Many insurance policies now include provisions providing for arbitration of disputes in London under the substantive law of New York. These provisions “stack the deck” in favor of insurance companies who are repeat players in London arbitrations. However, with careful strategy and preparation, a policyholder can prevail even in this “foreign experience.”

This trend began with the “Bermuda Form” sold by companies like ACE Insurance Company, Ltd., and XL Insurance Company, Ltd. Although, for many years, most disputes arising under the Bermuda Form were settled, insurance disputes arising under the Bermuda Form increasingly are arbitrated, either because Bermuda insurers, like insurers of yore, decide to litigate disputes or because the policyholder is unable to obtain redress (or even a response) otherwise.

In our experience, insurance arbitration, especially in foreign capitals, is not necessarily a less expensive means of resolving disputes than litigation. Arbitration in London requires “setting up shop” in London where many policyholders do not have operations and putting up witnesses in an expensive (though interesting) capital of foreign arbitration. In addition, in large losses, policyholders may find themselves in a series of arbitrations, forced to engage in one proceeding after another to go up the “chain” of insurance companies, with the attendant risk of inconsistent results and increased costs. Arbitration can result in layers of lawyers for each party (U.S. law firms, barristers, and also a foreign solicitor firm) and requires payment of the decision-makers, who are well compensated.

American policyholders, unschooled in the art of international arbitration, may find the procedures confusing, necessitating strategies that differ from those used before an American court or jury. Because arbitration is confidential and policyholders, unlike insurers, typically are not repeat players, policyholders face the disadvantage of not knowing how similar issues have been resolved in other arbitrations. However, policyholders can navigate these waters—and beat the insurance companies, who are repeat litigants in London arbitrations, at their own game.

This article first surveys the key features of the excess general liability insurance policies sold by ACE and XL and now other insurers which have picked up on key concepts used in the Bermuda Form. The article then discusses practice aspects of arbitration in London under the English Arbitration Act.

Key Features of the Bermuda Form

The “Bermuda Form” policy, as originally drafted and issued by ACE, sought to be regarded as a balanced policy form, taking into account the interests of policyholders who, when the Bermuda insurers began in the mid-1980s, invested in the new insurers, providing capital necessary to support the fledgling companies. The policy form drafted by the ACE and later XL to provide high-excess general liability insurance to help stem the liability insurance crisis in the 1980s has several distinctive features, discussed below.
The Occurrence-Reported Trigger of Coverage

The Bermuda Form provides neither pure occurrence coverage, nor pure claims-made coverage, but, rather, a hybrid of the two. In broad terms, the policy covers occurrences that are reported to the policyholder during the policy period, with a start-point and an end-point. The starting point typically is either the inception date of the policy, or a specified retroactive date; the end-point typically is the moment when the policyholder stops buying the basic cover granted by the policy, or the insurer stops selling it. The policy also typically is a continuous policy, in the sense that it continues from year to year, usually with the same policy number, until it is cancelled or is not renewed. In contrast, a claims-made policy stops at one year end, and starts again afresh, with a new policy period and usually a new policy number, if the policy is renewed. Thus, a Bermuda Form policy has a policy period that may span years with a number of Annual Periods. 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” or discovery period, known as Coverage B.

Dispute Resolution

For policyholders, an important consequence of this scheme of dispute resolution is that little binding precedent has developed—or will, outside of the occasional U.S. litigation against ACE or XL.

The Bermuda Form includes an arbitration clause seeking to move the decision-making process on disputes with policyholders from the U.S. court system to London arbitration. The Form also includes a choice-of-law provision selecting as the governing law the substantive law of the State of New York. Ostensibly, one of the reasons that insurers have long favored New York law is because it applied the old “per se” rule on notice, which voided coverage if the policyholder’s notice was found to be “late.” That rationale has changed now that New York, by statute, has adopted the modern rule on notice, requiring the insurer to show prejudice before coverage is voided due to the timing of notice of claim. The Bermuda Form, however, also modifies New York law in certain key respects, seeking to negate the effects of contra proferentem and select other doctrines that are perceived to favor policyholders.

For policyholders, an important consequence of this scheme of dispute resolution is that little binding precedent has developed—or will, outside of the occasional U.S. litigation against ACE or XL that is not dismissed, develop—regarding interpretation of the Bermuda Form. Although English law does permit appeals of arbitration awards in limited circumstances, these circumstances are confined to awards involving an error of English law. Although some U.S. courts have addressed questions relating to the Bermuda Form (e.g., as a result of a contribution claim by another insurer against XL or ACE), no U.S. decision has addressed or resolved substantive issues under the Form. This may change to some extent as Bermuda Form policy provisions are increasingly incorporated in policy forms utilized by other insurance companies and 28 Bermuda companies 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 U.S. courts. However, the lack of precedent on key provisions in the Bermuda Form may disadvantage policyholders and also provide a key benefit to the insurer which, unlike the policyholder, obviously will be aware of its own previous wins and losses in earlier proceedings with respect to certain provisions of the Bermuda Form.

Aggregation of Claims

The Bermuda Form addressed the issue of “stacking of limits” that arose in asbestos and other mass-tort and environmental liabilities in a number of ways. The key was the use of an occurrence-first-reported
trigger. A simple way to avoid cumulation of limits in a liability policy is to specify a single moment or event as the trigger and to sweep into the single triggered policy all the financial consequences of all interrelated underlying claims. Accordingly, the Bermuda Form requires the policyholder to aggregate related events together or “integrate” them into a single year, that being 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. The policyholder does not have to report every liability claim that is made, but only those that are “likely to involve this policy” under the notice provision in the policy.

This feature of sweeping all related injuries or losses into a single policy year is commonly called “occurrence integration,” or “batch occurrence,” or simply “batching.” The batching clause enables the policyholder to add together a large number of small occurrences, with the result that the policyholder can exceed the very high retention underlying a high-excess Bermuda Form policy that would otherwise never be reached to provide coverage for each individual claim. The insurer is protected, in that it bears only one loss in respect of any one particular problem, no matter how broad in scope or magnitude.

**Expected or Intended Injury and the “Maintenance Deductible”**

The Bermuda Form contains a clause known in Bermuda insurance industry custom and practice as the “maintenance deductible.” Bermuda Form policies do not actually use that term. In fact, the relevant clause is the part of the provision in the definition of “occurrence” that addresses injury or damage expected and intended by the policyholder. The concept of excluding injury or damage that the policyholder expected or intended is, of course, a well-known feature of traditional U.S. CGL insurance policies, and was carried over into the Bermuda Form. It has remained there, with revisions made over time. Although the concept in general terms is well understood, the complexity of the definition of occurrence in the Bermuda Form, and the difficulty of applying it in specific factual circumstances, often results in controversy.

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

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

**Strategic Considerations in a London Arbitration**

**Selecting the Arbitrators**

The arbitration clause in a typical Bermuda form gives little clue as to the considerations that go into the all-important process of selecting arbitrators. For example, should the policyholder select an American lawyer or jurist, who is schooled in the American federal system and, ideally, principles of New York insurance law? Should the policyholder select an experienced practitioner in the area of insurance coverage litigation or a retired judge?

A traditional English viewpoint is that policyholders should select a well-respected English barrister, called a Queen’s Counsel or Q.C. The argument is that, because the other two arbitrators on the panel likely will also be Q.C.’s, it is important for policyholders to appoint another member of this select “club.” Although this view holds great currency, policyholders are well-advised to consider “de-Anglicizing” the arbitration panel by selecting an American arbitrator. A retired judge or experienced and well-known lawyer with expertise in New York law and the American judicial system can provide to the other arbitrators important insight on the issues of New York substantive law presented in the proceeding. English lawyers are less likely to fully appreciate the authoritativeness of an unreported New York’s state trial decision.
versus a well-reasoned decision by the United States Court of Appeals for the Second Circuit, applying New York law. They also may not appreciate the importance of legislative history or other features of American legal analysis taken more for granted on this side of the Atlantic. Particularly in situations where the New York Court of Appeals has not addressed an issue that is key in the arbitration, it is our judgment that the policyholder may be very well-served by having an arbitrator in the hearing room who can speak authoritatively about these distinctions.

Because arbitration generally proceeds more smoothly when the parties are able to reach consensus, the two party-appointed arbitrators in our experience are happy to abide by the parties’ choice of a proposed Chair.

Once the parties have appointed their arbitrators, the two arbitrators select a Chair, or “neutral,” for the panel. To minimize controversy and speed the proceedings, the parties may seek to agree on the choice of a Chair. Because arbitration generally proceeds more smoothly when the parties are able to reach consensus, the two party-appointed arbitrators in our experience are happy to abide by the parties’ choice of a proposed Chair.

This choice of the Chair of the Tribunal also is important. The Chair should be an experienced arbitrator with the stature to command the respect of both the two party-appointed arbitrators and the parties themselves. Experience and force of personality also are factors to consider. An ideal Chair will ensure that the proceedings run smoothly, yet fairly, for both parties, and will be completed in the shortest amount of time possible.

Initiating Arbitration

Either party may initiate the arbitration, simply by invoking in writing the arbitration clause in the insurance policy. As in litigation in a U.S. court, the policyholder typically is best-served when the process takes place in as short an amount of time as possible. First, an insurance company is most likely to consider serious settlement overtures when a trial date looms. Second, expense for both parties likely will be minimized if the process is shorter rather than longer.

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

New York Law

Bermuda-based insurance companies have drafted their policy form to apply (for the most part) the substantive law of New York in the belief that New York law tends to favor the rights and interests of insurers. As shown by the recent decision by the New York Court of Appeals rejecting application of the “total pollution exclusion” in Belt Painting v. TIG Insurance Co., this assumption does not always hold true. The policyholder should seek to exploit those provisions of New York law that may favor policyholders over insurance companies. For example, the New York statute applicable to misrepresentation defenses may be used to require the insurance company to produce underwriting manuals and other documents that can rebut the insurance company’s defense.

In addition, as masters of the form, insurers have sought to jettison those parts of New York law they consider odious, like contra proferentem. Commentators have questioned whether this “gerrymandering” of the law is legitimate, but English lawyers have evinced little interest in or sympathy for this view.

Discovery

In international arbitration, the parties may decide upon an agreed set of rules to govern discovery. Discovery, or “disclosure” as it is referred to in the United Kingdom, includes only production of documents. While 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.

It may be important—indeed, crucial—for counsel for parties under these procedural rules to continue to contest the opposing party’s failure to produce important categories of documents.
Although rules governing disclosure have been relaxed in England in recent years, the traditional practice, which requires parties to set forth with specificity the categories of documents sought, continues. However, as in U.S. civil procedure, parties may move to compel disclosure if the opposing party refuses or fails to produce documents. Parties identify disputed categories of documents, brief those issues for the Tribunal, and argue them at a hearing set for that purpose. The Tribunal will then issue a decision on the disputed categories.

It may be important—indeed, crucial—for counsel for parties under these procedural rules to continue to contest the opposing party’s failure to produce important categories of documents. Failure to do so may result in a finding by the Tribunal that the requesting party has waived its right to pursue production. Under English procedure, however, parties frequently pursue adjudication regarding production of disputed categories of documents right into the actual trial. While the Tribunal will be reluctant to order additional production of previously withheld material in mid-trial, it may do so in order to ensure the fairness of the proceedings. Presenting a written record confirming the requesting party’s diligence in seeking the discovery is important to success in these situations.

Counsel

In the British system, lawyers have been traditionally either solicitors or barristers. Solicitors traditionally have prepared the case for trial, while barristers act as trial lawyers. Parties need not pursue the traditional English “model” in international arbitrations. For example, a U.S. law firm can act as the “solicitor” instructing a barrister or Q.C. at the final trial, or “hearing.” Alternatively, American lawyers may act as trial counsel or split those duties with an English lawyer or Q.C. In our experience, it is helpful to have the advice and expertise of an English barrister or Q.C. in preparing the case for trial, at a minimum. The decision on whether to retain a barrister to help with presentations at trial may depend on several factors, including cost, the composition of the Tribunal and the lead trial lawyer for the insurance company.

An English lawyer can advise a policyholder’s trial team on the differences between American and English practice. For example, oral arguments differ from the advocacy taught to U.S. lawyers. In English arbitrations, the practice is to lead the arbitrators, step by step, through the important authorities supporting an argument, with copies of the decisions in hand over the course of lengthy (by American standards) opening and closing arguments. This practice seems odd to American lawyers. However, an effective English-style presentation of substantive legal principles may help decide the case in your favor.

Briefing

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

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

The presentation of evidence in a London arbitration differs substantially from traditional trial practice in the United States.

In our experience, as in American trials, the assistance of an experienced legal assistant can be invaluable. A party’s legal assistant can assist not only the parties’ lawyers and witnesses, helping to locate trial exhibits in the bundle during cross-examination and oral argument, but also the Tribunal in organizing and finding documents. Having an arbitrator come to rely upon the expertise and mastery of the record of your legal assistant, in preference to that of the opposing party, helps to project that aura of competence and thorough preparation that trial lawyers, American or British, seek to project.

Trial

The presentation of evidence in a London arbitration differs substantially from traditional trial practice in the United States. A party’s direct or affirmative evidence is presented in writing in witness statements. Witnesses are presented live only for cross-examination. A party should offer all of its witnesses for cross-examination or risk the chance that the arbitrators will not give a witness’s direct evidence
much weight. This rule does not apply if the parties agree that a witness need not be presented for cross-examination.

This system puts a premium on comprehensive, yet concise, well-organized witness statements. Again, the plaintiff or petitioner typically has the opportunity to present both opening statements and rebuttal statements following the opponents’ statements. The parties can agree to a different order of presentation, however.

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

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

1 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. See Chapters 2 and 6 of Richard Jacobs, Lorelie S. Masters, & Paul Stanley, Liability Insurance in International Arbitration: The Bermuda Form (Hart Publishing, 1st ed. 2004) (The Bermuda Form).

2 The policy generally affords coverage during the period of “Coverage A.” When the policy would otherwise terminate, the policyholder has the option to purchase “Coverage B,” which provides an extended reporting period for claims relating to occurrences that began during the Coverage A period. Coverage B does not provide tail coverage for “fresh” occurrences that began only during Coverage B. Complications arise in respect of “batch” or “integrated” occurrences, and their start and end points.

3 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.

4 See the English Arbitration Act 1996, § 69, which largely codifies the principles governing appeals established by the case law applying Sections of the English Arbitration Act 1975.

5 See, e.g., Egmatra AG v. Marco Trading Corp. [1999] 1 Lloyd’s Rep 362; Reliance Indus. Ltd. v. Enron Oil & Gas India Ltd., and another [2002] 1 Lloyd’s Rep 645. The 004 version of the Bermuda Form contains a waiver of any right of appeal which, under the English Arbitration Act 1996, is valid even if concluded before any dispute had arisen. The earlier versions of the Bermuda Form do not contain an equivalent waiver.

6 Some U.S. courts have upheld jurisdiction over Bermuda and other off-shore insurance companies.

7 A detailed explanation of this concept may be found in Chapter 7 of The Bermuda Form. See also Mitchell F. Dolin & Ethan M. Posner, Understanding the Bermuda Excess Liability Form, 1 J. Ins. Coverage, No. 4, 68 (Aspen Law & Business, Autumn 1998).