International Arbitration Under The Bermuda Form

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While the *Bermuda Form* may sound like the name of a novel by Robert Ludlum,[1] it is in fact an excess liability insurance policy. This article is about the arbitration of coverage disputes under the Bermuda Form. The Bermuda Form typically provides that it is governed by a modified version of New York law and requires that disputes be resolved by arbitration in London under the English Arbitration Act. As a result, Bermuda Form arbitrations inevitably involve a mix of American and English legal cultures, often with a combination of English QCs and experienced New York litigators serving on the arbitral tribunal or acting as advocates, or both. This, of course, raises the possibility of the kind of cultural clashes so wonderfully depicted in *Downton Abbey* between brash New Yorker Martha Levinson and the sharp-witted Dowager Countess of Grantham. The following exchange, in which the Dowager Countess discusses Ms Levinson, sees the sardonic wit of the former on full display:

Dowager Countess: *When I'm with her, I'm reminded of the virtues of the English.*

Matthew Crawley: *But isn't she American?*

Dowager Countess: *Exactly.*

But the New Yorker gives as good as she gets:

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1 See, for example, *The Bourne Identity*, *The Chancellor Manuscript*, *The Matlock Paper*.

Dowager Countess:	*The groom never sees the bride the night before the wedding!*
Martha Levinson:	*Nothing ever alters for you people does it? Revolutions erupt and monarchies crash to the ground, and the groom still cannot see the bride before the wedding.*
Dowager Countess:	*You Americans never understand the importance of tradition.*
Martha Levinson:	*Yes we do. We just don't give it power over us. History and tradition took Europe into a world war. Maybe you should think about letting go of its hand.*

This article focuses on some considerations arising out of the fact that Bermuda Form arbitrations inevitably involve a mix of English and American legal cultures and discusses some considerations that bear on the selection of arbitrators and the presentation of an effective case in Bermuda Form proceedings. Before doing so, however, it begins with a general discussion of the Bermuda Form, its origins and some of its important features.

The origins of the Bermuda Form

The Bermuda Form is an excess liability insurance policy that emerged in the wake of the crisis in the liability insurance market in the United States in the mid-1980s. One reason for that crisis is worth highlighting since it played a role in shaping the content of the Bermuda Form – the many decisions of the US courts interpreting liability policies in a manner that exposed insurers to large indemnity obligations in mass tort cases. While US courts did not all take the same approach, the leading case of *Keene Corp v Insurance Company of North America*[2] is illustrative.

Keene involved a dispute about coverage for injuries caused by exposure to asbestos under an occurrence-based policy. In any dispute about coverage for bodily injury under an occurrence-based policy, a central issue involves identifying the particular event or events that might trigger coverage under a particular policy for the particular injury alleged in the underlying claim. This is important since it was and still is the typical practice for liability policies issued in the US to be annual policies; each year a new policy (usually very similar or identical in material terms to the prior policy) is issued for a one-year term with its own set of policy limits, each of which is a separate contract. Identifying the event that triggers coverage is therefore critical to determining which particular policy or policies, if any, come into play.

2 667 F.2d 1034 (DC Cir 1981).

In many cases an injury first manifests itself at the same time as, or close to the time of, the event that causes the injury (eg, an injury caused by a car accident), such that it is straightforward to identify the pertinent event that triggers coverage and to assign it to a particular policy period. Matters are not so straightforward, however, where there is a long passage of time between exposure to or use of a harmful product and the development of symptoms of an injury, such as diseases caused by exposure to asbestos or use of pharmaceuticals such as Diethylstilbestrol (DES). In the case of asbestos, for example, there can be a delay of years or decades between the first exposure to an asbestos product and the first manifestation of any disease such as mesothelioma or lung cancer. The *Keene* court noted:

> 'The language of each policy at issue in this case clearly provides that an "injury", and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal proximity to one another. In cases involving asbestos-related disease, however, inhalation – the "occurrence" that causes the injury – takes place substantially before the manifestation of the ultimate injury – asbestosis, mesothelioma, or lung cancer. Furthermore, although it is not known how little exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.'[3]

The *Keene* court distinguished three distinct, but potentially overlapping, time-periods with respect to injuries caused by asbestos:

- inhalation exposure – this refers to the time-period during which the injured party is exposed to harmful asbestos products, for example, by inhaling dust when installing asbestos insulation products;
- exposure in residence – this refers to the time-period during which asbestos dust, having been inhaled, progressively causes microscopic, cellular damage to the body of the injured party; and
- manifestation of injury – this refers to the time-period during which the progressive damage caused by asbestos manifests itself as a disease such as lung cancer.

3 *Ibid*, 1040.

Rather than trying to identify the pertinent injury for the purposes of triggering insurance coverage by reference to one particular point within one of those three time-periods, the *Keene* court adopted what has become known as a 'triple' or 'continuous' trigger approach to occurrences under a liability policy. It held that when it came to diseases caused by asbestos, all liability policies in effect at any point during the periods of inhalation exposure, exposure in residence and manifestation are triggered: 'We conclude that each insurer on the risk between the initial exposure and the manifestation of the disease is liable to Keene for indemnification and defense costs.'[4]

The effect of *Keene* and other decisions of US courts was to leave insurers exposed to large liabilities under each of many annual policies going back several decades. As a result of decisions such as *Keene* and other factors, the excess casualty insurance market collapsed in the United States in the 1980s. Forged in the crucible of this crisis was a new excess liability insurance product – the Bermuda Form.

The Bermuda Form, so called because it was introduced by two Bermuda-based companies, ACE Insurance Company, Ltd and XL Insurance Company, Ltd, explicitly excluded coverage for certain mass torts, including claims for injuries with respect to asbestos and DES, and is typically characterised by the following features:

- coverage disputes are resolved by arbitration in London;
- the governing law is that of New York, but with some explicit modifications;
- the Bermuda Form is a single contract, rather than a series of annual contracts and an occurrence is triggered upon the first report of a claim by the policyholder; and
- a particular approach to mass tort claims.

Each of these issues is considered in turn.

Arbitration in London

One of the central features of the Bermuda Form is to take the resolution of coverage disputes out of the hands of the US courts and to have them instead resolved by arbitration in London under English arbitration law.[5] A typical arbitration clause in the Bermuda Form (Form XL XS-004) provides as follows:

> 'Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully

4 *Ibid*, 1041.

5 Some Bermuda Form policies provide that disputes are to be resolved by arbitration in Bermuda.

> determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 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:…'.[6]

One aspect of this development is that no settled body of law has developed with respect to the meaning of key terms in the Bermuda Form.[7] Under section 69 of the English Arbitration Act, English courts can, in certain circumstances, take appeals on points of English law but not on the law of any other jurisdiction. Since the law governing the Bermuda Form is typically that of New York, questions of policy interpretation would never reach the English courts unless the parties were to agree that their particular Bermuda Form policy should be governed by English law. In addition, arbitrators' decisions on the interpretation of the Bermuda Form are not likely to reach US courts, except in very rare circumstances, since any challenge to a tribunal's decision must be made to the English courts on the limited grounds of review available under the English Arbitration Act.[8]

While decisions of US courts interpreting commercial general liability (CGL) policies by reference to New York law may be pertinent in Bermuda Form arbitrations to the extent that they interpret the same language at issue in a Bermuda Form policy (eg, the phrase 'as soon as practical' in context of a policyholder's duty to give notice of claim), many of the new concepts in Bermuda Form policies (such as the notion of an 'integrated occurrence,' discussed below) have as yet to have been addressed by any English or US court. And many court decisions made in the context of a CGL policy cannot be automatically transposed to the Bermuda Form context since, in many cases, those decisions are premised on different contractual obligations than those imposed by the Bermuda Form. For example, many decisions about whether an insurer and an insured share a 'common interest' for privilege purposes are premised on a finding that the

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6 Form XL XS-004, Article VI.N(1). Not all Bermuda Forms are identical, although they are similar in structure and approach. This article discusses only one policy — the Form XL XS-004 — for the sake of convenience. But practitioners involved in Bermuda Form cases should study carefully the terms of the particular policy at issue.

7 In the absence of judicial authority, parties to Bermuda Form arbitrations often rely upon two excellent books about the Bermuda Form: Richard Jacobs, Lorelie S Masters and Paul Stanley, *Liability Insurance in International Arbitration: The Bermuda Form* (Hart, Oxford 2011); David Scorey, Richard Geddes and Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford University Press, Oxford 2011).

8 See, for example, *C v D* [2007] EWCA CIV 1282, [2007] ALL ER (D) 61 (December) (affirming anti-suit injunction enjoining party from challenging arbitral tribunal's decision in New York federal court because arbitration held in London pursuant to Bermuda Form such that any challenge to the award must be heard by the English court).

insurer has appointed a lawyer to defend the policyholder under its duty to defend,[9] a duty not imposed by a Bermuda Form policy. To compound this lack of judicial authority, because there is an implied duty of confidentiality in arbitration under English law, an arbitration award, which in any case has no precedential value, would not automatically surface in a subsequent case dealing with the same issues or language.[10]

The result of all this is that even if an arbitration tribunal in one case renders a decision on policy language unfavourable to an insurer, that insurer theoretically has the opportunity to fight the same battle again over the meaning of the same policy language, often before a different arbitral tribunal. And since any particular insurer is likely to be involved in arbitrations over the meaning of its policy more often than any particular policyholder, insurers are far more likely to have experience as to what arguments have been successful in the past and how different arbitrators may have interpreted particular policy language.

'Modified' New York law

Although English law governs the procedural arbitration law that applies to London-based Bermuda Form arbitrations, the Bermuda Form typically provides that the policy itself is governed by a modified version of New York law. For example, the Article VI.O of Form XL XS-004 provides:

> '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 this Policy are to be construed in an evenhanded fashion as between the Insured and the Insurer; without limitation,

9 See, for example, *North River Ins Co v Columbia Cas Co,* 1995 WL 5792, at *4 (SDNY 5 January).

10 See, for example, *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136 at 147a.

> where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, 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 Insurer or reference to the "reasonable expectations" of either thereof or to contra proferentem and without reference to parole or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition N, the internal laws of England and Wales shall apply.'

Thus, the Bermuda Form calls for the application of New York law with a few exceptions, some specific, some vague. An example of a specific exception relates to punitive damages; while New York law prohibits coverage for punitive damages, that prohibition does not apply under the Bermuda Form. An example of a vague exception is the requirement that the policy be construed 'in an evenhanded fashion as between the Insured and the Insurer.' While the policy goes on to provide some examples of what this means – a prohibition on the use of extrinsic evidence to interpret an ambiguous provision, the elimination of the contra proferentem rule, and the rejection of any presumption in favour of the insurer or the insured when it comes to construction of policy language – these examples are explicitly designated to be 'without limitation'.

It is important not to overlook the impact of the evenhandedness proviso in any coverage dispute, as it may prove favourable either to the insurer or to the insured, depending on the circumstances. Take the issue of late notice. The Bermuda Form requires that notice by a policyholder to an insurer be provided 'as soon as practicable'.[11] While there is ample New York law interpreting this provision, with the leading case being the New York Court of Appeals decision in *Mighty Midgets, Inc v Centennial Ins Co*,[12] none of the New York decisions construing the words 'as soon as practicable' was made by reference to the evenhandedness proviso. Under New York law as it stands unmodified by the evenhandedness proviso, two central principles governing the issue of late notice are that: (i) 'notice requirements

11 Form XL XS-004, Article V (VA).

12 47 NY 2d 12 (1979).

are to be liberally construed in favor of the insured';[13] and (ii) notice can be adjudged late even when an insurer has suffered no prejudice.[14]

It seems clear that the evenhandedness proviso would displace the first principle set forth above. Since the proviso rejects any interpretive presumption in favour of an insurer or an insured, so it follows that any presumption that notice requirements be construed in favour of the insured should not apply. However, what of the second? The Bermuda Form requires that its provisions – including therefore the one requiring that notice be given 'as soon as practicable' – be construed in an evenhanded fashion. In *Mighty Midgets,* the New York Court of Appeals held that 'the provision that notice be given "as soon as practicable" called for a determination of what was within a reasonable time in the light of the facts and circumstances of the case at hand.'[15] While New York cases have held – in the absence of the evenhandedness proviso – that notice can be found to be unreasonably late even where an insurer has suffered no prejudice, it could be argued that the 'evenhandedness' proviso might impact this rule in certain cases. After all, if one of the 'circumstances of the case at hand' is that the timing of a notice made no difference at all to the insurer – the insurer was in no different position than it would have been in had it received an undisputedly timely notice rather than one on the date it did – it arguably would not be evenhanded to construe the term 'as soon as practicable' in so harsh a fashion as to sever automatically the policyholder's right to coverage in such circumstances.

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13 *Morris Park Contracting Corp v National Union Fire Ins Co* 33 AD 3d 763, 764, 822 NYS 2d 616, 618 (2d Dep't 2006).

14 *Argo Corp v Greater New York Mut Ins Co* 4 NY 3d 332, 794 NYS 2d 704 (2005). While the no-prejudice rule has been amended by statute with respect to policies issued or delivered in New York after 17 January 2009, NY Ins Law s 3420(a), this amendment would be unlikely to apply to Bermuda Form policies. This is for two main reasons. First, s 3420 applies only to policies 'issued and delivered' in New York state. In a recent case, *Indian Harbor Ins Co v The City of San Diego,* 2013 WL 5340380 (SDNY, 25 September) where the court found an unreasonable delay by the insured municipality in giving notice of pollution liability to its insurer, the court, applying New York law, considered the application of s 3420. The insurer argued that it was not required to provide coverage because notice was late. The policyholder responded that the insurer was required to show prejudice because s 3420 applied. The court held that s 3420 did not apply since the policy was not 'delivered or issued' in New York; the policy was delivered to California, and the electronic signatures of the insurer's representatives were affixed to the policy in Pennsylvania not New York. Second, the Bermuda Form makes clear that one exception to the application of New York law to the Bermuda Form is to the extent such law 'pertain[s] to regulations under the New York Insurance law… applying to… issuance, delivery or procurement of policies of insurance' in New York State. Section 3420 may fall within that exception.

15 *Mighty Midgets* 47 NY 2d at 19.

Continuing contract and occurrence reported approach

As noted above, two related features of the standard occurrence liability policy at issue in cases such as *Keene* proved to be particularly problematic for insurers. One feature was that each annual policy was a separate contract, each with its own set of policy limits. The other was the adoption by the courts of doctrinal approaches – such as the 'continuous' trigger – holding that injuries that arose over a long period of time triggered coverage under each of those annual policies, from the time the injured party was exposed or used the harmful substance to the time of the manifestation of the injury and beyond.

The Bermuda Form is structured and drafted in such a way as to limit this liability for insurers. Thus, while, typically, commercial insurance coverage written in the US is structured as a series of annual contracts, each with its own set of policy limits, all of which may come into play if a continuous trigger is found, the Bermuda Form is structured as a single, continuing contract. The Bermuda Form is typically initially written for one year (the 'First Annual Period'), but may be extended beyond one year not through the issuance of a brand new annual policy but, rather, by an extension of the same policy for a subsequent year or years ('Subsequent Annual Period(s)'). This extension typically follows an annual review meeting between the policyholder and the insurer at which the premium, limits and other matters are discussed and may result in changes to the policy.

The second feature that distinguishes the Bermuda Form from the traditional occurrence policy is that the triggering of coverage is not tied simply to when an injury took place. Thus, while it is necessary for the occurrence to take place during the policy period for coverage to be triggered, it is not sufficient. It is also necessary that the policyholder report the occurrence to the insurer during either the same policy period in which the occurrence took place or in a subsequent 'discovery period'. The first type of coverage, that is, for occurrences both taking place and reported within the policy period is called Coverage A. The second type of coverage, that is, for occurrences taking place within the policy period but reported during a subsequent period – the discovery period – is called Coverage B. The Bermuda Form states that it provides cover for damages on account of personal injury, property damage or advertising liability encompassed by an occurrence, provided:

> 'COVERAGE A: notice of the Occurrence shall have been first given by the Insured in an Annual Period during the Policy Period in accordance with Article V of this Policy, or

> COVERAGE B: notice of the Occurrence shall have been first given during the Discovery Period in accordance with Article V of this Policy, but only if the Discovery Period option has been elected in accordance with the provisions of this Policy.'[16]

Thus the policy provides coverage during the Coverage A period, which starts at the inception date of the policy (unless the parties have agreed to a retroactive coverage date) and, if the parties agree, continues for successive annual periods until either the policy is cancelled or no further extension is agreed. Once Coverage A ends, the policyholder may extend the time to report claims that arose during the Coverage A period by purchasing Coverage B.

Mass tort claims under the Bermuda Form

The Bermuda Form contains the concept of an 'integrated occurrence' – which is likely to come into play in the mass tort context, enabling a policyholder to integrate multiple claims into a single occurrence. Specifically, an injury 'to two or more persons or properties' can be treated as a single occurrence if the injury: (i) 'commences over a period longer than 30 consecutive days'; and (ii) 'is attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such.'[17] The policyholder has to give a specific notice of integrated occurrence to be able to have multiple claims encompassed within a single occurrence.

The benefit to the policyholder in giving a notice of integrated occurrence stems from the fact that the Bermuda Form has a high per occurrence retention, with the possibility that any individual claim alone may never exceed that retention. By permitting the policyholder to give a notice of integrated occurrence, and thus add together claims that individually would not exhaust the high per occurrence retention under the policy, the policyholder obtains the potential for coverage where otherwise there might be none. From the standpoint of the insurer, the benefit to encompassing multiple claims in a single occurrence is that all the claims are collectively subject to one per occurrence limit.

Another feature of the term 'integrated occurrence' in the Bermuda Form is that it is defined not to include any injury that is 'expected or intended'. This notion may also come into play in the mass tort context. The term 'expected or intended' is defined as follows:

16 Form XL XS-004, Article I.

17 Form XL XS-004, Article III.R.

'Personal Injury, Property Damage or Advertising Liability shall be "Expected or Intended" where:

(a) actual or alleged Personal Injury, Property Damage or Advertising Liability is expected or intended by an Insured;

(b) as respects an Integrated Occurrence, an Insured has historically experienced a level or rate of actual or alleged Personal Injury or Property Damage; or

(c) as respects an Integrated Occurrence, an Insured expects or intends a level or rate of actual or alleged Personal Injury or Property Damage (irrespective of whether or not the Insured expects or intends Personal Injury to any specific individual or Property Damage to any specific property);

provided, however, that in the case of subparagraph (b) and/or (c) above, if actual or alleged Personal Injury or Property Damage fundamentally different in nature or at a level or rate vastly greater in order of magnitude occurs, all such actual or alleged fundamentally different or vastly greater Personal Injury or Property Damage shall not be deemed "Expected or Intended" (subject to paragraph 3 below).'[18]

The exclusion of coverage for claims that are expected or intended by an insurer is a standard feature of a CGL policy. The Bermuda Form takes a rather complicated approach to this, with the aim of trying to balance the interests of the policyholder in having coverage for unexpected occurrences and the insurer in not having to cover claims that the policyholder knows are likely to occur based on its historical experience with a particular product or activity.

When it comes to integrated occurrences, an occurrence is expected or intended when an insured has 'historically experienced a level or rate of actual or alleged Personal Injury or Property Damage', except when that injury or damage is 'fundamentally different in nature or at a level or rate vastly greater in order of magnitude'. This is a rather circuitous way of dealing with the fact that a policyholder may know in advance that one of its products will likely cause some number of injuries. In the case of certain pharmaceutical products, for example, while the vast majority of users typically will suffer no serious adverse reactions or side-effects, the policyholder may know, based on its experience, that a small percentage of users inevitably will. The Bermuda Form does not cover claims by those who have suffered such adverse reactions when the nature, level or rate of such reactions is consistent with expectations based on historical

18 Form XL XS-004, Article III.L(1).

experience. However, if those adverse reactions are 'fundamentally different in nature or at a level or rate vastly greater in order of magnitude' than the policyholder's historical experience, they are not excluded from coverage as 'expected or intended'. This concept is often referred to as the 'maintenance deductible'.

Selecting arbitrators for Bermuda Form arbitration

The Bermuda Form takes a similar approach to arbitrator selection to that of many international arbitration clauses; each party may select one arbitrator, and the two selected choose the third. Article VI.N(1) of the Form XL- XS-004 provides in part:

> 'Any party may, in the event of such a dispute, controversy or claim, notify the other party or parties to such dispute, controversy or claim of its desire to arbitrate the matter, and at the time of such notification, the party desiring arbitration shall notify any other party or parties of the name of the arbitrator selected by it. the other party who has been so notified shall within thirty (30) calendar days thereafter select an arbitrator and notify the party desiring arbitration of the name of such second arbitrator. If the party notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator within thirty (30) calendar days following the receipt of such notification, the party who first served notice of a desire to arbitrate will, within an additional period of thirty (30) calendar days, apply to a judge of the High Court of Justice of England and Wales for the appointment of a second arbitrator and in such a case the arbitrator appointed by such a judge shall be deemed to have been nominated by the party or parties who failed to select the second arbitrator. The two arbitrators, chosen as above provided, shall within thirty (30) calendar days after the appointment of the second arbitrator choose a third arbitrator. In the event of the failure of the first two arbitrators to agree on a third arbitrator within said thirty (30) calendar day period, either of the parties may within a period of thirty (30) calendar days thereafter, after notice to the other party or parties, apply to a judge of the High Court of Justice of England and Wales for the appointment of a third arbitrator and in such case the person so appointed shall be deemed and shall act as the third arbitrator. Upon acceptance of the appointment by said third arbitrator, the Board of Arbitration for the controversy in question shall be deemed fixed. All claims, demands, denials of claims and notices pursuant to this Condition N shall be given in accordance with Condition U below.'

The question, therefore, arises as to how a party should select an arbitrator under the Bermuda Form. A neutral approach to the selection of a party arbitrator in a Bermuda Form case would require a party to put aside its status as policyholder or insured and to identify the set of qualifications, skills and experience that an arbitrator should possess to reach a fair and accurate decision.[19] From that standpoint, a party might identify as essential the following qualifications: (i) knowledge of New York contract and insurance law; (ii) knowledge of English arbitration law; (iii) if, as is often the case, the case involves a dispute about coverage for claims asserted in litigation in the United States, knowledge of the United States system of civil litigation; (iv) independence and neutrality – no predisposition towards either an insurer or a policyholder; and (v) some experience with the Bermuda Form itself.

But that, of course, is not the approach parties in real life take to arbitrator selection. In real life, parties do not approach arbitrator selection from a neutral, impartial standpoint. Rather, they seek to appoint an arbitrator who, all things considered, would be the most favourable for their particular case. There is nothing nefarious in this. It is simply an acknowledgement of the obvious fact that all arbitrators are to some degree a product of their backgrounds and experience.

In Bermuda Form cases, the conventional wisdom, often reflected in reality, is that experienced English QCs are a better choice for insurers, and that experienced New York lawyers a better one for policyholders. This is for several reasons, two of which are worth highlighting. First, although New York law is considered to be pro-insurer relative to the law of other states in the United States, it is far more favourable to policyholders than English law. As a result, since New York law is the governing law, policyholders believe it essential that at least one member of the tribunal should be well-versed in that law so that he or she can, at a minimum, make certain it is understood by all members of the tribunal.

One way in which New York law is more favourable to a policyholder than English law is that, under New York law, it is not necessary for a policyholder

19 This approach – which asks each party to put aside its status as policyholder or insurer – is akin to the method advanced by John Rawls in *A Theory of Justice* for how parties should select the principles of justice to govern the basic structure of society. Rawls offers a contractarian theory based on a heuristic device he calls the 'veil of ignorance'. He imagines parties choosing the principles of justice in temporary ignorance of all material facts about themselves (eg, race, gender, class, intelligence, strength, etc.) that would distinguish them from any other person. The point of this is to prevent particular parties from insisting on principles of justice that would favour anyone with their particular race, gender, class, natural endowments, etc, which Rawls believed to be irrelevant from the moral point of view. See John Rawls, *A Theory of Justice* (Belknap, 1971).

to prove actual liability in order to be able to recover under a policy for the settlement of claims; it is sufficient that it demonstrate potential liability on the facts known by the policyholder to exist at the time of any settlement. In the leading case on this point, *Luria Bros & Co v Alliance Assurance & Co*,[20] the Second Circuit Court of Appeals, applying New York law, stated: 'In order to recover the amount of the settlement from the insurer, the insured 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, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree or probability of claimant's success against the insured.'[21]

In *Uniroyal, Inc v Home Ins Inc*,[22] the court, applying New York law, elaborated on the rationale for this approach. Requiring the insured to prove actual liability would 'place settling defendants in the hopelessly untenable position of having to refute liability in the underlying action until the moment of settlement, and then of turning about face to prove liability in the insurance action…. Such a regime would markedly reduce the advantages to the insured of settling: faced with the choice of defending the tort action vigorously or settling it without hope of insurance reimbursement, insureds would tend to choose the former. Settlements expressly disavowing tort liability… would be discouraged lest the express disavowal operate as a waiver of insurance coverage claims.'[23]

English law, by contrast, requires the policyholder to meet a higher hurdle to recover from its insurer, namely, to establish actual liability. The proposition was recently reaffirmed in *AstraZeneca Insurance Company, Ltd v (1) XL Insurance (Bermuda) Ltd (2) ACE Bermuda Insurance Ltd*,[24] which involved coverage under a Bermuda Form that the parties had amended by endorsement to be governed by English rather than New York law, and to provide that disputes were to be resolved in the English Commercial Court rather than by arbitration in London.

AstraZeneca involved the question of coverage under Bermuda Form policies for almost US$800m paid to settle litigation in the United States and Canada concerning claims alleging injuries caused by the use of the antipsychotic drug, Seroquel. In that case, AstraZeneca argued that policy coverage was triggered not only when an insured establishes an actual liability but also when it settles 'an arguable liability'. Justice Flaux rejected

20 780 F.2d 1082, 1091 (2d Cir 1986).
21 *Ibid*, 1091.
22 707 F Supp 1368 (EDNY 1988).
23 *Ibid*, 1378.
24 [2013] 1 CLC 478 (Comm).

this view, holding that, under English law, a policyholder can obtain coverage only by establishing actual liability for the underlying claims:

> 'From this analysis of the case law, in my judgment there is a consistent and well-established line of authority that, in the absence of clear contrary wording in the contract of liability insurance, under English law (i) the insured has to establish that it was under an actual legal liability, not just an alleged liability, to the third party before it is entitled to an indemnity under the contract and (ii) the ascertainment of loss by a judgment or settlement does not automatically establish such actual legal liability (although a judgment against the insured may be strong evidence of such liability). It 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.'[25]

These differences between English law and New York law suggest a second reason why policyholders are likely to want to have an experienced New York practitioner on a Bermuda Form tribunal. As noted, under New York law, as set forth in *Luria*, an insurer's obligation to provide coverage under the Bermuda Form turns on balancing, on the one hand, the risk of liability and size of any possible damages award against, on the other, the amount paid in settlement. As a result, a central issue in any coverage dispute involving claims asserted in United States litigation is assessing the litigation risk – the risk of liability and an estimate of the amount of damages if liability were found. But it is well-known that litigation in the United States poses very different risks to an alleged tortfeasor than does litigation in England, both in terms of the probability of liability and likely amount of damages. While many non-US lawyers have an understanding of the US system from the standpoint of outside observers – they are familiar with certain features of the US system, such as that civil cases are typically decided by juries, that class actions can dramatically increase the risks of litigation, that plaintiff's lawyers operate on a contingency fee basis, that punitive damage may be awarded – such an understanding inevitably falls short of that of an actual participant in the practice, one involved in the litigation of mass tort cases in particular jurisdictions against particular law firms, before particular judges, and who has lived through the risks with anxious anticipation. Again, it benefits policyholders to have on the tribunal an arbitrator who can bring the participant's standpoint to life.

25 *AstraZeneca*, *1 CLC* at 521.

Presenting your case in a Bermuda Form arbitration

When it comes to advocacy, it is trite knowledge that you should know your audience. This requires a consideration of both substance and style, what you say and how you say it. It is obvious that one should present one's case differently depending on whether it is to a New York jury or an English High Court judge. In the case of a Bermuda Form arbitration, there may be a mix of English and American legal cultures. And while different approaches to advocacy are as likely to appear as much within the same legal culture as in different ones, there is no doubt that English QCs and New York litigators generally have different styles. While it is hard to generalise about those differences, two tendencies I have observed are worth noting.[26] First, relative to her New York counterpart, an English barrister is more likely openly to concede the weakness of certain arguments that might otherwise be helpful to her case. This is not to say that a New York lawyer would necessarily advance weak arguments; it is conventional wisdom that advancing weak points undermines your strong ones. But a barrister is more likely to take this thinking further than her New York counterpart, openly renouncing not only arguments that are obviously meritless, but also those that may be viewed to have some legs. The second is that an English barrister is likely to take an understated approach to presenting her case relative to her US counterpart. An English advocate is more likely to lay out just enough of her case to allow you to draw the inexorable conclusion, but not to beat you over the head with it. A New York lawyer is more likely to take no chances – she will lay out her case, and leave you in no doubt as to what conclusion you should draw from it.

These tendencies are reflective of expectations, depending on the background of the arbitrator, as to how a case should be presented and of what makes a persuasive presentation. To an English lawyer, a barrister's approach of not overselling her case and disavowing even plausible arguments makes the presentation of the case she does advance all the more credible. To a New York lawyer, used to conceding little and advancing their case to the hilt, that same approach may come across as diffident, as indicative of a lack of confidence in her case. This is not to say that an arbitrator cannot tolerate any deviation from her expectations; there are many experienced Bermuda Form arbitrators familiar with the different styles of American and English advocates. However, at the same time, they will nonetheless have certain expectations based on their own backgrounds as to what constitutes persuasive advocacy, and an advocate who strays too

26 I use the word 'tendencies' deliberately; they are not always true and are always a matter of degree.

far from the norm – for example, a New York lawyer who is too strident in presenting her case to English arbitrators in a Bermuda Form case – will not find as receptive an audience as one who conforms to it.

This is not to suggest that a New York lawyer should try to adopt wholesale the style of an English QC in order to make their presentation congenial to an English arbitrator, or vice versa. This is because the adoption of any particular style may not fit with an individual's personality and will then lead them to be uncomfortable or appear inauthentic, or both. Furthermore it is to stress the point that a good advocate needs to have some understanding of the background of the arbitrators, and some flexibility in the light of that understanding. Let me offer one example from a recent case in which I appeared before three English arbitrators. One of the issues in the case turned on the meaning of a particular contractual term under English law. My opponent, a New York lawyer, argued his case by relying, in part, on the dictionary definition of the contested term. The particular dictionary he relied upon was *The Merriam-Webster Dictionary*, a leading authority in the US. While it would be an appropriate authority were the case being heard were by US arbitrators, it was hardly going to be as persuasive to English lawyers as *The Oxford English Dictionary*. And it was not. Here, the advocate failed to take into account the standpoint of those who would be deciding the case; he relied on what would have been most persuasive to him, not them.

Another aspect of knowing your audience goes to the substance of one's arguments. Lawyers with different legal backgrounds will come to a case with different assumptions about the law. A lawyer's assumptions about the law stand in relation to their training and experience in a particular legal system, much as a person's accent stands in relation to the country in which they grew up. Spend long enough growing up somewhere and it becomes virtually impossible to lose your accent. But while you might never lose it, exposure to other cultures teaches you that your manner of speaking is not neutral. A lawyer who has practiced long enough in one culture will never unlearn what they know. But a good advocate can ensure that the arbitrator who comes to a case with certain assumptions based on their legal background understands that those assumptions are not some neutral approach to an issue, but one of many, and that the approach they find most familiar is not the appropriate one in the particular case.

The advocate cannot do this without some understanding of how an arbitrator might typically approach an issue based on their legal background (eg, under English law, as noted, a policyholder must demonstrate actual liability in order to recover settlement payments) and without explaining explicitly how the approach required by the governing law differs

(eg, under New York law a policyholder need only show potential liability). While some English arbitrators who have a good deal of experience in Bermuda Form arbitrations are likely to appreciate that New York law has a more relaxed standard for a policyholders to be able to recover the amount of a settlement and that there are other pertinent differences between New York and English law, an advocate cannot simply take this for granted.

A final point is worth stressing. Where the arbitration involves the question of whether the policyholder is entitled to recover from the insurer the amount paid to settle mass tort claims asserted in litigation in the US, the decisive question under New York law is whether the settlement was 'reasonable in view of the size of possible recovery and degree or probability of claimant's success against the insured.'[27] This requires knowledge not simply of New York law, but also of the distinctive risks posed by US litigation relative to that of other countries. While many non-US lawyers are familiar with many distinctive aspects of the US legal system – such as jury trials, class actions, punitive damages – an advocate cannot assume that a non-US arbitrator will be familiar with the very particular risks posed by, and the settlement dynamics of, mass tort litigation in the US.

Some of the distinctive features of mass tort litigation and settlements in the US include the following:

- it makes a big difference which law firm is representing the plaintiffs – some law firms have developed a great deal of experience, knowledge and expertise in representing multiple plaintiffs in mass tort cases, have the resources actively to pursue cases, can afford to lose a few and learn from their mistakes, and consistently win large damages awards;
- law firms that represent many plaintiffs will often insist on a global lump sum settlement for all their cases which will have varying degrees of merit, rather than settling cases individually based on the specific merit of each;
- some particular US jurisdictions are far more favourable to plaintiffs than others;[28]
- the risks of taking a case to trial are not simply limited to the outcome of that particular case since a big loss by the policyholder in one case can increase the settlement value of every pending case, and lead to the filing of new ones;
- sometimes judges will fix early trial dates for the most sympathetic cases from the standpoint of a plaintiff in order to impose settlement pressure;
- some judges will arrange the trial of different categories of 'bellweather'

27 *Luria*, 780 F.2d at 1091.

28 See, for example, www.judicialhellholes.org.

cases[29] together, for example, one where the plaintiff suffered personal injury together with one where the plaintiff suffered only property damage, with the effect that the jury will hear evidence concerning the more serious case (personal injury) in considering issues of liability and damages in the less serious case (property damage);

- some jurisdictions adopt the procedure of reverse-bifurcation (having a trial on damages before liability), which can have a bearing on any cost-benefit analysis of settlement options.

An advocate cannot assume that a non-US arbitrator will be familiar with these, or other aspects of mass tort litigation in the United States, and will need to take particular care to bring these features to life.

While an advocate in a Bermuda Form arbitration is unlikely to have to be so adept that she can prevail only by persuading persons holding such disparate world views as the Dowager Countess of Grantham and Martha Levinson, she must nonetheless continually keep in mind that old adage: know your audience.

29 The purpose of a bellweather trial is to provide some indication of the settlement value of the remaining cases.