

Bermuda-Form Insurance Coverage Arbitrations in London: Key Issues and Practical Considerations

Webinar
September 30, 2010

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Typical Bermuda Form Arbitration Provision (in part)

“Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act of 1996 (“Act”) and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows:

.....”

Commencement of Proceedings

How are arbitration proceedings typically commenced, and under what circumstances would an insurer ever commence an arbitration proceeding against a policyholder?

- Commencement governed by terms of arbitration agreement
- Arbitration commenced by serving demand on other party which is to include name of initiating party's selected arbitrator
- Policyholders typically initiate arbitration
- Insurers may initiate arbitration where policyholders contest mandatory arbitration or fail to take action on disputed issues

Commencement of Proceedings

Under what circumstances, if any, can a party successfully challenge the mandatory arbitration clause in a Bermuda form policy if that party would prefer to litigate in court?

- Challenges are not common
- State law may void mandatory arbitration clause in policy
- McCarran-Ferguson Act pre-empts Federal Arbitration Act
- International arbitrations present unique issues
- Parties may seek anti-suit injunctions from courts in England or US

Selection of Arbitration Tribunal

What factors should be taken into consideration by a policyholder in the selection of a party-appointed arbitrator and a tribunal chairperson?

- Policyholders often seek seasoned lawyers with US law background, especially New York law experience
- Familiarity with international arbitration procedure is important
- For tribunal chair, reputation for impartiality and integrity are critical

Selection of Arbitration Tribunal

How do the two party-appointed arbitrators proceed to select a tribunal chairperson?

- Generally contact is made by email or telephone
- They try to look for a “neutral” who will be acceptable to both parties
- If the party-appointed arbitrators cannot agree on a single nominee for chair, they agree on a short-list of candidates and solicit the parties’ objections to the short list candidates

Selection of Arbitration Tribunal

To what extent may a party representative speak *ex parte* with its party-appointed arbitrator regarding selection of the tribunal chairperson?

- Historically, this has been more common in the US and not as common in the UK, but an acceptable practice is developing
- Whether permissible should be the subject of discussion and agreement between the two party-appointed arbitrators
- Generally, party-appointed arbitrators will agree to seek the parties' approval to a chosen nominee or ask for their views on the short-list

Selection of Arbitration Tribunal

What happens if the two party-appointed arbitrators cannot agree on selection of a tribunal chairperson?

- Process contemplated and governed by Bermuda form arbitration agreement
- Either party may apply to English High Court
- Resort to High Court has been rare
- The Court is likely to be more familiar with English candidates than US candidates
- Agreement by the parties is always preferred over a court-imposed chairperson

Composition of Representational Team

What are the benefits to American counsel and their clients in retaining English solicitors to assist in a London arbitration proceeding?

- The benefits are affected by the composition of the tribunal
- Assistance in selection of party-appointed arbitrators and tribunal chairperson
- Translating the differences in approach between English and American arbitrators
- Framing arguments to English barristers sitting as arbitrators
- Responding to the different tactics and approaches of English barrister advocates
- Explaining the international convention on arbitration rules of procedure and evidence
- Familiarity with rules and practice regarding use of experts
- Logistical support
- Experience with requests for award of costs

Composition of Representational Team

What practices prevail regarding the retention of English barristers to assist in an arbitration proceeding?

- Retention of an English barrister is not required
- Insurers often engage an English barrister
- There is an added cost of doing so
- The tribunal may be comprised of one or more English barristers

Composition of Representational Team

Are there any guidelines or rules regarding English barristers representing a party when an arbitrator is from the same chambers?

- The area is fast-changing
- The ICC (International Chamber of Commerce) has upheld challenges to counsel and arbitrators from same chambers
- The LCIA (London Court of International Arbitration) has also signaled informally its unease with the practice

***Ex Parte* Communications with Arbitrators**

To what extent may a party representative speak *ex parte* with its party-appointed arbitrator after the tribunal chairperson has been selected and the three arbitrators have been empanelled?

- There should be no *ex parte* communications after that point, even for scheduling purposes
- All communications with tribunal should be in writing, copied to all concerned (arbitrators and parties)
- There is an exception in circumstances of perceived impropriety or bias shown by other members of the tribunal

Pre-Hearing Procedure

What type of pre-hearing procedures or scheduling steps can a party expect?

- Case management conference(s)
- Scheduling order(s)
- Pleadings stage and/or narrowing of issues in dispute with joint statement of issues
- Preliminary issues stage
- Exchange of documents (“disclosure”)
- Resolution of discovery disputes
- Exchange of witness statements
- Designation of experts and exchange of reports and joint reports
- Pre-hearing briefs (“submissions”)

Pre-Hearing Procedure

What type of pre-hearing discovery is typically permitted by a tribunal?

- For English-seated arbitrations, discovery means document production
- Document requests must be narrowly framed
- The IBA Rules of Evidence provide guidance (often made applicable by agreement of the parties)
- The tribunal has ultimate say
- No pre-hearing access to other side's witnesses

Legal Issues

Typical Governing Law Provision of Bermuda Form (in part)

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: [limited exceptions noted]; To the extent that New York is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Section E, the internal laws of England and Wales shall apply.

Legal Issues

In a Bermuda-form arbitration, what issues are governed by New York law and what issues are governed by English law?

- English law governs supervision of the arbitral process (the “curial law”)
- Debatable which law governs the scope of the arbitration agreement; choice of this law will depend upon the court in which challenge is brought
- By contract, New York law governs substance, *i.e.*, policy construction and interpretation
- New York law also governs rules of policy construction but as modified by contract
- English law governs arbitration procedure (the “lex arbitri”)

Legal Issues

What rules of policy construction or interpretation, if any, may a tribunal adopt or apply to construe the terms of the insurance policy?

- Rules of policy construction are substantive; therefore, New York rules of construction apply
- But the governing law provision of the Bermuda form purports to negate certain NY rules of policy construction for ambiguous terms
- NY precedent applies to unambiguous terms
- NY law places the burden to prove exclusions on insurers; this rule is not altered, but the high standard of proof required to meet this burden under NY law may be

Privilege Issues

What particular rules concerning the application of attorney client privilege and work product doctrine should apply?

- Decision lies within the discretion of the tribunal
- Choice of law issue: Conflict of law exists whether matters of privilege are substantive (US view) or procedural (English view)
- “Closest connection” test is increasingly being used
- Look to privilege law in the jurisdiction where communication occurred or document was created
- Tribunal has discretion, and may ask for *in camera* review

Conduct of Hearing

How does the tribunal allocate the time agreed for the hearing?

- The general principle is that parties should share the time available on an equal basis, but the tribunal may take into account the claims and defenses at issue, the burden of proof, and the number of witnesses on each side
- The parties should be encouraged to agree to a timetable and to a schedule for the testimony of fact witnesses and experts
- If time is to be shared equally, a rough check is generally kept on a running basis by a delegated member of the legal team on each side
- Some tribunals use a chess clock, but this is rare

Conduct of Hearing

How are witness testimony and trial exhibits prepared and presented during the hearing?

- Evidence presentation is much different than US litigations/arbitration
- Direct testimony of witnesses is by advance written statements
- Exhibits are jointly organized in “bundles” for presentation
- Demonstrative exhibits are permitted by agreement of the parties and/or with the consent of the tribunal

Conduct of Hearing

What do arbitrators prefer regarding how counsel should conduct the hearing?

- It is generally a rather flexible proceeding; the tribunal's primary concerns are efficiency and fairness
- The oral hearing is generally for the main purpose of cross examination of witnesses who will have previously submitted written witness statements which stand as their evidence in chief (*i.e.*, their "direct" testimony)
- Frequently, more than one counsel is employed on each side who share oral submissions, cross examination, etc.
- Prefer detailed written opening submissions (briefs) a few days before the hearing and short oral opening statements by counsel at the commencement of the hearing

Conduct of Hearing

What do arbitrators prefer regarding how counsel should conduct the hearing? (cont'd)

- Counsel have a free hand in cross-examination
- Counsel should not ask leading questions on re-direct
- Scope of re-direct may be limited
- If feasible, prefer full closing arguments orally at the end of the hearing rather than written post-hearing briefs submitted when the evidence is no longer fresh in the minds of the tribunal
- Depending on complexity and number of issues, may desire written, post-hearing briefs with references to the hearing record

Entry of Award

Does the arbitration tribunal typically issue its decision in the form of a written, reasoned decision or simply enter a monetary award without explanation?

- Invariably, arbitral tribunals in London issue a written, fully reasoned award. Depending on the complexity of the issues, this may run to anywhere between 10 and 100 pages

Entry of Award

Can the tribunal award additional damages in the form of interest on its damages award?

- Policyholder may be able to obtain awards of pre-award and post-award interest
- Interest awards contemplated by Arbitration Act (Section 49)
- Conflict and choice of law issues exist
- Discretion afforded to tribunal

Entry of Award

How does the arbitration tribunal address the assessment of costs to a prevailing party?

- There are generally two issues – (i) the allocation of costs as between the parties and (ii) the assessment, *i.e.* quantification, of those costs
- The basic principle, embodied in the English Arbitration Act 1996, is that, absent special circumstances, costs should follow the event
- One may distinguish and treat differently the costs of the arbitration (arbitrators' fees and expenses, hire of rooms, etc.) and the legal costs of the parties

Entry of Award

How does the arbitration tribunal address the assessment of costs to a prevailing party? (cont'd)

- There may be some degree of apportionment, the successful party only being indemnified against a proportion of its costs, depending *e.g.* on whether there have been issues which will have occupied substantial preparation or hearing time on which the successful party has lost
- The allocation and apportionment of costs will be a matter for the tribunal either in the main award or in a supplemental award after giving the parties an opportunity to make submissions of costs after the result of the arbitration is known
- The assessment of costs will also be a matter for the tribunal, but costs are often agreed or occasionally referred to the English High Court for “detailed assessment”

Post-Award Proceedings

To what extent is the final award of the arbitration tribunal subject to judicial review?

- Challenge of final award brought before court in the seat of Arbitration
- English Commercial Court specified under Arbitration Act 1996
- Three bases for possible challenges:
 - Section 67 – tribunal lacked jurisdiction
 - Section 69 – error of law (Bermuda form generally negates such challenge)
 - Section 68 – serious irregularity
- English Commercial Court has been generally unwilling to grant challenges under Section 68