

# THE NEW BERMUDA TRIANGLE: ARBITRATION OF COVERAGE DISPUTES UNDER THE BERMUDA FORM

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By Lorelie S. Masters,<sup>\*</sup> Michael S. Levine,<sup>\*\*</sup> and Latosha M. Ellis<sup>\*\*\*</sup>

## INTRODUCTION

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

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<sup>\*</sup> A partner in Hunton Andrews Kurth LLP’s insurance coverage practice, Lorelie S. Masters serves on the American Bar Association’s Board of Governors and is a founder and former President of the American College of Coverage Counsel. She is co-author of two well-regarded insurance treatises. One, *Liability Insurance in International Arbitration: The Bermuda Form* (Hart Publishing, 2d ed. 2011) (*The Bermuda Form*), won the 2012 Book Prize of the British Insurance Law Association for outstanding contributions to the literature on insurance coverage and has been called the “standard work on the topic” by the English Court of Appeal. She has served as counsel, expert, and arbitrator in Bermuda Form arbitrations.

<sup>\*\*</sup> Michael S. Levine is a partner in Hunton Andrews Kurth LLP’s insurance recovery practice, where he represents clients in insurance disputes and advises clients about their insurance policies and programs to help maximize coverage. Mike is a Managing Editor of the American Bar Association’s insurance coverage journal, *Coverage*, and a frequent speaker on insurance coverage issues, policy analysis and construction and extracontractual liability issues.

<sup>\*\*\*</sup> Latosha M. Ellis is an associate Attorney in Hunton Andrews Kurth LLP’s insurance coverage practice, where she represents clients from a diversity of industries in insurance recovery and related commercial disputes. Prior to practicing law, Latosha worked in underwriting, product strategy and development, and marketing for various standard and specialty lines insurance companies.

## I. HISTORY OF THE BERMUDA FORM

In the wake of the collapse of the US casualty insurance market in the mid-1980s, Marsh & McLennan worked with J.P. Morgan Chase and a group of US policyholder companies from across the Fortune 500 to create the first Bermuda Form insurance companies. These “Bermuda Form insurers,” ACE Insurance Company, Ltd., and XL Insurance Company, Ltd., sought to provide high excess commercial general liability (“CGL”) insurance to companies in the United States that could not obtain sufficient capacity in light of the 1980s’ liability insurance crisis. ACE was formed in 1985 to provide high excess coverage above US\$100 million. XL began in 1986 to provide excess coverage below the ACE layer, offering limits of between \$25 million and \$100 million.<sup>1</sup> When the capital markets declined to provide the necessary start-up capital, household names like DuPont and Ford agreed to provide the seed money for these nascent insurance companies so that the funding companies, and others similarly situated, could secure the excess liability insurance they needed to protect against catastrophic losses.

In exchange for their capital contributions, the investing policyholders made their needs clear. They sought high-level catastrophic coverage to a later spike in claims that, despite a routine or historic claims history for that product or type of claims, was not expected. Stated differently, they sought coverage for the situation in which a product with a known history of low-level claims later experienced an unanticipated spike in claims that “fundamentally” differed either in “nature” or in “magnitude” from the previous historical level of claims.<sup>2</sup> As a result of these concerns, the policy form developed—the “Bermuda Form”—included two characteristics that remain unique to Bermuda Form policies: the “occurrence-reported” trigger of coverage and the unique definition of “occurrence.”

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

<sup>2</sup> *Id.* at § 1.35. The early Bermuda Form insurers and investors used vaccines as the prototypical example of such a scenario: vaccines historically have always produced a predictable number of “noise-level” claims each year, but also can be subject to a later unanticipated spike in claims deserving of insurance, that would apply without protracted disputes over coverage.

When claims for coverage arise, it is useful to remember this history and the representations that Bermuda Form insurers made to investors and other prospective policyholders at the time of their formation: that they 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 policy language closely in order to find as many bases for denying coverage as possible.<sup>3</sup>

## **II. KEY FEATURES OF THE BERMUDA FORM**

Because of the necessary capital contributions by investing policyholders, the resulting policy form was developed to include the following distinctive features to address concerns expressed at the founding of this new market in Bermuda:

- An occurrence-reported trigger of coverage, activating coverage when the insured reports an occurrence to the insurer.
- 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, the term “occurrence integration.” The Form’s definition of “occurrence” differentiates between injuries and damage from products liability and from premises, operations and other non-product exposures.
- The related provision, not found in the policy form, called “maintenance deductible,” and made operative by the language in the “occurrence” definition that provides coverage for loss that is “vastly greater in order of magnitude,” or “fundamentally different in nature” than earlier claims.
- The dispute resolution provision, which specifies arbitration in London under the English Arbitration Act.
- Unique choice of law provisions that identify New York law (as revised by the Form) as the governing substantive law.

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<sup>3</sup> *Id.* at §§ 1.06, 1.12. Of course, the many mergers and consolidation in casualty insurance markets has muddied the waters.

Each of these features is discussed in further detail below.

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

In one of its singular innovations, the Bermuda Form uses a hybrid trigger that combines two, more traditional, triggers: an “occurrence”-based trigger and a pure claims-made trigger of coverage. As generally defined, Bermuda Form policies cover occurrences that are reported to the insurer during a period for reporting that has both a starting point and an endpoint.<sup>4</sup> The starting point typically is either the inception date of the policy or a specified retroactive date.<sup>5</sup> The endpoint typically is the moment when the policyholder stops buying the basic coverage granted by the policy,<sup>6</sup> or the insurer stops selling it.

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 the policy is cancelled or not renewed.<sup>7</sup> 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,” known as “Coverage B,” if the policy is

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<sup>4</sup> A Bermuda Form 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 endpoints. *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. A Bermuda Form 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.

<sup>7</sup> In contrast, the coverage promised under a claims-made policy typically is defined to stop at the end of one policy period, and begin again, with a new policy period (and usually a new policy number), if the policy is renewed.

not renewed. The advantages of the aggregation features of the Bermuda Form continue into the discovery period provided in Coverage B.

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

As discussed above, the Bermuda Form came into being in part because of the concerns and needs of both investing policyholders and similarly situated companies in the United States and the insurance industry. To address policyholders' concerns, the Form also needed to provide excess catastrophe coverage for unexpected spikes in claims or liabilities. To address insurer concerns, it needed to prevent the "stacking of limits" that arose in landmark asbestos, environmental and other coverage cases in the United States as a result of the breadth of "occurrence"-based CL policy forms.<sup>8</sup> In answer to both concerns, the form adopted a single-point trigger, triggering coverage when the policyholder first reported an occurrence; and also allowed for aggregation of claims, responding to policyholder companies' need for catastrophic coverage. 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." 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.

This batching, or "batch sweep," feature of the Bermuda Form provided the asset protection typically afforded by excess insurance and was marketed as a feature that would respond to (among other things) unanticipated increases in claims, over and above historical claims experience.<sup>9</sup> The trigger, aggregation, and related provisions in

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<sup>8</sup> See discussion in *The Bermuda Form* at §§ 1.07-1.13 and its discussion of the history of coverage litigation, including discussion of landmark cases like *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), and others.

<sup>9</sup> 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"

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 might otherwise never be reached to provide coverage for each individual claim.

Bermuda Form insurers today tend to challenge, aggressively, the use of this “batch-sweep” feature, and the calculation of which claims qualify for “batching.” This was not the case in early Bermuda Form arbitrations involving batch claims submitted 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 years ago.

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

Certain versions of the Bermuda Form contain a clause known in Bermuda insurance industry custom and practice as the “maintenance deductible.” Bermuda Form policies have never actually used that term, which is part of the definition of “occurrence” that addresses injury or damage “expected” or “intended” by the policyholder. Bermuda Form insurers carried the traditional concept of excluding expected or intended injury or damage into the Bermuda Form, with revisions to address concerns of both the policyholder market in the United States and the (then) fledgling Bermuda insurers. 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.<sup>10</sup>

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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 Form policy, simply “batching”).

<sup>10</sup> The concept remains in the current version of the Bermuda Form, 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, versions of the Bermuda Form typically used by ACE and XL and by others, diverge.

Many products sold on a mass-market basis have a known incidence of loss. The “maintenance deductible” language seeks to preclude coverage for the “noise-level” claims expected each year; however, but also to preserve coverage for an unexpected change in the level or kind of claims.<sup>11</sup>

In adopting this innovation, the drafters of the Bermuda Form sought to strike a balance between the legitimate interests of policyholder and insurer. They sought to preserve the existence of coverage a “spike” in claims arising from a product with a known incidence of losses while, at the same time, keeping responsibility for paying the expected, “noise-level” claims with the policyholder. Not found in traditional US or London policy forms,<sup>12</sup> the language was designed to address that specific concern and need for coverage; however, the provisions in the Bermuda Form seeking to implement this concept are complex, and often ambiguous in application. That ambiguity leads to disputes. For example, insurers in more recent claims have used an argument, never raised in earlier claims, 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).

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

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

The Bermuda Form seeks to move the decision-making process on disputes 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), with applications of New York Law—as revised—as the governing substantive law. The drafters of

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<sup>11</sup> A detailed explanation of this concept may be found in Chapter 7 of *The Bermuda Form*.

<sup>12</sup> For a discussion of traditional standard policy forms promulgated in the US market by the Insurance Services Offices, Inc. (“ISO”), see, e.g., Lorelie S. Masters & Jordan S. Stanzler, *Insurance Coverage Litigation* §§ 1.01-1.04, 1.11, 4.01, 4.07, 7.04, 9.02, 14.02, 14.04, 15.02 (2d ed. 2000 & Supp. 2019).

the Bermuda Form favored this unusual dispute-resolution scheme. London arbitration avoids the US court system, and insurance companies have historically favored New York law.<sup>13</sup> They perceive New York law to be more insurer-friendly than other laws and recognize that companies based in the United States likely would find application of US law more acceptable and familiar than that of a foreign country. They also believe London to be a more favorable venue for insurers than US courts, believing English barristers or retired judges to be less influenced by what the insurers perceived as undesirable outcomes in insurance disputes in courts in the United States.

As a result, little binding precedent has developed<sup>14</sup>—or will develop—regarding the Bermuda Form.<sup>15</sup> English Law permits appeals of arbitration awards in limited circumstances, confined to awards involving an error of English law. 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 provide a key benefit to insurers which obviously will be aware of previous wins and losses in earlier proceedings interpreting the Bermuda Form.

## **E. Choice of Law**

The Bermuda Form’s choice-of-law provision selects the law of New York as the governing substantive law, and the law of the United Kingdom as governing procedure. New York has a well-

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<sup>13</sup> Some principles of New York law that insurers traditionally have 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 (2016), *answering question certified to N.Y. Court of Appeals by Del. Supreme Court(?)*, 148 A.3d 633 (Del. 2016) (holding that allocation must be addressed under New York Law as a matter of contract interpretation, not “equity” or “fairness” as argued by insurers).

<sup>14</sup> This may change 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>15</sup> As discussed further *infra*, some US courts have upheld jurisdiction over Bermuda and other offshore insurance companies in third-party actions brought by other insurers seeking contribution or indemnity from Bermuda Form insurers.



developed body of insurance law, and, as previously discussed, is perceived to favor insurers. New York law on “late notice” has historically been a key example, as it traditionally (with some important exceptions) applied the old “per se” rule on notice, which voids coverage if the policyholder’s notice is found to be “late.” However, that rule is changing, and New York courts are now more inclined to require a showing of prejudice to the insurer.<sup>16</sup> That departure from historical views, considered with other developments in New York insurance law, may be changing the perception that New York law generally is favorable to insurers.

The Bermuda Form also modifies New York substantive law in certain key respects. For example, it explicitly allows for recovery of punitive damages. Importantly, the Bermuda Form also seeks to negate the effects of *contra proferentem* and select other doctrines that are perceived to favor policyholders.<sup>17</sup>

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<sup>16</sup> In 2008, N.Y. Ins. Law § 3420(d) adopted the modern “notice-prejudice rule” for policies and risks located in New York. A 2017 decision by the New York Court of Appeals held 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. *Carlson*, 30 N.Y.3d at 306 (interpreting § 3420(d)). Other points in New York law favor policyholders. *E.g.*, 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.”); *Belt Painting Corp. v. TIG Ins. Co.*, 763 N.Y.S.2d 790 (N.Y. 2003) (interpreting “absolute pollution exclusions” narrowly to exclude coverage only for environmental pollution, as opposed to any type of fume or contaminant).

<sup>17</sup> The relevant choice-of-law provision, found in Article VI(O) of Form 004, states:

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

On strictly procedural matters, English law 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, questions of privilege in a London arbitration will be addressed under English law. For example, can the policyholder 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, asserting a “common interest” between the policyholder and the insurer. 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>18</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>19</sup>

Issues of procedure applicable to Bermuda Form arbitrations are subject to the English Arbitration Act 1996 and governed by English law.<sup>20</sup>

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

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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* (italics?) 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.

<sup>18</sup> *The Bermuda Form* at §§ 16.39-16.44.

<sup>19</sup> *Id.* at § 3.42.

<sup>20</sup> *See* English Arbitration Act 1996 §§ 33-41.

proceeding in the United Kingdom will be governed by English law.<sup>21</sup> Because arbitrations under the Bermuda Form are seated in London, such arbitrations are subject to the jurisdiction of English courts for issues addressing, for example, the appointment of arbitrators.<sup>22</sup>

### **III. STRATEGIC CONSIDERATIONS IN LITIGATING BERMUDA FORM ARBITRATIONS<sup>23</sup>**

#### **A. Overall Consideration**

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.<sup>24</sup> This possibility is often underappreciated by policyholders at the time of purchase.

Arbitration can be lengthy, requires paying arbitrators, typically is not resolved by “summary judgment” or dispositive motions, and may require serial arbitrators (each of which is likely to be expensive and time consuming) – two considerations of paramount importance to a policyholder awaiting recovery of insurance proceeds.

#### **B. Initiating the Arbitration**

As in United States coverage litigation, 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

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<sup>21</sup> See, e.g., *C v. D* [2007] EWCA Civ. 1282, [2008] 1 Lloyd’s Rep. 239.

<sup>22</sup> English Arbitration Act 1996 § 2(1). For a further discussion of these issues, see *The Bermuda Form* Ch. 3.

<sup>23</sup> For additional discussion, see Lorelie S. Masters, John Jay Range and Paul Moura, “*The Bermuda Form and Arbitration of Disputes in London*” Vol. 73, No. 1, *Disp. Res’n J.* 67 (2018).

<sup>24</sup> 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).

to consider serious settlement overtures as final. Second, expenses of litigation for both parties likely will be minimized if the process is shorter rather than longer. However, selection of arbitrators frequently takes months, as the process in which the parties work to fill the panel and appoint a chair or neutral, unless they agree to an expedited or formalized process. Advice from an English lawyer is helpful in preparing the final hearing brief and hearing exhibits, referred to as “bundles”, for presentation of arguments and adherence to expected English procedure.

Pleadings are closely scrutinized. Arguments not presented in the pleadings likely will not be allowed, and amendment of pleadings in advance of trial may be crucial. 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.

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.

The primary advantage gained from initiating arbitration 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.

### **C. Choice of Arbitrators**

As with any arbitration, selection of the party-appointed, or “wing” arbitrators and chair is of utmost importance and extensive consideration often goes into those choices. The Bermuda Form arbitration provision states only 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 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.

#### **D. Discovery**

In international arbitration, like other *ad hoc* arbitrations, the parties can craft the process by agreement, and thus may agree to a 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. Alternatively, parties may agree to conduct depositions specific to the arbitration.

Although the U.K. has relaxed rules governing disclosure in recent years, the traditional practice, which requires parties to set forth with specificity the categories of documents sought, continues. 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 typically argue them at a hearing set for that purpose. The Tribunal will then issue a decision on the disputed categories.

In English procedure, parties may pursue production of disputed categories of documents through the actual trial, or “final hearing.” While tribunals will be reluctant to order additional production of previously withheld material in mid-hearing, they will do so in order to ensure the fairness of the proceedings.

## **E. Briefing**

The English style of briefing does not focus on the type of case discussions used 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. Bundles are presented in two-hole English binders, prepared and submitted to the tribunal in advance of the start of the hearing.

## **F. The Final Hearing**

A party's direct or affirmative evidence is presented in writing in witness statements, and witnesses then are presented live only for cross-examination. A party should offer all its witnesses for cross-examination; if a party does not do so, the arbitrators may not give a witness's direct evidence much weight. This convention does not apply if the parties agree that a witness need not be presented for cross-examination.

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, today, is a realistic alternative to live testimony with today's technology.

## **G. Awards**

### **1. Final Awards**

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.

### **2. Interest Awards**

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>25</sup> This decision is left to the discretion of the tribunal.<sup>26</sup> 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

As Bermuda Form policies require application of New York substantial law, prevailing parties in Bermuda Form arbitrations often argue for application of the 9% rate mandated by New York CPLR § 5004. This question has been the subject of much litigation and controversy.<sup>27</sup> Some Bermuda Form tribunals may then adopt a “compromise” approach to sidestep such issues.

### 3. Costs Awards

Versions of the Bermuda Form (001, 002A, 003) prior to the current 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 a tribunal may enter an order for costs in its discretion. Essentially two categories of costs typically need to be allocated: (i) the arbitrators’ fees and expenses; and (ii) the legal or other costs of the parties.

In practice, arbitrator fees are rarely a subject of dispute. If disputes do not arise, the English Arbitration Act makes the parties jointly and severally liable for the arbitrators’ reasonable fees and expenses.<sup>28</sup>

Under the general principle in English practice, the decision-maker will order the “losing party” to pay the “prevailing” party’s legal costs, and tribunal typically uses this principle as the starting point for these awards. Because the prevailing party does not succeed on every issue in dispute, the tribunal may make reductions for costs incurred on issues on which the party that overall “prevailed” has failed.<sup>29</sup> In all events, the general rule is that all costs should be

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<sup>25</sup> See English Arbitration Act 1996 § 49.

<sup>26</sup> *The Bermuda Form* at § 17.04.

<sup>27</sup> *Id.* at §§ 17.11-17.22.

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

<sup>29</sup> *The Bermuda Form* at §§ 17.36-17.38.

reasonable, and the burden of proving reasonableness is on the receiving party.<sup>30</sup>

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

The English Arbitration Act gives the Tribunal power to correct clerical mistakes or errors in an award.<sup>31</sup> Thus, challenges to the calculation of damages and costs can typically be addressed in the arbitration itself.

A party may seek to challenge more egregious errors in an England-based Bermuda Form arbitration award through English court proceedings. Nonetheless, such challenges are exceedingly difficult. An English court will permit a challenge based on an error of law only if the challenger shows 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 serious doubt.”<sup>32</sup> Notably, under no circumstances can a court review challenges to findings of fact.

An award also may be challenged for serious irregularities. These include 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>33</sup> Yet even in these situations, the challenger must show that an irregularity has caused or will cause substantial injustice.<sup>34</sup> An award may also be challenged if the tribunal exceeds its substantive jurisdiction,<sup>35</sup> but such challenges also are difficult to mount.

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<sup>30</sup> See English Arbitration Act 1996 § 63.

<sup>31</sup> *Id.* at § 57.

<sup>32</sup> See English Arbitration Act 1996, § 69; see also *Enterprise Ins. Co. Plc. v. U-Drive Solutions (Gibraltar) Ltd.* [2016] EWHC 1301 (QB) (court lacked jurisdiction over appeal because § 69 conditions were not met, despite parties’ stipulation to allow appeal).

<sup>33</sup> See English Arbitration Act 1996 § 68.

<sup>34</sup> *Symbion Power LLC v. Venco Intiaz 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); *Secretary of State for the Home Dep’t v. Raytheon Sys. Ltd.* [2014] EWHC 4375 (TCC) (failure to address issue submitted to arbitration constituted a substantial injustice).

<sup>35</sup> See English Arbitration Act 1996 § 67.



The only US courts with authority to vacate or decline to enforce an arbitral award are courts at the seat of the arbitration, but such challenges are limited.<sup>36</sup> 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>37</sup> but only if enforcement would violate “‘explicit public policy’ that is ‘well-defined and dominant ... [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests.’”<sup>38</sup>

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

Because of the arbitration provision, courts discussions addressing the substantive provisions of the Bermuda Form are few. Thus, little precedent has developed—or will develop—regarding interpretation of the Bermuda Form. Nonetheless, several decisions in England and the United States offer insight into the resolution of disputes involving Bermuda Form policies.

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

*AstraZeneca Ins. Co. Ltd. v. XL Ins. (Bermuda) Ltd. and ACE Bermuda Ins. Ltd.*,<sup>39</sup> rejected the policyholder’s claims for coverage in product liability claims given the revisions of the Bermuda Form negotiated by the policyholder.

That case considered whether AstraZeneca’s captive insurer was entitled to recover as cedent hundreds of millions of dollars in

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<sup>36</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>37</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 F. Appx. 716 (2d Cir.), *cert. denied*, 543 U.S. 956 (2004).

<sup>38</sup> *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (internal citations omitted).

<sup>39</sup> [2013] EWHC 349 (Comm.), at ¶ 14 (*AstraZeneca I*).

defense costs and settlement payments under a Bermuda Form policy incurred in liability claims relating to the antipsychotic drug Seroquel. The *AstraZeneca* cases present a prime example of a foreign court's assuming, incorrectly, that its reading of another jurisdiction's law is correct.

At the trial level, the Commercial Court of the High Court of England and Wales, Queens Bench Division, rejected the policyholder's claim for coverage based on its reading of the law chosen in that policy, English law. The policyholder had negotiated two revisions to the Bermuda Form: removing the arbitration provision, thereby allowing litigation in court; and changing the governing substantive law from New York to English law. 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. Hence, the precedential value of the case and its usefulness in interpreting standard Bermuda Form policies is limited.

*The AstraZeneca* cases analyzed whether the Bermuda Form policy covered payments made by the policyholder to settle the underlying claims. The insuring clause promised 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." 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."<sup>40</sup>

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

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<sup>40</sup> *Id.* at ¶ 14.

indemnification of *actual* legal liability, not just an alleged liability.<sup>41</sup> The court further explained that the insured bears the burden under English law to prove that, on a balance of probabilities, it would have been subject to actual legal liability. The court concluded that, although a judgment against an insured may be strong evidence of such liability, neither a settlement nor a judgment automatically establishes a policyholder’s “actual legal liability.” According to the court, even after a judgment against the uninsured in the underlying case, “[i]t is still open to the insurer to challenge that there was an actual legal liability in which case it is for the insured to prove that there was.”<sup>42</sup> As a result, the court held that, 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 a third-party claim.<sup>43</sup>

In another ruling likely shocking to most US policyholders, the court, relying on English law, also concluded that the policyholder must show that it would have been subject to “actual legal liability” before it can recover defense costs. The court explained that defense costs were a component of the definition of “Damages,” and thus the policyholder could recover defense costs under the Bermuda Form 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.<sup>44</sup> The potentiality standard applicable to recovery of defense costs in the United States had no applicability under AstraZeneca’s version of the Bermuda Form.

The court of appeal agreed with the lower court’s analysis.<sup>45</sup> 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 and New York authorities cited to support coverage for settlements where the insurer refuses to defend and, thus, is bound

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<sup>41</sup> *Id.* at ¶¶ 29, 39-136.

<sup>42</sup> *Id.* at ¶ 96. This decision clearly is contrary to public policy in the United States promoting settlement. The judge deciding the case for years also had represented insurers before he joined the bench.

<sup>43</sup> *Id.* at ¶ 136.

<sup>44</sup> *Id.* at ¶¶ 137-145.

<sup>45</sup> *AstraZeneca Ins. Co., Ltd. v. XL Ins. (Bermuda) Ltd., et al.*, [2013] EWCA Civ. 1660 (20 Dec. 2013) (*AstraZeneca II*), at ¶¶ 83-85. See discussion at *id.*, ¶¶ 32-82.

by a reasonable settlement.<sup>46</sup> Contrary to the English appeal court’s conclusion, New York law is clear that a policyholder who settles a case when the insurer does not accept coverage, “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>47</sup> As Judge Weinstein explained in *Uniroyal, Inc. v. Home Ins. Co.*, “the law [in New York] is clear that a reasonable settlement binds the insurer to indemnify.”<sup>48</sup> These New York cases recognize that requiring the policyholder to prove its own liability would defeat the protective purpose of liability insurance, be contrary to the public policy favoring settlements, and provide grounds to the insurer to argue against coverage, a classic Catch-22. Under the New York cases, a policyholder need demonstrate only that settled claims are of a “type” that falls within the policy’s coverage. Thus, allegations in the complaint, rather than findings of actual liability, suffice to show that the coverage—intended to cover judgments and settlements—applies.<sup>49</sup>

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

*Halliburton Co. v. Chubb Bermuda Ins. Ltd.*<sup>50</sup> 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 arising out of the

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<sup>46</sup> *Id.* at ¶ 25. While this is a clever reading of the New York case cited, it is not correct. See *Luria Bros. & Co. v. Alliance Assur. Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) (*Luria*) (citation omitted). In addition, the insurer in *AstraZeneca* had denied coverage; there obviously would be no need for coverage litigation if the insurer had agreed to pay. This fact therefore undercuts the purported distinction made by the *AstraZeneca* cases. In addition, this is a general rule of New York governing indemnitors, and not a punitive rule assessed only against insurers that breach their contracts. See also *Insurance Coverage Litigation*, ¶ *supra* n. 12, at § 14.10.

<sup>47</sup> See, e.g., *Luria*, 780 F.2d at 1091; 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.’”).

<sup>48</sup> 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988) (*Uniroyal*).

<sup>49</sup> This result also advances the public policy accepted in all jurisdictions in the United States (including New York) that favors settlement.

<sup>50</sup> [2018] EWCA Civ. 817 (*Halliburton*).

BP/Deepwater Horizon oil “spill” in the Gulf of Mexico 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.<sup>51</sup> Indeed, the arbitrator had been appointed only by insurers in Bermuda Form arbitrations.

To the extent policyholders could ascertain or know such information, a party has a right to expect that a Chair, even more than a party-appointed arbitrator, should be neutral.<sup>52</sup> In part for this reason, the policyholder challenged the appointment of this barrister as Chair on the grounds that a tribunal Chair, in particular, should be assumed to be a neutral.

The English Court of Appeal recognized that the litigation raised issues of keen importance to parties, facing arbitration of disputes 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 summarized *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.

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<sup>51</sup> Although the arbitrator in question was a well-known Queen’s Counsel and for decades had served as an 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.

<sup>52</sup> Indeed, Chairs of tribunals often are called “neutrals,” and under the English Arbitration Act, all members of arbitration tribunals are supposed to be neutrals.

[¶ 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?<sup>53</sup>

The English Court of Appeal reached the same “overall conclusion” adopted by the English High Court. The Court of Appeal found no appearance of bias that justified disqualifying the arbitrator. The court explained that the test for impartiality of an arbitration tribunal under English law is whether—at the time the disqualification application was made—facts or circumstances known to the arbitrator would or might lead the fair-minded and informed observer to foresee 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>54</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>55</sup>

The Court of Appeal 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 appeal court did not consider the arbitrator’s failure to disclose the other appointments in the very same matter, and 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

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<sup>53</sup> *Halliburton.*, at ¶¶ 2-3.

<sup>54</sup> *H v. L*, [2017] EWHC 137 (Comm.), at ¶ 16.

<sup>55</sup> *Id.*

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,”<sup>56</sup> they also both concluded that the arbitrator's failure to disclose was 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.”<sup>57</sup> 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.”<sup>58</sup> Finally, the English Court of Appeal made no note 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).

*Halliburton* serves as an important reminder that arbitrator partiality disputes in London-based Bermuda Form arbitrations are resolved in English courts under English law, notwithstanding the Bermuda Form's provisions selecting New York Law 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>59</sup> Although the English court in *Halliburton* stated that disclosure of the other arbitrations in question could have been “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

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<sup>56</sup> *Halliburton*, at ¶¶ 31, 63-69, 94.

<sup>57</sup> *Id.* at ¶ 81.

<sup>58</sup> *Id.* at ¶ 27.

<sup>59</sup> *J. P. Stevens & Co. v. Rytex Corp.*, 34 N.Y.2d 123, 125 (1974) (*J. P. Stevens*); 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.”).

productive of arbitral stability.”<sup>60</sup> Similarly, Canon IV of the ARIAS US 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,” and that “[a]ny doubt should be resolved in favor of disclosure,”<sup>61</sup> and that “[t]he duty to disclose all interests and relationships is a continuing obligation throughout the proceeding.”<sup>62</sup>

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

*M.F. Global Holdings Ltd. v. Allied World Assurance Co., Ltd.*,<sup>63</sup> addressed an arbitration provision identifying (as some Bermuda Form policies in the past have done) Bermuda, not London, as the place of arbitration. There, the United States Bankruptcy Court for the Southern District of New York ordered M.F. Global Holdings Ltd. and Allied World Assurance Co. Ltd. to arbitrate their \$15 million errors-and-omissions insurance coverage dispute in Hamilton, Bermuda. M.F. 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>64</sup> arguing that the coverage dispute was a “non-core” issue and public policy favors enforcing arbitration agreements.

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<sup>60</sup> *J.P. Stevens*, 34 N.Y.2d at 128.

<sup>61</sup> ARIAS U.S. Code of Conduct Canon IV (Jan. 1, 2019) ([www.aries-us.org/arias-us-dispute-resolution-process/code-of-conduct](http://www.aries-us.org/arias-us-dispute-resolution-process/code-of-conduct)).

<sup>62</sup> *Id.*, Canon IV, comment 6.

<sup>63</sup> No. 1:16-ap-01251, 571 B.R. 80 (Bankr. S.D.N.Y. 2017), *leave for appeal denied*, 296 F. Supp. 3d 662 (S.D.N.Y. 2017) (*M.F. Global*).

<sup>64</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 at the least logistically more difficult.



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’ prepetition relationship, and did not implicate rights created under the Bankruptcy Code or 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.<sup>65</sup> 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>66</sup>

## V. PRACTICE POINTERS FOR POLICYHOLDERS

These decisions provide a cautionary tale, about unintended consequences, and the advisability of changing the governing law before negotiating revisions to the Bermuda Form (or perhaps any standard policy form). They also highlight other potentially sticky aspects of Bermuda Form’s policy language that policyholders should consider when purchasing such products.

Policyholders should challenge insurers who try to use the *AstraZeneca* cases 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

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<sup>65</sup> 571, B.R. at 97.

<sup>66</sup> See, *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 the coverage of the policy, ‘may well be ... the most important asset of [the debtor’s] estate.’”) (citations omitted).

other United States jurisdictions, it is more favorable to policyholders than English law.<sup>67</sup>

The *Halliburton* 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. In particular, *Halliburton* deserves further consideration in 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 all parties equal transparency about the background of arbitrators chosen for such panels.

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 [readability]. 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>68</sup>

*M.F. Global* illustrates that courts may enforce the Bermuda Form’s arbitration clause even when there are logistical challenges or

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<sup>67</sup> This is a point acknowledged by the courts in *AstraZeneca I* and *II*. See, e.g., [2013] EWHC, ¶¶ 18-19; see also [2013] EWCA, ¶¶ 24-25.

<sup>68</sup> *Almazeedi v. Penner & Another*, [2018] UKPC 3 26/02/2018, a 2018 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 an arbitration 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.

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.

### **CONCLUSION**

The Bermuda Form policies, if properly considered, can be invaluable to policyholders facing exposure to high, catastrophic losses. However, in order to maximize recovery, it is imperative that policyholders and their counsel understand the many unique terms and conditions when purchasing coverage and presenting claims under the Bermuda Form.