport to void arbitration clauses in certain insurance policies.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

There is little case law on this subject to guide the parties. However, in the case of most commercial agreements that include an agreement to refer future disputes, it will be presumed that the law governing the reference agreement is the same as the proper law of the agreement. Nevertheless, the "separability" of the arbitration agreement from the agreement in which it is embedded (see the response to question 3.2 above) creates the potential that

the law of the arbitration agreement may differ from the proper law of the agreement. The context in which this is most likely to arise in Bermuda arbitration is in the case of disputes over "Bermuda Form" policies of insurance, according to which interpretation of the agreement is subject to (modified) New York law, but arbitration of disputes takes place in Bermuda (if not London, UK). If so, the chief alternative is the law of the seat of the arbitration. In this situation, it is very likely that the arbitral tribunal will take the approach adopted by English courts in finding that the arbitration clause is more closely connected to the procedural law of the arbitration.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no limits to the parties' autonomy to select the tribunal save as stipulated in the arbitration agreement. The parties are free to specify the number of arbitrators, the qualifications they should possess, as well as the procedure for their selection. Prospective candidates are required under Article 12 of the Model Law to disclose any circumstances likely to give rise to justifiable doubts about their impartiality and independence. The Model Law prevents one party objecting to the appointment of an arbitrator by reason of his nationality unless the parties have agreed otherwise.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

The Model Law provides the parties with autonomy to agree a procedure for appointing the arbitral panel and this may include express provision in the arbitration agreement for a default procedure. Articles 11(3) and (4) make express provision for the appointment of an arbitral tribunal where the parties have failed to agree on a procedure, or where a party fails to perform its obligations under an agreed procedure.

Where a party fails to act as required, either under the agreed procedure, or under the default procedure, or a third party fails to perform any function entrusted to it under the agreed procedure, any party can ask the Supreme Court of Bermuda to take the necessary steps, unless the agreed procedure provides another means of securing the appointment. The court's decision on such an application cannot be appealed. There are a number of reported and unreported decisions in which the Supreme Court has shown itself ready to make appointments in default pursuant to the 1993 Act.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. See the response to question 5.2, in relation to the court's role in relation to defaults by a party.

In addition, Article 12 of the Model Law provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality and independence. A party may only challenge an arbitrator appointed by him, or in whose appointment he has participated, on the basis of reasons he becomes aware of after the appointment.

The procedure for challenging an arbitrator is set out at Article 13 of the Model Law. This requires the objecting party to act expeditiously once it becomes aware of the constitution of the tribunal or becomes aware of a relevant circumstance.

There is no reported Bermudian authority as yet on challenges pursuant to Article 12. However, in the Supreme Court of Bermuda decision in *Raydon Underwriting Management Co Ltd v Stockholm Re (Bermuda) Ltd* [1998] Bda LR 73, which concerned the 1986 Act, it was held that the test to be applied in the case of "apparent bias" is whether, "*in all the circumstances of the case, there is a real danger of bias on his part, in the sense that he might unfairly regard with favour, or disfavour, the case of a part to the issue under consideration by him*".

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Bermuda?

Article 18 of the Model Law provides that each party is to be treated with equality and given a full opportunity to present its case. It follows therefore that the arbitrators must remain impartial and independent throughout the proceedings. See also the response to question 5.3 above in connection with the power to challenge an arbitrator for lack of independence and impartiality.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Bermuda? If so, do those laws or rules apply to all arbitral proceedings sited in Bermuda?

Save for the requirement that the parties be treated equally and each be given the opportunity to present its case, there are no mandatory rules governing arbitration procedure under either the 1993 Act or the Model Law in Bermuda.

6.2 In arbitration proceedings conducted in Bermuda, are there any particular procedural steps that are required by law?

The parties are free to agree the procedure to be followed by the arbitral tribunal. Failing such agreement, the tribunal may conduct the arbitration in such manner as it considers appropriate. Article 23 of the Model Law provides for the filing of statements of claim and defence. Generally, Bermuda arbitrations tend to adopt procedures influenced by English and Bermudian civil procedure, where the parties first exchange statements of case followed by documentary discovery and then the exchange of fact and expert witness statements.

6.3 Are there any particular rules that govern the conduct of counsel from Bermuda in arbitral proceedings sited in Bermuda. If so: (i) do those same rules also govern the conduct of counsel from Bermuda in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than Bermuda in arbitral proceedings sited in Bermuda?

The conduct of counsel admitted to the Bermuda Bar is governed by the Barristers' Code of Professional Conduct 1981. (i) These rules also govern the conduct of counsel from Bermuda in arbitral proceedings sited elsewhere. (ii) The Code of Conduct does not govern the conduct of counsel from countries other than Bermuda in arbitration proceedings sited in Bermuda, who would likely be subject to professional conduct rules in their home jurisdiction.

6.4 What powers and duties does the national law of Bermuda impose upon arbitrators?

Arbitrators must treat each party with equality and give each party a full opportunity to present its case (Article 18 of the Model Law). Arbitrators are also required to give the parties proper notice in advance of any hearing or meeting (Article 24(2)) and remain under a continuing duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Bermuda and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Bermuda?

There are professional and immigration restrictions regulating the appearance of lawyers from other jurisdictions in legal matters in Bermuda. However, by virtue of Section 37(3) of the 1993 Act, a foreign legal practitioner, while acting on behalf of a party to an arbitral proceeding under the 1993 Act, including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within Bermuda. It is the policy of the Bermuda Government to promote the use of Bermuda as a venue for international arbitrations and current immigration policy exempts participants (arbitrators, counsel, witnesses and party representatives) in arbitrations under the 1993 Act from Bermuda's work permit requirements.

6.6 To what extent are there laws or rules in Bermuda providing for arbitrator immunity?

Section 33 of the 1993 Act provides that no arbitrator shall be subject to service of process in any civil matter relating to a dispute in respect of an arbitration under the 1993 Act. Section 34 of the Act goes on to provide that an arbitrator cannot be liable for any act or omission in his capacity as an arbitrator in connection with an arbitration conducted under the Act, although he may be held liable for the consequences of any conscious or deliberate wrongdoing.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

The jurisdiction of the court to deal with procedural issues is limited. The court may intervene to:

- grant an interim measure of protection (Article 9);
- appoint an arbitrator where either the agreed mechanism or the default mechanism provided for by the Model Law has failed (Articles 11(3) and 11(4));
- respond to a challenge to the appointment of an arbitrator (Article 13(3));
- decide whether the appointment of an arbitrator should be terminated (Article 14);
- decide on the jurisdiction of a tribunal following a preliminary ruling on the question by the tribunal (Article 16(3));
- assist in the taking of evidence (Article 27); or
- set aside an award (Article 34(2)).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in Bermuda permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Article 17 of the Model Law provides that (unless the parties agree otherwise) the tribunal may request a party to take such interim measure of protection as it considers necessary in respect of the subject-matter of the dispute. The tribunal may require any party to provide appropriate security in connection with such measure.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Article 9 of the Model Law provides that a party may request the Bermuda court to make an order for an interim measure of protection. Section 35(5) of the 1993 Act provides that the court may make orders:

- for the preservation, interim custody or sale of goods that are the subject matter of the arbitration;
- to secure an amount in dispute in the arbitration;
- for the detention, preservation or inspection of any property or thing which is the subject of the arbitration or as to which any question may arise therein, and authorising for any such purpose any person to enter upon or into any land or building in the possession of any party to the arbitration, or authorising any samples to be taken or any observations to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence;
- for interim injunctions; or
- for the appointment of a receiver.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

The Bermuda court will take the steps necessary to give effect to an arbitration agreement, and assist the arbitral tribunal as required.

7.4 Under what circumstances will a national court of Bermuda issue an anti-suit injunction in aid of an arbitration?

There is a well established body of authority affirming the strong policy grounds upon which arbitration agreements will be upheld by the Bermuda court through an anti-suit injunction, including *International Risk Management Group Limited v Elmwood Insurance Limited and others* [1993] Bda LR 48 and *Skandia International Insurance Company and others v Al Amana Insurance and Reinsurance Company Limited* [1993] Bda LR 30, and other cases cited at question 3.3 above. Where proceedings are commenced in breach of a valid and binding arbitration clause, the presumption is that an injunction will normally be granted unless the other party can show "strong reasons" why it should not. The Bermuda court will act robustly in restraining a breach of an arbitration clause unless there are strong reasons for not doing so (see *ACE Bermuda Insurance Ltd v Continental Casualty Co* [2007] Bda LR 8, [2007] Bda LR 38).

The Bermuda court may enforce arbitration agreements regardless of whether the seat of the arbitration is Bermuda or elsewhere, as in *IPOC International Growth Fund Ltd v OAO CT Mobile* [2007] Bda LR. 43, where the Court of Appeal for Bermuda upheld a first instance decision preventing a Bermudian entity from pursuing foreign proceedings in breach of Swedish and Swiss arbitration agreements.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

There is no express provision under either the 1993 Act or the Model Law that allows an arbitral tribunal to order security for costs or the Bermuda court to make such an order in support of an arbitration. Nor are there any reported authorities addressing this issue.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Bermuda?

Under Article 19, the parties are free to agree the rules of evidence that apply to arbitral proceedings in Bermuda. Section 35(2) of the 1993 Act provides that the tribunal may receive any evidence that the tribunal considers relevant and, unless the parties have otherwise agreed, shall not be bound by rules of evidence applicable in Bermuda. Article 18 empowers the tribunal to determine the admissibility, relevance, materiality and weight of evidence.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

Apart from the overriding requirement that an arbitrator must treat each party with equality and give each party a full opportunity to present its case (Article 18 of the Model Law), there are no limitations on the arbitrator's authority to order the disclosure of documents by the arbitrating parties. An arbitrator does not have authority to compel disclosure from a third party without the assistance of the court.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Article 27 of the Model Law permits the arbitral tribunal to request assistance from the Bermuda court in relation to the taking of evidence. In practice, this will apply only to the taking of evidence from non-parties. Section 35 of the 1993 Act also enables a party to issue a subpoena to compel the production of documents or to compel the attendance of a witness. The court may also make orders in respect of the examination on oath of any witnesses, and can issue a request for the examination of a witness outside of the jurisdiction.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

Section 35 of the 1993 Act provides that, unless the parties agree otherwise, every agreement to arbitrate in Bermuda contains an implied term that the arbitral tribunal has the power to examine witnesses on oath or affirmation and also the power to administer oaths to, or take affirmations of, witnesses in the arbitration. However, it is not customary for witnesses to be examined on oath and typically a witness' direct testimony is elicited through a written witness statement.

8.5 What is the scope of the privilege rules under the law of Bermuda? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The scope of privilege as applied by arbitration tribunals is a complex subject, particularly in an international context. It is generally accepted that the rules of privilege that apply in litigation also apply to arbitrations. Bermuda law recognises two types of privilege: legal professional privilege; and litigation privilege. Whether a communication with counsel attracts privilege will depend on the nature of the communication (i.e. whether it falls within either category of privilege). The privilege belongs to the client and may be waived by the client either intentionally or unintentionally. Difficult issues can arise in Bermuda Form arbitrations concerning the existence and scope of privilege, for example the extent to which the arbitral tribunal should uphold a claim for privilege under a foreign law that would not be recognised under Bermuda law.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of Bermuda that the Award contain reasons or that the arbitrators sign every page?

Article 31 sets out the requirements as to the form and contents of an arbitral award, namely: (i) the award shall be made in writing and shall be signed by the arbitrator or arbitrators; (ii) in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated; (iii) the award shall state the reasons upon which it is based, unless the parties have agreed otherwise; and (iv) the award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place. There is no requirement that the arbitrators sign every page of the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in Bermuda?

There is no right of appeal of arbitration awards under the 1993 Act on the merits. The exclusive recourse against an arbitral award is to have it set aside (Article 34). An application can be made to the Court of Appeal for Bermuda where the applicant can show: (i) a party to the arbitration agreement was under an incapacity; (ii) the arbitration agreement was invalid; (iii) a party was not given proper notice of the appointment of an arbitrator, or of the proceedings, or was otherwise unable to present its case; (iv) the award deals with a dispute outside the scope of the arbitration agreement; (v) the arbitral tribunal, or the procedure it adopted, was not in accordance with the agreement of the parties; (vi) the court finds that the

subject-matter of the dispute is not capable of settlement in arbitration by the law of Bermuda; or (vii) the award offends public policy. Section 27 of the 1993 Act declares (without limiting the generality of other grounds for challenge) that an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The grounds for challenging an award under the 1993 Act are very narrow and it is unlikely that the parties could further narrow the bases for challenge by agreement. Nevertheless, arbitration provisions in Bermuda Form policies typically provide that the parties waive any right to appeal to the fullest extent permitted.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Not under the 1993 Act. If parties to a Bermuda arbitration wished to have broader grounds for challenge, they could expressly adopt the 1986 Act (see question 2.1 above) which affords wider bases for appeal.

10.4 What is the procedure for appealing an arbitral award in Bermuda?

The procedure for an application to set aside an award is also set out in Article 34. The application must be made within three months of the date upon which the applicant receives the award. The court has discretion to suspend its hearing on the application to give the arbitral tribunal an opportunity to correct the error that has given rise to the application to set aside the award.

11 Enforcement of an Award

11.1 Has Bermuda signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The New York Convention was extended to Bermuda by the United Kingdom on 14 November 1979. A reservation has been entered limiting the application of the Convention to the recognition and enforcement of awards made by a territory of another Contracting State, i.e. reciprocity. Convention Awards are enforceable under Part IV of the 1993 Act, and a full text of the Convention is annexed to the 1993 Act as Schedule 3.

11.2 Has Bermuda signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

No, it has not.

11.3 What is the approach of the national courts in Bermuda towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

A party seeking to enforce a Convention Award may do so either by action or by leave of the court. Entering judgment by leave is likely to be the preferred route for enforcement. The Court of Appeal in *LV Finance Group Ltd v IPOC International Growth Fund Ltd* [2006] Bda LR 67 suggested that it is difficult to imagine why a party would choose not to follow this route. The alternative procedure may be adopted where the award is incapable of being converted into a judgment, for example, because of incompleteness or uncertainty or because it is oral.

The party seeking to enforce the award must demonstrate that the award is a *prima facie* one that the court is bound to recognise by virtue of section 40(2) of the 1993 Act. In this regard, that party must produce: (i) an authenticated original of the award or a certified copy of it; (ii) the original arbitration agreement or a certified copy of it; and (iii) where either the award or arbitration agreement is in a language other than English, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

In *Huawei Tech Investment Co. Ltd v Sampoerna Strategic Holdings Ltd.* [2014] SC (Bda) 8 Civ, Bermuda's Chief Justice observed that the Bermuda courts have on many occasions stressed the strong public policy in favour of enforcing foreign arbitration awards.

In *New Skies Satellite BV v FG Hemisphere Associates LLC* [2005] Bda LR 59, the Court of Appeal held that where ambiguity exists in the rules or procedure regarding the enforcement of awards under the 1993 Act, they will be interpreted in a manner which gives effect to the relevant treaty obligations, rather than contradicts them.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Bermuda? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The principle of *res judicata* applies to arbitration and therefore issues that have been finally determined by an arbitral tribunal cannot be re-heard in the Bermuda court. The application of this principle was affirmed by the Privy Council (on an appeal from Bermuda under the 1993 Act) in *Associated Electric & Gas Insurance Services Ltd. v European Reinsurance Co. of Zurich* [2003] 1 WLR 1041.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The court has discretion not to enforce an award where it is shown that: (i) one or more of the parties to the arbitration agreement was under some incapacity; (ii) the arbitration agreement pursuant to which the award was purportedly made was invalid; (iii) the party against whom the award was made was not given proper notice of the appointment of the arbitrator or the commencement of proceedings or was otherwise unable to present his case; (iv) the award deals with issues outside the scope of the arbitration agreement; (v) there were procedural irregularities; (vi) the award is not yet final; (vii) the subject matter of the dispute is incapable of determination by arbitration in the country where the arbitration took place; or (viii) recognition or enforcement would be contrary to public interest of that country (section 42 of the 1993 Act, Article 36 of the Model Law and Article V of the New York Convention).

12 Confidentiality

12.1 Are arbitral proceedings sited in Bermuda confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Generally, arbitration proceedings under the 1993 Act are private and confidential as a matter of Bermuda law. This has been affirmed by both the Privy Council in the Associated Gas case (see question 11.4) and by the Supreme Court of Bermuda in *ABC Insurance Company v XYZ Insurance Company* [2006] Bda LR 8. The obligation of confidentiality is not absolute and there are narrow exceptions e.g. disclosure of the award to found an issue estoppel.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Yes, but only with the agreement of the parties or with leave of court. It is arguable that a witness may be impeached by reference to testimony given in prior arbitration proceedings if the court grants leave to adduce the transcript of prior testimony.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal must determine an appropriate remedy in accordance with the law that the parties have chosen to apply to the dispute. In the absence of the parties' agreement to the contrary, it is unlikely that the tribunal has power to award punitive damages under Bermuda law.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Section 31 of the 1993 Act provides that, subject to any agreement by the parties to the contrary, where a tribunal makes an award for money, the tribunal may include an award of interest at such reasonable rate as it determines. Where the sum payable is in Bermuda Dollars, the Interest and Credit (Charges) Regulations 1975 will apply.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Under section 32 of the 1993 Act, and subject to any agreement by the parties to the contrary, the arbitral tribunal has wide direction in relation to an award of attorneys' fees and/or costs. It can determine who is to bear fees and costs, and in what shares they should be borne. Costs are broadly defined to mean: (i) the fees and expenses of the arbitrators; (ii) legal fees and expenses of the parties, their representatives and expert witnesses; (iii) administration fees of an arbitral institution; and (iv) any other expense incurred in connection with the proceedings.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Arbitral awards are not generally subject to tax in Bermuda. However, Head 9 of Schedule 1 of the Stamp Duties Act 1976 provides that an award on an arbitration attracts stamp duty in the sum of 0.25 per cent of the amount or value awarded but not exceeding a maximum of $25.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of Bermuda? Are contingency fees legal under the law of Bermuda? Are there any "professional" funders active in the market, either for litigation or arbitration?

Section 96 of the Barristers' Code of Professional Conduct provides that, except in respect of undefended debt collections or to the extent permitted by Bar Council, Bermuda counsel shall not enter into contingent fee arrangements where the fees charged depend upon the results of the case, or consist of a pre-arranged share of money recovered on behalf of the client. It is unlikely that this restriction would apply to overseas counsel conducting arbitrations in Bermuda. A recommendation for the introduction of conditional and/or contingency fee arrangements is being actively considered by the Bermuda Bar Association. The involvement of professional third party funders is becoming more prevalent in Bermuda. In *Stiftung Salle Modulable and another v Butterfield Trust (Bermuda) Limited* [2014] SC (Bda) 14 the plaintiff procured funding in return for approximately 40 per cent of any damages recovered. The Court declined to follow "antiquarian" authorities, and observed furthermore that fair trial rights guaranteed by the Bermuda Constitution suggested that funding arrangements should be encouraged rather than condemned in Bermuda.

14 Investor State Arbitrations

14.1 Has Bermuda signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Yes, it has.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is Bermuda party to?

Bilateral Investment Treaties with the following countries have been extended by the United Kingdom to Bermuda: (i) Grenada; (ii) Guyana; (iii) Bolivia; (iv) Hungary; and (v) Tunisia.

14.3 Does Bermuda have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

As an overseas territory of the United Kingdom, treaty language is largely negotiated by the UK.

14.4 What is the approach of the national courts in Bermuda towards the defence of state immunity regarding jurisdiction and execution?

Bermuda has not introduced legislation equivalent to the United Kingdom Sovereign Immunity Act 1978. Accordingly, the common law rules governing the defence apply. It is likely that the Bermuda court will give effect to state immunity where circumstances require.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in Bermuda (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Bermudian insurers and reinsurers routinely include arbitration agreements in the many thousands of (re)insurance policies issued in the Bermuda market annually. Typically, these provide for arbitration in Bermuda (under the 1993 Act) or for arbitration in London (under the English Arbitration Act 1996). It is common for insurance policies issued in Bermuda to adopt New York law as the substantive law of the contract, but to adopt Bermuda or English law to govern procedural matters. There has been recent discussion about the suitability of arbitration as a means for resolving disputes relating to private trusts.

15.2 What, if any, recent steps have institutions in Bermuda taken to address current issues in arbitration (such as time and costs)?

A continuing trend in the Bermuda insurance market has been to allow the insured to determine the venue for any arbitration hearing, subject to a defined choice of venues (e.g. Bermuda, England or Canada). However, in such cases, the Bermuda or English arbitration statute continues to apply. Despite some pressure from insurance brokers, the Bermuda insurance market has been resistant to abandoning arbitration clauses or to agreeing to arbitration in the United States.

There is anecdotal evidence that the decision of the European Court of Justice in *West Tankers Inc v Allianz SpA (formerly Riunione Adriatica di Sicurta SpA)* [2008] 2 Lloyd's Rep 661 has caused some insurers to adopt Bermuda over London as the seat of an arbitration where the insured (or one of its subsidiaries) is either domiciled in the European Union, or there otherwise exists a risk it may commence coverage litigation somewhere in the European Union in breach of the arbitration agreement.

At least one insurer in Bermuda has modified its arbitration clause so as to mitigate the effect of the "loser pays" costs "rule" in Bermuda arbitrations by providing that the insurer will not seek recovery of its costs in a coverage dispute unless the insurer succeeds on all matters in dispute. This modification would not be permitted under the English Arbitration Act.

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Mr. Potts regularly represents Bermuda insurers and reinsurers in 'Bermuda Form' international arbitrations, and in Court applications in support of domestic and international arbitrations, including applications for anti-suit injunctions, stays, appointments of arbitrators, interim relief, and enforcement of awards.

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Sedgwick Chudleigh is the associated Bermuda office of the international law firm, Sedgwick LLP (Sedgwick). Sedgwick was founded in 1933 in San Francisco and evolved to become one of the leading insurance and litigation firms in the United States. Globally, the firm now has almost 400 lawyers in offices in the United States and Europe.

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