

## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

### **Responses submitted by:**

*Name: Jan Woloniecki*

*Law Firm/Company: ASW Law Limited*

*Location: Hamilton, Bermuda*

### **1. Would your jurisdiction be described as a common law or civil code jurisdiction?**

Bermuda is a common law jurisdiction. The island is a self-governing dependant territory of the United Kingdom. Appeals from the Court of Appeal for Bermuda are heard by the Judicial Committee of the Privy Council in London.

### **2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?**

The system of adjudication is adversarial.

### **3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?**

Judges of the Supreme Court of Bermuda (which is the court of first instance) and the Court of Appeal for Bermuda are appointed by the Governor of Bermuda.

### **4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?**

There is a specialized Commercial Court (which is an administrative sub-division of the Supreme Court of Bermuda). Its judges are the Chief Justice of Bermuda and one other full time Supreme Court judge.

### **5. Is arbitration an option and when? If so, what rules are typically used?**

Arbitration is commonly used for all kinds of commercial disputes and is the typical form of dispute resolution in the insurance and reinsurance industry. There are two separate statutory regimes available: The Arbitration Act 1986 (which is based on English legislation) and the Bermuda International Conciliation and Arbitration Act 1993 (which gives legal effect in Bermuda to the UNCITRAL Model Law). The 1993 Act applies to all international commercial arbitrations having their seat in Bermuda unless the parties have agreed in writing to apply the 1986 Act (which is typically used in domestic arbitrations, such as rent review and construction contract disputes).

## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

### **6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?**

Bermuda Courts are strongly pro-arbitration. They will typically stay Bermuda proceedings brought in breach of a valid arbitration agreement and will grant an injunction against a defendant over whom they have personal jurisdiction if it brings proceedings anywhere in breach of an arbitration agreement.

### **7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?**

The Bermuda International Conciliation and Arbitration Act 1993 contains a statutory exhortation encouraging parties to mediate but there is no mandatory requirement to do so.

### **8. What is the process for pre-hearing fact discovery (if any)?**

*(a) Are there provisions for mandatory document disclosures?*

The Rules of the Supreme Court of Bermuda (RSC) provide, in the case of an action begun by writ, for automatic disclosure of documents that relate to the issues in the action as defined by the pleadings by means of a list of documents. The lists of documents are exchanged and parties may then proceed to inspect the original documents and obtain copies.

*(b) Is there provision for oral examinations of the parties or others?*

There is no deposition procedure allowing for “oral discovery” of the kind that exists in the U.S. There is one limited exception in relation to insolvent companies, where a liquidator may obtain an order from the Court for the examination of a company’s directors, officers (including auditors) or any other persons having knowledge about the affairs of the company. A liquidator is not supposed to use this procedure as a means of fishing for evidence to commence proceedings (although in practice that is what often happens.) The taking of a deposition of a witness can be ordered to be taken but only for the purpose of using that deposition as evidence at the trial. Such depositions are typically used when a witness is overseas or unlikely to be able to attend the trial by reasons of illness.

*(c) Are there limits on the length of oral examinations?*

As explained above oral examinations are exceptional; there are no specific limits on their length.

*(d) Are witness statements or summaries to be provided before the hearing?*

The RSC provide for the exchange of written statements of all witnesses of fact in advance of the trial. At interlocutory hearings evidence in form of affidavits is typically served in advance of the hearing pursuant to an order of the Court.

*The Foundation of the International Association of Defense Counsel*  
**INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **BERMUDA**

### **9. What is the process for pre-hearing expert disclosure (if any)?**

(a) *Are expert reports or written summaries required to be exchanged?*

Leave of the Court is necessary before any expert evidence is served. The Court will also give directions regarding the service of expert evidence (whether it is to be exchanged or served sequentially and whether any reply reports are permitted.)

(b) *Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?*

No.

(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

The Court has the power to order a without prejudice meeting of experts and can direct them to produce a joint report identifying the areas of agreement and disagreement between them.

### **10. Are there other notable discovery rules?**

There is a limited jurisdiction under the so-called *Norwich Pharmacal* rule for the Court to order a non-party to produce information that would enable a potential plaintiff to identify a tortfeasor.

### **11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?**

The Court has extensive powers of case management under the RSC and prehearing conferences are typically held in the Commercial Court several months in advance of any substantive hearings to set down a procedural timetable. The process is typically driven by counsel for the parties. It is not the practice in Bermuda for a judge to pro-actively manage his or her “docket” or to summon counsel to a conference.

### **12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?**

The RSC permits an application for summary judgment to be made by a Plaintiff on affidavit evidence. The test is whether or not the Court finds there to be any issues of fact or law which ought to be determined at a trial.

## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

**13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?**

Arguments on admissibility of evidence, other than expert evidence, are typically dealt with at trial. As explained above before any expert evidence can be introduced the leave of the court must first be obtained. Arguments over the admissibility of expert evidence can therefore be made at the pre-hearing stage.

**14. What is the standard for admissibility of expert evidence?**

The expert must be independent and objective and the subject matter of his/her evidence must be an issue where specialised knowledge is required.

**15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?**

The Court does have such a power but it is rarely, if ever, exercised.

**16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?**

Bermuda law recognises and protects privilege in relation to legal advice and so-called “litigation privilege” (which covers any document prepared with the dominant purpose of being used for obtaining advice in relation to actual or contemplated litigation). There is a concept of “common interest” privilege covering both legal advice and documents covered by “litigation privilege” that are exchanged between parties and their attorneys who are regarded as having a “common interest” (for example an insurer and a policyholder defending a liability claim). Settlement discussions are typically expressed to be “without prejudice” and are confidential and privileged.

**17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?**

Privacy concerns do not typically provide a basis for non-disclosure of documents which are not otherwise privileged.

*The Foundation of the International Association of Defense Counsel*  
**INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.  
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **BERMUDA**

**18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?**

A judge of the Supreme Court of Bermuda

**19. Briefly describe the trial process?**

(a) *Are there opening submissions, in what form and of what length?*

The parties are required to exchange written submissions (“skeleton arguments”) in advance of the hearing which the Court will read. Opening oral submissions by counsel for both parties are common and their length will depend upon the complexity of the case.

(b) *What is the order of presentation of witnesses?*

The Plaintiff’s fact witnesses will typically be called first, followed by the Defendant’s fact witnesses. Occasionally, a witness will be heard “out of turn” if there is a good reason to do so (for example the witness has to travel to Bermuda and his/her schedule limits availability). It is common for expert witnesses to be heard “back to back” at whatever stage of the trial the Court thinks appropriate.

(c) *Who conducts examination and in what order?*

Since all fact witnesses are required to provide written witness statements in advance of the trial, typically a witness is called and asked to confirm the truth of his/her statement and there is little or no examination in chief (direct testimony). Therefore witness evidence effectively begins with cross-examination by counsel for the other side, and is followed by re-examination by counsel for the party calling the witness. The judge may also ask questions.

(d) *What is the process for closing submissions?*

The party who bears the burden of proof (typically the Plaintiff) generally speaks last.

**20. Please identify any other notable trial procedures.**

Since wigs and gowns have been dispensed with by Commercial Court in Bermuda there is nothing notable about trial procedures.

## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

**21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?**

The person who makes a positive assertion (usually the plaintiff in relation to causation and damages) bears the burden of proof. The standard of proof in civil cases is that of “the balance of probabilities”.

**22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?**

Damages are compensatory. In a breach of contract case the principle is to put the plaintiff in the position it would have been in if the contract had been performed. In a tort case the object is to award damages which will put the plaintiff in the position it would have been in if the wrongful conduct had not occurred. Pre-judgment interest is available pursuant to statute. Punitive damages are theoretically available in tort claims only, in particular defamation. They are not available in a breach of contract case.

**23. If punitive damages are available, what is the threshold for recovery, and range of awards?**

There is no case in which punitive damages have been awarded by a Bermuda court.

**24. Are there time limits for bringing claims? Responding to claims? Please describe.**

There are statutory time limits for bring claims. For example breach of contract claims must be brought within six years of the date on which the cause of action accrues. A defendant served with a writ in Bermuda must file a memorandum of appearance within fourteen days of service (time is extended for defendants overseas) and once an appearance has been entered a defendant must file a defence to action within fourteen days (although this is typically extended by agreement.)

**25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?**

In order to establish personal jurisdiction over a foreign defendant that defendant must either be served personally in Bermuda (which in the case of a corporation means either that it has some form of registered office or an agent for service in Bermuda) or that the claim falls within a list of specific grounds set out in Order 11 of the R.S.C. (in a contract case this will include a claim where the contract is governed by Bermuda law or contains a Bermuda jurisdiction clause). The Bermuda Courts apply the principle of forum non conveniens. In order to sue a Defendant located outside the jurisdiction

## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

the Plaintiff must show not only that the claim falls within one of the Order 11 jurisdictional grounds but that Bermuda is the most appropriate forum for the action. In a case where the Defendant has been served with a writ in Bermuda, and thus the Court has jurisdiction as of right, it is the Defendant who bears the burden of proving that Bermuda is not the appropriate forum for the action.

**26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.**

It is generally open to a defendant to join third parties to an action provided that the Court has personal jurisdiction over those third parties and the claims the defendant is making, for example a claim for a contribution or an indemnity, are related to the issues in the action brought by the plaintiff.

**27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).**

Bermuda is a loser pays costs system. The amount of costs is determined by the Registrar of the Supreme Court in a process known as “taxation”.

**28. Are contingency fees allowed?**

No.

**29. Is third party funding of claims permitted? Under what circumstances?**

The Supreme Court of Bermuda has recently recognized the legitimacy of third party funding arrangements. The precise limits of such arrangements and the consequences in relation to costs have yet to be worked out by the Court.

**30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?**

Class actions are not allowed in Bermuda. Given the size of the jurisdiction (the Island has a population of 60,000) mass tort claims of the kind that occur in the U.S. are unknown.

## INTERNATIONAL BEST PRACTICES SURVEY

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# BERMUDA

**31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?**

No.

**32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?**

The trial process is almost entirely party-driven. The time taken to get to trial will depend on the complexity of the case (how long will discovery take and how long will the production of witness statements or experts reports take) and how long a trial is likely to be. It is possible to get orders for an expedited hearing, and where both parties are committed to bringing a matter on quickly then a trial lasting a week could be brought on within six months or even less. This is however unusual. Twelve to eighteen months is probably typical for a commercial case that will take from three to five days to try. It is not unusual for cases to sleep since there is no pro-active judicial management.

**33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?**

Final orders of the Supreme Court may be appealed as of right to the Court of Appeal to Bermuda. A further appeal lies with leave to the Privy Council (leave is invariably granted in any substantial commercial dispute). The judges of the Court of Appeal are appointed by the Governor of Bermuda and are all retired judges from either the Bermuda Supreme Court or from England or other Commonwealth jurisdictions. The Privy Council is composed, mostly, of judges who sit in the U.K. Supreme Court (formerly the House of Lords).

**34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?**

Electronic trials are not the practice in Bermuda (where judges prefer to use paper which they can mark). The facilities do exist in the two court rooms used by the Commercial Court for video conferencing.

**35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?**

It is very unusual to use anything more sophisticated than a blown up chart in a trial or appeal in Bermuda.



## **INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

# **BERMUDA**

**36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?**

Depending on the size and complexity of the case it is certainly possible to have the same lawyers do all the pre-trial work and to appear as an advocate at trial. However, in commercial cases it is more common to have a team with a division of labour between junior and senior lawyers. Bermuda has a “fused” profession, all members of the bar are “barristers and attorneys of the Supreme Court of Bermuda” and in theory all have the same rights of audience before the Courts. In practice there are many lawyers who specialise in corporate, commercial or property law who never go to court, and there is a specialised commercial litigation bar most of whom trained originally as barristers in England.

**37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?**

There is provision for a finding of contributory negligence based on comparative fault, and for an apportionment of liability among tortfeasors.

**38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?**

It is not necessary for the Hague Convention procedure to be followed. For example any form of foreign proceeding or document of any kind can be served on a Bermuda corporation by leaving the document at the corporation's registered office.

**39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)**

The rule is that all documents produced on discovery are subject to an “implied undertaking” given by the other party that those documents will be kept confidential and will not be used for any purpose other than the litigation in Bermuda. The use of such documents for the purposes of litigation outside of Bermuda will only be allowed with the leave of the Court.

**40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.**

Not Applicable.

**INTERNATIONAL BEST PRACTICES SURVEY**

---

*This document is a resource tool only. The information was compiled in 2014.*

*Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.*

## **BERMUDA**

- 41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?**

The extent to which third party litigation funding is permissible should be addressed by legislation.

- 42. Are there legislative efforts under way that address any of the litigation practices in your country?**

No.