

Banking and Finance Country Comparative Guide – Bermuda (Legal 500)

Briefing Summary: This guide to Bermuda's banking and finance laws and regulations includes commentary on the national banking authorities, banking licences, cross border activities, organisational and corporate governance requirements for banks and sanctions for violations of the law. It also looks at the legal requirements relating to cryptocurrencies and digital assets and how client's assets and deposits are protected including the special resolution regime and insurance.

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Sector: Banking, Blockchain, Digital Assets and Tokenisation, Fintech and Regtech, Insurance

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Content Authors: Steven Rees Davies, Gavin Woods, Charissa Ball

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What are the national authorities for banking regulation, supervision and resolution in your jurisdiction?

Institutions licensed to carry on deposit taking business in or from within Bermuda are supervised by The Bermuda Monetary Authority (**BMA**) pursuant to the Banks and Deposit Companies Act 1999 (**BDCA**).

Which type of activities trigger the requirement of a banking licence?

Absent a relevant exemption, licencing under the BDCA is triggered when an entity carries on deposit-taking business in or from within Bermuda. Such entity must also be a company incorporated in Bermuda.

The BDCA defines “deposit-taking business” as when an entity:

- in the course of the business, lends money received by way of deposit to others; or
- finances any other activity of the business wholly or to any material extent, out of the capital of or the interest on money received by way of deposit.

Key Contacts



Steven Rees Davies
PARTNER, BERMUDA
+1 441 542 4525

[EMAIL STEVEN](#)



Gavin Woods
PARTNER, BERMUDA
+1 441 542 4519

[EMAIL GAVIN](#)



Charissa Ball
COUNSEL, BERMUDA
+1 441 542 4276

[EMAIL CHARISSA](#)

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY

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Subject to certain exclusions, “deposit” is defined under the BDCA as a sum of money paid on terms:

- under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and
- which are not referable to the provision of property or services or the giving of security.

Does your regulatory regime know different licences for different banking services?

There are three classes of licence issued under the BDCA as follows:

- a banking licence, which requires the institution to provide certain minimum services to the public in Bermuda set out in section 14 of the BDCA, including savings, deposit or other similar accounts in Bermuda dollars; overdraft and other loan facilities in Bermuda dollars; foreign exchange services; and directly or indirectly, credit card or debit card facilities;
- a deposit company licence, under which the institution cannot accept deposits of money on current account or otherwise on terms which require repayment on demand, and which requires the institution to provide the following minimum services to the public in Bermuda—
 - savings, deposit or other similar accounts in Bermuda dollars on terms which require repayment on notice; and
 - loans in Bermuda dollars secured on the mortgage of real property in Bermuda whereby not less than the prescribed minimum percentage of total assets of the institution shall at all times be invested in loans secured to the full amount of the outstanding balance owed to the institution under such mortgages;
- a restricted banking licence, which authorises the institution to provide to persons conducting or seeking to conduct digital asset business or a digital asset issuance in or from within Bermuda such of the services required under a banking licence as the Authority may approve.

Does a banking licence automatically permit certain other activities, e.g., broker dealer activities, payment services, issuance of e-money?

No, a licence issued under the BDCA will not automatically permit other activities and licenced institutions will need the approval of the BMA to carry on certain commercial activities, such as engagement in manufacturing.

Additional licences may be required for other regulated business activities, such as investment business under the Investment Business Act 2003. However, institutions licensed under the BDCA are exempted from licensing under the Money Service Business Act 2016. As such, an institution licensed under the BDCA may conduct and provide money services business activities, including payment services, to the public.

Is there a “sandbox” or “license light” for specific activities?

Since 2018, the BMA has established a regulatory sandbox and innovative hub targeted towards the insurance industry in Bermuda. In November 2021, the BMA published the General Regulatory Sandbox and Innovation Hub Application and Approval Guidelines (**GRS**) which reflects that accessibility to the regulatory sandbox and innovative hub has been broadened to participants across various regulated financial sectors in Bermuda and sets out the current manner by which the BMA intends to administer the innovative sandbox regime.

The regulatory sandbox is for Bermuda registered companies seeking to perform tests of new technologies and offer innovative products, services and delivery mechanisms to a limited number of clients in a controlled environment for a limited period of time. The innovation hub is for industry participants seeking dialogue with the BMA on their innovative solutions and technology.

The BMA also introduced a similar regulatory “sandbox” for the digital asset sector whereby companies seeking to test or conditionally launch digital asset products or services in accordance with the Digital Asset Business Act 2018 (**DABA**) could apply for a Class ‘T’ (Test) or Class ‘M’ (Modified) license. Whilst deposit-taking business, as defined under the BDCA, is not an activity regulated under the DABA, if a person is seeking to carry on activities that requires a licence under the BDCA and intends to use blockchain or digital asset technology in the provision of products and services, then the DABA “sandbox” regime would apply to those specific products and services.

Also, more specifically, the BMA will consider applying a “sandbox” approach to new potential banking licensees that request such consideration during the application process. This would provide a six to twelve-month start-up period to become fully compliant with all regulatory requirements. However, during that period, the entity may be under enhanced supervision and may have high-risk aspects of their business plan restricted until full compliance is met. Once full compliance is met, a licence will be issued and the entity will be allowed to engage in its full business plan.

Accordingly, persons seeking to use innovative solutions for the provision of banking services would need to consider both the BDCA and the various sandbox and innovation hub regimes available in Bermuda that are intended to promote innovation across the financial sectors in Bermuda.

Are there specific restrictions with respect to the issuance or custody of cryptocurrencies, such as a regulatory or voluntary moratorium?

The issuance in or from within Bermuda of cryptocurrency (or 'digital assets' as defined under the Digital Asset Business Act 2018 (DABA)) is a regulated business activity requiring regulatory permission under the Digital Asset Issuance Act 2020 (DAIA). Similarly, custody of digital assets by a Bermuda registered company in or from within Bermuda is a regulated business activity requiring a licence under DABA.

Do crypto assets qualify as deposits and, if so, are they covered by deposit insurance and/or segregation of funds?

The DABA regulatory regime recognises and regulates the receipt and handling of digital assets by persons in Bermuda for and on behalf of third-parties and requires the segregation of client deposits of digital assets. Further, digital assets held by a licensed digital asset business (a DAB) that are (a) held for the third-party client entitled to the digital assets; (b) not property or digital assets of the DAB; and (c) not subject to the claims of creditors of the DAB, are subject to a requirement to maintain a surety bond or trust account, or indemnity insurance for the benefit of its client in such form and amount as is acceptable to the BMA for the protection of its client or such other arrangement as the BMA may approve. Further, a DAB that has custody of one or more digital assets for one or more clients must maintain in its custody a sufficient amount of each type of digital asset in order to meet its obligations to clients.

What is the general application process for bank licenses and what is the average timing?

The application process under the BDCA consists of three stages: (i) pre-application and early analysis, (ii) formal application and (iii) licensing and supervision. The initial stage of the process includes an information gathering stage, pre-application business plan, and feedback from the BMA. Following the initial stage of information sharing with the BMA, the formal application will need to be made and accompanied by a business plan.

Schedule 1 of the BDCA sets out the minimum licensing criteria that the BMA applies to all licensees and prospective applicants. In considering an application for a licence, the BMA will look for an applicant's ability to satisfactorily meet the minimum licensing criteria at the time the licence is granted and on a continuous basis. The BDCA imposes no limit within which the BMA must issue a decision in respect of an application. However, the BMA will aim to complete an assessment of all applications within three months of receipt of the application, but that time period may vary if the application is incomplete and/or the BMA requires clarification of any matter.

Is mere cross-border activity permissible? If yes, what are the requirements?

For deposit taking business which is not conducted in or from Bermuda but is being offered from a place outside of Bermuda (i.e. on a pure cross-border basis) there is no licensing requirement under the BDCA.

Institutions regulated under the BDCA will be required to address cross-border correspondent banking relationships and methods for clearing and settling local payments.

What legal entities can operate as banks? What legal forms are generally used to operate as banks?

The BDCA stipulates that only companies incorporated in Bermuda may carry on deposit-taking business in Bermuda.

There are 4 Bermuda banks.

Bermuda banks are generally incorporated as local companies limited by shares. A Bermuda "local company" is a company where:

- at least 60% of the total voting rights in the company are exercisable by Bermudians;
- at least 60% of the directors of the company are Bermudians; and
- at least 60% of the securities of the company are beneficially owned by Bermudians.

However, a local company may apply to the Minister of Finance for a licence to conduct business in Bermuda without having to comply with the above requirements in accordance with Section 114B of the Companies Act 1981.

What are the organizational requirements for banks, including with respect to corporate governance?

Under the BDCA, it is a licensing requirement that a bank must implement corporate governance policies and processes. The BMA has issued a Corporate Governance Policy (December 2012) (**CGP**) and will take compliance with such policy into consideration when assessing whether a bank meets this requirement. The CGP can be found on the BMA's website and includes policy and guidance on:

- Board practices
- Senior management
- Risk management and internal controls
- Compensation
- Disclosure and transparency

As noted above, all banks in Bermuda must be companies incorporated under the laws of Bermuda. A licensed bank may opt to utilise a private act passed by the government of Bermuda for the purposes of having bespoke corporate governance. In any event, a licensed bank will need to keep the BMA apprised of any updates relating to the following (among others):

- the organizational ownership and management structure;
- the incorporation documents (such as the memorandum of association and bye-laws of the company);
- the identity of an indirect or direct legal and beneficial owners of the company;
- the identity of any persons intending to become a director or senior executive of the company (including any individual having a significant influence over the institution in a different capacity); and
- the internal governance policies and procedures.

The BDCA also requires that the banking institution be effectively directed by two independent individuals and each individual must actively participate in major decisions.

Do any restrictions on remuneration policies apply?

In addition to the common law principles regarding remuneration of directors and officers of a company, the BMA's CGP dictates that remuneration policies and practices of the bank should be consistent with the bank's corporate culture, long-term objectives, strategy and control environment.

Has your jurisdiction implemented the Basel III framework with respect to regulatory capital? Are there any major deviations, e.g., with respect to certain categories of banks?

Bermuda has implemented the Basel III framework with respect to regulatory capital through the issuance of the *Basel III for Bermuda Banks – Final Rule*, which came into effect on 1 January 2015, and was further updated in November 2017. The BMA set out a range of new capital and liquidity standards as prescribed by the Basel Committee on Banking Supervision, as well as the three pillars proposed by Basel III: (i) Pillar I – Minimum Capital Requirements, (ii) Pillar II – Supervisory Review Process, and (iii) Pillar III – Market Discipline. The BMA has asserted that protecting the interests of a diverse base of depositors, preserving the stability of the Bermuda financial system, and enhancing the reputation of the Bermuda banking market and its participants, with minimal deviation from the core Basel framework, is of the utmost importance to the BMA and industry players.

Are there any requirements with respect to the leverage ratio?

The inception of the Basel III framework in Bermuda includes 5% leverage ratio calculated as the ratio of T1 Capital (including AT1) to Total Exposure in accordance with the Basel III rule 4.

What liquidity requirements apply? Has your jurisdiction implemented the Basel III liquidity requirements, including regarding LCR and NSFR?

In the *Basel III for Bermuda Banks – Final Rule* issued by the BMA, the BMA has adopted the liquidity coverage ratio (**LCR**) implementation timetable consistent with that published by the Basel Committee with a minimum requirement of 60% rising in equal annual steps to reach 100% on 1st January 2019 (which is now in force).

The BMA has also implemented the Basel III requirements with respect to the Net Stable Funding Ratio (**NSFR**) of Bermuda banks. The NSFR is the amount of available stable funding relative to the amount of required stable funding. The minimum ratio has been set by the BMA at equal to or greater than 100%, which means that on an ongoing basis a bank must retain stable funding sources at least equal to that of its assets which require funding. While the NSFR minimum is 100%, the BMA expects Bermuda banks to establish an internal buffer over and above this minimum requirement and be able to demonstrate why the quantum of this buffer is appropriate for such institution.

Do banks have to publish their financial statements? Is there interim reporting and, if so, in which intervals?

Bermuda banks must publish certain financial statements on a semi-annual basis.

Does consolidated supervision of a bank exist in your jurisdiction? If so, what are the consequences?

In May 2007, the BMA issued its *Approach to Consolidated Supervision*, which confirms that the BMA approaches consolidated supervisions as a complement to, not a substitute for, solo supervision. The BMA supervises Bermuda banks both on an unconsolidated and consolidated basis, and therefore receives information on the capital adequacy of, and sets individual capital guidance for, both the solo bank and the group as a whole. The BMA has clarified that the purpose of consolidated supervision is not to supervise all the companies within a group, but rather to ensure that the licensed entity is supervised as a part of its group.

What reporting and/or approval requirements apply to the acquisition of shareholdings in, or control of, banks?

A person who becomes a shareholder of a Bermuda bank by holding 5% or more of the shares in the institution or another company of which it is a subsidiary company; or is entitled to exercise, or control the exercise of, 5% or more of the voting power at any general meeting of the institution or of another company of which it is such a subsidiary is required to notify the BMA in writing within 7 days.

No person shall become a 10%+, 20%+, 30%+, 40%+, 50%+, 60%+ or 75%+ shareholder of a Bermuda bank unless such person has provided prior written notice to the BMA indicating their intention to do so. The BMA then has three months to provide its objection or consent to the proposed change of control. If the BMA has not responded within three months of receipt of such notice, it will be deemed consent under the BDCA. Where additional information is required by the BMA in relation to the proposed change of control, the time period between the BMA's request for information and the delivery of the requested information shall be added to the three-month notice period.

Bermuda also has general exchange control policies requiring notification to or consent of the Bermuda government for acquisition of certain shareholding in Bermuda companies, including Bermuda banks.

Does your regulatory regime impose conditions for eligible owners of banks (e.g., with respect to major participations)?

In assessing a proposed change of control the BMA must satisfy itself that:

- the person concerned is a fit and proper person to become a shareholder of the description in question of the institution;
- the interests of depositors and potential depositors of the institution would not be in any other manner threatened by that person becoming a shareholder of that description of the institution; and
- without prejudice to paragraphs (a) and (b), that, having regard to that person's likely influence on the institution as a shareholder of the description in question, the criteria in the Second Schedule of the BDCA would continue to be fulfilled in the case of the institution or, if any of those criteria is not fulfilled, that the person is likely to undertake adequate remedial action.

Are there specific restrictions on foreign shareholdings in banks?

The BDCA does not contain any specific restrictions on foreign shareholders in Bermuda banks. However, Bermuda banks must comply with the ownership requirements as set out above.

Is there a special regime for domestic and/or globally systemically important banks?

The BMA assesses the extent to which Bermuda's banks (collectively and individually) pose a degree of material systemic risk to the economy of Bermuda due to their roles in deposit-taking, corporate lending, payment systems and other core economic functions. This assessment is based on a range of metrics relating to the size, interconnectedness, substitutability and complexity of each bank. The BMA applies a capital surcharge buffer, specified as a stated percentage of risk weighted assets (**RWA**) and composed of common equity Tier 1 capital (**CET1**) for Bermuda banks designated to be a Domestic-Systemically Important Bank (**D-SIB**) on the basis of the assessment. The size of this buffer will vary between 0.5% and 3%, depending on the extent of systemic risk posed by each D-SIB. Each D-SIB is advised of its specific buffer directly by the BMA.

There is no special regime for globally systemically important banks under the Bermuda regulatory regime.

What are the sanctions the regulator(s) can order in the case of a violation of banking regulations?

Under the BDCA, in exercising its powers the BMA can impose a civil penalty, publicly censure, make a prohibition order against the bank and/or publish information about any matter to which a decision notice relates.

What is the resolution regime for banks?

In early 2016, Bermuda Parliament passed the Banking (Special Resolution Regime) Act 2016, however, only Section 10 came into force on 16 December 2016. The resolution regime for Bermuda banks reflects the fact that Bermuda does not have a lender of last resort, nor does it yet have a deposit insurance scheme. Therefore, the financial safety net relies almost exclusively on the prudential regulation and supervision of the BMA through the Banking (Special Resolutions Regime) Act 2016.

How are client's assets and cash deposits protected?

As the Bermuda banking regulatory regime does not yet have a deposit insurance scheme, one must look to the statutory obligations of Bermuda banks for the various measures in place designed to protect depositors' assets.

For instance, under the BDCA, the BMA may restrict a licence by imposing such conditions as it thinks desirable for the protection of the bank's depositors or potential depositors, and for safeguarding its assets, including (without limitation) imposing limitations on the acceptance of deposits or prohibiting the bank from soliciting deposits.

Additionally, the BDCA requires Bermuda banks to maintain adequate liquidity, having regard to the relationship between its liquid assets and its actual and contingent liabilities, to the times at which those liabilities will or may fall due and its assets mature.

Does your jurisdiction know a bail-in tool in bank resolution and which liabilities are covered?

As of now, Bermuda has not implemented a bail-in tool in its banking resolution regime.

Is there a requirement for banks to hold gone concern capital (“TLAC”)?

The BMA adopts CET1 as the primary and predominant form of regulatory capital and this standard is deemed the primary capital adequacy measure for Bermuda banks. CET1 is intended to absorb losses on a “going concern” basis with a bank continuing in operation. Additional Tier 1 capital is also allowed in the capital framework, subject to the inclusion criteria contained in the June 2011 Basel III framework document. Tier 2 capital provides an additional measure of regulatory capital, on a “gone concern” basis of impending insolvency and potential liquidation.

The BMA adopts the Basel III regulatory minimum capital levels as follows: a) CET1 must be at least 4.5% of RWA at all times; b) Tier 1 capital must be at least 6.0% of RWA at all times; and c) Total capital (T1 + T2 capital) must be at least 8.0% of RWA at all times.

In your view, what are the recent trends in bank regulation in your jurisdiction?

The inception of the digital asset business regulatory regime in Bermuda in 2018 has drawn a significant number of Fintech organisations to Bermuda as an attractive option to establish roots in a well-respected regulated jurisdiction. With this influx of innovators now actively engaged in the Bermuda market, other industries, such as insurance and banking, are quickly adapting to facilitate an innovative and regulatory space for such entities to thrive.

The GRS sets out the manner by which the BMA intends to administer an innovative sandbox regime across various regulatory industries in Bermuda. The primary purpose of the GRS is to create a safe and transparent environment for companies to test their innovations and/or clarify regulatory requirements before seeking licensing, authorization or registration. The BMA is currently conducting industry consultation prior to implementing the new regulatory regime. We hope that this will contribute to the upward trend of welcoming innovative financial service businesses to Bermuda.

The formation of the Fintech regulatory regime in Bermuda has also contributed to the increased desire for information security, especially as it relates to managing cyber risk. In October 2021, the BMA issued its consultation paper with respect to a proposed *Cyber Risk Management Code of Conduct (CRM Code)* for banks, corporate service providers, trust businesses, money service businesses, investment businesses and fund administration businesses. The CRM Code aims to mitigate the potential for financial, reputational and operational costs to financial services firms and to Bermuda as a jurisdiction. The public consultation is now closed and we anticipate further information about the CRM Code is forthcoming this year.

What do you believe to be the biggest threat to the success of the financial sector in your jurisdiction?

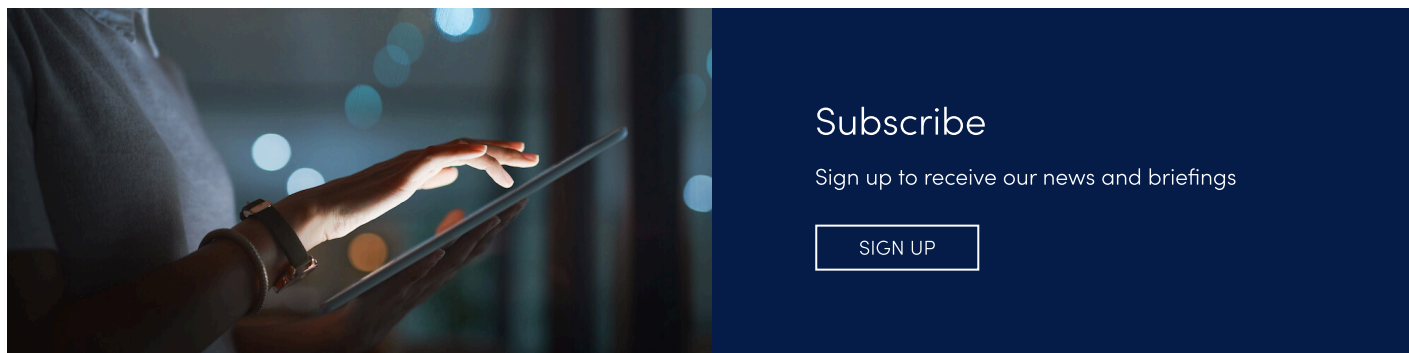
The financial sector will need to meet the recent and developing challenges created by innovative digitalization and data processing technology affecting the sector.

In addition, the financial sector has to deal with new challenges due to the COVID-19 pandemic including its effect on tourism and knock-on effect on the financial sector.

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