

English arbitration: A proven asset to US corporations that buy insurance in Bermuda



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For more than 25 years, US corporations and their officers and directors have obtained reliable insurance services

from Bermuda insurers. One of the key, yet under-appreciated, reasons why the Bermuda market has been such a trustworthy environment for insurance services is the dispute resolution provision, which typically calls for English arbitration. Arbitration was first introduced by the Fortune 500 companies and brokers who founded the Bermuda market. Those insureds wanted an alternative to the US court system, and found in arbitration an efficient, fair process that encourages quick resolution of disputes. Looking back over time, the results speak for themselves: Bermuda insureds get what they pay for, namely, full policy limits for covered claims. This article discusses the main benefits of English arbitration, which helps explain why so many of the United States' most successful corporations continue to rely upon the Bermuda market for their insurance needs.

There is a huge disincentive for Bermuda insurers to take aggressive positions. A key component to English arbitration is the "loser pays" rule, which mandates that the insurer will pay the insured's costs if the insurer is wrong about coverage. A Bermuda insurer is therefore less likely to pursue suspect coverage positions, as there is a massive financial disincentive against taking a "flier" in an English arbitration. If unsuccessful, the insurer will have to pay the full policy limit, both sides' legal costs and interest. A \$20 million dispute can quickly turn into a \$25-30 million loss for a Bermuda insurer.

Bermuda insureds get their full policy limits. The correlative benefit of the "loser pays" rule to the Bermuda insured is that it will get its full limit of coverage on a net basis. In the US if, for example, an insured has to spend \$2 million to access a \$20 million policy, the net result is \$18 million in coverage. With the "loser pays" rule, the insured recoups its reasonable costs from the insurer and also gets the full \$20 million in coverage, plus interest. While the premium may be the same, the net result is more favorable for the Bermuda insured.

The process is efficient and less distracting for senior management. There are no depositions in English arbitration, which avoids one of the most time consuming, expensive and distracting aspects for a company involved in US litigation. Further, in English arbitration each witness submits a written statement (akin to an affidavit) in advance of the hearing and in lieu of direct testimony. Witnesses who submit statements are only required to sit for cross-examination, if called, and re-direct as necessary. This avoids unnecessary discovery and the accompanying litigation cost and distraction to senior management spent preparing for depositions and direct testimony. This procedure also reduces the amount of time needed for a hearing and focuses the tribunal on the core issues. Moreover, there generally are no appeals. Once an insured gets its award for a covered claim, the only remaining question is how much additional money must be paid by the insurer in interest and costs – an issue that is typically resolved amicably.

The process is fair. English arbitrators pride themselves on looking at the policy and US governing law – and not inflammatory facts – to ascertain whether coverage is afforded under the policy. The arbitrators also have a great deal of experience with the US tort system, US securities law and what some have referred to as the extortionist nature of the US plaintiffs' bar. Even when an insured's alleged conduct may be deemed

reprehensible, which is a potential with multi-million and billion-dollar settlements, the arbitrators will not be distracted in answering the coverage questions. Furthermore, the arbitrators have no allegiances to the policyholder or insurer bars. Each arbitrator acts independently.

There is no further public airing of the insured's problem. Another major benefit to English arbitration is strict confidentiality. An insured looks to its insurer for coverage either during or after what is usually an ugly, public dispute. If the underlying litigation is still active, it is extremely helpful to the insured to have a private avenue to address coverage issues (which may at times be in conflict with the insured's defense in the underlying litigation). If the litigation has concluded, the insured wants to move forward with its business without further distraction. Another public battle, this time with an insurance company – in which all of the unsavory facts will be publicly re-aired in order to resolve the coverage dispute – is the last thing an insured wants in these circumstances. Confidential arbitration avoids this problem.

Bermuda insurers pay covered claims promptly, so arbitrations are very infrequent. A US insured considering buying insurance from a Bermuda insurer should understand that, for all the reasons stated above, arbitrations are infrequent. The reality is that Bermuda insurers have a strong track record for promptly paying covered claims. This track record is information that Bermuda underwriters should have readily available, and this information demonstrates a proven commitment to standing by their insureds during critical times. While there are certainly many reasons why the Fortune 500 companies that founded the Bermuda market over 25 years ago continue to rely upon the same insurers so many years later, English arbitration has proven to be one of the key, yet under-appreciated reasons for this longevity. ☺

BIMA board elected

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Other speakers included the Director of Education and Training at the Bermuda Insurance Institute, Julie Preece and the Executive Director of Business Bermuda

Cheryl Packwood.

BIMA is an association of professional insurance managers in Bermuda. It exists to protect the interests of its members and their clients. The clients under management – which are more than 1,200 insurance and reinsurance companies – consist mainly of captives but also include large mutuals,

rent-a-captives and commercial insurers and reinsurers.

The Association's principal role is to liaise with the Bermuda Government and other bodies on matters affecting the insurance industry. ☺



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