



Important Dispute Provisions to Consider in Bermuda Construction Contracts

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Bermuda is a subtropical Island in the middle of the Atlantic Ocean which is an Overseas Dependent Territory of the United Kingdom. While known as a tourism destination, Bermuda is also a major center for off shore business and has a booming construction industry.

While Bermuda's construction industry is a pillar of the local economy with many local construction companies, Bermudian construction firms will often partner with internationally based contractors and subcontractors during the course of a construction project. Prior to doing business in Bermuda, it is important for international contractors and subcontractors to carefully consider the dispute resolution options that should appear within the agreements which will govern their relationships with their Bermudian counterparts. In this article, we shall provide an overview of the terms which should be included in the dispute resolution provisions of a Bermudian construction contract.

The jurisdiction or "choice of law" provision of a Bermudian construction contract is critical, as it shall remove any doubt as to whether the terms of the contract will be governed by Bermudian Law or the law of some other jurisdiction should a dispute between the parties arise. In a Bermudian construction contract, the governing law is typically chosen to be that of Bermuda, though it is possible for parties to agree to have their dispute heard in another jurisdiction. Careful attention, however, should be paid to this provision and any inferential reference to any other contract whose terms are referenced in the main agreement, as such inferential reference may specify that any dispute is to be heard in another jurisdiction.

When a dispute arises in the context of a Bermudian construction contract, it is normally possible for parties to elect to have their claim heard by the Bermudian Courts if they so choose. When an action is filed with a Bermudian court, if the defending party files a Defence to an action filed with a Bermudian court, that party is deemed to have elected to have the matter heard by the Bermudian Court even if there is mediation and/or arbitration clause within the contract. If the matter is determined by the Bermudian Court, the matter may ultimately be appealed as high as the Privy Council in London.

Most Bermudian construction contracts, however, do include provisions which allow the parties to resolve their disputes through "Alternative Dispute Resolution" or "ADR" methods that one typically sees in contracts drafted in the US and throughout the British Commonwealth. Parties to such contracts typically prefer resorting to ADR methods as they have the benefit of providing confidential and cost effective means of dispute resolution which may allow for minimal disruption of an ongoing project.

A typical Bermudian construction contract will mandate that "stepped" dispute resolution process be followed. A "stepped process" usually requires the parties to first negotiate, then attempt to resolve their matter through non-binding mediation, and ultimately submit their dispute to binding arbitration if necessary.

In Bermuda, "mediation" refers to the use of an independent mediator who is retained to assist the parties with their negotiations. If the parties cannot resolve their dispute, the parties will typically be required by the contract to submit to binding arbitration. Arbitration clauses in Bermudian construction contracts also normally make provision for the procedural rules that are to be followed at the arbitration. Such procedural provisions normally state that the parties shall follow the UNCITRAL Rules but it is open to the parties to agree to the procedure that is to be followed at the formation of the contract. At the conclusion of the arbitration there is a limited right of

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appeal to the Supreme Court of Bermuda which may be appealed further, but in practical terms such appeals are rare and the decision of the Arbitrator is usually final.

An alternative form of arbitration, namely "Expert Determination" may also be agreed to by the parties which allows for an arbitration to be heard by an architect, quantity surveyor, or other like expert as opposed to a lawyer.

Before entering a Bermudian construction contract, an international party should also take note of whether the contract allows for an award of "liquidated damages". If the parties are proposing to include such a provision, it is our firm advice that a "cap" on such damages be agreed to for the purpose of limiting liability.

While Bermuda is a beautiful and sophisticated jurisdiction within which to do business, it is important that our potential international partners understand Bermuda's dispute resolution landscape prior to doing business here. For that reason, we recommend that the advice of Bermudian counsel be sought prior to entering into a Bermudian construction contract to ensure that our international partners fully understand their rights and obligations.

As originally published on IFLR1000.com on 29 August, 2017. This article is intended for informational purposes only and is not a substitute for legal advice.



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