Bermuda Form Policies – A Guide

Keys to securing and preserving coverage under Bermuda Forms and other insurance policies with mandatory arbitration clauses

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Introduction and scope of this paper

Since 1986, companies headquartered in Bermuda and other “offshore” markets have sold catastrophic excess liability insurance coverage on bespoke forms drafted specifically for these markets. These policies have extremely large policy limits, such as $25 million, $50 million or $100 million, and are sold with proportionally large retentions. These “Bermuda Forms,” which have undergone several revisions since their creation yet retain the same core concepts, differ dramatically from liability policies sold in the United States, the United Kingdom and elsewhere, with different triggers of coverage, notice provisions, conditions and exclusions.

Specifically, Bermuda Form policies all contain unique dispute resolution procedures that require the arbitration of coverage disputes in London (under the English Arbitration Act 1996 and, going forward, the Arbitration Act 2025 – hereinafter referred to as the “English Arbitration Act”[1]) or Bermuda, and the application of New York substantive law (with certain exceptions). Arbitration of Bermuda Form insurance disputes is a highly developed practice, with unique issues and a small roster of specialists among arbitrators and counsel. Along with arbitrations of other types of insurance coverage disputes, Bermuda Form insurance coverage arbitrations have made London an international center of insurance arbitration.

Further, over the past nearly three decades, insurance companies selling Bermuda Form liability insurance have proved immensely profitable, and they have expanded their portfolios to include all manner of coverages, including directors’ and officers’ liability, first-party property, etc. Many of these policies also include clauses requiring London arbitration.

The goal of this White Paper is to explore the nature of disputes under these forms and provide policyholders with the best opportunity to protect and secure their rights. Below, we set out some of the challenges of securing coverage under a Bermuda Form requiring arbitration of any claim disputes and explain key aspects of this type of arbitration. Many of the substantive issues are unique to liability forms, although most of what is discussed applies to any policy requiring London arbitration.

1 NB: Existing section references for the English Arbitration Act 1996 are maintained pending the new (amending) provisions coming into force.

Overview of the Bermuda Form

The Bermuda Form arose as a result of the collapse of the liability insurance market in the United States in the 1980s. At that time, large U.S. companies were facing increased liabilities from a host of mass torts, principally asbestos-related liabilities, and new legislation imposing strict liability for environmental damage. Policyholders suffering these liabilities attempted to claim against their historic liability insurance policies, and most courts correctly held insurers liable for indemnification and defense costs over the full course of developing injury, from initial exposure to, primarily, asbestos or pollutants, through the manifestation of personal injury (and/or death) or property damage. As a result, insurers that had sold occurrence-based liability insurance policies – triggered by injury during the policy period – had to indemnify policyholders for large liabilities incurred over a number of years and often decades. Paying these large indemnities led to huge losses, resulting in insurer insolvencies or surviving companies refusing to sell liability coverage to some of the world's largest corporations. As a consequence, capacity in the liability insurance market for many large corporations virtually disappeared in the mid-1980s.

To address this gap in capacity, a number of Fortune 50 companies provided the capital to fund and create what were originally two mutual insurance companies, XL and ACE, to sell excess liability insurance on a new policy form, the Bermuda Form. This policy form introduced unique features designed to prevent a repeat of the 1980s insurance crisis, while at the same time providing policyholders with the coverage they needed. The following features make the Bermuda Form distinctive:

Trigger of coverage. Liability policies are usually written either on an "occurrence" or "claims-made" basis. Occurrence policies provide coverage for loss resulting from injuries occurring during the policy period (e.g., a lung injury from asbestos or property damage from contaminants). Claims-made policies provide coverage for loss resulting from claims arising during the policy period (e.g., a lawsuit in 2020 arising from bodily injury or property damage in 2015). The Bermuda Form is a hybrid of these two types of policies. It provides coverage for injury taking place after a specified Retroactive Date (sometimes the Inception Date of the policy) and reported to the insurer within an Annual Period of the policy or an extended reporting period after that Annual Period. (Typically, a Bermuda Form policy is renewed from Annual Period to Annual Period.) In this way, an Occurrence (including, as explained below, an Integrated Occurrence) triggers only one Annual Period. This benefits the selling carriers, as one Occurrence cannot expose them to losses in multiple Annual Periods, and benefits the purchasing policyholders, as compiling all injuries from one Occurrence into one Annual Period allows them to exhaust a single large retention and access an entire annual excess tower of coverage.

Aggregation of injury. The Bermuda Form permits policyholders to "batch" or "integrate" injuries that are attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn, with such injuries being treated as included within one Occurrence. Because Bermuda Form policies are typically purchased in programs with large retentions, this feature allows policyholders to trigger coverage for injuries that, on their own, would be within the retention. Consider, for example, a single-plaintiff medical device lawsuit. While the value of such a claim would be unlikely to exceed a multi-million dollar retention on its own, it could trigger coverage when aggregated with thousands of other claims made in response to similar adverse reactions arising from the same device.

The "maintenance deductible" exception to an expected/intended defense. The Bermuda Form, like most excess liability insurance policies, excludes coverage for injuries that are "expected or intended." Such exclusions can be problematic for policyholders in certain industries, such as the pharmaceutical industry, where it is accepted that a drug or device may annually injure, or be alleged to injure, a small number of people. Because the Bermuda Form, unlike typical liability policies, was designed for policyholders in these industries, it contains an exception for nominal "expectation" or "intent" of injury, which allows coverage for injuries from products that are "fundamentally different in nature" or "vastly greater in order of magnitude" than previously experienced losses. Without this exception, insurers could argue that a drug manufacturer would have no coverage for a large spike in lawsuits alleging adverse effects from its product because it had received claims in previous Annual Periods and thus should have expected that the drug could harm a small number of people.

Structural issues

A typical Bermuda Form program consists of three to 10 Bermuda Form policies, providing $100 million to $1 billion in coverage above a large retention of at least $25 million. There are a number of structural issues to consider when creating a Bermuda Form program.

The Retroactive Date (or Inception Date)

Under the Bermuda Form, there is no coverage for injuries taking place prior to the Retroactive Date. The original Bermuda Forms had a Retroactive Date of 1986 (when Bermuda Forms were first introduced), to protect carriers from the sort of claims that led to the liability insurance crisis. Universally, Bermuda Form carriers continue to include Retroactive Dates, typically coinciding with the year in which a particular policyholder first purchased coverage from a particular Bermuda Form carrier. This date will continue from Annual Period to Annual Period as long as the policyholder continues to renew the policy at the same retention and limit. However, if the policyholder declines to renew and later purchases Bermuda Form coverage again from the same carrier, the new policy will have a new Retroactive Date. This puts a premium on maintaining older Retroactive Dates by continuously renewing Bermuda Form policies from Annual Period to Annual Period. Awareness of the risk of an interruption in continuity in Retroactive Dates in a liability tower is critical, as it can lead to a significant gap in available coverage within that tower.

Underlying coverage

Frequently, policyholders purchase insurance, or reinsurance for their captive, to cover liabilities in the retention of their Bermuda Form tower. In arranging such coverage, policyholders must take care to avoid prejudicing what often is the more important element: the Bermuda Form coverage. There are three primary issues to consider.

First, policyholders should ensure that they do not purchase coverage in the retention covering defense costs outside of limits. Typically, in mass tort litigation in the United States, policyholders incur tens of millions of dollars (or more) in defense costs prior to incurring any liability costs via settlement or judgment. Bermuda Form carriers will argue that they have no obligation whatsoever until the retention is eroded by payment of indemnity, and further that the policyholder may not thereafter claim pre-erosion defense costs as part of the Ultimate Net Loss owed under Bermuda Forms.

Second, a run of tort claims may trigger multiple policy periods for occurrence or claims-made liability forms in the retention of a Bermuda Form program. Bermuda Form policies are excess not only of their retention – being the larger of the dollar retention or the limits of the underlying coverage – but also of Other Insurance. If underlying injuries or claims span many policy periods, and the underlying occurrence or claims-made liability forms do not have some sort of batching mechanism, the Bermuda Form carriers will argue that their policies are excess of not only their retention, but also of each triggered occurrence or claims-made policy purchased in the retention. Most claims-made policies offer endorsements that deem such claims to have been made during one policy period, but few occurrence forms have such provisions.

Third, as noted above, in volatile Bermuda Form programs, where new participants come in each year, there are issues surrounding new Retroactive Dates for the new participants. Further, to the extent renewals run up against the expiration date of the Annual Period, we have seen such new participants leverage their bargaining power to secure an endorsement giving them the best available terms in the entire program. Given that other policies in the program may be very old – and have as many as 100 endorsements – such clauses can effect a significant narrowing of coverage.

Issues around preserving and perfecting coverage

Notice of Occurrence

Bermuda Forms devolve certain discretion to the policyholder as to when to give Notice of Occurrence. A policyholder is obligated to give notice of "an Occurrence likely to involve" a Bermuda Form policy "as soon as practicable." As a practical matter, Bermuda Form carriers are typically kept updated from Annual Period to Annual Period about claims that may evolve into claims for coverage through submission of a claim bordereau near the Annual Period's expiration. A policyholder may be forced to give Notice of Occurrence at the end of an Annual Period because the carrier has informed the policyholder that the exposure at issue will be excluded going forward.

There are only a couple of issues to consider with regard to Notices of Occurrence. First, Bermuda Form policies specifically state that giving notice of an Occurrence to the underwriter is not giving Notice of Occurrence, which must be sent to the claims department and comply with certain particulars.

Second, although New York law was historically bad for policyholders in relation to "late" notice issues, a late notice defense is run infrequently in arbitrations, and almost always fails given the high retentions of most Bermuda Form programs and the fact, noted above, that the Bermuda Form devolves discretion to the policyholder. Indeed, when the Bermuda Forms were first sold, XL and ACE published "Notice Guidelines," which urged policyholders to exercise discretion so as not to deluge them with Notices of Occurrence. While these guidelines are extrinsic – and, thus, cannot technically be used to construe the Bermuda Form policy, as discussed below – the small college of arbitrators who hear disputes under Bermuda Form policies well know about them. As a result, only egregiously late notice, or notice that hints at gamesmanship, should prove a bar to coverage.

Batching (subsequently integration)

As noted above, if a policyholder gives Notice of Integrated Occurrence, all injuries of the same type are aggregated, and the coverage that applies is the coverage in the Annual Period in which Notice of Integrated Occurrence was given. If the policyholder gave Notice of Occurrence in an earlier Annual Period in respect of an Occurrence involving injury of the type within the Notice of Integrated Occurrence, that Occurrence is pulled forward. Notice of Integrated Occurrence does not happen by accident or automatically; the policy requires that the notice be specifically identified as a Notice of Integrated Occurrence, and insurers are strict about requiring compliance with that designation in the notice.

While "batching" can benefit policyholders (by allowing them to pierce the retention by aggregating small claims), care should be taken when providing Notice of Integrated Occurrence. For instance, if Drug X is alleged to cause heart failure, giving Notice of Integrated Occurrence described as "injuries from Drug X" may prevent, years later, a subsequent Notice of Integrated Occurrence if Drug X is alleged to cause strokes. On the other hand, defining the Integrated Occurrence too narrowly can result in the exclusion of injuries from the Integrated Occurrence. This can subject policyholders to separate, expensive retentions for what are essentially the same types of injuries. Consultation with knowledgeable brokers and/or coverage counsel in how to frame Notice of Integrated Occurrence is often money well spent to avoid any future issues.

Questions can arise around the timing of the constituent injuries in the Integrated Occurrence. For instance, if one such injury occurs prior to the Retroactive Date, does that invalidate the entire Integrated Occurrence? The answer is no; that injury is simply not within the Integrated Occurrence (although it may form part of the Maintenance Deductible). Second, what about injuries from products sold after Notice of Integrated Occurrence; i.e., can such injuries be said to be expected or intended? The language of the Bermuda Form policies historically aggregated "all" injuries within an Integrated Occurrence definition. As noted below, however, modern Bermuda Forms contain new exclusions, including a Commercial Risk Exclusion barring, as expected or intended, "actual or alleged **Personal Injury** or **Property Damage** similar to, and not vastly greater in order of magnitude than, that included in such **Integrated Occurrence** arising out of sales, if any, of such products by the **Insured** after the date of **Notice of Integrated Occurrence**" (terms in bold are defined terms).

Assistance, cooperation and loss payable conditions

Bermuda Form policies give the selling carriers the right to associate in the defense and control of claims. Generally, Bermuda Form carriers do not exercise these rights as their claim staffs are small, and they do not want to expose themselves to the jurisdiction of U.S. courts. In any event, under New York law, a reservation of rights indicates a divergence of interest between the carrier and the policyholder, meaning that the policyholder need not (and should not) share privileged or work-product material generated in the defense of a claim. Everything that "crosses the line" between the policyholder and the underlying claimants should be made available to the Bermuda Form carriers, and frequently defense counsel can provide updates by conference call to discuss non-privileged matters.

The policyholder should provide advance notice of settlements within the retention (or underlying layers) of the Bermuda Form program. It is often tricky, given the defenses that may be lodged by Bermuda Form carriers and differences in coverage between various policies, to know with specificity when a settlement will pierce the level of a particular Bermuda Form carrier, but it is our experience that, with sufficient notice, they will either consent to a particular settlement while reserving the right to object to it as unreasonable, not covered, etc., or agree not to challenge the settlement on lack of consent grounds. An extensive written record of correspondence between the policyholder and the Bermuda Form carriers demonstrating efforts to inform the carrier of the settlement process is a plus in any arbitration.

Expectation or intent

New York law on "expectation" or "intent" is fairly pro-policyholder. As a general matter, to avoid coverage, the carrier must show that the policyholder subjectively expected or intended the actual injury for which the claimant seeks relief. Given this high bar, it is our experience that the defense is universally pleaded, but mostly for the purposes of opening up the scope of disclosure; it is not a defense upon which carriers can reasonably expect an award. There are a couple of issues to consider, however.

First, note that while most domestic liability policies bar coverage for injury expected or intended by "the insured," Bermuda Forms bar coverage for injury expected or intended by "an insured." For example, if an injury is caused by a rogue employee – an insured – the Bermuda Form carrier may argue that the injury was expected by that employee, thus barring coverage for the employer. Under New York law, however, employees acting in a way in which they could be found to have expected or intended injury are considered to be acting outside the scope of their employment and should be found not to be acting as employees (and thus as insureds).

Second, for products, an issue may arise as to when the determination of expectation or intent is to be made. Policyholders argue it is at the time that the policy is purchased. The carriers say it is a rolling inquiry, and that expectation and intent for each injury must be evaluated, for instance, at the time the product causing that injury is sold.

Third, for both the maintenance deductible and the exception to the Commercial Risk Exclusion, there may be an issue as to what is "fundamentally different in nature or at a level or rate vastly greater in order of magnitude." Again, the maintenance deductible reflects the realization that policyholders frequently experience a certain "noise" level of claims from their products and that the existence of such claims should not render a subsequent material "spike" of claimed injuries "expected or intended." The provision preserves coverage for injuries of a different order of magnitude even if the policyholder had experienced prior minimal injuries. The Commercial Risk exclusion bars coverage for injuries from products released into the stream of commerce after a Notice of Integrated Occurrence unless the injuries are of a different nature or greater magnitude. Note that Bermuda Form carriers typically take the position that an order of magnitude is mathematical and means at least a tenfold increase.

Exclusions

As a general matter, the exclusions in Bermuda Form policies mirror those in other liability policies. There are three notable exceptions.

First, the standard Pollution Exclusion excepts Product Pollution Liability, which is defined to mean liability for injury arising out of the "end-use" of the policyholder's products, if it occurs (1) after the policyholder releases them into the market and (2) away from the policyholder's premises. Many other Pollution Exclusions are further endorsed to except liability for injury from a release starting at a known time and discovered and reported within a defined period.

Second, there is a Securities, Antitrust, Etc. Exclusion, which appears to be narrowly confined to financial irregularities but includes the unbound and undefined term "fraud." Bermuda Form carriers treat this as a very broad exclusion indeed, barring coverage whenever underlying claimants allege any type of deceptive behavior in their complaint.

Third, there is an evolving, "kitchen-sink" Toxic Substances Exclusion to which substances at the heart of new mass torts are routinely added.

Allocation of covered/excluded claims

One issue that arises in most Bermuda Form arbitrations is allocation of a settlement between covered and excluded liabilities, and how such allocation is established. Intertwined with this issue is the question of privilege – specifically, whether a policyholder must waive privilege to establish the quantum of coverage to which it is entitled. The problem arises where the policyholder settles a series of underlying claims that allege, for instance, both negligence and fraud. The Bermuda Form carrier will likely argue that the fraud claims motivated settlement, as they would prove more expensive if taken to verdict, and therefore that the ultimate amount paid in settlement must be allocated largely, or even wholly, to fraud (and thus excluded by the "fraud" exclusion noted above). The policyholder will argue that the fraud claims were a throw-in, with no merit, and that the settlement was based wholly on the negligence claims.

The law on this is straightforward, if thin. Under New York law, either a reasonable settlement of an asserted liability or the judgment of a court will establish liability for the purposes of the insurance policy.[2] A reasonable, good faith settlement creates a presumption in favor of the insured that the settlement is covered in full by the insurance policy.[3] "[The insurance company] must accordingly bear the ultimate burden of proving what amount of the settlement cost should be excluded from the policy coverage."[4] The insurance company bears the burden of proof to show a "factual basis" for allocation as between covered and excluded costs.[5] Generally, absent a waiver of privilege, the insurance company must do this through documents that "crossed the line" between the policyholder and the underlying claimant. In other words, where a settlement disposes of claims that would be covered, and claims that would be excluded, a reasonable settlement leads to a presumption that the entire settlement is covered. Thereafter, however, the insurance company can attempt to bear its burden to establish a factual basis for proving that a sum certain must be attributed to uncovered claims. (Note that a different rule controls defense costs: They are covered as long as they are "reasonably related" to the defense of covered claims.) In essence, the insurance company steps into the shoes of the underlying plaintiffs' counsel and seeks to prove the worst case that the underlying plaintiffs asserted against the policyholder.

These issues typically play out as follows. First, the insurance company, at the beginning of the arbitration, will seek disclosure of all attorney-client and work-product material on the ground that the policyholder and the insurance company share a common interest, that the policyholder has put such material "in issue," or that the Assistance and Cooperation Condition amounts to a contractual waiver of privilege. These fights were waged in domestic insurance coverage cases in the 1980s and early 1990s, and, as in those cases, policyholders in London arbitrations generally prevail in preserving privilege. Accordingly, disclosure of any privileged documents is by waiver alone.

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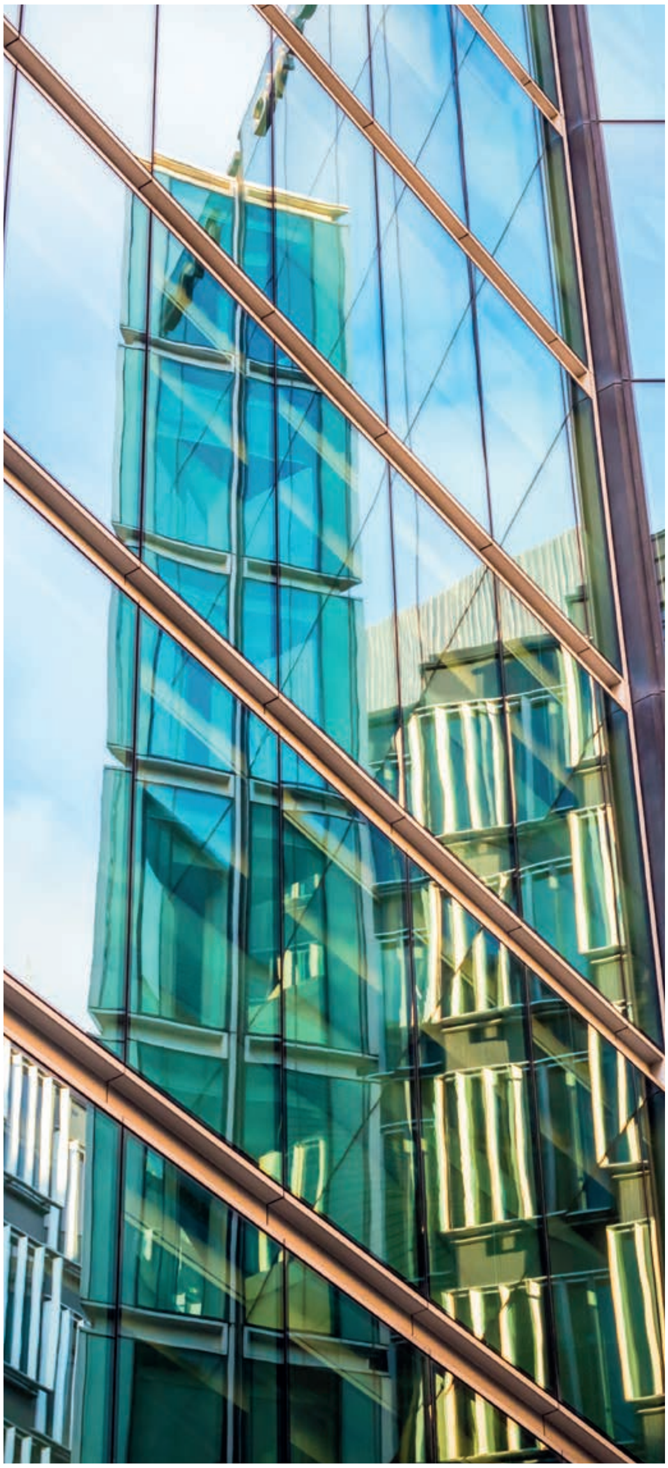
2 See *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F. 2d 1082, 1091 (2d Cir. 1986) (applying New York law).

3 *Pepsico, Inc. v. Continental Cas. Co.*, 640 F. Supp. 656, 662 (S.D.N.Y. 1986), *disagreed with on other grounds by Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 92 (2d Cir. 1996) (applying New York law).

4 *Id.*; see also *Pfizer, Inc. v. Stryker Corp.*, 385 F. Supp. 2d 380, 387 (S.D.N.Y. 2005) (applying New York law); *High Point Design, LLC v. LM Ins. Corp.*, No. 14-cv-7878, 2016 WL 426594, at *4 (S.D.N.Y. Feb. 3, 2016) (applying New York law), *aff'd in part, remanded in part on other ground, 911 F.3d 89 (2d Cir. 2018); St. Paul Fire & Marine Ins. Co. v. Scopia Windmill Fund, LP,* No. 14-cv-8002, 2015 WL 5440694, at *13 (S.D.N.Y. Sept. 9, 2015) (applying New York law).

5 *Pfizer,* 385 F. Supp. 2d at 386-87.

Second, the insurance company will muster evidence – perhaps from counsel for the underlying plaintiffs – that the primary concern motivating settlement related to uncovered claims. In doing so, the insurance company will observe that the policyholder has insulated the issue from the tribunal by claiming privilege over attorney-client and work-product material. The policyholder then has a choice: (1) waive privilege over the select attorney-client communications and work-product evaluating the comparative merits of the covered and uncovered claims; or (2) attempt to establish, through the testimony of the participants, that the settlement was concluded on the basis of negligence. The latter is somewhat tricky given that such testimony cannot delve into privileged grounds but rather must be limited to what "crossed the line" with the underlying plaintiffs.



Arbitration

Law of construction

The Bermuda Form applies a modified version of New York law as the substantive law governing the interpretation of the policy. However, because the policies typically elect London (rather than Bermuda) as the seat of arbitration, English procedural law applies. The Bermuda Form's dual-law approach reflects the competing interests of policyholders and insurers, but the form itself, along with the development of Bermuda Form arbitration in practice, attempt to balance those interests.

The Bermuda Form makes key modifications to New York law:

Elimination of the contra proferentem rule. *Contra proferentem* is an accepted tenet of New York insurance law. It requires ambiguous language to be interpreted against the drafter. The elimination of the *contra proferentem* rule can have a major impact on the outcome of a coverage dispute. For example, many New York court decisions on substantive coverage issues reference the *contra proferentem* rule as a back-stop, which benefits policyholders by redressing the unequal bargaining power of parties to insurance policies. However, in a Bermuda Form arbitration, insurance companies can argue that any New York case applying that doctrine must be disregarded. This argument seeks to eliminate an important tool that a policyholder litigating a coverage dispute in a New York court would normally have at its disposal.

Prohibition against extrinsic evidence. Similarly, contracting parties are precluded from introducing extrinsic evidence of their intent in order to resolve ambiguities in the policy. Instead, a typical Bermuda Form arbitral tribunal possesses extensive legal insurance expertise, more often than not from leading barristers or lawyers and former judges who are very accustomed to and experienced in analyzing the proper meaning of the Bermuda Form in the context of a given factual scenario.

Insurability of punitive damages. Bermuda Form policies dispense with New York's public policy rule, which prohibits obtaining insurance for punitive damages. This is an aspect of the Bermuda Form that benefits policyholders, permitting them to be indemnified against awards of punitive damages.

Litigating and settling your case to preserve Bermuda coverage

Separate arbitrations

Many large policyholders purchase Bermuda Form liability policies from multiple insurance companies. Where a catastrophe triggers multiple Bermuda Forms, each form will typically be the subject of a **separate** arbitration. There is no general power in an English court or of the arbitrators to consolidate separate arbitrations, meaning that the parties must agree to consolidation. Each set of proceedings is confidential, and the insured may need to pursue a series of separate arbitrations, which not only drives up costs, but also creates the possibility of inconsistent findings/conclusions.

Characteristics of the tribunal

Because Bermuda Form policies blend English and New York law but are arbitrated under English procedural law, insurance companies most frequently appoint English barristers or retired English Commercial Court (or appeal court) judges as their party-appointed arbitrators. Policyholders are more varied in their approach and typically appoint either (1) former U.S. judges who can authoritatively opine on New York law, (2) English barristers with policyholder coverage experience, or (3) U.S. litigators experienced in insurance arbitration. Note that unlike in arbitrations involving liability insurance policies – where former U.S. judges can explain, authoritatively, the whims of U.S. juries, a topic foreign to English lawyers – there is no particular advantage in a first-party case in selecting a former judge.

Bermuda Form arbitration clauses generally dictate that the arbitral tribunal is to be comprised of two party-appointed arbitrators (to be selected within a designated time period) and a third arbitrator to be appointed by the two arbitrators to act as chair. It is best for the parties to agree that counsel, rather than the arbitrators, will select the chair; this permits the policyholder to gather intelligence on candidates for this position before they are appointed. Selecting the chair is the most important step in the arbitration process – this is the step upon which the case can be won or lost. Frequently, the insurance company-appointed arbitrator will be a strong personality, requiring an equally strong chair. Further, if the policyholder appoints a U.S. arbitrator, it should endeavor to ensure that the (presumably) English chair is one who is willing to consider the points of someone trained under a different system.

In general, those considered to be the best chairs enjoy a reputation for being scrupulously fair. Because the Bermuda Form community is not a large one, it is sometimes the case that a chair will have been instructed by insurance companies, or even the same insurance company, in the past. This is not necessarily disqualifying. Issues such as these must be disclosed as part of the panel selection process and updated as appropriate throughout the proceeding if new issues that might qualify as a conflict arise. The details of required disclosures have recently been spelled out by the UK Supreme Court in the *Halliburton* decision and must be followed in arbitrations under the English Arbitration Act.

Relatedly, English rules for arbitrators operate differently than those in the United States. In the UK, arbitrators are under a duty to act impartially and are obliged to disclose any potential conflicts or risk of bias. This is a mandatory requirement that applies throughout the entire proceeding. In contrast, in the United States, under many sets of arbitral rules, party-nominated arbitrators are allowed to be partisan and act in the interests of the party that has appointed them, almost as a quasi-advocate. These are very different approaches to the role of the arbitrator and must be respected, appreciated and followed in the respective forums.

Last, note that tribunal members typically have differing rates. Be sure to establish the rate of your party-appointed arbitrator at the time they are retained; failing to do so may permit the tribunal to "round up" their rates to the highest charged by any of them.

Timing

One of the purported benefits of arbitration is that it can be more efficient (in terms of both time and costs) than litigation. This is not always the case. From the date a party demands arbitration, arbitrations can take anywhere from 18 months to three years to conclude, depending on the number of issues and the level of disclosure involved. Setting a final hearing date early in the process is the best means of moving the process along as quickly as possible, which is usually in the policyholder's interest.

Much of this has to do with the schedules of those involved: It can be very difficult to align the calendars of ever-busy English solicitors and barristers and U.S. attorneys. Finding blocks of time available to all for the intermediate or main hearings frequently requires booking years in advance.

London v. Bermuda

Most Bermuda Forms require arbitration in London or Bermuda. As to the former, there are experienced coverage counsel with strong U.S./London teams, and English tribunals are experienced in encouraging the use of technology, including remote cross-examination where appropriate. By contrast, Bermuda does not possess a strong infrastructure to support arbitrations of this nature and has proven even **more** expensive and **less** convenient. It remains to be seen whether parties and tribunals involved in London arbitration will make use of virtual hearings (as occurred during the early stages of the COVID-19 pandemic).

Barristers and solicitors

It is not uncommon for parties involved in disputes originating in the United States to have three sets of counsel: (1) U.S. coverage counsel; (2) English solicitors; and (3) English barristers. U.S. coverage counsel and English solicitors typically handle disclosure, witness statements and the drafting of written pleadings and submissions. Typically, barristers are the advocates at the hearing and usually present the case, especially if the chair is an English barrister or retired judge accustomed to seeing cases put forward by barristers. Opening submissions or statements can run a day or more per side, and tribunals expect to be taken, line by line, through important cases. These elements are foreign to U.S. litigators.

Further, English counsel can assist U.S. coverage lawyers with framing their case by alerting them to major differences between U.S. and English law. Similarly, U.S. lawyers can help English solicitors understand particular issues of U.S. law that may be unfamiliar to English lawyers, requiring them to be explained in greater detail to the English members of a tribunal.

Confidentiality

As a matter of English common law, arbitrations are confidential. The duty of confidentiality is enshrined in English arbitration law and therefore precludes the development of case law ascribing meaning to key terms in the Bermuda Form, which benefits insurers more than it does policyholders (because insurers are more likely than policyholders to be frequently involved in these types of arbitrations, and therefore they have more insight into how key terms may be interpreted by arbitral tribunals). However, as the Bermuda Form “market” has become more firmly established, it has developed a core of practitioners and arbitrators with genuine experience and expertise in the policies and features of the Bermuda Form arbitration process. This greater expertise among a relatively small group of lawyers has helped redress the imbalance of insight and knowledge between insurers and policyholders that was a feature in the early years of Bermuda Form arbitration. This imbalance is further redressed because there are now two well-regarded textbooks dedicated to Bermuda Form arbitration. These textbooks are regularly cited and referred to in arbitration hearings.

Disclosure

Discovery in arbitrations differs from that in U.S. litigation. First, there are no depositions. Direct testimony, or the evidence-in-chief, is presented through witness statements, which record in writing the direct evidence of the parties’ witnesses. This procedure broadly applies to both lay and expert witnesses. A fact/lay witness will provide a written witness statement, verified by a statement of truth. An expert will provide an expert report that includes a declaration of impartiality and objectivity, and the report is usually verified by a statement of truth. Witnesses who submit witness statements (both lay and expert) are then subject to cross-examination by the other party at the hearing.

As to documentary disclosure, the rules in England and the United States are similar but not identical. For example, it was previously common for the parties under English procedure to forgo specific document requests and instead agree to disclose all documents that are relevant to the parties' claims and defenses. At times, parties will agree to this standard disclosure, followed by specific document demands. The English procedure of "standard disclosure" has changed, and, particularly in arbitration, parties are encouraged to agree issues/categories pursuant to which documents are deemed relevant or responsive. In arbitration in England, parties also often adopt Redfern/Stern Schedules (a common feature of international arbitration) to make document requests and manage the document production process. Further, privilege logs are rare. If they are ordered, documents in privilege logs are typically identified by category rather than through logs that identify every individual document that has been withheld. It may be a matter of debate as to whether privilege is a U.S. or English law matter, and it is possible that the tribunal will require the policyholder to re-review its documents deemed privileged by U.S. lawyers in the underlying case to ensure that they are indeed protected by English or Bermudian privilege.

The mechanics of arbitration

Prior to the hearing, the parties attempt to cull from the competing document disclosures the universe of relevant (non-privileged) documents, which are placed in numbered hearing bundles. Tribunals expect parties to cooperate extensively on the production of bundles and include only documents that are likely to be referred to at the hearing. It is from this collection of documents that the parties will pull documents to be shown to the tribunal during oral submissions or to witnesses during cross-examination.

Because there is little or no oral examination on direct, it is difficult for a party to map out how much time it will need for its case, as it is difficult to predict how much time the carrier will take in cross-examination. Many cross-examinations are perfunctory, and frequently a carrier will decide that it does not need to cross-examine a particular witness (even after the policyholder has gone to the expense of securing the witness' appearance in London or Bermuda). Re-direct examination is extraordinarily rare and, when it does occur, very brief.

The tribunal may request that the parties provide closing oral submissions at the close of evidence or make written submissions a few weeks or months after the hearing, followed by a short final oral hearing.

The award

Under the English Arbitration Act, the tribunal has power to make awards on different issues, and each award will be final and binding, subject to any challenge by way of appeal or review or otherwise in accordance with the Act. The award will be reasoned and address all of the issues, to avoid the award being open to challenge.

There are limited routes to challenge an award. The tribunal retains jurisdiction (under section 57 of the English Arbitration Act) to correct any errors in the award or address a point it has overlooked. As to other challenges in the English courts (as the supervisory court), under section 68, a court has power to set aside an award in the event of "serious irregularity" (which is defined in the English Arbitration Act). This is a high threshold/test to meet and successful challenges are rare. Given that Bermuda Form arbitrations involve a tribunal of experienced practitioners, it is highly unlikely that there will be a serious irregularity, and there are no reported cases of a successful challenge. Absent such serious irregularity, there is generally no real prospect of challenging or appealing an award in respect of a claim on the typical Bermuda Form. The award will generally be enforceable in line with other arbitral awards, such as those under the New York Convention.

Fee shifting

Further, under English or Bermudian procedural law, the principle that "costs follow the event" applies. In other words, the losing party pays the winning party's costs. The English Arbitration Act provides a tribunal with broad discretion to award costs. An unsuccessful policyholder can therefore expect to pay a large portion of the fees of the insurance company, which typically can be very high. On the other hand, a victorious policyholder can expect to be awarded a substantial proportion of their own fees and costs. Increasingly, arbitration tribunals strive to award costs on an issue-by-issue basis and not simply to the overall winner. For example, if the carrier wins several disclosure motions, but loses the final hearing, the policyholder's fee recovery may be reduced by the fees incurred by the insurer in bringing in the disclosure motions. Further, it is possible, if both sides agree, to opt out of fee shifting altogether. These issues are most frequently resolved by negotiation following the issuance of the final award, and tribunals are loathe to conduct costs hearings if they can avoid them.

Interest

For policyholders, there may be a silver lining to the possible delay in securing an award: interest. There is no uniform or standard practice. There is frequent debate as to whether the right to pre-award interest is (1) substantive and controlled by New York's statutory rule granting simple interest at 9%, or (2) procedural and controlled by English law. The English law on this point is generally discretionary and grants pre-award interest (usually simple and less commonly compound), normally at the Bank of England base rate plus a given percentage (although if the award is expressed in dollars, a tribunal may award pre-award interest at the applicable U.S. prime rate.) The parties' respective positions on this issue will be affected by the period of time during which money has been owed; i.e., the longer the period, the more attractive compound interest, even at a lower rate, may be. A tribunal will also have jurisdiction to award interest on the award (i.e., the rate that would be charged if payment is not made within the time ordered). Under the Judgment Act 1838, the current statutory rate is 8%.

Conclusion

Most large companies with general liability exposures buy Bermuda Form insurance policies with mandatory arbitration clauses. Bermuda Form policies have unusual clauses, and arbitration under English procedural law is, to most U.S. in-house and outside counsel, an undiscovered country. Further, Bermuda Form insurers and their counsel are well versed in the forms they sell, arbitration generally, and – despite the confidential nature of arbitrations – the voting history of prospective tribunal members and chairs. Policyholders with incipient Bermuda Form disputes should do what they can to level the playing field. We suggest, as set forth above, the first step in doing so is recognizing what they do not know, and then seeking help from counsel with experience in this area.

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