

PANORAMIC NEXT

Dispute Resolution

BAHAMAS

LEXOLOGY



Dispute Resolution

2025

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Seladore Legal

Panoramic Next: Dispute Resolution is an engaging interview-style exploration of the global litigation, arbitration and alternative dispute resolution (ADR) landscape. Leading dispute resolution specialists offer their insights into the most prominent market and case law trends; practical considerations surrounding the choice of dispute resolution method; incisive commentary on recent judicial treatment of common contractual clauses; and more.

Generated: June 11, 2025

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Bahamas

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Summary

PROFILES

About

Q&A

What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences?

How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards "niche" or specialist litigation firms reflected in your jurisdiction?

What have been the most significant (by value or impact) recent court cases and litigation topics in your jurisdiction?

What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

What have been the most significant (by value or impact) recent trends in arbitral proceedings in your jurisdiction?

What are the most significant recent developments in arbitration in your jurisdiction?

How popular is ADR (eg, mediation, expert negotiation) as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

Profiles

ABOUT

Dwight Ginton is a partner in the firm's litigation group. His experience covers a wide range of civil litigation matters, including banking, finance, securities and equity litigation; admiralty and shipping proceedings; personal injury negligence claims; fraud; contentious probate, trust and real property matters; and employment disputes.

Dwight's work experience has included practising in the litigation department of one of the top five law firms in Beijing, China, where he assisted in corporate disputes between foreign and Chinese investors.

Q&A

WHAT ARE THE MOST POPULAR DISPUTE RESOLUTION METHODS FOR CLIENTS IN YOUR JURISDICTION? IS THERE A CLEAR PREFERENCE FOR A PARTICULAR METHOD IN COMMERCIAL DISPUTES? WHAT IS THE BALANCE BETWEEN LITIGATION AND ARBITRATION? WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF THE MOST POPULAR DISPUTE RESOLUTION METHODS?

The magistrates' courts are the lowest courts in the hierarchy of the judiciary. These courts may have a higher volume of cases than others but claims are relatively small. In addition to small claims, magistrates' courts have the jurisdiction to try summary or minor criminal offences.

The Industrial Tribunal is not a part of the judiciary and was established to hear employment and industrial matters only. It is intended to be a more expeditious and less costly alternative to courts and was originally designed to mirror mediation and arbitration proceedings. Unlike a court, the Industrial Tribunal does not have the power to award legal costs and this often discourages parties from retaining costly legal representation. A disadvantage of the Industrial Tribunal is that it cannot enforce judgments, so a successful litigant must obtain a Supreme Court order to execute an Industrial Tribunal decision. A single legally qualified judge presides over Industrial Tribunal cases.

The Supreme Court is somewhat of a misnomer because it is not the highest court in the Bahamas' judicial system but is a high or superior court that ranks between the magistrates' courts and the Court of Appeal. It has general jurisdiction to hear criminal and civil cases. A single judge presides in matters at this level and they have the power to determine issues of fact and law in civil suits, but criminal cases are tried by jury. The Bahamas has gained a reputation internationally for its erudite judges who hand down decisions that are regarded as fair and just. As often occurs in high courts in other jurisdictions, matters tend to take longer to be heard due to a backlog of cases.

The Court of Appeal is the highest court with a physical presence in the Bahamas and it hears appeals from the Supreme Court, the Industrial Tribunal and the magistrates' courts in certain matters. Usually, three judges sit on a panel for a hearing although all five justices of appeal tend to preside together over cases of national importance.

The Judicial Committee of the Privy Council is the highest court in the judicature of the Bahamas. It usually conducts its hearings in London but it has sat in the Bahamas on four

occasions and there are plans for its judges to hear matters in this jurisdiction again in the future.

ARE THERE ANY RECENT TRENDS IN THE FORMULATION OF APPLICABLE LAW CLAUSES AND DISPUTE RESOLUTION CLAUSES IN YOUR JURISDICTION? WHAT IS CONTRIBUTING TO THOSE TRENDS? HOW IS THE LEGAL PROFESSION IN YOUR JURISDICTION KEEPING UP WITH THESE TRENDS AND CLIENTS' PREFERENCES?

Attorneys are taking greater care in preparing governing law and governing forum clauses in legal documents considering the Privy Council's ruling in *Crociani and others v Crociani and others* [2014] UKPC 40. In that case, a settlor made a trust that stated the Bahamas was the 'forum for the administration of the trust'. Relations between the settlor and one of the beneficiaries deteriorated so the settlor revoked the trust. That beneficiary commenced proceedings in Jersey against the trustee, alleging a breach of trust and seeking the distribution of the trust assets. An application was made to stay the proceedings on the ground that a provision in the trust deed conferred exclusive jurisdiction on the courts of Mauritius but this was rejected by the Jersey court. This decision was upheld by the Jersey Court of Appeal so the settlor and others appealed to the Privy Council. The main issue to be determined was the correct interpretation of the governing law clause in the trust deed. The Privy Council made a distinction between contracts and trust deeds and held that the weight to be given to a jurisdiction clause in a trust deed ought to have less weight than in a contract. Also, it was held that while the word 'administration' could be used to refer to the function of the court, it could also be used to mean the running of the trust. Further, it was found that the forum could be different countries for different aspects of administration. This was a move away from previous interpretations that the forum whose law was applicable also meant the country in which legal proceedings must be commenced. The *Crociani* decision was followed in the Bahamian case *RTL v ALD and others* [2014] 3 BHS J. No. 83, where the issue of *forum conveniens* arose. Since these court decisions, more attention has been given to the preparation of governing law and governing forum clauses to avoid ambiguity. Such clauses are now generally clearer to avoid any dispute on the interpretation of where a legal dispute should be adjudicated and which country's law should be applied.

HOW COMPETITIVE IS THE LEGAL MARKET IN COMMERCIAL CONTENTIOUS MATTERS IN YOUR JURISDICTION? HAVE THERE BEEN RECENT CHANGES AFFECTING DISPUTES LAWYERS IN YOUR JURISDICTION? HOW IS THE TREND TOWARDS "NICHE" OR SPECIALIST LITIGATION FIRMS REFLECTED IN YOUR JURISDICTION?

There are approximately 1,300 hundred lawyers in the Bahamas, a ratio of about three lawyers per 1,000. By comparison, there are approximately nine lawyers per 1,000 in New York State and about two lawyers per 1,000 in England. While these ratios increase considerably in the major cities in those jurisdictions, the per capita ratio of lawyers in the Bahamas is generally comparable to those states. The four largest law firms in the Bahamas have approximately 35 lawyers who each specialise in various aspects of commercial law. Specialisation is becoming more common as clients seem to prefer attorneys who practice exclusively in a particular area of law. It is felt there is a fair amount of competition in the Bahamas for a jurisdiction with its population size and economy. Bahamian lawyers have built significant expertise in financial services given that the country was perhaps the first offshore financial centre in the Americas, having

opened its first offshore bank approximately 90 years ago. Some commentators criticise the jurisdiction for barring overseas lawyers from practising but lawyers from other common law countries are allowed to work as registered associates at a law firm but without rights of audience in the courts. Barristers from abroad with specialist expertise are allowed to argue cases in complex matters on an ad hoc basis. There is a widely held view among Bahamian lawyers that lawyers from abroad should only have limited access to the profession because local lawyers possess extensive knowledge of the laws of their own country. However, this stance may soon be overridden by increasing international pressure to remove restrictions on overseas lawyers practising in the jurisdiction to deepen the pool of talent available.

WHAT HAVE BEEN THE MOST SIGNIFICANT (BY VALUE OR IMPACT) RECENT COURT CASES AND LITIGATION TOPICS IN YOUR JURISDICTION?

Ervin Dean v Bahamas Power & Light concerned a wrongful and unfair dismissal claim in which an employee's contract of employment was terminated by his employer. The company paid the employee B\$97,608.42 in accordance with the Employment Act but the employee claimed he was entitled to compensation in accordance with his employment contract, which was governed by an industrial agreement. At first instance, the judge found the termination was in breach of the claimant's contract of employment and awarded damages of B\$652,404.80 in addition to the amount he received upon termination. The employer appealed and the Court of Appeal upheld the judge's finding on liability but reduced damages to B\$174,806 on the basis that there was no evidence to support the award granted by the judge. The employee appealed to the Privy Council and sought to have the Court of Appeal's decision reversed and the judge's award of the large sum restored. The Privy Council found that the employee neither pleaded nor proved unfair dismissal in the court proceedings, so he was not entitled to damages under that heading. Further, the Privy Council held that insofar as the judge decided the employee's dismissal was unfair, such a finding was not available to her. The Privy Council dismissed the appeal and affirmed the reduced award handed down by the Court of Appeal.

WHAT ARE CLIENTS' ATTITUDES TOWARDS LITIGATION IN YOUR NATIONAL COURTS? HOW DO CLIENTS PERCEIVE THE COST, DURATION AND THE CERTAINTY OF THE LEGAL PROCESS? HOW DOES THIS COMPARE WITH ATTITUDES TO ARBITRAL PROCEEDINGS IN YOUR JURISDICTION?

Many clients find litigation lengthy and inefficient so they often complain when they find it necessary to commence court actions. Parties to a dispute are often aware of the advantages of arbitration that include its informality, speed and relatively low costs. However, they generally opt for litigation, notwithstanding its negatives. It seems parties have come to expect the difficulties that arise with court action because it has long been the most common means of dispute resolution and is often described as a cultural norm. Also, there is a belief that the rigour of adversarial litigation makes it more probative than arbitration and a more just determination of the matter is likely to result from such proceedings. It seems advocates of arbitration should apply greater efforts to promote arbitration because many people seem reluctant to arbitrate simply because they are unfamiliar with the actual process.

DISCUSS ANY NOTABLE RECENT OR UPCOMING REFORMS OR INITIATIVES AFFECTING COURT PROCEEDINGS IN YOUR JURISDICTION.

The Supreme Court Civil Procedure Rules (CPR) that came into effect on 1 March 2023 is perhaps the most significant development in Bahamian civil and commercial litigation procedure in recent history. Unlike the previous Supreme Court Rules this country adopted in 1978 from the court rules in England, the CPR were drafted by local jurists who sought to devise procedures particularly suited to this jurisdiction while incorporating practices from other common law court systems.

The new rules seek to eliminate some of the disadvantages of litigation by ensuring cases are dealt with expeditiously and fairly. For example, the CPR require that originating documents include not only facts but references to relevant law and copies of documents that would be relied upon by the claimant. Previously, such material did not need to be disclosed until shortly before trial. Also worthy of note is the procedure for the 'automatic' discovery of non-specified documents without a court order. The parties are to only seek a court order for disclosure in certain circumstances and must cooperate with discovery requests from opposing counsel.

Another significant development of major importance in Bahamian court proceedings is the implementation of e-filing in the Supreme Court on 5 February 2024. The Supreme Court handles more than 15,000 filings a year and the new electronic filing service is expected to save the court both time and money. It is anticipated that this new system will fundamentally improve how the court provides services to attorneys and litigants. As in other jurisdictions that have e-filing, this new system will allow litigants to file and access documents via the internet at any time.

The Court Services Act 2023, which came into effect on 1 July 2024, is another recent landmark development that is likely to have a transformative effect on the administration of justice in the Bahamas. This legislation establishes a Court Services Council made up of judges, magistrates, members of the legal profession and specialists in various fields. The Court Services Council is now responsible for the general management of the judiciary and will be independent of the executive and legislature. Judiciary personnel and the physical structures of the courts that fell within the purview of the Minister of Legal Affairs will now be the Court Services Council's responsibility. A chief executive officer (CEO) appointed by the Court Services Council will manage the day-to-day affairs of the courts. While the executive branch of the government will provide some of the courts' funding based on a budget submitted by the Court Services Council, judges will have administrative and financial control of the judiciary. The Court Services Council's objectives include promoting transparency and accountability and this is expected to improve efficiency in the court system. These changes are intended to assist this jurisdiction achieve Dicey's ideal of the separation of powers. Judges will be more independent and less likely be subject to political interference and influence from the other branches of government. This new arrangement should assist in upholding the Rule of Law and seek to ensure fairness for everyone.

WHAT HAVE BEEN THE MOST SIGNIFICANT (BY VALUE OR IMPACT) RECENT TRENDS IN ARBITRAL PROCEEDINGS IN YOUR JURISDICTION?

The most significant recent trend in arbitral proceedings is perhaps the resolution of trust disputes by way of arbitration pursuant to the Trustee Amendment Act, 2011 and the

International Commercial Arbitration Act, 2023. The Bahamas is generally known as one of the most favourable jurisdictions in which to establish a trust because of its benign trust laws. It is widely felt this legislative development that permits parties to arbitrate trust disputes increases the advantages of having a trust in this country.

The Trustee Amendment Act stipulates that a trust deed may provide for the determination of a dispute by way of arbitration. This enactment is particularly suited to trusts because they are often entered for the privacy they allow in estate planning. Arbitration is more confidential than litigation because documents are not required to be filed and hearings are not open to the public as with court matters. Also, parties have greater control of arbitration since the proceedings are not subject to complex court rules and judges' calendars.

In *Volpi v Delanson Services Limited and another*, the Bahamian courts had to consider the provisions in the *Trustee Amendment Act*. Gabriele Volpi (Volpi), an Italian billionaire, settled two trusts. The trustee distributed most of the trust assets to Volpi and then terminated the trusts. In response, Matteo Volpi, Volpi's son, who was a beneficiary, commenced litigation proceedings alleging breach of trust. The court had to determine whether the matter should proceed to arbitration. It was held that the trust instruments contained valid arbitral clauses so any dispute concerning the trusts should be determined by arbitration. Consequently, the court ordered that the court action be stayed and the matter proceed to arbitration. The *Volpi* decision demonstrates the courts' support for this groundbreaking legislation.

Recently, the court had to consider an application by defendants to stay an action pending the outcome of arbitration proceedings in the *Cem Okullu'Nun Yeminli Beyani v Weiser Global Capital Markets Ltd and another*. The claimant raised a preliminary objection to the application for a stay and sought to have it dismissed on the ground that the International Commercial Arbitration Act applied to the matter and not the Arbitration Act, which the defendants relied upon. The legal proceeding concerned a loan agreement with an arbitration clause and was governed by the law of another jurisdiction. The effect of an amendment to the Arbitration Act was to limit its application to arbitrations in the Bahamas while the International Commercial Arbitration Act applied to international commercial arbitration. Previously, the Arbitration Act applied to both local and international arbitration. The main issue in the court application arose from the fact that the International Commercial Arbitration Act did not come into force until three months after the amendments in the Arbitration Act came into effect, which created a lacunae. The court held that the Arbitration Act remained in effect until the International Commercial Arbitration Act came into operation. This decision would be relevant to any cases that arose during the intervening period.

WHAT ARE THE MOST SIGNIFICANT RECENT DEVELOPMENTS IN ARBITRATION IN YOUR JURISDICTION?

The International Commercial Arbitration Act, which came into effect in 2023, has improved the Bahamas' competitiveness as an international arbitration centre because it enhanced the statutory framework for arbitration in this jurisdiction. The enactment provides for the composition of an arbitral tribunal, the appointment of arbitrators and the grounds to challenge arbitrators' decisions. Aspects of the United Nations Commission on International Trade Law (UNCITRAL) model arbitration law have been incorporated into the law.

HOW POPULAR IS ADR (EG, MEDIATION, EXPERT NEGOTIATION) AS AN ALTERNATIVE TO LITIGATION AND ARBITRATION IN YOUR JURISDICTION? WHAT ARE THE CURRENT ADR TRENDS? DO PARTICULAR COMMERCIAL SECTORS PREFER OR AVOID ADR? WHY?

This jurisdiction is a leading international financial centre, so the expeditious and cost-effective resolution of commercial disputes is important. The usual backlog in court cases, which has been exacerbated by the shutdowns during the coronavirus pandemic, has made parties more inclined to consider alternative forms of dispute resolutions. While arbitration may not be considered very popular at present, recent legislative improvements has made it more attractive to people in various industries. The trust provisions in the jurisdiction's arbitration laws are particularly advantageous to the country's financial services industry. In addition, arbitration benefits the maritime industry in which a significant number of disputes are generally settled by arbitration. The Bahamas has one of the largest ship registries in the world, so it could seek to attract some of the maritime arbitration with its innovative arbitration regime. The recent amendments to arbitration legislation could establish the Bahamas as a major international arbitration centre which would prove beneficial to attorneys and other professionals in this jurisdiction.

WHAT IS THE POSITION IN RELATION TO LITIGATION FUNDING IN YOUR JURISDICTION? IS FUNDING AVAILABLE? HAVE THERE BEEN ANY SIGNIFICANT DEVELOPMENTS IN THIS AREA IN YOUR JURISDICTION?

As in many common law jurisdictions, third parties in the Bahamas are prohibited from funding an unconnected party's litigation under the doctrines of maintenance and champerty. Maintenance refers to an unconnected third party assisting someone in litigating by providing resources and financial assistance. Similarly, champerty is where a third party pays a part or all the litigation costs for a claimant in return for a share in any court award.

The rules prohibiting maintenance and champerty are intended to prevent abuses of justice by corrupt entities that commence fraudulent and vexatious claims. Such practices encourage parties to bring legal proceedings for profit instead of a genuine desire to seek legal redress. The prohibition of third-party funding continues in many jurisdictions as a matter of public policy on the ground that it protects the purity of justice. The rules against maintenance and champerty extend to arbitration, which accordingly prevents the use of third-party funding in that form of dispute resolution.

The rules against maintenance and champerty have been relaxed in several common law jurisdictions, and courts in these counties now only prohibit this practice where there is an element of impropriety. There has not yet been a decision in the Bahamas that affirms this recent development but it is likely to occur soon given the general acceptance of third-party litigation funding in other countries.

The Inside Track

WHAT IS THE MOST INTERESTING DISPUTE YOU HAVE WORKED ON RECENTLY AND WHY?

The most interesting dispute in which I was involved recently is perhaps the case *Baron's Court Holdings Ltd. and another v The Registrar General* [2022] 1 BHS J No. 112 that was a court application for the restoration of Baron's Court Holdings Ltd (Baron's Court Holdings) to the register of companies after it had been dissolved for almost 20 years. Baron's Court Holdings was incorporated under the International Business Companies Act, 2000, which was amended by the International Business Companies (Amendment) Act, 2010 to correct deficiencies in the original legislation but omitted provisions on the restoration of dissolved companies. There were subsequent actions in which the court permitted the restoration of dissolved companies in circumstances such as fraud. Baron's Court Holdings was incorporated for estate planning purposes by a member of the Bacardi family, which owns the largest rum brand in the world. His heir sought to restore Baron's Court Holdings, which had been dissolved by mistake, but there was no case authority that specifically addressed this issue. I posited that the courts could make rules even where there is legislation governing an area of law. The Chief Justice, who presided in the case, was initially apprehensive about creating a rule directly related to a statute, given that it is generally considered the purview of Parliament. However, he ultimately held that the court had the inherent jurisdiction to restore the company on the grounds of mistake. This decision is somewhat unusual because it is a case precedent that, in effect, filled a void in a statute.

WHAT DO YOU CONSIDER TO HAVE BEEN THE MOST SIGNIFICANT LEGAL DEVELOPMENT OR CHANGE IN YOUR JURISDICTION OF THE PAST 10 YEARS?

The most significant legal development in the Bahamas in the past 10 years is perhaps the passage and implementation of the Court Services Act because it has given the courts more independence from the executive arm of the government. The court buildings and the personnel that work in the judiciary are no longer under the Minister of Legal Affairs. A board consisting mostly of judges and practising lawyers is now responsible for the administration of the courts.

WHAT KEY CHANGES DO YOU FORESEE IN RELATION TO DISPUTE RESOLUTION IN THE NEAR FUTURE ARISING OUT OF TECHNOLOGICAL CHANGES?

Technological developments such as digital court records and virtual hearings are likely to improve access to justice for litigants. E-filing is likely to improve efficiency in the judiciary because court documents would be readily available to court personnel and judges for case management purposes. It is anticipated that artificial intelligence (AI) will have a transformative effect on dispute resolution because it could assist judges in analysing law and evidence. Also, lawyers could benefit from improved legal research and case analysis, which this technological advancement could provide.



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