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## POLICIES ON WORK PERMITS IN BERMUDA

### The Immigration & Protection Act

The primary policy inherent in the Bermuda Immigration and Protection Act 1956 (as amended), is the protection of jobs within Bermuda for Bermudians and spouses of Bermudians. The Bermuda government requires that qualified Bermudians be given first opportunity to acquire employment provided they meet the specific qualifications and criteria of the position. The only exception to this rule would be for senior executives of international companies that bring specialized management expertise to the company and are considered key executives for the company.

### Limits on Work Permits

Work permits are normally issued for a year. It should be noted that there is provision for longer permits of up to five years. Generally five year work permits are granted to 'key employees' in an organization.

As of April 2001, six year limits on work permits came into effect although senior executives and/or key employees that contribute to the success of a company can work free of any time constraints. This also applies where there is a proven severe shortage of qualified staff.

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**Reasons For Incorporating  
In Bermuda**

°	Respected International Business jurisdiction (built on the principle of "know your customer");
°	Tax Neutral Business

Companies that wish to have an employee made exempt from the six year limit must have a good record in training and employing Bermudians; producing clear and correct job advertisements; and submitting work permit applications that are correctly completed. Such firms can also look forward to speedier processing of work permit applications.

**Application Procedures: Advertisement Requirement**

Work permit applications are made by employers after they have advertised the position on at least three consecutive occasions in a local Newspaper. The advertisement requirement for key executives is generally waived. The advertisement for the position must include:

- The name, telephone number and mailing address of the employer seeking the employee;
- The title of the position being filled;
- A brief description of the position to be filled which should be consistent with the normal functions associated with the position. An advertisement is invalid if it contains a job description which seems to be tailor-made to fit a particular non-Bermudian applicant;
- Notice of the deadline for application, which must allow a grace period of at least five working days, following the date of the last advertisement, to allow sufficient time for Bermudians to apply.

Once it has been established that there are no qualified Bermudian candidates for the position, an application is made to the Department of Immigration for a work permit and the application must include:

- One of the space advertisements which appeared in the newspaper;
- A covering letter giving the date of the publication of each advertisement; the name of the publication in which each of the advertisements appeared; and the type of each of the three advertisements;
- A copy of the letter sent to each Bermudian applicant who was not successful.

Environment (no income, capital gains, transfer or withholding taxes);

◦ Business sensitive and well established Legal System (based upon English common law);

◦ Minimal Government Annual Reporting except for Restricted Businesses;

◦ Access to Capital Markets (through Bermuda Stock Exchange listings);

◦ Access to one of the most successful Insurance/Reinsurance Markets in the world;

◦ Reliable Banking System;

◦ Efficient Support Services (legal, accounting, management, corporate and trust services);

◦ State-of-the-Art Global Internet Services and Telecommunications (connecting Bermuda to the world); and

◦ Friendly yet efficient business environment for holding Company Meetings.

## Waiver of Advertisement

The Minister responsible for Immigration matters may, on occasion, waive the requirement to advertise. These exceptions are likely to be in cases such as that of an international company where the position to be filled is that of a beneficial owner who wishes to run the company; there is proprietary information and the prospective permit holder is an existing employee or has specific expertise required for the position; and where there is a clear demonstrable benefit to Bermuda and Bermudians, e.g. jobs, physical presence; or a senior post which must be filled internally; or requires a highly skilled resource not readily available in Bermuda.

Senior management positions (including CEO, COO and CFO positions) in Bermuda exempted companies are not required to be advertised. Exempted Companies wishing to obtain work permits for Senior Management positions are required to submit the Work Permit Application to the Department of Immigration setting out the required details of the position and the length of time of the work permit. For senior management positions, work permits can be granted for periods of five years and the restrictions on time limits for work permits do not apply.

## Initial Work Permit Application

An initial work permit application must be made in writing by the employer and addressed to the Chief Immigration Officer at the Department of Immigration. Applications must be accompanied by:

- A completed Immigration Questionnaire Form (IQF1).
- A copy of the advertisement of the position (if required) accompanied by details of the dates and name of newspaper in which it ran, please note that the advertisement must be no older than three months.
- The required government application annual fee (currently \$559.00 per year).

For prompt processing of a work permit, the letter of application should include the following:

- A description of the position.
- If the length of the work permit requested is more than one year, reasons for requesting a long-term permit.
- The name, address, telephone number and résumé of each Bermudian applicant and a detailed explanation or justification of why each Bermudian or non-Bermudian spouse of a Bermudian who applied for the position was unsuitable for the advertised position. Reference should be made to qualifications, previous work experience and specific job requirements.
- When the application is in respect of a new position, an explanation of why the expansion is required.

It is required that all questions on the Immigration Questionnaire be answered completely. If the question is not applicable, the applicant is required to so indicate.

The following documents must accompany the Application:

- Four passport-sized photographs of the prospective employee.

A medical health certificate from a physician in respect of the applicant's general health and the health of accompanying dependents.

- A full-size chest X-ray plate (applicant and all accompanying dependants over the age of 12 years).
- Copies of academic certificates. If the certificates are not in English, then a translation is required.
- Employment and/or training reference from current or previous employers.
- At least two character references.
- A copy of a Marriage Certificate, if applicable.
- Birth Certificates of children and other dependants, if applicable.

Immigration Questionnaire Forms and medical certificates are required for dependents over the age of 11 years who will be accompanying the work permit holder to Bermuda.

### **Applications-in-Principle**

The present government policy will permit such applications-in-principle in respect of positions where there is a severe shortage, either because of scarce resources world-wide which have a local impact resulting in shortages in Bermuda owing to the exceptional high demand in a particular field. Categories where it may be said that there are severe shortages include:

- Actuary
- Chartered accountant
- Insurance Broker
  
- Senior Catastrophe and finite insurance/reinsurance modelling analysts
- Senior Underwriters
- Technically skilled specialists in information systems/technology fields

Permission-in-principle will also be considered for employees of any local or exempted company that has a significant physical presence in Bermuda who are seeking to employ senior or key people within the business organization. For an employee to be categorised as “key” to the business operations, the business must demonstrate most of the following criteria:

- The person is among the best practitioners in the world;
- The person has rare specialised expertise that cannot be easily found world-wide;
- There is a severe shortage of the person’s particular expertise in Bermuda;
- Without the continued presence of the individual the business will be seriously injured;
- The individual is directly responsible for creating well-paying jobs to which Bermuda will benefit;
- The person is directly responsible for training Bermudians.

Where the Department of Immigration has considered and approved permission-in-principle applications and all criteria has been met, the application will be approved administratively

Applications-in-principle for work permits may be made by companies in good standing with the Department of Immigration who have demonstrated good employment practices on a consistent basis. Instead of advertising a specific job, a company may prefer to place general advertisements for vacancies at six month intervals.

### **Renewal of Work Permits**

Prior to the expiration of a work permit, the employer is required to apply to the Department of Immigration if he wishes the permit to be renewed or extended.

Applications for the renewal of work permits should be submitted no fewer than four weeks and no more that 12 weeks prior to expiration. The original work permit should accompany the extension request.

Positions which have been held by non-Bermudians for three years must be advertised prior to seeking a renewal of the existing work permit unless there is good reason not to do so. Certain categories are exempt from the three-year advertising policy.

Unless there are special circumstances, before considering the renewal of a work permit, including a periodic work permit, the Board of Immigration will normally require that a job held by a non-Bermudian be advertised.

However, an employer may choose to place general advertisements every three months, or as work permit renewals or new positions arise, and report to the Board of Immigration on the outcome of such advertising. The employer may then refer to the latest general advertisement when applying for a renewal of an individual's work permit, provided that person's job category has appeared in that general advertisement.

If the employer believes that he or she has justification for the position not being advertised, then an application, stating those reasons, can be made to the Board of Immigration to waive the requirement to advertise. Should the application for a waiver be refused, an appeal may be made, in writing, to the Minister.

It is acknowledged that, depending on the seniority of the position, the calibre of the applicant required and where no Bermudian applicants are available, it may not be feasible to expect a prospective employee to pull up stakes, wherever he or she may be, and move to Bermuda for a one-year period.

### **Length of Time – Processing Work Permits**

The processing of work permit applications takes three to four weeks and may take longer where the Act requires consultation with statutory bodies (i.e. The Bermuda Bar Association, Dental Association and Medical Association).

The Immigration Board meets every Thursday to consider applications, and the weekly deadline for applications is Friday at 4:45 p.m.

The three-week processing period is calculated from the Friday of the week the application was sent to the Department of Immigration.

The following statement may be included in an advertisement involving the renewal of a work permit after three years of employment.

**This position is being advertised prior to work permit renewal applications with a view to attracting suitably qualified Bermudians or spouses of Bermudians.**

Sufficient Re-entry Permits to cover each family member will accompany each work permit when it is issued to an employer. The employer is required to give the permits to the employee. This document serves as a landing permit for the new permit for the new work permit-holder and dependents that are listed.

Dependents that have been granted permission to accompany the person named in the work permit will be listed in the space provided at paragraph 3 of the Re-entry Permit.

The document also serves as permission for the work permit-holder, and/or his or her listed dependents, to re-enter Bermuda after absences from the Island of up to three months.



For absences exceeding three months, it will be necessary to apply to the Department of Immigration for a special re-entry permit.

Where dependents are given permission to reside in Bermuda subsequent to the re-entry permit being issued, the employee may present his copy of the permit to the Travel Documents staff at the Department of Immigration accompanied with a letter giving the names to be added to the document.

Please note that only a signed document issued by the Department of Immigration will be acceptable. Photocopies will not be accepted. Should the original document be lost or destroyed, a new one can be issued for a fee.

### **Long Term Work Permits**

Historically, work permits have been issued annually. However, provision now exists for the issue of permits for a longer period of time, and applications may be made for periods of up to five years in most work categories. The granting of a long-term work permit will depend on whether it is likely that a Bermudian will be disadvantaged during the tenure of the permit.

Long-term work permits may be granted either on first application or on renewal of long or short-term work permits. Long-term work permits will not be granted in respect of restricted categories of employment unless there are special circumstances, such as a long association with Bermuda, or close family ties.

The main consideration will be, as stated earlier, whether a Bermudian might be materially disadvantaged by the grant.

There are a variety of reasons why a long-term work permit may be desirable. In any application, employers should set these out in detail. For guidance, some reasons commonly cited are as follows:

- (a) The non-Bermudian for whom the permit is being sought is the spouse of a Bermudian.
- (b) It is important that the position have a high degree of continuity.
- (c) The position requires a high degree of expertise.



(d) The position is of particular economic benefit to Bermuda.

(e) The position (and perhaps others) would not exist if it were not filled by a particular non-Bermudian. It is recognized that although the most easily understood example of this would be a person who was the president or owner of the company, it may equally apply to an employee who performs a vital role in the company, or brings special skills to that company.

(f) There is an overall shortage of qualified Bermudians in the category.

(g) There are Bermudians under training for the particular job within the company, but they will not qualify for the position within the period of the permit.

(h) The application is made for the non-Bermudian to work for a specified, limited period with no renewals while a Bermudian is under training. It should be stressed that this non-renewal provision only applies where this type of application is made by the employer, and should not be taken as preventing holders of long-term work permits granted for other reasons from applying for extensions.

Where a long-term work permit is sought specifically under paragraph (h) above:-

- Employees must sign a written statement that they understand that at the end of the stated period they and their dependents are to leave and not seek further employment in Bermuda.
- This written statement must be signed and witnessed. The names of the employee and the witness must be written clearly next to the appropriate signature. This must then be submitted to the Chief Immigration Officer with the application.
- The employer must sign a statement that no extension of the work permit will be sought in respect of the employee or any of his or her dependents.
- An employee who has completed the term of such a work permit must leave Bermuda, with his or her dependents.

- After leaving Bermuda, the former holder of a long-term work permit granted under paragraph (h) above must remain abroad for such period as the Minister shall deem appropriate before that person can be considered for re-employment or new employment. The purpose of this requirement is to ensure that those allowed into Bermuda on a long-term work permit on the basis of limited stay are not then able to use this means to live for extended periods in Bermuda.

Where a long-term work permits is sought specifically under paragraph (g) above.

- The Bermudian trainee(s) must be identified.
- The validity of the permit is subject to training continuing.
- When training ceases, for whatever reason, then the Department of Immigration must be informed at once.
- If training has terminated, provided the Department of Immigration has been informed immediately, the work permit will remain in effect for a further period of three months or until the expiry date, whichever occurs first. During this period of grace, another Bermudian may be identified as a bona fide trainee. Should this occur, the work permit resumes its effect as though no change had occurred. Otherwise, the work permit shall cease to have effect, must be returned and a new application made on grounds other than that given in (g). Extensions of this period of grace may be applied for.

Any non-Bermudian employee who is replaced by a Bermudian, or whose position has become redundant through the success of a trainee, will normally be given sympathetic consideration should he or she wish to seek alternative employment in Bermuda.

### **Temporary Work Permits**

For Bermuda companies that wish to employ certain persons to do temporary assignments in Bermuda, an application may be made for a Temporary Work Permit which is generally granted for

a period of three months. There is no need to advertise the position in Bermuda. Renewals of the temporary work permit can be obtained.

## **COLLECTING FROM INSURANCE COMPANIES IN BERMUDA**

For a creditor of an insurance company, including a reinsurance company, in Bermuda (who is not claiming as a policyholder — as to which special rules apply) there are three principal means of collecting a liquidated sum of money in Bermuda from a Bermuda insurance company. The three main collection procedures available are:

- (a) civil proceedings commenced by writ;
- (b) a statutory demand pursuant to the Companies Act 1981; and
- (c) winding-up proceedings pursuant to the Companies Act 1981.

The usual overriding concern of creditors will be to recover the sum due, or as large a portion of it as is possible, quickly and with the least amount of expense. In Bermuda, the unsuccessful party in any court proceedings is likely to be ordered to pay a portion of his opponent's legal costs (in addition to having to pay his own legal costs).

The risks involved in any litigation give rise to the need to select the most efficient recovery method available. As sums may be recovered from companies which are insolvent or on the brink of insolvency, it is important to ensure that monies collected are not liable to attack under the law relating to preferences in insolvency (a subject which falls outside the scope of this article).

Some difficulties have in the past been experienced by creditors seeking to collect from insurers in Bermuda; but as Bermuda has developed into a major international insurance jurisdiction the options available in terms of practical relief have expanded.

### **Statutory Demand**

Bermuda's Companies Act 1981 (the "Companies Act") is based

on England's Companies Act of 1948. The relevant provisions of the Companies Act, for present purposes, are:

(a) a company may be wound up by the Court if it is unable to pay its debts;

(b) a company shall be deemed to be unable to pay its debts if a creditor (whether by assignment or otherwise) to whom the company is indebted in a sum exceeding \$500.00 has served a written demand (a "statutory demand") for the sum due on the company and the company has neglected to pay the sum for 3 weeks thereafter; and

(c) a creditor may apply to the Court for a company to be wound-up if the statutory demand is not met within 3 weeks after service on the company.

A statutory demand may not be an appropriate collection procedure where there is an ongoing commercial relationship between the parties, and a winding-up petition based on a statutory demand cannot properly be presented to the court where the debt which is the subject of the statutory demand is bona fide disputed. A debt which is not disputed on substantial grounds may, however, properly form the basis of a statutory demand.

The utility of a statutory demand is most likely to arise either where the creditor is seeking to enforce an agreement, judgment or arbitration award or, in cases of actual or apprehended insolvency, where the debtor has clearly failed to pay an admitted debt (which may be a sum owing in respect of an insured loss).

### **Presenting a Petition**

A winding-up petition may be presented under the Companies Act by any creditor or creditors (whether an original creditor or a creditor by assignment), including any contingent or prospective creditor or creditors. However, the Court of Appeal for Bermuda has ruled that a single policyholder (contingent creditor) of an insurance company may not petition to wind-up an insurance company because of the provisions of the Insurance Act 1978 (the "Insurance Act"). The Insurance Act provides that an insurance company may be wound-up by policyholders (contingent creditors) as such on the petition of 10 or more policyholders owning policies of an aggregate value of \$50,000 or more, but not

otherwise. The right of a policyholder to apply to wind-up an insurance company for failure to pay an admitted claim appears to be unaffected.

### **Grounds for Winding up**

For practical purposes in a debt collection context, the usual grounds on which a winding-up petition presented by a creditor of an insurance company will be granted is where the company is unable to pay its debts or it is otherwise just and equitable that the company should be wound up (e.g. for refusal, rather than inability, to pay any debt). A company is deemed to be insolvent if (a) a debt is unpaid three weeks after a statutory demand is served on it (assuming, of course, that the debt is not bona fide disputed); (b) a judgment is unsatisfied (either in whole or in part) after execution has been levied; or (c) the company is proven to be unable to pay its debts as and when they fall due (commercial insolvency).

A creditor should have no difficulty in obtaining a winding-up order based on a statutory demand or judgment; proof of commercial insolvency may be more challenging and costly.

### **Commercial Insolvency**

An insurance company may be wound up where the petitioning creditor can establish that the company is commercially insolvent, in the sense that it is unable to pay its debts as and when they fall due. Commercial insolvency (as opposed to balance sheet insolvency) for a winding-up petition is not free from difficulty; however, it may be an effective means of debt collection where the existence of a debt (in a sum certain) is clear. It is, however, necessary to read the Companies Act in conjunction with the solvency requirements of the Insurance Act (and related regulations), which impose more stringent solvency and liquidity standards on insurers than are imposed on other types of companies in Bermuda.

Although only a bona fide dispute on substantial grounds as to the fact of liability (as opposed to the amount of liability) will normally justify striking out a petition based on commercial insolvency, the Bermuda courts are only likely to make an order to wind-up an insurance company in very clear cases.

Commercial insolvency may often be difficult to establish and is generally the least effective collection mechanism of the three statutory bases for a winding-up petition. The exception to this general rule is in cases where a winding-up order (as opposed to payment) is desired. An unsecured creditor may wish to wind-up an insurance company in order to prevent the dissipation of assets to the detriment of the general body of unsecured creditors of the company, himself included.

### **Conclusion**

The selection of the most appropriate mechanism for recovering the liquidated sum will depend on a variety of factors, such as the size and nature of the claim and the commercial relationship between the parties. In each case the success of any recovery will probably depend upon the ability of the creditor to document clearly that an undisputed sum is due.

In cases where collection difficulties are anticipated, creditors would be well advised to try to obtain admissions of specific, quantified liabilities in open correspondence and/or to conclude agreements in respect of specific amounts. Where collections are made by means of any of the mechanisms discussed above from companies which are subsequently held to have been insolvent, the Bermudian law of fraudulent preferences will not normally be problematic for the recipients of payments made as a result of commercial and/or legal pressure to pay.

So while it may be (mistakenly) believed in some quarters that insurance recoveries are hard to obtain in some offshore jurisdictions, winding-up procedures under Bermuda law are usually a highly effective collection device when pursuing Bermudian insurers in Bermuda.

The information contained in this article represents general principles and is not intended to be exhaustive. Legal advice should be obtained in respect of any particular debt sought to be enforced in Bermuda.

For further information regarding an action for the defaults of a company in Bermuda please contact Paul A. Harshaw at [paharshaw@milligan.bm](mailto:paharshaw@milligan.bm)

**US COURTS PIERCING THE**

## **CORPORATE VEIL OF A BERMUDA EXEMPTED COMPANY**

A little over a year ago, in April 2003, the Supreme Court of the State of New York, Appellate Division, First Department, unanimously upheld the judgment of the Supreme Court for New York County entered a year earlier that the corporate veil of Ardra Insurance Company Ltd (“Ardra”) should be pierced and that compensation should be paid by shareholders of that company in the amount of some \$28,000,000.00. This was the last decision in a series of decisions delivered over nearly a decade.

The decision of the New York Court to pierce the corporate veil of Ardra appears to be based on section 1505(a)(1) of the New York Insurance Law and it seems to be accepted in American legal circles that the decision in the case of Ardra is an exception to the general rule that shareholders will not be liable for the debts of the company in the absence of some wrongdoing.

By way of background, the facts as found in the various courts are that Ardra (as reinsurer) had entered into reinsurance treaties with a company called Nassau Insurance Company, (“Nassau”), a New York corporation, and both Ardra and Nassau were owned by Tiber Holding Corporation (“Tiber”), which in turn was owned and controlled by the Di Loreto family. The only reinsurance treaties entered into by Ardra were those with Nassau. Nassau was placed in liquidation in New York in 1984 and the State Superintendent of Insurance was appointed the liquidator of Nassau. The Order placing Nassau in liquidation contained a provision permanently restraining any person from bringing or furthering the prosecution of any actions at law against Nassau. In 1985 the liquidator of Nassau commenced proceedings in New York to recover sums of money said to be due under the treaties with Ardra. Ardra initially sought to compel arbitration under the treaties and to stay the New York action, but in 1988 those proceedings failed on the bases that New York law provided a statutory scheme for liquidating insurance companies and overrode the contractual provision of the relevant treaties. That decision was upheld by the New York Court of Appeal in 1990.

In the meantime, in 1987, Ardra commenced proceedings in Bermuda seeking a declaration of the validity of the arbitration clause for one of the treaties (which had provided for arbitration in Bermuda) and an injunction to restrain the liquidator of Nassau



from pursuing any court proceedings in relation to disputes which are the subject matter of the arbitration clause. At the same time, Ardra applied for and was granted an interim injunction restraining the liquidator of Nassau, for a period of 28 days, from taking any further steps in the courts of the State of New York which would interfere with the proceedings in Bermuda or taking or continuing any judicial proceedings against Ardra in relation to the disputes which were the subject matter of the arbitration clause. The liquidator of Nassau did not appear in the Bermuda proceedings but instead commenced contempt proceedings against Ardra in New York and sought to have Ardra found in contempt for instituting the Bermuda action. The alleged contempt was the breach of the prohibitions upon instituting or continuing proceedings against Nassau or its liquidator mentioned above. The application to find Ardra in contempt in New York was eventually denied on procedural grounds, and though it was renewed in 1988 there was never any conclusion to that application.

Substantive proceedings continued in New York and in 1991 the New York Supreme Court, on the application of the liquidator of Nassau, ordered that Ardra should post pre-answer security (for costs) of more than \$10,000,000.00. That Order was made in accordance with New York procedural law.

As Ardra was unable to post the required amount of pre-answer security within the time frame imposed, its Answer (Defence) in the New York proceedings was struck out and judgment was entered for the liquidator of Nassau in the amount sought. The liquidator of Nassau then sought to enforce the New York judgment in Bermuda, but failed in that application for two reasons:

1. It would be contrary to public policy for the Supreme Court of Bermuda to enforce the New York judgment because the liquidator of Nassau was in continuing contempt of an order of the Supreme Court expressly prohibiting him from pursuing the very action which he sought to enforce judgement in; and
2. The judgment sought to be enforced was obtained in breach of English and Bermudian notions of substantial or natural justice, Ardra not being permitted to defend unless it posted a sum of security which the New York Court had no reason
3. to think it could pay and which the Bermudian court found as a fact it could not pay within the required

time frame.

It is to be noted that the Supreme Court of Bermuda in rendering its judgment specifically pointed out that only two years earlier the rules relating to enforcing foreign judgments in Bermuda (which could not be enforced under Bermuda's Judgments (Reciprocal Enforcement) Act 1958) had been reiterated and that in that case a judgment of the Supreme Court of New Hampshire had been enforced in Bermuda. The court also pointed out that it was plain that at each stage, each side was attempting to use the courts of the two countries to compel litigation in their respective domestic forum and that in such a case there is always the risk that the court of one country will be manipulated by the parties into a false position of apparent conflict with the court of the other. The Supreme Court of Bermuda, however, recognized that there existed well established rules for regulating such conflict and deciding where and according to whose law, any matter is appropriate to be tried.


Eventually, the liquidator of Nassau sought to pierce the corporate veil of Ardra by way of New York law. In an action by the liquidator of Nassau against Tiber in the United States District Court for the Eastern District of Pennsylvania, the court held that the unique facts of the litigation made it inappropriate to apply the law of Bermuda, the place of incorporation, for the purposes of piercing Ardra's corporate veil. The reason for this finding (according to the court) was that Ardra was incorporated in Bermuda as an "exempt" company, meaning that Ardra could only accept business from outside Bermuda and could not conduct business with Bermuda residents or companies and thus that the (American) test of the traditional interests of the place of incorporation was greatly diminished. The court also found as a fact that Ardra's only business was with a New York company, Nassau, which conducted business of insurance, a highly regulated field in New York and (somewhat surprisingly) that the Supreme Court of Bermuda had refused to enforce the judgment underlying the litigation. The court went on to say that on the facts described above, particularly the lack of comity by Bermuda on an issue integral to the litigation, enforcement of the underlying judgment, led the US District court to conclude that the New York courts would apply an interest analysis to determine which law should be applied to the corporate veil piercing claim against Ardra. It concluded that New York law was the appropriate law.

It is important to remember that the Federal court's decision was based squarely on section 1505(a)(1) of the New York Insurance Law. That provision of law required that, within the context of a holding company scheme, transactions involving a controlled insurer (Nassau) must be fair and equitable. The transactions between Nassau and Ardra were not fair and equitable to Nassau, according to the court. The court permitted the liquidator of Nassau to pierce the corporate veil of Ardra to reach the personal assets of the controlling shareholders without any allegation of fraud; the determination was that the transactions between Nassau and Ardra were not fair and equitable to Nassau and that that was sufficient to pierce the corporate veil of Ardra as a matter of New York law, and to hold Ardra's shareholders liable for Ardra's debt.

Whilst it is self-evident that the prolonged litigation in two jurisdictions and the conflicting decisions of the various courts in those jurisdictions are unsatisfactory in the context of the global business (and particularly insurance) climate prevailing today, it is to be hoped that the decision to pierce Ardra's corporate veil will in future be held to be strictly based on the New York Insurance Law and that the decisions of the US courts will not be enlarged to create a general exception in relation to foreign companies who do business with American companies. It is to be hoped that two of the three reasons given by Justice Dubois of the US District Court for the Eastern District of Pennsylvania are to be taken at face value: (1) The unique facts of the case make it inappropriate to apply the law of Bermuda; and (2) Ardra's only business was with a New York company. The third reason given by Justice Dubois, that the Supreme Court of Bermuda has refused to enforce the judgment given in New York as a result of Ardra's inability to provide Pre-Answer security, whilst couched as a reason for the decision may well (and, it is to be hoped, will) be found in future to have been merely a passing remark which was not necessary for the decision.

The information contained in this article represents the author's view of the various legal decisions and is not intended to be an exhaustive analysis of the litigation discussed. The author's view of the American decisions discussed should not be taken to be an opinion in respect of American law.

For further information regarding an action for the defaults of a company in Bermuda please contact Paul A. Harshaw at [paharshaw@milligan.bm](mailto:paharshaw@milligan.bm)



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