

The Bermuda Form Arbitration Process: A Glimpse Through The Insurers' Spectacles

By Mina Matin

Introduction

1. It is reported that, in recent years, there has been a threefold increase in U.S. citizens giving up their citizenship and becoming British, a process known in U.S. tax circles as renunciation. The reason is principally U.S. tax law and not any other. Otherwise, U.S. citizens are not enamoured of the U.K. Indeed, the climate in England is notoriously atrocious, the English accent is curious, and the humour is dubious. However, U.K. tax is preferable to U.S. tax. Yet, despite their renunciation, these erstwhile citizens harbour a passion for U.S. laws and are really U.S. citizens with UK tax clothing.
2. The same might be said about Bermuda Form arbitrations, where U.S. policyholders have embraced the idea of (mainly) English arbitrations for U.S. disputes. English arbitration laws and practices can be preferable to U.S. arbitration laws and practices in certain respects even though the policyholders are truly U.S. entities. For this reason, they have retained New York law to protect them whilst opting for English arbitration clothing with which to cover them. In the same vein, it might be said that Bermudian insurers have retained the cloak of protection of English arbitration laws and practices whilst agreeing to New York law (subject to certain modifications) in an effort to maintain an “even-handed” and “fair” level playing field even though in all other respects their cultural affinity is towards English law.
3. In this context, this Article explores some of the practical issues that might arise in Bermuda Form arbitration

proceedings. In particular, it takes a look at these issues from the perspective of both insureds and insurers who have each come to the Bermuda Form playing field with inevitably different and competing objectives but yet must abide by the same set of rules.

Governing Law

A. Relevant Provisions

4. Condition O of the standard Bermuda Form Policy provides insofar as material as follows:

“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 [Bermuda or England and Wales], 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 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...*” (emphasis added).

5. The standard Bermuda Form Policy will therefore engage New York law, English law or Bermuda law, depending on the selection of the parties. The normal selection is New York law. It is rare for the parties to select English or Bermuda law to be the governing law of the contract because of the perception of policyholders (who tend to be North American) that English and Bermuda law tends to be more favourable to insurers than to policyholders. The Insurance Act 2015, which came into force in England in August 2016, might change that perception to a degree so far as English law is concerned but Bermuda has no such law and there are no signs that it is considering enacting any equivalent.

6. The arbitration provision in Condition N of the Policy provides, in relevant part, as follows:

“Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, 1979 and/or any statutory modification or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected as follows...”

7. This provision not only makes London, England the place where the arbitration will be held (although there is a discretion in the arbitration tribunal exceptionally to hold the arbitration elsewhere if the circumstances demand)¹ but also makes England the juridical seat of the arbitration: in other words, the arbitration is an English arbitration and is subject to the supervision and oversight of the English Courts in accordance with English legislation. The general effect is that no other courts in any other jurisdiction may interfere with the tribunal or have jurisdiction in relation to the conduct of the arbitration and any challenges to its procedures or substance.

8. In general, therefore, the governing law of the substantive rights and obligations of the parties will be New York law whilst the law of the arbitration will be English law with the juridical seat of the arbitration being London,

England. I shall proceed on this basis for the purposes of this Article.

9. There are two consequences of the juridical seat of the arbitration being that of London, England:
- Firstly*, the procedural law that is applicable to the arbitration will be that of the English Arbitration Act 1996.
 - Secondly*, the arbitration will be subject to the supervisory jurisdiction of the English High Court under the Arbitration Act 1996.²

B. Procedural Law Applicable to the Arbitration

10. The Arbitration Act 1996 confers expansive powers on the parties and the Tribunal. The Tribunal is required to “act fairly and impartially as between the parties” and to “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”³
11. The Tribunal also has a broad discretion to determine “all procedural and evidential matters, subject to the right of the parties to agree any matter.”⁴ This includes but is not limited to matters such as: (a) whether and if so, what form of pleadings are to be used and when they should be served, (b) disclosure issues, (c) whether to apply strict rules of evidence as to the admissibility, and relevance of weight of materials.⁵
12. What this means is that a tribunal has the discretion to adopt procedures that are not generally applied in English Court (or any other country’s court) proceedings. For example, a tribunal may determine that depositions, which are not deployed in English proceedings, should be deployed. That said, the tribunal would typically tend to adopt English or international arbitration procedures for the conduct of the arbitration.

² See section 2(1) of the 1996 Act.

³ See section 33(1) of the 1996 Act.

⁴ See section 34(1) of the 1996 Act.

⁵ See section 34(2) of the 1996 Act which sets out a list of procedural and evidential matters which the tribunal has a discretion to determine.

¹ See section 34(2)(a) of the Arbitration Act 1996.

C. Supervisory Jurisdiction of the Arbitral Process

13. Issues that fall within the ambit of the English High Court's powers include: (a) the removal or the appointment of arbitrators⁶ (see further section C(iii) below), (b) the substantive jurisdiction of the tribunal,⁷ (c) challenges to an arbitral award on the basis that the tribunal did not have substantive jurisdiction or on the ground of serious irregularity and appeals.⁸

D. Applicable Substantive Law

14. As noted above, the express law governing substantive legal issues is that of the internal law of New York. As a result, it is unlikely that New York's choice of law rules would apply.
15. Disputes have sometimes arisen as to whether New York law governs issues of misrepresentation and/or non-disclosure. Parties have purported to assert that New York law applies solely to matters of construction and interpretation, and that misrepresentation and/or non-disclosure issues are not disputes that arise out of or relate to the policy.
16. Under English law, disputes regarding: (a) the contractual interpretation of the contract, as well as (b) the validity of the contract including issues of misrepresentation or material non-disclosure are governed by the law chosen by the parties as applicable to the substance of the dispute.⁹ If the policy provides for English arbitration in London, a tribunal applying English law (as would normally be the case in London arbitrations where choice of law clauses are ordinarily interpreted in accordance

with the *lex fori*, the law of the forum)¹⁰ would likely conclude that New York law applies to all issues of substance between the parties, including therefore issues of misrepresentation and/or non-disclosure.

17. The two express qualifications to the application of New York law are as follows:
- a. *Firstly*, the application of New York's regulatory law is excluded. The reference to "*regulation under the New York Insurance law*" is likely a reference to regulatory statutes and not to New York's Insurance Law that pertains to issues of misrepresentation and/or material non-disclosure. Indeed, as noted above, the general practice is that New York Insurance Law applies to issues of misrepresentation and material non-disclosure.
 - b. *Secondly*, punitive damages are not, as a matter of public policy under New York law, insurable. It follows that the modification to the application of New York law that relates to "punitive damages" is likely intended to provide for the recoverability of punitive damages under the Bermuda Form Policy so that a tribunal may award an indemnity in respect of punitive damages.

E. "Modified" New York

18. Condition O of the Bermuda Form Policy also provides insofar as is material as follows:

"[T]he provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded 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, exclusions and conditions (without regard to authorship of language, without any presumption or arbitrary interpretation of construction in favor of either

⁶ See sections 18, 19 and 24 of the Arbitration Act 1996.

⁷ See section 32(1) of the 1996 Act which provides that the court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the Tribunal. Such an application will not be considered, however, unless it is made with the agreement of all the parties to the arbitration or the permission of the Tribunal (see section 32(2) of the Arbitration Act 1996).

⁸ See sections 67 and 68 of the Arbitration Act 1996.

⁹ See section 46(1)(a) of the 1996 Act; *Evans Marshall & Co. Ltd. v. Bertola SA* [1973] 1 WLR 349.

¹⁰ Under English conflict of laws principles, which apply to an arbitration seated in London under an arbitration agreement governed by the English Arbitration Act 1996, the effect of a choice of law clause is a matter for the *lex fori*, and is determined by applying the normal English rules of interpretation: see, for example, *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.* [1971] AC 572 at p.603 (per Lord Diplock).

the Insured or the Company or reference to the "reasonable expectations" of either party or to contra proferentem and without reference to parol or other extrinsic evidence."

19. What this means is that the following are all outlawed, namely: (i) any presumptions in favour of the insured or, in the same vein, any anti-insurer principles, (ii) any rule that applies an interpretation of the policy in accordance with the reasonable expectations of the parties, (iii) any rule that states that any ambiguity must be resolved in favour of the insured or against the insurer, (iv) any recourse to the rule of contra proferentem (i.e., applying any ambiguity in favour of the insured), and (v) any recourse to extrinsic evidence such as the subjective views of the parties or negotiations.

F. The Role of Extrinsic Evidence

20. The rationale for excluding extrinsic evidence is to prohibit contractual interpretation based upon the subjective views of the parties as to the meaning of the policy terms. It does not follow, however, that the Bermuda Form Policy should be construed in isolation without regard, for example, to the contextual circumstances in which it was entered into, the commercial purpose of the policy and its terms, and the knowledge of both parties of extraneous facts that might have influenced their agreement.
21. This is not considered to be inconsistent with New York law which provides that the fundamental rule in the construction of all contracts, including insurance contracts, is to enforce the mutual intent of the parties at the time that the contract was formed as expressed in the unequivocal language employed in the contract.¹¹
22. Examples of extrinsic evidence that might be deployed include: issues as to the custom and practice or known purpose of a particular provision; or the structure of the

program of which the policy forms a part.¹² Examples of extrinsic evidence which may not be deployed include: pre-contractual or contemporaneous or subsequent declarations by the one of the parties as to the meaning of the policy, pre-contractual or contemporaneous or post-contractual conduct or correspondence of any one of the parties from which one might be able to infer their subjective understandings of what the policy means, and testimony of the parties' subjective intentions.

G. Are there alternatives to "modified" New York law that should be considered?

23. Of all the laws of the individual States of the Union, New York law is probably regarded as the most even-handed as between insured and insurer. There is no doubt that English or Bermuda insurance laws are regarded as less favourable to insureds than even New York law but, in truth, that is probably as much a consequence of the applicable New York legal principles, themselves, as of the disposition of English arbitrators who tend to be English Queen's Counsel and former English judges. These arbitrators are in fact notoriously even-handed as between insureds and insurers but, from the perspective of North American insureds and their lawyers, who have come generally to expect tribunals to be pro-insured, they *therefore* seem to be more favourable to insurers. That is simply the product, however, of their even-handedness.
24. It would be rare (and possibly ill-advised) for a policyholder to choose English or Bermuda governing law above New York law. Similarly, it would be rare (and possibly ill-advised) for an insurer to choose arbitration other than in London, England, or Bermuda. The combination that has worked reasonably well until now is to have modified New York governing law with English or Bermuda arbitration. In that way, the competing interests of the parties are reasonably well balanced.

¹¹ See *Breed v. Insurance Co. of North Am.*, 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 355 (1978); *United States Fidelity & Guaranty Co. v. Annuziata*, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 791 (1986) ("Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement.")

¹² See e.g., *Newmont Mines Limited v. Hanover Insurance Company* 784 F.2d 127, 135 (2d Cir. 1986): "The cardinal principle for the construction and interpretation of insurance contracts – as with all other contracts – is that the intentions of the parties should control. See, e.g., 29 N.Y. Jur. Insurance §§ 593-594 (1963). Unless otherwise indicated, words should be given the meanings ordinarily ascribed to them and absurd results should be avoided. As we have stated before, the meaning of particular language found in insurance policies should be examined 'in the light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes.' *Champion International Corp. v. Continental Cas. Co.*, 546 F.2d 502, 505 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977)."

Selection of Arbitrators

A. The Selection Process

25. One of the critical first steps and often the key to success in the arbitral process is the selection of arbitrators. As Alexander Graham Bell said, “[b]efore anything else, preparation is the key to success.” A poor selection of an arbitral tribunal can lead to devastating results.
26. In a Bermuda Form arbitration, there will generally be three (impartial) arbitrators: two party appointed arbitrators together with a chairperson.
27. The decision to appoint an arbitrator often involves detailed investigations into proposed arbitrators having regard to their experience and qualifications and the merits of the case. That said, unlike U.S. proceedings, detailed interviews with prospective candidates are not commonplace.”
28. A good guide to those communications that are appropriate are set out in the Chartered Institute of Arbitrators International Arbitration Practice Guideline on “Interviews for Prospective Arbitrators” (“CIA Guidelines on Interviews”). The CIA Guidelines on Interviews provide that it is permissible to have initial contact with a prospective arbitrator and to interview the arbitrator but only to the extent of ascertaining: (i) his past experience in international arbitration, (ii) expertise in the subject matter of the dispute, (iii) his availability, including the expected timetable of the proceedings and estimated timings and length of hearing and/or (iv) the arbitrator’s fees and other terms of appointment.¹³ Matters that should not be discussed include: (i) the specific facts or circumstances giving rise to the dispute, (ii) the positions or arguments of the parties, (iii) the merits of the case, and (iv) the prospective arbitrator’s views on the merits, parties’ arguments and/or claims.¹⁴ Moreover, ex parte communications between an arbitrator and those appointing him are generally forbidden.
29. As a general practice, insurers in a Bermuda Form arbitration tend to appoint English Queen’s Counsel or retired English Commercial Court Judges as their party appointed arbitrator and/or put forward their names as the chairperson. This practice has arisen in part for cultural reasons (see above) but also because of their analytical approach to contractual interpretation which is often key to an insurer’s defences. Whilst insureds also appoint English Queen’s Counsel, they also often seek to appoint U.S. arbitrators who, they think, might be more inclined to be understanding of, and more favourable, to policyholders.
30. Unlike the more adversarial systems in other parts of the world, all three arbitrators must be “impartial” and “independent.” Impartiality and independence extend to those instances where an arbitrator has already expressed a view adverse to a party in the same or a related case. Thus, it has been held by the English Court of Appeal that, “[t]he mere fact that a judge earlier in the same case or in a previous case, had commented adversely on a party or a witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection.” It should, therefore, be noted that the fact that an arbitrator has been appointed for one party in a prior arbitration and/or has determined certain issues which may well arise in a subsequent arbitration, does not preclude that arbitrator from acting in a subsequent related arbitration (see further paragraphs 32 to 37 below). Quite often in these situations, a party might make noises of unhappiness without, however, formally objecting. The arbitrator might then decide to resign or not to accept the appointment - but that will be in order to avoid any sense of grievance rather than because of any legal imperative.

B. Frequent Flyer appointments

31. A recurrent criticism levied by policyholders against insurers is what has been described as “frequent flyer” appointments i.e., repeated and frequent appointment of the same arbitrator as the gateway to a favourable outcome. Such criticisms are usually entirely baseless (with the specific exception of the circumstances that are identified below in section E(iii)). Indeed, the same could be said of insureds in their selection of arbitrators. In light of the select pool of truly expert and appropriate arbitrators for a Bermuda Form dispute, it is inevitable that the same arbitrator may be appointed in multiple

¹³ See Article 2 (Matters to discuss at an interview prior to appointment) of the Chartered Institute of Arbitrators International Arbitration Practice Guideline on “Interviews for Prospective Arbitrators.”

¹⁴ See Article 3 (Matters that should not be discussed) of the Chartered Institute of Arbitrators International Arbitration Practice Guideline on “Interviews for Prospective Arbitrators.”

arbitrations.

32. In a recent decision in the Commercial Court, England, Mr. Justice Popplewell held that the appointment of an arbitrator in related arbitrations was insufficient to create an appearance of bias *per se* to justify his or her removal under section 24(1) of the Arbitration Act 1996.¹⁵
33. Section 33 of the Arbitration Act 1996 requires the tribunal to act fairly and impartially between the parties. The question whether circumstances exist which give rise to justifiable doubts as to an arbitrator's impartiality is to be determined by applying the common law test for apparent bias,¹⁶ namely, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.¹⁷ The test is an objective one.
34. Mr. Justice Popplewell relied upon the case of *Amec Capital Projects Ltd. v. Whitefriars City Estates Ltd.* [2004] EWCA Civ. 1418 in support of the proposition that, “*the mere fact that the tribunal has previously decided the issues [in a separate adjudication] is not of itself sufficient to justify a conclusion of apparent bias. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons.*”
35. He went on to say that these comments apply with as much force to arbitrators in international reinsurance arbitrations. He specifically commented that, in relation to Bermuda Form arbitrations,

“[a] number of arbitrations may be commenced around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been

*successful before one tribunal, may then be tempted to appoint one of its members...as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A's arguments. It follows from *Locabail and Amec* that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before the hearing on another layer.”¹⁸*

36. Mr. Justice Popplewell's ruling might be considered a little naïve and unworldly by some, especially any who have had an unsettling experience of serial appointments and serial appointees. However, extrapolating from the fundamental principle that the English arbitral process requires “impartiality,” the relevance of an arbitrator having acted in related arbitrations is, at least conceptually, diminished.
37. Moreover, the decision did not address the frequency with which an arbitrator may act in related proceedings and repeated appointments on behalf of a party. To this end, in my experience, most parties to the Bermuda Form arbitral process abide by the IBA Guidelines on Conflict of Interest. The IBA Guidelines provide, among other things, that doubts as to an arbitrator's impartiality or independence may arise if the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.¹⁹

C. Methods of agreeing the Third Arbitrator

38. Typically, the chairperson or third arbitrator is selected by the two party appointed arbitrators. A list of names might be given by each side to the two party appointed arbitrators with view to those arbitrators selecting a third who is common to both lists. In some arbitrations, where

¹⁵ See *H v L & Ors.* [2017] EWHC 137 (Comm.)

¹⁶ See *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451 at 17; *A v. B* [2011] 2 Lloyd's Rep. 591 at 22 and *Sierra Fishing Co. v. Farran* [2015] EWHC 140 at 51.

¹⁷ See *Porter v. Magill* [2002] AC 357 per Lord Hope at 103.

¹⁸ *Id* at para. 28 (citing with approval an extract from “*Liability Insurance in International Arbitration*,” 2nd Edn at 14.32).

¹⁹ See paragraph 3.1.3 of the IBA Guidelines on Conflicts of Interest.

the parties cannot come together, and where even the two appointed arbitrators cannot agree, the third arbitrator is selected by a drawing of lots. In the event, however, that both parties are unable to select a common arbitrator as the chairperson, the dispute can be referred to the English / Bermuda High Court which will make the final choice.

D. Default Selection by the English High Court

39. Section 16 of the Arbitration Act 1996 provides as follows:

- a. *The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire.*
- b. *If or to the extent there is no such agreement, the following provisions apply.*

... (Emphasis added).

(5) *If the tribunal is to consist of two arbitrators and an umpire-*

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(7) *In any other case (in particular, if there are more than two parties) section 18 applies as in the case of a failure of the agreed appointment procedure. (Emphasis added).*

40. Section 18 of the Act provides as follows:

- a. *The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.*
- b. *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*
- c. *Those powers are-*
 - 1. *To give directions as to the making of any necessary appointments;*
 - 2. *To direct that the tribunal shall be constituted by*

such appointments (or any one or more of them) as have been made;

- 3. *To revoke any appointments already made;*
- 4. *To make any necessary appointments itself. (Emphasis added).*

41. Section 27 of the Act further provides:

- a. *Where an arbitrator ceases to hold office, the parties are free to agree-*
 - 1. *Whether and if so how the vacancy is to be filled...*
- b. *If or to the extent that there is no such agreement, the following provisions apply.*
- c. *The provisions of section 16 (procedure for appointment of arbitrators) and 18 (failure of appointment procedure) apply in relation to the filling of the vacancy as in relation to an original appointment. (Emphasis added).*

42. In order to invoke these provisions, a party must satisfy the court that there is no agreement as to the procedure for the appointment of a third arbitrator or that the procedure has failed.

43. It is rare for the Court to have to intervene. Normally, the parties and/or the two appointed arbitrators find some means for the appointment of the third arbitrator even if the final result satisfies nobody very much or entirely.

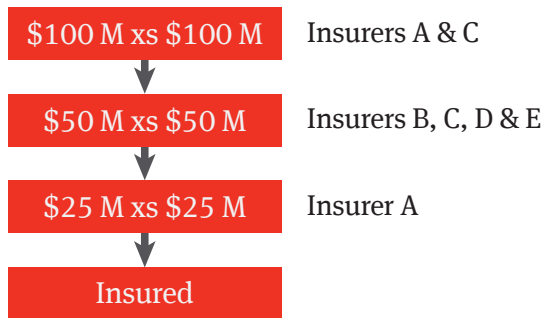
Choice of Counsel

A. Is English Counsel desirable?

- 44. *“Unless otherwise agreed by the parties,” either party may be represented in the arbitration proceedings by “a lawyer or other person chosen by him.”²⁰*
- 45. Given that the juridical seat of the arbitration is in London and the applicable procedural law of the arbitration will

²⁰ See section 36 of the 1996 Act.

be that of English law pursuant to the provisions of the Arbitration Act 1996, the general trend is towards the choice of English Counsel, usually a Queen's Counsel, as the lead advocate. This is also partly for cultural reasons as well as the fact that the tribunal will commonly have two English lawyers on the panel. Counsel will likely have appeared before the arbitrators in other Bermuda Form disputes and will therefore have some familiarity with the workings of the Form and with Bermuda Form arbitrations. There is, of course, nothing to prevent the use of U.S. Counsel as the lead advocate on the matter. Both English and/or U.S. Counsel are equally effective.



B. Can English Counsel be from the same chambers as an arbitrator?

46. The short answer is, yes. Instinctively, this might appear unjust especially to those accustomed to the U.S. adversarial system. It is also not uncommon to find that Counsel from the same set of chambers are on opposite sides. In the latter instances, these arbitrations sometimes are the most bitterly fought.

Consolidation of Related Proceedings Among Insurers In the Same Tower or Layer

A. Is Consolidation Desirable?

47. Section 35 of the Arbitration Act 1996 provides that the parties may agree that: (a) arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms that are agreed between them. The tribunal has no independent power to order the consolidation of proceedings or concurrent hearings.

48. Insurance coverage to an insured under the Bermuda Policy generally consists of several layers of excess of loss

coverage that are placed with one or more insurers usually in the Bermudian market. For example, a basic program might be as follows:

49. Let us assume that the insured faces multiple claims amounting to over \$200 million in losses which it seeks to recover from its insurers. All insurers A, B, C, D and E deny coverage. The insured therefore commences arbitration proceedings against all of the insurers to recover \$175 million.

B. How would it work?

50. In this scenario, the insured may well desire to consolidate the proceedings in order to minimize its costs. In certain cases, consolidation may be desirable and more cost effective for both parties. For example, the dispute between the insured and insurers B, C, D and E in respect of the layer \$50 million excess of \$50 million.

51. From an insurer's perspective, however, consolidation of all the disputes may be not be desirable for the following reasons:

- (a) The Bermuda Form Policy is a standalone Policy such that the terms and conditions pertaining to each Policy are separate and unique.
- (b) It is possible that the issues pertaining to each layer of coverage will be different, especially in circumstances where a defence of misrepresentation and/or non-disclosure is raised which is contingent upon the subjective expectation and belief of the underwriter for each insurer.
- (c) It is possible that one insurer does not wish to be associated with another for commercial and other reasons. It is possible that one insurer will wish to take certain points but not others while another insurer wishes to take a different line. One insurer might be more inclined to compromise with the insured than another insurer and might wish, therefore, to have separate lines of communication. There are a myriad of reasons why insurers might not want to be joined with others in a common defence.
- (d) Even if the issues pertaining to each dispute are the same, it does not follow as a matter of course that a consolidated arbitration will be less costly. Each

insurer might want, despite likely discouragement from the insured and the tribunal, its own counsel to present its case.

52. These are just some of the factors that might bear upon an insurer's decision whether to seek agreement for consolidation or not. Each arbitration must, of course, be viewed upon the facts specific to that arbitration and insurers may well be willing to consolidate proceedings with other insurers in the tower under the appropriate circumstances.

C. Implications of the policyholder choosing the same arbitrator in different arbitrations in the same tower

53. A policyholder may well desire to choose the same arbitrator in different arbitrations against different insurers but in the same tower. The logical reason being that the particular arbitrator selected will be well versed in the factual matrix and the issues (which are likely to be similar) in each of the respective arbitrations.
54. From the perspective of each respective insurer in the tower of insurance, selection of the same arbitrator is wholly undesirable. Even though the arbitrator is required to act impartially and independently, that arbitrator will inevitably glean and be privy to facts and information (including factual and/or expert evidence) from some of the arbitration proceedings that are absent in other proceedings and which will most likely colour his views even if not always consciously).
55. As noted above, the mere fact that an arbitrator takes a view in one proceeding does not per se preclude him from acting in another proceeding involving the same issue. To this end, the recent U.K. Commercial Court decision of *H v L* (see paragraphs 32 to 37 above) might be said to inure to the benefit of the policyholder (over that of insurers) in its ability to appoint the same arbitrator in multiple arbitrations against other insurers who participate in higher layers in the Bermuda Form Tower.
56. That said, if and insofar as it can be shown that the repeated appointment of a particular arbitrator gives rise to "justifiable doubts as to his impartiality" which is the ground for challenging an arbitrator's appointment pursuant to section 24 of the Arbitration Act 1996, proceedings may be brought before the UK High Court for his or her removal. As highlighted above, the test that the

court will apply is that of a "fair-minded and informed objective observer" and whether there is, based upon the facts of the case, a reasonable possibility that the arbitrator is biased.²¹

Confidentiality of Proceedings

A. Are the proceedings inherently confidential?

57. The genesis of the confidentiality of arbitration proceedings arose under English common law as an adjunct to the implied obligation and/or an implied term of the arbitration agreement in relation to the discoverability of documents.²² The Court of Appeal has held that:

*"...there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any purpose any documents prepared for and used in arbitration, or disclosed or produced in the course of arbitration, or transcripts or notes of the evidence in the arbitration or the award."*²³

58. The Court of Appeal recognized, however, an overriding public interest favouring the disclosure of documents in circumstances where: (a) the parties expressly or impliedly consent to disclosure, (b) where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party, and (c) where the interests of justice require disclosure.
59. The English courts consider the private and confidential nature of arbitration under English procedure as being paramount unless the interests of justice dictate otherwise. This extends to confidentiality in every aspect of the arbitration, not just documents. It extends to evidence, arguments, pleadings and the award.

B. Is confidentiality desirable?

60. Confidentiality of the arbitral proceedings and of the documents produced in those proceedings may be desirable from the perspective of both the insured and the

²¹ See *Laker Airways v. FLS Aerospace* [1999] 2 Lloyd's Rep. 45 at 48 (per Rix J).

²² See *Dolling-Baker v. Merrett* [1990] 1 W.L.R. 1205; *Ali Shipping Corp. v. Shipyard Trogir* [1991] 1 W.L.R. 314.

²³ See *Emmott v. Michael Wilson & Partners Ltd.* [2008] EWCA Civ. 184.

insurer:

- a. In the case of the insured who may still be litigating the underlying claims throughout the U.S., the insured may wish to preserve privilege in respect of documents produced in the arbitration to avoid disclosure in the underlying proceedings, or alternatively to conceal arguments that were ultimately successful in the arbitration. This might also be especially so in circumstances where the insured is fighting multiple concurrent and separate arbitrations with each of the insurers in the tower of insurance. Knowledge of key arguments deployed, documents produced and so forth might have a detrimental effect upon the result of the arbitrations in each of the proceedings.
- b. In the same vein, insurers may wish to prevent arguments that have been successfully maintained against them from being adopted by other insureds and/or documents (in particular the arbitration award itself) from being produced in other and/or similar arbitration proceedings involving similar claims against the insurer. Insurers are also motivated by a desire to avoid any publicity that would likely be generated by an arbitral process that was not private and confidential.

C. Is confidentiality actually observed in practice?

61. Criticisms have been raised that confidentiality is moot since it is not observed in practice. In my view, such criticisms lack merit. Those who are involved in the Bermuda Form arbitral process generally abide by its rules and if they do not, they ought to.

Document Disclosure Issues

A. What is the appropriate process for requests, objections and search efforts?

62. Pursuant to the English Civil Procedure Rules ("CPR") which apply to court proceedings, "standard disclosure" requires a party to disclose and make a reasonable search for those documents: (a) upon which he relies, and (b) the documents which (i) adversely affect his own case;

(ii) adversely affect another party's case; or (iii) support another party's case.²⁴

63. Many Bermuda Form arbitrations will adopt "standard disclosure" as the springboard for disclosure with further and specific provision (generally in the Order for Directions) for the further disclosure of specific documents. Usually requests for further and specific disclosure are presented in the form of a "Redfern Schedule" with each party identifying: (a) the specific categories of documents sought, (b) the basis for their relevance, and (c) any objections to the requests for disclosure. Insofar as there are objections to requests (which is often the case), the dispute will be heard and dealt with by the tribunal which has the jurisdiction (pursuant to its broad powers to determine evidential and procedural matters) to make any such orders for the production and/or withholding of documents. Generally, a procedure for the resolution of disclosure disputes is provided for in the Initial Order for Directions to prevent any disclosure disputes from derailing the timetable of the arbitration proceeding itself.
64. The parties, however, may agree to adopt an alternative procedure for the production of documents. A common approach is that taken pursuant to the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"). The starting point is Article 3 of the IBA Rules, which places the onus upon each party to produce to the other party the documents upon which it *relies*. Either party may, in response, serve a "Request to Produce" to additional documents. The IBA Rules encourage the parties to resolve any disputes regarding disclosure and only failing which the tribunal will consider the Requests to Produce and whether additional disclosure should be provided. A fundamental difference between the IBA Rules and the English CPR Rules is that only those documents upon which a party "relies" are required to be produced in the first instance. By contrast, the CPR Rules require a party to disclose those documents not only upon which it relies, but which are also *adverse* to its case.

B. Should there be reasonable limits on electronic discovery?

²⁴ See Part 31 of the CPR and the supplemental Practice Direction.

65. The intrinsic nature of Bermuda Form disputes is such that the claims often arise out of extensive underlying litigation between the insured and plaintiffs (commonly in multiple class action lawsuits) throughout the United States in a number of jurisdictions. Consequently a vast number of documents is produced including fact and expert deposition transcripts and exhibits, experts' reports and so forth. Insureds are sometimes reluctant to produce voluminous and irrelevant documentation whilst insurers similarly find the voluminous production of largely irrelevant material to be burdensome. Moreover, the general trend in U.S. proceedings is for attorneys to provide disclosure of documents as they appear in their clients' files or alternatively in response to document requests. Notoriously, in the former case, the documents that are produced are not organized in any or any orderly fashion much to the dissatisfaction of insurers. By contrast, disclosure in English proceedings is by reference to relevant categories of documents that are often ordered chronologically.

66. This begs the question as to the appropriate limits of electronic discovery especially in circumstances where there will undoubtedly be enormous quantities of documentation and the parties will be required to have made a reasonable search for documents. In this regard, the advantage of an English arbitration is that the tribunal will only order disclosure insofar as it is: (a) relevant to the issues in dispute, and (b) is necessary and proportionate having regard to the issues and complexities of the case. It follows that a tribunal may consider it appropriate for a reasonable search of electronic documents to have been made and to be produced by reference to pertinent keyword searches and also having regard to the cost and ease with which particular electronic documents may be retrieved. Guidance may be obtained from the Practice Directions that supplement Part 31 of the CPR Rules.

C. What privilege law applies?

67. During the course of the disclosure process questions and/or disputes sometime arise as to the applicable law insofar as privilege is concerned i.e., whether English law, New York law or the law of another U.S. state applies. The choice of law rules that are applicable to any dispute are generally governed by the *lex fori* (i.e., the law of forum) which, in a Bermuda Form dispute, will typically be that of England or Bermuda. Pursuant to English conflicts of law rules, procedural issues are governed by English law as

determined by the Arbitration Act 1996.

68. Generally, therefore, an arbitral tribunal in a London arbitration with its juridical seat in England will apply English law to the question of privilege on the basis that English law is the law of the forum where the arbitration is taking place.²⁵ Indeed, it has been commented that, “[t]he cases demonstrate that the English courts apply the simple rule under English Conflict of Law rules that it is the *lex fori* that applies to determine whether a communication is privileged.”²⁶ It is therefore irrelevant whether (in the case of disclosure issues) a document would be a privileged communication under a foreign (i.e. non-English) law, not privileged under a foreign law or whether privilege has been waived as a matter of foreign law.

69. It has been suggested that section 34 of the Arbitration Act 1996 which provides that the tribunal shall determine all procedural and evidential matters including whether any documents should be disclosed, extends to privilege such that a tribunal may decline to apply English laws pertaining to privilege. It has been commented, however, that “[p]rivilege is not a matter of discretion: it is a fundamental rule of law”²⁷:

“Legal professional privilege is...much more than an ordinary rule of evidence, limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests.”²⁸

70. It follows that, in an English arbitration that is subject to English curial and procedural law, the tribunal would be very unlikely to order the disclosure of those documents that are, under English law, privileged in the absence of an agreement between the parties otherwise. As to those documents that are not privileged under English law but are privileged under some other, relevant law, it always lies in the discretion of the tribunal not to order disclosure: not necessarily on the basis of non-English privilege but on the basis of the tribunal's discretion

²⁵ See *Bourns v. Raychem* [1993] 3 All ER 154; *British American Tobacco Investments Ltd. v. United States of America* [2004] EWCA Civ. 1064.

²⁶ See *Thanki, The Law of Privilege* (2006) at § 4.79

²⁷ See “*Liability Insurance in International Arbitration: The Bermuda Form*” (Second Edition) by Jacobs QC, Masters and Stanley QC at §16.20, p. 317.

²⁸ See *R v. Derby Magistrates' Court ex parte B* [1996] 1 AC 487, 507; See also *R (Morgan Grenfell Ltd.) v. Special Commissioner* [2003] 1 AC 563.

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