



Chambers Global Practice Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Doing Business In... 2021

Bermuda

Jeremy Leese, Teressa Macbeth,
Allan Doughty and Nathan Samuels
MJM Barristers & Attorneys

practiceguides.chambers.com

BERMUDA

Trends and Developments

Contributed by:

*Jeremy Leese, Teresa Macbeth,
Allan Doughty and Nathan Samuels*
MJM Barristers & Attorneys see p.8



Introduction

COVID-19 may not have hit Bermuda as hard as larger countries overseas, but it has still had a significant effect on both life on the island and business in the jurisdiction throughout most of 2020 and into 2021.

As expected, the worst-hit sector of the economy was tourism and hospitality, but there are already signs of the green shoots of recovery, from the opening of Bermuda's first new large resort for a number of years (the St Regis Bermuda Resort in St George's), to the change in ownership of other resorts, with redevelopment and construction work to take place elsewhere, as well as the recent return of cruise ships. Whilst we are still seeing fairly low levels of visitors, those in Bermuda's tourism business are planning for the future, when it is hoped that visitor numbers will return to pre-COVID-19 levels.

In comparison, the international business sector has been robust in its ability to maintain levels of activity without any significant dip. In fact, it might be said that, in certain quarters, Bermuda is busier than ever. We have seen numerous enquiries from overseas investors looking to be involved in projects locally, often with a Bermudian partner, and we will discuss below the best ways to approach such investment and the factors to consider, including how the new Economic Investment Certificate and Residential Certificate Policy can be utilised.

We will also touch on how the jurisdiction responded to the COVID-19 pandemic and

became a model of co-operation between the UK and its Overseas Dependent Territories.

Finally, we will look at how the area of trusts law in Bermuda has been improved in the past year, so that wealth management, protection and disposition can be handled in a more effective and certain manner in accordance with settlor's wishes.

Foreign Investment in Bermuda

Bermuda's political, economic and social environment provides stability and consistency, making it attractive for foreign investment.

Incorporated companies in Bermuda are either local or exempted, with most international business companies being classified as "exempt". This is a term that addresses ownership, not taxation. Bermuda's tax system applies equally to local and exempted companies. An exempted company may be 100% owned by non-Bermudians and is exempt from the ownership regulations – otherwise known as the 60/40 Rule – which govern local, non-exempt companies. To be classified as a local or non-exempt company, Bermudians must be beneficial owners of at least 60% of the shares in the company, exercise at least 60% of the total voting rights in the company, and make up at least 60% of the directors of the company.

To do business within the local Bermudian economy, an exempted company must be authorised by its constitutional documents to do so and be granted a licence by the Minister of Finance.

BERMUDA TRENDS AND DEVELOPMENTS

*Contributed by: Jeremy Leese, Teressa Macbeth, Allan Doughty and Nathan Samuels,
MJM Barristers & Attorneys*

The approval for a licence is determined on the basis that such a licence is in the best interest of Bermuda; in our experience, it is rarely granted, leaving only certain limited activities, expressly excluded from the requirement for a licence, available to an exempted company to be conducted locally – for example, doing business with other exempted undertakings and buying its locally-needed supplies or services from local companies, such as accounting, banking, legal, management and office supply services.

Bermuda has always aimed to be an attractive option for direct foreign investment with a view to boosting its economy. In an effort to ease foreign ownership restrictions, the Companies Act 1981 was amended to allow companies listed on the Bermuda Stock Exchange to apply for a licence to seek foreign investment over and above the 40% maximum foreign ownership. Previously, foreign investors had to adhere to the 60/40 Rule. Many hotels and telecommunications companies fall into this category, as do Bermuda's four banks.

Last year, there was a governmental proposal to change the 60/40 Rule to become the 40/60 Rule, so that local companies would only require 40% Bermudian involvement at board and shareholder level. This has yet to be implemented, but shows the way the jurisdiction is heading in terms of welcoming foreign investment. In the meantime, any investor in a local business who wishes to secure control of such company can apply for a licence from the Minister of Finance to enable it to do so.

In order that a foreign investor can set up its investment vehicle quickly, as time is often of the essence, we usually suggest the incorporation of a local company where it would, initially, be a 40% minority shareholder, while a local partner would be the 60% majority shareholder ("joint venture"), often with minority shareholder/board

veto rights enshrined in the joint venture agreement to protect the foreign investor's capital in this start-up period. In such a way, the joint venture can be incorporated swiftly (usually within two weeks), with no need for any governmental permission or licence. The alliance with a local partner can be key to securing governmental support and is a frequently-used method for a foreign investor entering the Bermuda market. The experience and expertise of the local partner in how business operates in Bermuda, combined with its usually majority Bermudian workforce, dovetail well with a foreign investor's capital injection and know-how based on undertaking other projects overseas.

After incorporating the local company with a local partner, an application can be submitted for a licence for the joint venture to carry on business outside of the 60/40 rule, to enable the foreign investor to become the majority shareholder and control the majority of the board of directors of the local company going forward. Whilst this approval can take up to three months, we usually advise clients to seek to obtain an approval in principle beforehand from the Minister of Finance (who is very much open to meeting with investors and discussing their proposals), thereby allowing the joint venture to make plans, and seek any other permits and approvals, assured that the approval will be forthcoming.

In this interim period, applications for work permits can be made for any key personnel who the foreign investor requires to be employed on the island, albeit that care should be taken to ensure Bermuda labour and immigration laws are complied with, so that Bermudians are given opportunities to be hired before looking overseas for employees. New projects will often be granted a certain number of work permits (say, five) without the need for the roles to be advertised to Bermudians first, but usually only where they are key management without whom the project

could not proceed and on the understanding that a certain number or percentage of jobs will be filled by Bermudians. This latter requirement is often a condition of the licence to vary the 60/40 Rule, which can cause the licence to be revoked if compliance is not met.

The Bermuda Business Development Agency (BBDA) was also established to pro-actively encourage direct foreign investment in Bermuda. Its mission is to foster an environment conducive to economic growth and job creation by supporting existing Bermuda companies and helping new businesses to establish themselves in Bermuda.

Further assistance with regard to overseas investors comes in the form of Bermuda's new Economic Investment Certificate and Residential Certificate Policy, pursuant to which non-Bermudian individuals who invest at least BMD2.5 million in the island receive the right to live in Bermuda, along with a path to long-term residency after a period of five years. Unlike previous policies, successful applicants also receive automatic approval to work. The new policy came into effect on 1 March 2021. The Economic Investment Certificate is valid for five years, after which holders are eligible to apply for the Residential Certificate. If successful, they will have the right to reside in Bermuda indefinitely with their dependents. The certificates are likely to appeal to high net worth individuals interested in relocating to Bermuda, as they will be able immediately to work in the businesses in which they invest.

To be eligible for an Economic Investment Certificate, the applicant must make a "qualifying investment" of at least BMD2.5 million, which can be made in real estate or government mandates funds, but also in an existing Bermuda-based business or with regard to the devel-

opment and launch of a new Bermuda-based business.

The government has partnered with the BBDA to offer a concierge service to facilitate the submission and approval process. The Economic Investment Certificate and Residential Certificate Policy should benefit those who are looking to relocate their businesses and families to Bermuda. In contrast to earlier legislation that focused on attracting retirees who were then barred from employment, the government is now making it possible for affluent working people to experience the advantages of Bermuda living.

There is a clear recognition in Bermuda that overseas investment in the jurisdiction is not only welcome, but is needed, and the various governmental departments and authorities are more than willing to work with foreign investors looking to enter the Bermuda market to make their plans a reality.

COVID-19 Regulation in Bermuda

On 11 March 2020, the World Health Organization declared the multinational outbreak of COVID-19 a pandemic. On 18 March 2020, the first positive case of COVID-19 was identified within Bermuda's population. What has followed since then within Bermuda has proved to be a fascinating study in the exercise of governmental power between the British Crown and the elected government of Bermuda. The partnership may be viewed as an excellent example of co-operation between a sovereign nation and its dependent territories within the post-colonial context that has enabled Bermuda to steer a path through the pandemic whilst remaining a fully functioning international finance centre.

Bermuda is an Overseas Dependent Territory of the UK. This means that Bermuda is not a sovereign nation, but rather a self-governing dependency of the British Crown. While Bermuda has

BERMUDA TRENDS AND DEVELOPMENTS

Contributed by: Jeremy Leese, Teressa Macbeth, Allan Doughty and Nathan Samuels, MJM Barristers & Attorneys

its own Westminster-style parliament, its head of state holds the title of “Governor” and is an official appointed by Her Majesty, holding a large amount of power when compared to the role of other heads of state within the sovereign nations of the Commonwealth.

Shortly after the first COVID-19 case was confirmed in Bermuda, the Premier of Bermuda announced on 31 March 2020 that he had asked Bermuda’s Governor to declare a constitutional emergency; this took effect the following day. The effect of that declaration allowed the Governor to pass emergency regulations that could legally override certain civil liberties that are normally guaranteed by the Constitution, such as freedom of movement and freedom of association. In consultation with the elected government, the Governor agreed to pass regulations pursuant to his emergency powers that allowed for the management of the outbreak, including Bermuda’s first “shelter in place” order, which was implemented on 3 April 2020 and lasted a total of four weeks. As those regulations were mostly exempt from constitutional scrutiny, it was not possible to petition the court to review their legality during the brief period during which they were in force.

While the Governor’s power to declare a constitutional emergency had been exercised on several occasions during the 1960s and 1970s, that power was used sparingly and in response to civil unrest. However, the Governor’s emergency powers were now being implemented to meet a very different social need and in full consultation with the elected government.

After the first “shelter in place” order ended, the Governor signed into law amendments to Bermuda’s Public Health Act, which allowed the Minister of Health to declare a “Public Health Emergency”. This new type of emergency may only be declared where the government is satis-

fied that a communicable disease or the threat of a communicable disease endangers the health of the Bermudian public. After a Public Health Emergency has been declared, the Governor may then issue regulations pursuant to that declaration after he has consulted with the Minister of Health. Such regulations are arguably subject to the scrutiny of the courts per its powers of judicial review. The amendment to the Public Health Act, however, also declares that any regulations passed pursuant to a Public Health Emergency are supreme to all other legislation within the canon of Bermudian law, including Bermuda’s anti-discrimination and employment legislation. The amendments to the Public Health Act are, however, clear in stating that any regulations passed pursuant to the new emergency powers are subject to the jurisdiction of the Constitution, which means that the constitutionality of any provision of these regulations may be challenged before the court.

Only recently, the constitutionality of certain aspects of the Emergency Regulations have been challenged before the Supreme Court of Bermuda. Although we are still waiting for the final ruling of the Supreme Court of Bermuda in relation to these challenges, an application for an interlocutory injunction filed at first instance was dismissed by the Court on the grounds that the applicants did not establish that they would suffer irreparable harm if the regulations they complained of were allowed to come into effect. While it remains to be seen as to how the Court will ultimately rule concerning these challenges, we expect that the decision will centre on whether the measures the applicants seek to resist are rationally connected and proportionate to the social concerns that the government of Bermuda is seeking to address through the regulations.

Trust Law Reforms

Despite the turmoil of the COVID-19 pandemic, Bermuda has undertaken significant updates to its trust “operating system”. These updates were rolled out under The Trusts (Special Provisions) Amendment Act 2020 (the “First Update”) and The Trusts (Special Provisions) Amendment (No 2) Act 2020 (the “Second Update”); both of which came into effect on 5 August 2020. Although neither of these updates create any entirely new features within Bermuda’s trust law regime, they have strengthened the existing legislative framework by simplifying Bermuda’s trust firewall provisions and restoring settlors’ freedom of disposition as it relates to illegitimate children.

Like many trust jurisdictions, Bermuda has had strong firewall provisions for many years. However, despite its primary intention (to shield domestic trusts from the application of all foreign law), it is often practical and necessary for courts to make exceptions and consider the application of foreign law in specific circumstances. As a result, Bermuda’s firewall provisions took the form of a blanket exclusion, with the possibility of various exceptions, which, in practice, proved cumbersome and created uncertainty.

In response, the First Update has done away with the “blanket exclusion approach” and has instead set out specific circumstances in which appropriate exclusions of foreign law will be applied, based on existing public policy principles.

Specifically, the application of foreign law will be excluded if it creates, recognises, or defeats – or gives a foreign court power to create, recognise, or defeat – any right or interest in or to property, or any obligation or liability on any person, by virtue or in consequence of, or in anticipation of:

- the death of a person (other than as a result of a voluntary disposition, whether testamentary or otherwise, by the deceased) – which includes the application of forced heirship rules and the enforcement of claims to trust property as a result of the settlor’s death;
- the creation, existence or dissolution of a relationship of marriage, domestic partnership (or analogous relationship), cohabitation or other familial relationship, whether by blood or adoption – which includes community of property rules or other foreign law regimes that confer rights on the basis of familial relationships in respect of trust property; or
- bankruptcy, liquidation or an analogous insolvency process, including a provisional process or a process for the restructuring of debts – which effectively includes rights and obligations derived from foreign insolvency processes.

One way to look at Bermuda’s updated firewall provisions is to see the above policy-driven exclusions as effectively forming the first barrier of an upgraded firewall. When a question of trust creation arises that involves foreign law and falls into one of the above exclusions, recognition will not be given to such foreign law by the Bermuda courts. However, when a question of trust creation arises that involves foreign law, but is not caught by the above exclusions, that question will be determined by the Bermuda courts using the usual choice of law rules, even if that requires, where appropriate, the application of foreign law. Once it has been established that a trust has been validly settled (ie, foreign property has been validly transferred to a Bermuda trust), a less permeable second barrier will exclude the application of almost all foreign law (not just those areas of foreign law that run contrary to public policy).

BERMUDA TRENDS AND DEVELOPMENTS

Contributed by: Jeremy Leese, Teressa Macbeth, Allan Doughty and Nathan Samuels, MJM Barristers & Attorneys

In addition to this simplified approach, the First Update has also added clarity to some of the key concepts within Bermuda's firewall provisions:

- confirming that a "Bermuda trust" not only includes a trust governed by Bermuda law but now also includes trusts that are governed in part by Bermuda law;
- defining the terms "foreign court", "foreign law", "foreign order" and "foreign trust" such that Bermuda's firewall provisions not only apply to orders of foreign courts but now also apply to any decision of any foreign entity exercising judicial or quasi-judicial functions (including an arbitral tribunal); and
- defining the term "settlor" to include a testator who creates a testamentary trust and the settlor/trustee of a declaration of trust.

The Second Update deals with the freedom of disposition as it relates to illegitimate children. In 2002, Bermuda's Children Act 1998 was amended to remove the distinction between legitimate and illegitimate children. The purpose of this amendment was to ensure illegitimate children had the same rights as existed for legitimate children. However, as a consequence of this amendment it became impossible for a trust settlor to create a trust in favour of his or her legitimate children only (unless such children were included as beneficiaries of the trust by name, as opposed to being described as a class). This restrictive position ran contrary to established common law principles granting freedom to enjoy one's own private property, freedom of testamentary disposition and freedom of religion. As a remedy, the

Second Update amends the Children Act such that a settlor of a Bermuda trust is now able to opt out of the statutory equivalence of legitimate and illegitimate children.

Conclusion

There is no doubt that Bermuda continues to be a key international finance centre through which much business continues to flow. The international business sector is robust, verging on booming, and the outlook remains positive.

Virtual meetings and remote working are now simply part of the way we operate. Conferences do not work quite so well as virtual seminars of "talking heads", as the networking element crucial to so many of them cannot be easily replicated. However, if anything, the switch from telephone conference calls to video calls has actually helped to make global multi-jurisdiction transactions more personal, more human, and has made possible interaction with clients and contacts around the world in a convenient, real-time and user-friendly manner.

The tourist trade on the island has been badly affected, but is looking to bounce back as travellers start to return in greater numbers. The new airport is up and running and there is a mood of cautious optimism for better times ahead.

Bermuda is an attractive jurisdiction on many levels, ready to welcome new investment, new business and new visitors as the world begins to reopen for business.

*Contributed by: Jeremy Leese, Teresa Macbeth, Allan Doughty and Nathan Samuels,
MJM Barristers & Attorneys*

MJM Barristers & Attorneys is one of Bermuda's leading law firms. It has a broad-ranging practice with a reputation for excellence in its core practice areas. The firm is regularly retained by leading international law firms. MJM offers practical, common-sense advice based on an in-depth knowledge of the legal, regulatory and commercial environment in Bermuda. It also offers a high degree of director involvement in the work that it does. The firm is organ-

ised around five core practice areas: corporate and finance; dispute resolution; employment and immigration; private client; and property. Each practice area is led by a director who is recognised as a leading practitioner in Bermuda in his or her respective field of specialisation. MJM's collaborative approach across practice areas enables it to offer a comprehensive and thorough service to clients.

AUTHORS



Jeremy Leese is a director of the firm and head of the corporate and finance department at MJM. Jeremy's practice focuses on corporate finance, mergers and

acquisitions, shipping and aviation finance, corporate reorganisations and restructurings, banking and international real estate finance, structured finance, as well as regulatory and legislative compliance. After qualification with a magic circle firm in the UK, Jeremy practised corporate law in the UK for four years before moving in 1999 to one of the leading offshore law firms and working in its Bermuda, Hong Kong, Jersey and British Virgin Islands offices. After a spell heading the corporate and commercial team at a firm in Anguilla, Jeremy returned to Bermuda with MJM in August 2012.



Teresa Macbeth is a senior associate in the corporate and finance department at MJM. She has extensive experience in global finance and commercial real estate matters, including

banking, European property funds, sales and leasebacks, cross-border project financing with an emphasis on project and trade finance and asset-backed financing within the shipping sector. Her practice includes acting for multinational financial institutions, public and privately owned companies, high net worth individuals and asset managers and alternate lenders on complex, multidisciplinary financings. She has represented Dame Ellen MacArthur implementing systemic circular economy initiatives within a number of Fortune 500 companies, including the completion of a partnership with BlackRock, the world's largest asset manager, for the launch of BlackRock's first circular economy thematic fund. Prior to joining MJM, Teresa worked for SJ Berwin LLP, Orrick, Herrington & Sutcliffe LLP and the Ellen MacArthur Foundation in the UK, as well as another law firm in Bermuda.

BERMUDA TRENDS AND DEVELOPMENTS

Contributed by: Jeremy Leese, Teressa Macbeth, Allan Doughty and Nathan Samuels, MJM Barristers & Attorneys



Allan Doughty serves as senior counsel in the dispute resolution team and has a strong practice which embraces tort law, including negligence and personal injury cases,

contractual disputes, human rights and anti-discrimination law, constitutional law, public law and judicial review, medical law, including clinical negligence, coroners' inquests, privacy law and professional disciplinary law. Allan has acted for the Bermuda Hospitals Board, the Human Rights Commission, numerous individuals who have laid complaints pursuant to the Human Rights Act, police officers, the Commissioner of Police and many professionals facing disciplinary charges. Prior to joining MJM, Allan practised with Trott & Duncan Limited for ten years, during which time he became recognised as a leading attorney in the areas of disciplinary law, medical law and human rights law. He later joined BeesMont Law Limited, being named as head of litigation in 2018. While with BeesMont, Allan argued some of Bermuda's leading cases in the areas of human rights and anti-discrimination law, the right to expression as guaranteed by the Constitution and medical law, with one of his cases on clinical negligence and causation being heard by the Privy Council.



Nathan Samuels is a senior associate in the firm's property, trusts and estates department and has experience in a wide range of property and private client matters. Nathan routinely

advises clients in the areas of probate and estate administration, wills and estate planning, as well as buying and selling real property and property financing. Nathan received the Mello Jones & Martin Legal Scholarship Award in 2001 and continued with the firm as a pupil in 2005 and then as an associate in 2006. In 2012 Nathan left MJM to take on in-house counsel roles with local companies, Bermuda Commercial Bank Limited and then in 2016 with Colonial Group International Ltd. In 2019, Nathan returned to MJM as a senior associate. Nathan is a member of the Society of Trust and Estate Practitioners (STEP).

MJM Limited

Thistle House
4 Burnaby Street
Hamilton HM 11
Bermuda

Tel: 441 292 1345
Fax: 441 292 2277
Email: mjm@mjm.bm
Web: www.mjm.bm

