

## THE BERMUDA FORM AND ARBITRATION OF DISPUTES IN LONDON

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*Lorelie S. Masters, John Jay Range, and Paul Moura\**

### INTRODUCTION

The commercial insurance programs of many multinational and US businesses include “Bermuda Form” policies, a special policy form developed in Bermuda in the mid-1980s that includes unique provisions and provides for arbitration of disputes, usually in London under the substantive law of New York. Given the potential challenges that these specialty policies can create, policyholders should carefully consider purchase of Bermuda Form policies and structure them as favorably as possible to maximize coverage. In addition, if claims arise, policyholders can employ a number of strategies to ensure that the claim is presented with an eye toward the unique aspects of Bermuda Form policies.

### I. HISTORY OF THE BERMUDA FORM

In the mid-1980s, insurance broker Marsh & McLennan, with a consortium of US policyholder companies from across the Fortune 500, created the first Bermuda Form insurance companies, ACE Insurance

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\* A Partner in Hunton Andrews Kurth LLP’s insurance coverage practice, **Lorelie Masters** is a Member of the American Bar Association’s Board of Governors and a founder and former President of the American College of Coverage and Extracontractual Counsel. She is co-author, with English barristers Richard Jacobs QC and Paul Stanley QC, of *Liability Insurance in International Arbitration: The Bermuda Form* (Hart Publishing, 2d ed. 2011) (*The Bermuda Form*), which won the 2012 Book Prize of the British Insurance Law Association for outstanding contributions to the literature on insurance coverage.

**John Jay Range** is a Partner in the Washington, D.C., office of Hunton Andrews Kurth LLP. He has represented clients in arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID), the London Court of International Arbitration (LCIA), and the International Chamber of Commerce (ICC) Court of International Arbitration. He is the Chair of the Alternative Dispute Resolution Committee for the ABA Section of Infrastructure and Regulated Industries and a member of the Advisory Committee for the ABA Section of Dispute Resolution.

**Paul Moura** is an Associate Attorney in Hunton Andrews Kurth LLP’s insurance coverage practice, where he represents clients from a diversity of industries in insurance recovery and related commercial disputes. Prior to joining the firm, Paul was a policy researcher at a think tank based at the London School of Economics, where he helped to develop a network of policymakers, academics and lobby groups collaborating in areas involving consumer protection and digital rights.

Company, Ltd., and XL Insurance Company, Ltd., to provide high excess Commercial General Liability (CGL) insurance to companies operating in the United States when the market for such insurance collapsed during the 1980s' liability insurance crisis. ACE was formed in 1985 to provide high excess cover above US\$100 million, and XL was started shortly thereafter, in 1986, to provide excess coverage below the ACE layer, with limits of between \$25 million and \$100 million.<sup>1</sup> When the capital markets, in perhaps one of their more significant miscalculations, declined to provide the necessary start-up capital, Marsh worked with US policyholder companies to secure the necessary capital contributions. Thus, household names like DuPont and Ford provided the seed money for these nascent insurance companies as a means of securing the excess liability insurance they needed to protect against catastrophic claims such as DES and other mass torts that filled the headlines at the time.

Those investor companies sought in exchange for their capital contributions certain features in these new "Bermuda Form policies," such as limited pollution liability coverage and recognition that coverage should apply when there was a later, huge spike in claims that, despite a routine or historic claims history for that product or type of claims, was unexpected.<sup>2</sup> This latter concern led to the development of two of the characteristics that were (and largely remain) unique to Bermuda Form policies and formed a huge part of their attractions to US manufacturers and other policyholders: the unique definition of "occurrence" and the so-called maintenance deductible, a term that nowhere appears in the Bermuda Form and which, as the decades have proceeded, has become a source of complicated arguments used by Bermuda Form insurers to deny coverage. US investor policyholders sought high excess insurance that would provide coverage for the too-common situation in which a product with a known history of low-level claims later experienced an unanticipated spike in claims that differed either in kind or number, or "magnitude," from the previous historical level of claims. The early Bermuda Form insurers and investors used vaccines as the prototypical example of such a product or claim scenario: vaccines historically have always produced a predictable number of "noise-level" claims each year, but also can be subject to a later spike in claims deserving of insurance and for which

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<sup>1</sup> *The Bermuda Form* at §§ 1.01, 1.16.

<sup>2</sup> *Id.* at § 1.35.

the investor companies sought reliable insurance protection that would apply without protracted disputes or coverage.

The unique provisions of the Bermuda Form are discussed in Part II. It is useful in considering those provisions and when claims arise to remember this history and the representations that ACE and XL made to investor and other prospective policyholders at the time of their formation: that the Bermuda Form insurers would break with the unfortunate past, which had led to the seizing of liability insurance markets in the mid-1980s, when “traditional” liability insurers parsed policies closely in order to find as many bases for denying coverage as possible.<sup>3</sup> Those representations seem increasingly to ring hollow today. Although, for many years, most disputes arising under the Bermuda Form were settled, today such disputes increasingly are arbitrated, either because Bermuda insurers, like insurers of yore, decide to litigate disputes or because the policyholder is unable to obtain redress (or even a response) otherwise.

## II. KEY FEATURES OF THE BERMUDA FORM

As shown by the history of the Form and the method of acquiring capital for the creation of Bermuda Form insurers, the Form, as originally drafted and issued by ACE and XL, took into account the interests of the investing policyholders that provided capital necessary to the founding of this new excess liability insurance market. The policy form that the founders and investors sought to draft to help stem the liability insurance crisis in the 1980s has the following distinctive features:

- An occurrence-reported trigger of coverage.
- The Bermuda Form’s innovative aggregation of claim provisions which include the Form’s unique definition of “occurrence” and in some versions of the Form, “occurrence integration.”
- The related provision termed by the founding insurers, the “maintenance deductible.”
- The dispute resolution provision.
- The choice of law provisions.

Each of these features is discussed in further detail *below*.

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<sup>3</sup> *Id.* at §§ 1.06, 1.12.

### A. The Occurrence-Reported Trigger of Coverage

The Bermuda Form provides neither pure occurrence coverage nor pure claims-made coverage, but, rather, in one of its singular innovations, uses a hybrid trigger that is a combination of the two, more traditional, triggers. In broad terms, Bermuda Form policies cover occurrences that are reported to the policyholder during the policy period, under a period for reporting that has both a starting point and an end point.<sup>4</sup> The starting point typically is either the inception date of the policy or a specified retroactive date.<sup>5</sup> The end point typically is the moment when the policyholder stops buying the basic cover granted by the policy,<sup>6</sup> or the insurer stops selling it.

As a key to understanding the Form's unique trigger of coverage and its aggregation concepts, it is also important to note that a Bermuda Form policy is typically a "continuous policy," meaning that it continues from year to year, usually with the same policy number, until it is cancelled or is not renewed. In contrast, the coverage promised under a claims-made policy typically is defined to stop at the end of one policy year, and will begin again, with a new policy period and usually a new policy number, if the policy is renewed. Thus, a Bermuda Form policy has a policy period that may span years with a number of "Annual Periods," as defined in the Form. Each Annual Period requires a new premium and provides new limits of liability. The Bermuda Form also typically allows the policyholder to purchase an extended reporting period, called a "discovery period," also known as Coverage B if the policy is not renewed. The advantages of the aggregation features

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<sup>4</sup> The policy generally affords coverage during the period of "Coverage A." When the policy would otherwise terminate, the policyholder has the option to purchase "Coverage B," which provides an extended reporting period for claims relating to occurrences that began during the Coverage A period. Coverage B does not provide tail coverage for "fresh" occurrences that began only during Coverage B. Complications arise in respect of "batch" or "integrated" occurrences, and their start and end points. *See* Chapters 2 and 6 of *The Bermuda Form*.

<sup>5</sup> A retroactive date defines the starting point of the period during which the bodily injury or property damage covered by the policy must take place. In other words, the bodily injury or property damage alleged in claims covered by the policy must commence after the retroactive date. The retroactive date may be the same as the inception date of the policy or may be a date that is earlier than the inception date. The policy generally affords coverage during the period of "Coverage A." *See* Chapters 2 and 6 of *The Bermuda Form*.

<sup>6</sup> The parties typically meet annually to discuss loss experience and agree upon terms for continuation, such as the premium and the cancellation and policy extension conditions.

of the Bermuda Form continue into the discovery period provided in Coverage B.

### **B. The Bermuda Form's Unique Aggregation of Claims Provisions**

The Bermuda Form addressed the issue of “stacking of limits” that arose in asbestos and other mass tort and environmental liabilities in a number of ways. The key was the use of an occurrence-first-reported trigger. A simple way to avoid accumulation of limits in a liability policy is to specify a single moment or event as the trigger and to sweep into the single-triggered policy all the financial consequences of all interrelated underlying claims. Accordingly, the Bermuda Form was specifically developed to address the concerns of its investor policyholders that coverage allows for aggregation of claims. Indeed, the Form requires the policyholder to aggregate related claims together or, to use the terminology in the early versions of the Bermuda Form and the jargon of the Bermuda insurance market, “integrate” them into a single year or period, a period that is not the same as the traditional concept of “policy period,” which liability policies typically define as a 12-month period or defined number of months in length. The aggregation period, thus, is the year in which the policyholder determined that the claims were likely to implicate the policy and gave notice of the underlying occurrence to the insurer. Although in more recent years sometimes an issue in dispute, in its original conception, the Bermuda Form explicitly granted—and was intended to grant—to *the policyholder* the decision over when to declare the “integrated occurrence,” often called more colloquially, and to use the traditional CGL concept, a “batch.”

Pronouncements by at least some insurers in the Bermuda Market over the years have emphasized that the policyholder need not report every liability claim that is made during the period. Indeed, Bermuda insurers have discouraged policyholders from doing so. Instead, the Bermuda Form (arguably like traditional excess liability policies) seeks reporting of only those occurrences, or “batches,” that are “likely to involve this policy” under the notice provision in the policy. This feature of sweeping all related injuries or losses into a single policy year is commonly called “occurrence integration,” or “batch occurrence” (or, in another term that does not appear in any Bermuda policy Form, simply “batching”).

The batching, or “batch sweep,” feature of the Bermuda Form truly was an innovation at the time created, and the drafters specifically

designed it to respond to the needs and demands of both the US insurance market and the policyholder companies that wanted and needed the asset protection afforded by excess insurance which would respond to (among other things) unanticipated increases in claims, over and above past, historical claims experience. The aggregation and related provisions in the Bermuda Form thus enable the policyholder to add together a large number of small occurrences, with the result that the policyholder can exceed the often very high retention underlying a high-excess Bermuda Form policy that would or might otherwise never be reached to provide coverage for each individual claim. This feature then benefits both parties: It provides insurance protection for a policyholder that fears an unanticipated increase in claims for a product that has a typical number each year. It also protects insurers from a call to pay an unanticipated number of limits in that the policy promised to pay only one loss in respect of any one particular problem, no matter how broad in scope or magnitude.

From our experience, Bermuda Form insurers today tend aggressively to challenge the use of this “batch-sweep” innovation, and the calculation of which claims qualify for “batching.” This was not the case in early Bermuda Form arbitrations involving batch claims that were handled in the first decades of use of the Bermuda Form. Policyholders therefore often need to be even more strategic in how “batch claims” or “integrated occurrences” are presented under Bermuda Form policies today than was true before the early 2000s.

### **C. Expected or Intended Injury and the “Maintenance Deductible”**

The Bermuda Form contains a clause known in Bermuda insurance industry custom and practice as the “maintenance deductible.” Bermuda Form policies do not actually use that term. In fact, the relevant clause is part of the definition of “occurrence” that addresses injury or damage “expected” or “intended” by the policyholder. The concept of excluding injury or damage that the policyholder expected or intended is, of course, a well-known feature of traditional CGL insurance policies used for decades in worldwide commercial insurance markets by US, London and other insurers. Bermuda Form insurers carried that concept over into the Bermuda Form, with revisions to address concerns of both the policyholder market in the United States and the insurance industry and specifically the fledgling Bermuda insurers. It

remains in the current Bermuda Form,<sup>7</sup> with revisions made over time to address the ambiguities and complexities in application of these concepts that became obvious as policyholders presented batch claims for payment under the Bermuda Form. Although the concept in general terms is well understood, the complexities of the Bermuda Form's definition of occurrence, and the difficulty of applying it in specific factual circumstances or industries, often results in controversy—and arbitration of disputes over coverage.

As mentioned earlier, a classic example, used at the time the Bermuda Form was introduced, involves the manufacture of a vaccine. Although beneficial to huge numbers of people, many vaccines also may seriously harm a very small number of people who react adversely to the product. Thus, while millions of people use the vaccine safely and successfully each year, it also is known to harm a small number of people each year, most or all of whom are seriously injured and can be expected to sue. The Bermuda Form responded to this known incidence of loss by seeking to preclude coverage for the expected, “noise-level” claims each year, but to preserve coverage if, for some reason, the nature or level of claims changed significantly and unexpectedly from that experienced in the expected noise level of claims.

In very broad terms, the “maintenance deductible” concept in the Bermuda Form was an innovative solution to this recognized problem.<sup>8</sup> The Bermuda Form sought to strike a balance between the legitimate interests of policyholder and insurer. Absent the revised “expected or intended” language and the “maintenance deductible” concept, which originally operated as a proviso to the classic “expected/intended” language of the policy, the insurer might have said to the policyholder that the marketing of a product with a proven history of losses meant that the policyholder expected or intended all the damage alleged, whether or not a later unanticipated “spike” in claims took place. Accordingly, this concept sought to preserve the existence of coverage for a product with a known incidence of losses while, at the same time, keeping responsibility for paying “noise-level” claims on the shoulders of the policyholder. The language used is not found in

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<sup>7</sup> Meaning the 004 Form typically used by XL and other insurers and the 005 Form used by ACE. Early on, all insurers using the Bermuda Form used the same Form. Over the years, the versions used by ACE and XL diverged. Today, there are differences between the versions of the Bermuda Form typically used by ACE and XL (and by others).

<sup>8</sup> A detailed explanation of this concept may be found in Chapter 7 of *The Bermuda Form*.

traditional policy forms drafted by the Insurance Services Office, Inc., or its predecessors (ISO), the London Market or other insurance markets and used prior to the advent of the Bermuda Form, and was designed to address the specific concern discussed above. However, the language used is complex and leads to disputes. The language—seeking to preserve coverage for the claims that are “fundamentally different in nature or order of magnitude”—raises ambiguities which insurers in more recent years have sought to exploit in addressing coverage for batch claims. For example, insurers in recent claims, and unlike their positions in earlier similar claims, have argued that “order of magnitude” must mean at least a 10 times increase in claims, a point that is not specified anywhere in the policy language (or marketing materials). Policyholders in earlier claims did not confront that argument.

Again, these evolving arguments by insurers about how claims may be aggregated into a batch and how the maintenance deductible should be calculated put a premium on claims presentation and development of sophisticated strategies for rebutting those arguments—strategies that similarly put a premium on experience in handling Bermuda Form claims and arbitrations.

#### **D. Dispute Resolution Provision**

The Bermuda Form includes an arbitration clause seeking to move the decision-making process on disputes with policyholders from the US court system to arbitration in London under the English Arbitration Act (or, in some cases, in Bermuda under the Bermuda Arbitration Act). The current version of the English act, the English Arbitration Act 1996, applies to ad hoc arbitrations conducted in the United Kingdom. While it may appear odd to require parties to a contract governed by New York law to arbitrate their disputes in a foreign country, there are historical reasons for this procedure. Insurance companies have historically favored New York law,<sup>9</sup> perceiving it to be more insurer-

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<sup>9</sup> Some principles of New York law that insurers have traditionally favored have changed in recent years. *See, e.g., Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 306 (N.Y. 2017) (holding that legislature's 2008 revision of N.Y. Ins. Law § 3420(d), which applies the modern “prejudice rule” to issues of allegedly late notice of claim, applies broadly to all insureds and all risks located in New York and requires insurers to prove prejudice before they can void coverage for “late notice”); *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 264 (N.Y. 2016), *opinion after certified question answered*, 148 A.3d 633 (Del. 2016) (holding that New York does not accept an overall *pro rata* allocation rule, but instead

friendly than other laws and recognizing that companies based in the United States likely would find application of the law of a jurisdiction in the United States more acceptable and familiar than the law of a foreign country. They also have favored English barristers or retired judges as arbitrators, believing them to be less influenced by what the insurers perceived as undesirable outcomes in insurance disputes in the United States. London-based arbitrations also lessened the chances of the Bermuda Form's being interpreted in courts in the United States in connection with any confirmation or vacatur proceedings.

For policyholders, an important consequence of this scheme of dispute resolution is that little binding precedent has developed—or will develop—regarding interpretation of the Bermuda Form, beyond the occasional litigation in the United States against ACE or XL that is not dismissed or third-party action for contribution brought by other insurers seeking contribution or indemnity for amounts they are obligated to pay the policyholder. Although English law does permit appeals of arbitration awards in limited circumstances, these circumstances are confined to awards involving an error of English law.<sup>10</sup> While some United States courts have addressed questions relating to the Bermuda Form (*e.g.*, in actions for contribution claim by another insurer against XL or ACE), no United States decision has addressed or resolved substantive issues under the Form. This may change to some extent as Bermuda Form policy provisions are increasingly incorporated in policy forms used by other insurance companies, and as Bermuda insurers and other insurance companies using the Form do business in the United States to a greater extent and thus are subject to the jurisdiction of United States courts.<sup>11</sup> However, the lack of precedent on key provisions in the Bermuda Form, and the provisions of the English Arbitration Act specifying that arbitrations remain confidential, disadvantage policyholders and also provide a key benefit to the insurer which, unlike the policyholder, obviously will be aware of its own previous wins and losses in earlier proceedings with respect to certain provisions of the Bermuda Form.

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requires that the issue be addressed as a matter of contract interpretation, not “equity” or “fairness” as argued by insurers).

<sup>10</sup> See the English Arbitration Act 1996, § 69, which largely codifies the principles governing appeals established by the case law applying sections of the English Arbitration Act 1975.

<sup>11</sup> As discussed further *infra*, some United States courts have upheld jurisdiction over Bermuda and other off-shore insurance companies, particularly in third-party actions brought by other insurers seeking contribution from Bermuda Form insurers.

### E. Choice of Law

In addition to the arbitration clause, the Bermuda Form includes a unique choice-of-law provision which selects as the governing law the law of the State of New York on substantive issues of law, and the law of the United Kingdom on procedural issues. With regard to the substantive law, one of the reasons that insurers have long favored New York substantive law is because, as home historically to many insurers, New York has a well-developed body of law applicable to insurance policies of all kinds and many believe that New York law tends to favor the rights and interests of insurers. For example, New York law traditionally, with some important exceptions, applied the old “per se” rule on notice, which voided coverage if the policyholder’s notice was found to be “late.” That rationale, however, has changed in light of a 2017 decision by the New York Court of Appeals holding that New York’s rule on the timing of notice given by insureds is subject to the modern rule requiring the insurer to prove prejudice from the timing of notice with regard to insurance policies and risks based in New York.<sup>12</sup>

Certain other provisions of New York law are helpful to policyholders. For example, the New York Insurance Law specifically provides that evidence relating to other “similarly situated” policyholders is relevant to the issue of the materiality of an alleged misrepresentation in the policy application.<sup>13</sup> In addition, as exemplified by the New York Court of Appeals in *Belt Painting v. TIG Insurance Co.*,<sup>14</sup> New York courts are inclined to interpret “pollution exclusions” narrowly to exclude coverage only for environmental pollution, as opposed to any type of fume or contaminant.

The Bermuda Form also modifies New York substantive law in certain key respects. For example, it explicitly allows for recovery of punitive damages. The Bermuda Form also seeks to negate the effects of *contra proferentem* and select other doctrines that are perceived to

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<sup>12</sup> *Carlson*, 30 N.Y.3d at 306 (interpreting 2008 revision of N.Y. Ins. Law § 3420(d), to adopt the modern “notice-prejudice rule” with regard to policies and risks located in New York).

<sup>13</sup> N.Y. Ins. Law § 3105(c) (“In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.”).

<sup>14</sup> *Belt Painting Corp. v. TIG Ins. Co.*, 763 N.Y.S.2d 790 (N.Y. 2003).

favor policyholders. The relevant choice-of-law provision is located at Article VI(O) of Form 004:

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws:

- (1) may prohibit payment in respect of punitive damages hereunder;
- (2) pertain to regulation under the New York Insurance Law or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or
- (3) are inconsistent with any provision of this Policy; provided, however, that the provisions, stipulations, exclusions and conditions of the Policy are to be construed in an even-handed fashion as between the Insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company or reference to the 'reasonable expectation' of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise ..., the internal laws of England and Wales shall apply.

For strictly procedural matters, English law, in the form of the English Arbitration Act 1996, governs, though the distinction between

substantive and procedural law is not always clear. Generally, London arbitrators adopt procedures influenced by English civil procedure. For example, the parties typically first exchange statements of the case and documentary discovery, followed by an exchange of fact and expert-witness statements. The tribunal may also appoint its own expert.

In addition, there can be differences in what is or is not considered privileged under English law in a London arbitration. The most common question is whether the policyholder can withhold as privileged, documents generated by lawyers in the underlying proceedings. An insurer in a London arbitration may seek to compel disclosure of communications with counsel from the underlying proceedings based on a “common interest” between the policyholder and the insurer recognized under English law. However, a London arbitral tribunal is unlikely to allow such disclosure absent a clear agreement or strong implication that the policyholder agreed to share such information.<sup>15</sup> In any event, it is generally accepted that an arbitral tribunal in London has broad discretion to determine whether documents should be disclosed, and is not bound to follow the practices customary in English litigation.<sup>16</sup>

### III. STRATEGIC CONSIDERATIONS IN LITIGATING BERMUDA FORM ARBITRATIONS

As discussed, one of the key features of the Bermuda Form is its dispute resolution provision.<sup>17</sup> Most versions of the Bermuda Form specify that disputes be arbitrated in London under the English Arbitration Act, with the substantive law of New York applying.<sup>18</sup>

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<sup>15</sup> *The Bermuda Form* at §§ 16.39-16.44.

<sup>16</sup> *Id.* at § 3.42.

<sup>17</sup> Arbitration in the high excess layers in which Bermuda Form policies are found often leads to consecutive or serial arbitrations as arbitration under the English Arbitration Act is considered to be confidential and insurers with arbitration clauses are unlikely, in the case of a large loss implicating multiple layers of excess cover, to agree to a consolidated arbitration. As a result, arbitration of insurance disputes for large losses or under multi-layer excess programs often contradicts one of the rationales given to promote such arbitration—that arbitration is cheaper or faster than litigation in court. *See, e.g.*, Lorelie S. Masters, “Arbitration Clauses in Liability Policies: A Ticket to Ride?,” *The John Liner Rev.*, No. 4, at 33 (Winter 1996).

<sup>18</sup> Issues of procedure applicable to arbitrations conducted under the English Arbitration Act 1996 are governed by English law. *See* English Arbitration Act 1996 §§ 33-41. The choice of governing law also arises with regard to issues other than the applicable procedural and substantive law. For example, the validity of the arbitration agreement for arbitrations proceeding in the United Kingdom will be governed by English law. *See*

The 004 version of ACE's Form and some policy forms that follow the Bermuda Form have required arbitration of disputes in Bermuda under the Bermuda Arbitration Act, often with the law of Bermuda applying. Those provisions have not proven popular with the insurance marketplace and largely have been replaced or superseded, and policyholders should take care to avoid such provisions if they can as arbitration in Bermuda is logistically more difficult. In addition, while the London/New York law arbitration provisions of the traditional Bermuda Form were (and often are) perceived to be more insurer-friendly than litigation in United States courts, Bermuda arbitration is considered a step (or perhaps several steps) further toward the insurer side of the scale.

As with any arbitration, selection of the wing arbitrators and chair is of utmost importance, and extensive consideration often goes into those choices. The arbitration provision in the Bermuda Form says simply that each party will choose its "wing" arbitrator and those two arbitrators will choose the chair. In practice, parties often give input (sometimes extensive) into that process. These choices are more art than science, with background and insight into previous arbitrations on similar issues providing important input, a point that is particularly true in insurance arbitrations given the likelihood that similar issues arise in later arbitrations, and arbitrators may have been appointed in previous arbitrations involving the same parties or involving the same or similar issues. The discussion here focuses on key strategies when arbitrating Bermuda Form disputes in London under the English Arbitration Act and New York substantive law.

#### **A. Initiating the Arbitration**

As in litigation in a United States court, the policyholder typically is best served when the process takes place in as short an amount of time as possible. First, an insurance company is most likely to consider serious settlement overtures when a final hearing date looms. Second, expense for both parties likely will be minimized if the process is shorter rather than longer.

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*e.g.*, *C v. D* [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep. 239. Because the seat of arbitrations under the Bermuda Form is in London, such arbitrations are subject to the jurisdiction of English courts for issues addressing, for example, the appointment of arbitrators. English Arbitration Act 1996 § 2(1). For a further discussion of these issues, see *The Bermuda Form* ch. 3.

Either party may initiate the arbitration by invoking in writing the arbitration clause in the insurance policy. In initiating arbitration, a policyholder may help expedite proceedings by naming its arbitrator in the arbitration demand, as stated in the arbitration clause. Doing so will activate the insurance company's obligation to name its party-appointed arbitrator within 30 days. As a practical matter, the respondent in insurance arbitrations (whether the insurance company or the policyholder) often seeks an extension of this period. However, the sooner all arbitrators are named, the sooner the proceedings will begin in earnest.

What advantages are to be gained by initiating arbitration? The primary advantage is the same as a plaintiff would have in court: The ability to open the case and submit rebuttal after the respondent's case is presented. This advantage may carry over into pretrial hearings, or the final hearing, where the plaintiff is entitled to proceed first.

## **B. Discovery**

In international arbitration, the parties may decide upon an agreed set of rules to govern discovery. Discovery, or "disclosure" as it is referred to in the United Kingdom, includes only production of documents. While typical English practice does not allow deposition discovery, it may require production of the transcripts of depositions taken in American proceedings of potential witnesses to allow for cross-examination with potentially conflicting testimony from the American proceedings, and parties may agree to depositions.

Although rules governing disclosure have been relaxed in England in recent years, the traditional practice, which requires parties to set forth with specificity the categories of documents sought, continues. However, as in civil procedure applicable in the United States, parties may move to compel disclosure if the opposing party refuses or fails to produce documents. Parties identify disputed categories of documents, brief those issues for the tribunal, and argue them at a hearing set for that purpose. The tribunal will then issue a decision on the disputed categories.

It may be important—indeed, crucial—for counsel for parties to continue to contest the opposing party's failure to produce important categories of documents. Failure to do so may result in a finding by the tribunal that the requesting party has waived its right to pursue production. Under English procedure, however, parties frequently

pursue adjudication regarding production of disputed categories of documents right into the actual trial or final hearing. While the tribunal will be reluctant to order additional production of previously withheld material in mid-hearing, it may do so in order to ensure the fairness of the proceedings. Presenting a written record confirming the requesting party's diligence in seeking the discovery is important to success in these situations.

### **C. Briefing**

Advice from an English lawyer is helpful in preparing the final hearing brief and bundles, or exhibits. The English style of briefing does not focus on case discussions to the extent common in American-style briefing. Because witness statements and oral evidence focus on disputed factual issues, the key place to address disputed issues of policy interpretation is in the final hearing briefing, especially in the common situation where months pass between the completion of the final hearing and the arbitrators' final decisions in preparation of the award.

Hearing exhibits are presented in two-hole English binders (called "bundles"), prepared and submitted to the tribunal in advance of the start of the hearing. The hearing bundles include copies of pleadings and transcripts of earlier hearings in the matter, fact documents or hearing exhibits, witness statements, authorities cited in the final hearing briefing and policy documents. It is helpful if each bundle is indexed and organized in chronological order. Each document is also given a unique number keyed to the bundle in which it appears.

### **D. The Final Hearing**

The presentation of evidence in the "final hearing" of a London insurance arbitration typically differs substantially from traditional trial practice in the United States. A party's direct or affirmative evidence is presented in writing in witness statements. Witnesses are presented live only for cross-examination. A party should offer all its witnesses for cross-examination; if a party does not do so, it risks that the arbitrators will not give a witness's direct evidence much weight. This rule does not apply if the parties agree that a witness need not be presented for cross-examination.

This system puts a premium on comprehensive, yet concise and well-organized, witness statements. Again, the plaintiff or petitioner typically

has the opportunity to present both opening statements and rebuttal statements following the opponents' statements, although the parties can agree to a different order of presentation, or the panel may allow for additional presentations or points to be made.

Effective witness statements require substantial input from the witness her- or himself and, preferably, are written in the witness's own "voice." Lawyers also should prepare witnesses for cross-examination but need not prepare direct testimony as in an American civil jury trial.

In some cases, the parties may wish to consider video-conferencing for witnesses from the United States whose cross-examination is expected to be short. Video-conferencing saves money and, today, is a realistic alternative to live testimony because the technology has advanced by leaps and bounds.

#### **E. Interest Awards**

Sometime after the final hearing, the arbitration tribunal will issue an award. The typical Bermuda Form policy refers to an award being made within 90 days; however, that time period may be extended formally (with notice to the parties), or informally. Arbitrators may require payment of outstanding arbitrator fees before the award is issued.

Often, the principal sum covered by a Bermuda Form policy will be many millions of dollars, and thus awards of interest can amount to substantial sums. Under the English Arbitration Act, a tribunal may award simple or compound prejudgment and post-judgment interest from such dates, and at such rates, as it considers meet the justice of the case.<sup>19</sup> In Bermuda Form arbitrations, a common approach is to award interest at either the United States prime rate or the Bank of England base rate plus one percent, with the decision as to whether to award simple or compound interest left to the discretion of the tribunal.<sup>20</sup>

Prevailing parties in Bermuda Form arbitrations often argue for application of the 9% rate mandated by New York CPLR § 5004, as that rate is substantially higher than the United States prime rates of recent years. While the English Arbitration Act would allow a tribunal the discretion to award the CPLR's 9% rate, some policyholders have

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<sup>19</sup> See English Arbitration Act 1996 § 49.

<sup>20</sup> *The Bermuda Form* at § 17.04.

argued that the Bermuda Form's New York governing law provision gives them a substantive right to that rate regardless of the tribunal's discretion. This interest dispute—and the question of whether the New York CPLR indeed creates a substantive right to interest at 9%—has been the subject of much litigation and controversy.<sup>21</sup> Given that, some Bermuda Form tribunals may adopt an approach applying the CPLR's 9% interest rate without classifying whether that rate is procedural or substantive, thus sidestepping this thorny and unsettled legal issue.

#### **F. Costs Awards**

With regard to costs, versions of the Bermuda Form prior to the 004 Form contained a provision that each party should bear its own costs of an arbitration. Since then, the usual Bermuda Form has included a provision that any order for costs shall be in the sole discretion of the tribunal. Accordingly, there are essentially two categories of costs that will need to be allocated: (i) the arbitrators' fees and expenses; and (ii) the legal or other costs of the parties.

Arbitrations conducted under the English Arbitration Act are not administered, and the issue may arise at the outset of the arbitration about how the arbitrators' fees will be paid. A common practice is for each party to pay for the fees and expenses of its appointee, with the costs of the third arbitrator divided between both parties. Alternatively, some tribunals request that parties deposit a sum of money for arbitrator fees and expenses into an account controlled by the Chair. The tribunal may ask for payment of outstanding fees and expenses before the final award is issued. In practice, arbitrator fees are rarely a subject of dispute. If issues do arise, the English Arbitration Act makes the parties jointly and severally liable for the arbitrators' reasonable fees and expenses.<sup>22</sup>

As to legal costs, the general principle in English court practice is that the "prevailing" party will be ordered to pay the "losing" party's legal costs, and hence this principle is the starting point for an English arbitration tribunal. Often, the prevailing party does not succeed on every single issue in dispute, and thus the tribunal may consider it appropriate to make allowances (such as a percentage reduction) for

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<sup>21</sup> *Id.* at §§ 17.11-17.22.

<sup>22</sup> *See* English Arbitration Act 1996 §§ 28 & 56.

costs incurred on issues on which the prevailing party has failed.<sup>23</sup> In all events, the general rule is that all costs should be reasonably incurred, and the burden of proving reasonableness is on the receiving party.<sup>24</sup>

### **G. Post-Hearing Proceedings and Challenges to the Final Award**

As explained *above*, sometime after the final hearing, the arbitration tribunal will issue an award. Unless the parties agree otherwise, the award must contain the reasons for the award.<sup>25</sup> Typically, the parties will receive a detailed award that addresses all the issues that were submitted for adjudication. If the award does not address all essential issues, it may be open to challenge for that very reason.

As an initial matter, it should be noted that challenges based on errors in the calculation of damages and costs can typically be addressed in the arbitration itself, as the English Arbitration Act gives the tribunal power to correct clerical mistakes or errors in an award<sup>26</sup>

For more egregious errors, a party may seek to challenge an England-based Bermuda Form arbitration award through English court proceedings. Within 28 days after the award is issued, a party may commence court proceedings to challenge all or part of it.<sup>27</sup> Nonetheless, challenges to awards in England-based arbitrations are exceedingly difficult. In particular, English courts generally conduct a far more restrictive review of foreign law as compared to English law. Thus, a challenge for error in the application of New York law governing the Bermuda Form is unlikely to succeed unless there is evidence that the tribunal consciously disregarded the provisions of New York law.<sup>28</sup> Furthermore, an English court will permit a challenge based on an error of law only if certain conditions are met, and the challenger must show that “the decision of the tribunal on the question is obviously wrong,” or that “the question is one of general public importance and the decision of the tribunal is at least open to

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<sup>23</sup> *The Bermuda Form* at §§ 17.36-17.38.

<sup>24</sup> See English Arbitration Act 1996 § 63.

<sup>25</sup> *Id.* at § 52(4).

<sup>26</sup> *Id.* at § 57.

<sup>27</sup> *Id.* at § 70.

<sup>28</sup> See *A v. B* [2010] EWHC 1626 (Comm), paras [25-31] (court rejected challenge based upon tribunal’s failure to apply Spanish law); *Ruby Roz Agricol LLP v. The Republic of Kazakhstan* [2017] EWHC 439 (court declined to apply expansive interpretation of Kazakh law).

serious doubt.”<sup>29</sup> Notably, under no circumstances can a court review challenges to findings of fact.

An award also may be challenged for serious irregularities, such as a failure by the tribunal to decide all the issues submitted for arbitration, or if the award was procured by fraud or in a manner contrary to public policy.<sup>30</sup> Yet even in these situations, the challenger must show that an irregularity has caused or will cause substantial injustice.<sup>31</sup> An award may also be challenged if the tribunal exceeds its substantive jurisdiction.<sup>32</sup> However, because the tribunal is likely to consist of experienced lawyers and adjudicators, such challenges can be very difficult to mount.

Finally, US-based parties seeking to challenge a Bermuda Form arbitration award may wish to consider challenging the award in a US court. Generally, the only courts with authority to vacate an arbitral award are courts at the seat of the arbitration.<sup>33</sup> Nonetheless, there are narrowly limited circumstances in which a US court can decline to enforce (as opposed to vacate) a foreign arbitral award; for example, a US court may decline to enforce an arbitral award if its enforcement in the United States would be contrary to US public policy.<sup>34</sup> Even then, a US court may decline enforcement only if enforcement would violate “‘explicit public policy’ that is ‘well-defined and dominant ...

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<sup>29</sup> See English Arbitration Act 1996, Section 69; *Enterprise Insurance Co. Plc v U-Drive Solutions (Gibraltar) Ltd.* [2016] EWHC 1301 (QB) (court lacked jurisdiction over appeal because Section 69 conditions were not met, despite parties’ stipulation to allow appeal).

<sup>30</sup> See English Arbitration Act 1996 § 68.

<sup>31</sup> *Symbion Power LLC v Venco Imtiaz Constr. Co.* [2017] EWHC 348 (TCC) (illicit *ex parte* contact between party-appointed arbitrator and party did not amount to serious irregularity that constituted a substantial injustice); *The Secretary of State for the Home Department v Raytheon Sys. Ltd.* [2014] EWHC 4375 (TCC) (failure to address issue submitted to arbitration constituted a substantial injustice).

<sup>32</sup> See English Arbitration Act 1996 § 67.

<sup>33</sup> *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-49 (6th Cir. 1996) (“We hold ... that such a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose procedural law was specifically invoked in the contract calling for arbitration of contractual disputes.”); *Telenor Mobile Communications AS v. Storm LLC*, 524 F. Supp. 2d 332, 343 n.8 (S.D.N.Y. 2007); *International Std. Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990).

<sup>34</sup> See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(b); *MGM Productions Group, Inc. v. Aeroflot Russian Airlines* No. 03 Civ. 0500, 2003 WL 21108367, at \*5 (S.D.N.Y. May 14, 2003), *aff’d*, 91 Fed. Appx. 716 (2d Cir.), *cert. denied*, 543 U.S. 956 (2004).

[and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests.’<sup>35</sup>

#### IV. CASE LAW INVOLVING THE BERMUDA FORM

In this final part, we discuss reported case law involving the Bermuda Form. As explained *above*, the Bermuda Form includes an arbitration clause specifying that disputes be submitted to arbitration in London under the English Arbitration Act, but applying the substantive law of New York. The natural consequence of this arbitration provision is that reported decisions analyzing the substantive provisions of the Bermuda Form are few and far between. Little binding precedent has developed—or will develop—regarding interpretation of the Bermuda Form given that awards are issued in confidential arbitration proceedings. Nonetheless, several decisions in England and the United States offer insight into the handling and resolution of disputes involving Bermuda Form policies.

##### A. *AstraZeneca Insurance Co. Ltd. v XL Insurance (Bermuda) Ltd. and ACE Bermuda Insurance Ltd.*, [2013] EWHC 349 (Comm)

*AstraZeneca Insurance Co. Ltd. v XL Insurance (Bermuda) Ltd. and ACE Bermuda Insurance Ltd.*, [2013] EWHC 349 (Comm), is the only reported decision we have found addressing substantive provisions of the Bermuda Form, and the arguments made in open court for, and against, the coverage the policyholder believed it had purchased. The decision’s usefulness in interpreting standard Bermuda Form policies is limited, however, because—in a twist not usually found in these (or other commercial) policies—the policyholder there, evidently after the kind of negotiation not often found in these transactions, had succeeded in seeking specific revisions to the arbitration and choice-of-law provisions that are hallmarks of the Bermuda Form. As a result of these changes, which removed the arbitration provision to allow litigation in court and changed the governing substantive law from New York law to English law, the decision is likely to provide little precedential value for disputes under standard (non-modified) Bermuda Form policies. However, it provides an interesting insight, and a cautionary tale, about perhaps unintended consequences, or simply the advisability of consulting both the law in the jurisdiction

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<sup>35</sup> *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (internal citations omitted).

proposed to replace New York as governing law, as well as experienced counsel, before making revisions to the standard ADR and choice-of-law provisions in the Bermuda Form (or any standard policy form containing such provisions).

In that case, the Commercial Court of the High Court of England and Wales, Queens Bench Division, considered whether AstraZeneca's captive insurer was entitled to hundreds of millions of dollars in defense costs and settlement payments under a Bermuda Form policy in connection with product liability claims relating to the antipsychotic drug Seroquel.

As noted *above*, the Bermuda Form policy used in *AstraZeneca* was unique in two key respects that explain how it made its way to the courthouse. First, the parties to that policy engaged in negotiations that eliminated the arbitration provisions standard in Bermuda Form policies, and instead conferred jurisdiction on the English Commercial Court. Second, and perhaps regrettably for the policyholder, the parties agreed that the policy would be governed by English law, and not the New York law used in the standard form. Thus, while these modifications allowed for a rare judicial review of the Bermuda Form, they also mean that the decision may be limited to its facts and its atypical governing law. It also highlights other potentially sticky aspects of Bermuda Form's policy language that policyholders should consider when purchasing such products.

The core issue in *AstraZeneca* was whether the Bermuda Form policy covered payments made by the policyholder to settle the underlying claims. The insuring clause of the policy provided that the insurer was to "indemnify the Insured for Ultimate Net Loss the Insured pays by reason of liability: (a) imposed by law ... for Damages on account of: (i) Personal Injury ... encompassed by an Occurrence." (Emphasis added). The policy defined "Damages" as "all forms of compensatory damages, monetary damages and statutory damages ... which the Insured shall be obligated to pay by reason of judgment or settlement for liability ... and shall include Defense Costs." As the discussion below will show, this case presents a prime example of a foreign court's assuming, incorrectly, that it is reading another jurisdiction's law correctly.

The court first addressed the policyholder's claims that its payments to settle the underlying claims qualified as a "legal liability" (*i.e.*, a "liability ... imposed by law") under the policy as seen through the

lens of English law. Policyholders, of course, buy liability insurance to protect against both judgments and settlements, with the understanding (by both policyholders and insurers) that most cases settle. Contrary to that common expectation, the English court concluded that English law includes a “consistent and well-established” rule that an insurer is responsible only for indemnification of *actual* legal liability, not just an alleged liability. The court further explained that the burden is on the insured to prove that, on a balance of probabilities, the insured would have been subject to actual legal liability. The court relied on the conclusion that, although a judgment against the insured may be strong evidence of such liability, neither a settlement nor a judgment automatically establishes a policyholder’s “actual legal liability.” Thus, under English law, an insured is entitled to indemnity from its insurer only when it can show, on a “balance of probabilities,” that it would have been subject to actual legal liability for the third-party claim.

The court also limited the policyholder’s recovery of defense costs. Again, in a ruling that is likely shocking to most US policyholders, the court, relying on English law, concluded that the policyholder must show that it would have been subject to “actual legal liability” before it can recover its liability insurance. The court explained that defense costs were a component of the definition of Damages, and thus the policyholder could recover defense costs only in circumstances when “Damages” would be recoverable. Hence, the court concluded that the policyholder there could recover defense costs only if it could show, on a balance of probabilities, that it would have been under an actual liability for the third-party claim.

The court of appeal agreed with the lower court’s analysis. In a notable misreading of New York law, the English appeals judges also opined in *dicta* that a US court would reach the same result under New York law. However, New York law is clear that a policyholder who settles a case “need not establish actual liability to the party with whom it has settled ‘so long as ... a potential liability on the facts known to the [insured is] shown to exist.’”<sup>36</sup> As Judge Weinstein explained in *Uniroyal, Inc. v. Home Insurance Co.*, “the law is clear

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<sup>36</sup> See, e.g., *Luria Bros. & Co. v. Alliance Assur. Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) (citation omitted); accord *Tokio Marine & Nichido Fire Ins. Co. v. Calabrese*, No. 07-CV-2514 JS AKT, 2013 WL 752259, at \*8 (E.D.N.Y. Feb. 26, 2013) (If “an indemnitor has notice of the claim against it, ‘the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make.’”).

that a reasonable settlement binds the insurer to indemnify.”<sup>37</sup> These New York cases recognize that requiring the policyholder to prove its own liability would both defeat the protective purpose of liability insurance and provide grounds to the insurer to argue against coverage, a classic Catch-22. Under the New York cases, a policyholder need only demonstrate that settled claims are of a “type” that falls within the policy’s coverage; thus, the allegations of the complaint, rather than findings of actual liability, suffice to show that the coverage applies.<sup>38</sup>

Policyholders should be aware of the *AstraZeneca* decision and should challenge insurers who try to use it to argue that, even under New York law, coverage cannot exist under the Bermuda Form unless the insured can demonstrate “actual” as opposed to “alleged” liability. *AstraZeneca* should also serve as a reminder that policyholders considering the “Bermuda Form” should make sure to include “follow-the-settlements” wording that would require the insurer to indemnify its insured’s settlement payments without requiring the policyholder to prove its own liability in the underlying claims. In addition, policyholders should be careful in their selection of governing law. While New York law can sometimes be more insurer-friendly than other jurisdictions, it is more favorable to policyholders on a number of critical issues in comparison to English law.

**B. *Halliburton Co. v. Chubb Bermuda Insurance Ltd*, [2018] EWCA Civ 817**

*Halliburton Co. v. Chubb Bermuda Insurance Ltd*, [2018] EWCA Civ 817, also demonstrates potentially important differences between New York and English law. There, the English Court of Appeal considered an application for removal of an arbitrator who had been proposed as Chair in a Bermuda Form insurance arbitration based on allegations of an appearance of bias during the arbitration. The policyholder discovered that, subsequent to the arbitrator’s appointment in their arbitration with their insurer, he had accepted additional appointments involving the same insurer, same counsel for the insurer, and the same underlying incident, all without disclosing such additional appointments (and other appointments, as well) to the parties in the arbitration. Although the arbitrator in question had for decades been a

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<sup>37</sup> 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988).

<sup>38</sup> This result also advances the public policy in the United States that favors settlement.

well-known Queen's Counsel and arbitrator active in Bermuda Form arbitrations, the courts addressing this issue have refrained from identifying him in deference to the expectations of confidentiality typically invoked under the English Arbitration Act. It had been well-known for years, however, that the arbitrator had typically been appointed only by insurers in Bermuda Form arbitrations. In part for this reason, the policyholder took a challenge to the appointment of this barrister as Chair of a Bermuda Form insurance arbitration arising out of the BP/Deepwater Horizon oil "spill" in the Gulf of Mexico.

The English Court of Appeal recognized the litigation raised issues of keen importance to parties, particularly policyholders, facing arbitration of disputes with insurers under Bermuda Form and other insurance policies requiring resolution of disputes in London under the English Arbitration Act:

[¶ 2] This appeal raised issues of importance in relation to commercial arbitration law and practice. The specific issues upon which the judge gave permission to appeal may be summarised *below*:

- 1) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.
- 2) Whether and to what extent he may do so without disclosure.
- 3) The second of those issue give rise to the consideration of two further general issues, namely:

[¶ 3] The second of those issues gives rise to the consideration of two further general issues, namely:

- 1) When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality?
- 2) What are the consequences of failing to make disclosure of circumstances which should have been disclosed?

Thus, this decision is of crucial interest to policyholders who either have Bermuda Form policies in their insurance programs or who are considering whether to purchase policies that require binding and non-appealable arbitration in London under the English Arbitration Act. For the sake of transparency and the conviction of fair process for policyholders based in the United States and perhaps other markets as well, the question of whether to purchase policies that contain such clauses should be given careful thought.

The English Court of Appeal reached the same “overall conclusion” adopted by the court *below*, the English High Court. In its decision, issued April 19, 2018, the English Court of Appeal explained that the test for impartiality of an arbitration tribunal under English law is whether—at the time the disqualification application was made—there are facts or circumstances known to the arbitrator that would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased. As set forth in the decisions issued in this litigation, the “fair-minded” observer “is gender neutral, is not unduly sensitive or suspicious, reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses.”<sup>39</sup> Furthermore, the “informed” observer “is informed on all matters which are relevant to put the matter into its overall social, political or geographical context.”<sup>40</sup>

The Court of Appeal found no appearance of bias that justified disqualifying the arbitrator. It concluded that the arbitrator’s non-disclosure is “a factor to be taken into account in considering the issue of apparent bias,” but that such non-disclosure cannot in and of itself justify an inference of apparent bias. The court did not consider the arbitrator’s failure to disclose the other appointments in the very same matter, for the very same insurer and counsel, to provide grounds for disqualification, reasoning that those other appointments did not themselves give rise to any justifiable concerns over the arbitrator’s independence. Although both the lower court and the English Court of Appeal concluded that the arbitrator “*ought* as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure,” they also both concluded that the arbitrator’s

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<sup>39</sup> See *H v. L*, [2017] EWHC 137 (Comm) at ¶ 16.

<sup>40</sup> See *id.*

failure to disclose was likely not in itself sufficient grounds for disqualification. The court also considered the overlap in the subject matter and identities of the parties between the arbitrator's various appointments, but concluded once again that the overlap "does not give rise to justifiable doubts as to impartiality." The court referenced the lower court's explanation that such overlap is a "regular feature of international arbitration in London," and that arbitrators with expertise in insurance and Bermuda Form arbitrations "often comprise a limited pool of talent." Finally, the court made no special analysis of the fact that the arbitrator had been proposed as Chair of the panel, and not as a wing arbitrator (as had been the case in many previous arbitrations in which the arbitrator had been appointed).

This decision deserves further consideration in the U.S. insurance market and perhaps in other situations in which there are institutional litigants that will be understood to provide repeat business to arbitrators. Because, as the English Court of Appeal itself made clear, there is a "limited pool of talent" with experience in both arbitration and insurance, it should be understandable that policyholders might have a concern about the fairness of a process that does not provide for equal transparency about the background of arbitrators chosen for such panels.

*Halliburton* also serves as an important reminder that arbitrator partiality disputes in London-based Bermuda Form arbitrations are resolved in English courts applying English arbitration law, notwithstanding the Bermuda Form's provisions selecting New York as the applicable law for substantive contract interpretation issues. This feature is significant in light of the high burden to establish an appearance of bias under English law, particularly with respect to an arbitrator's duty to disclose. Under New York law, "the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511."<sup>41</sup> Although the English court in *Halliburton* referred to the disclosure of the other arbitrations in question as "a matter of good practice," New York courts have adopted a more stringent view, finding that "a rule requiring maximum prehearing disclosure must in the long run be productive of

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<sup>41</sup> *J. P. Stevens & Co. v. Rytex Corp.*, 34 N.Y.2d 123, 125 (1974); see also *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1264 (2d Cir. 1973) ("[T]he better practice is that arbitrators should disclose fully all their relationships with the parties, whether these ties be of a direct or indirect nature.").

arbitral stability.”<sup>42</sup> Similarly, Canon IV of the ARIAS•U.S. Code of Conduct for insurance and reinsurance disputes specifies that “[c]andidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment,” that “[t]he duty to disclose all interests and relationships is a continuing obligation throughout the proceeding” and that “[a]ny doubt should be resolved in favor of disclosure.”

While English law imposes a generally high burden for disqualification of arbitrators under English law, Bermuda Form policyholders should consider challenges particularly when it is generally known (as it had been with the arbitrator challenged in *Halliburton*) that the arbitrator in question has acted many times before only for one side in Bermuda Form arbitrations, has been appointed numerous times by a party or counsel, or has addressed the same issue; with the backdrop of the standard applicable under New York law, challenges seem particularly worthy of consideration when there is a question of lack of arbitrator disclosure.<sup>43</sup>

Counsel experienced in London or Bermuda Form arbitrations are likely to have better knowledge, if only general, about the backgrounds and other appointments of arbitrators and may be better positioned to detect arbitrator bias. Coverage counsel can also assist policyholders to negotiate arbitration provisions that set forth appropriate criteria for arbitrator and chair selection during the underwriting process or at the outset of the arbitration proceedings. Such advance planning can minimize the risk of being saddled with an arbitrator who may be less than forthcoming about dealings that may create an appearance of bias.

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<sup>42</sup> *J.P. Stevens v. Rytex*, 34 N.Y.2d at 128.

<sup>43</sup> *Almazeedi v. Penner & Another*, [2018] UKPC 3 26/02/2018, a recent decision by the Judicial Committee of the Privy Council, provides another illustration of the complex issue of bias under English law—although in the context of judicial bias. There, the Court held that it was inappropriate for a judge to fail to disclose his appointment as a judge of the Qatar International Court and Dispute Resolution Centre, which was a tribunal over which one of the party’s shareholders exercised appointment and removal powers. In a split decision, the Judicial Committee of the Privy Council held “with some reluctance” that the appellate court was correct to regard the judge’s nondisclosure as inappropriate.

**C. *MF Global Holdings Ltd. et al. v. Allied World Assurance Co. Ltd. et al.*, No. 1:16-ap-01251 (Bankr. S.D.N.Y. Aug. 24, 2017)**

*MF Global Holdings Ltd. et al. v. Allied World Assurance Co. Ltd. et al.*,<sup>44</sup> addressed an arbitration provision identifying (as some Bermuda Form policies have in the past done) Bermuda, not London, as the place of arbitration. There, the US Bankruptcy Court for the Southern District of New York ordered MF Global Holdings Ltd. and Allied World Assurance Co. Ltd. to arbitrate their \$15 million errors-and-omissions insurance coverage dispute in Hamilton, Bermuda. MF Global initially sought to litigate the coverage dispute in the bankruptcy court in New York, arguing that the disposition of coverage was “core” to the bankruptcy proceedings because resolving rights under the policy required interpretation and enforcement of prior bankruptcy court orders, and also because the dispute implicated an important asset of the estate. However, Allied World sought to enforce the insurance policy’s broad Bermuda arbitration provision,<sup>45</sup> arguing that the coverage dispute was a “non-core” issue and public policy favors enforcing arbitration agreements.

Agreeing with Allied World, the bankruptcy court concluded that it must refer the coverage dispute to arbitration in Bermuda. The court deemed the coverage dispute a “non-core” issue that was based on the parties’ pre-petition relationship, was not based on rights created under the Bankruptcy Code, and did not implicate the most important asset of the estate. The court also emphasized the Federal Arbitration Act’s strong policy in favor of enforcing arbitration agreements. Finally, the court also stayed the adversary proceeding in its entirety pending the outcome of the Bermuda arbitration. Other courts have recognized, however, that an insurance coverage dispute certainly can be a “core” issue if the insurance coverage would have a significant impact on the administration of the estate.<sup>46</sup>

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<sup>44</sup> No. 1:16-ap-01251, 571 B.R. 80 (Bankr. S.D.N.Y. 2017).

<sup>45</sup> As explained *above*, the 004 version of ACE’s Bermuda Form and some policy forms that follow the Bermuda Form required arbitration of disputes in Bermuda under the Bermuda Arbitration Act, often with the law of Bermuda applying. Those provisions have not proven popular with the insurance marketplace and largely have been replaced or superseded. Policyholders should take care to avoid such provisions if they can, as arbitration in Bermuda is logistically more difficult.

<sup>46</sup> See, e.g., *In re U.S. Lines, Inc.*, 197 F.3d 631, 638 (2d Cir. 1999) (“Indemnity insurance contracts, particularly where the debtor is faced with substantial liability claims within

*MF Global* illustrates that courts may enforce the Bermuda Form's arbitration clause even when there are logistical challenges or countervailing public-policy arguments that would favor resolving the dispute in court. Although debtors or other parties in bankruptcy may be able to establish that a coverage dispute is a "core" issue that should be adjudicated in the bankruptcy court, policyholders seeking the option to litigate Bermuda Form disputes in court in the advent of bankruptcy should consider including specific wording that provides that option.

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the coverage of the policy, 'may well be... the most important asset of [the debtor's] estate.')

