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*Arbitration in Bermuda*

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**Part 1: A Brief History of the Bermuda Insurance Market**

**First Wave: The Creation of the Captive**
When Fred Reiss coined the term ‘captive’ in 1961, he knew that his concept could only flourish if he found the right jurisdiction in which to operate. So, in 1962, Reiss started his quest in Bermuda to change the way we do insurance. More than 50 years and 4,300 captives later, Fred Reiss’s indomitable spirit has indeed made an unfathomable impact all over the world; all of which began on the small island of Bermuda. Of course some would argue that Captives were not the ‘first wave’ of insurance business on the basis that AIG was set up in Bermuda in 1947 by Cornelius Vander Starr. While the AIG business was important, it would be many years before others would follow their path.

**The Second Wave: The Collapse of the US Excess Liability Market**
Until the 1980s, the Bermuda market almost exclusively consisted of captives. The next important stage in the development of the Bermuda market resulted from the US commercial liability insurance crisis of the mid-1980s, which saw a dramatic increase in the frequency and severity of liability claims and substantial underwriting losses. By 1984, the world reinsurance markets had reached a crisis. To respond to the crises and expand the supply of liability coverage, ACE was formed in 1985. The formation of ACE, its revolutionary policy form, and the size of its initial capitalization, brought fundamental changes in the way that liability insurance was bought. It quickly distinguished Bermuda from other markets because Bermuda could now take the toughest risks in the toughest classes of business introducing a concept of ‘one stop shopping’ which revolutionized the procurement of insurance. This was followed closely in 1986 with the formation of EXEL (now XL Catlin).

**The Third Wave: Hurricane Andrew**
Hurricane Andrew made landfall in southern Florida south central Louisiana in late August 1992. Up to that date, Andrew was the most expensive natural disaster in history, with estimated damages exceeding $20 billion. The next wave of the evolution of the Bermuda insurance market-place saw the emergence of the specialty property catastrophe reinsurance. New companies set up in Bermuda around this time included Mid-Ocean Re, Partner Re and Renaissance Re.

**The Fourth Wave: 9/11**
The horrific events of September 11 had a staggering effect on the global insurance market. It is estimated that attack generated insured losses of approximately $40 billion. As expected, several Bermuda insurers and reinsurers played a prominent role in funding the 9/11 losses. ACE and XL
were among the top fifteen insurers in paying 9/11 losses, and seven of the top fifty insurers paying 9/11 losses were Bermuda companies. To help restore capacity, at least 10 new Bermuda insurers were formed with total equity capital of about $8.9 billion. The companies in the Class of 2001 included Allied World Assurance, Arch Capital, Axis Capital Holdings, and Montpelier Reinsurance. Catlin Bermuda Re, formed in 2002, is usually considered part of the Class of 2001. Several existing Bermuda companies also raised significant amounts of new capital to strengthen their balance sheets and generate additional underwriting capacity.

The Fifth Wave: The Kat Pack
The most recent wave of capital formation in Bermuda followed the devastation caused by Hurricanes Katrina, Rita, and Wilma in 2005. Eleven new Bermuda reinsurers were formed, with a total of at least $8 billion in equity capital. The Class of 2005 included Ariel Re, Harbor Point Re, and Validus Re. In addition, several new “sidecars” were formed, which raised $4.3 billion in new equity. The ability to form new companies quickly, the ease of raising capital, and innovative risk solutions have become the hallmarks of the Bermuda insurance market. Although the Bermuda market began as a center for captives, it is now recognized as one of the world’s three leading insurance markets, along with the US and Europe (including the UK).

The Current state of the Sea
In the midst of the global financial crisis and a disillusioned business environment, the Bermuda insurance market has remained resilient. Bermuda continues to be a leader in developing innovative solutions to risk financing problems and is now the leading jurisdiction for the setting up of special purpose insurers. Out of the 111 insurance-related applications received by the BMA in 2014, 32 were for Special Purpose Insurers (SPI’s).

Following a six-year campaign, Bermuda was awarded full equivalence with Europe’s Solvency II system earlier this year, underscoring the island’s world-class standards of regulation. Bermuda remains the largest offshore captive domicile in the world with over 800 registered captives generating over $48 billion in annual gross written premiums. Bermuda is the third largest insurance centre worldwide and the largest supplier of catastrophe reinsurance to US insurers. Over the last 12 years alone, Bermuda’s insurers and reinsurers have contributed an estimated $35 billion in catastrophe claims payments to their US clients, including $2.5 billion in response to the World Trade Center tragedy, $17 billion for Hurricane Katrina and $2 billion following tornado outbreaks from 2010 to 2012. This amount now also includes the estimated $3 billion in reported losses by Bermuda’s reinsurers for Hurricane Sandy in 2012. Bermuda houses 15 of the world’s top 40 reinsurance companies, who collectively supply 40% of the US and UK broker-placed property catastrophe reinsurance market. Bermuda’s major property and casualty insurers and reinsurers wrote $74 billion in global gross written premium and hold an aggregate global capital of $99.3 billion (CY 2014). A total 64 new insurers were registered in Bermuda in 2015.
Part 2: Unique Features of Bermuda Form Arbitrations

Background of Bermuda Form
The Bermuda Form is intended to operate as ‘excess’ insurance. It was created in the mid-1980s following the collapse of the US excess casualty insurance market. The Bermuda Form is neither purely an occurrence policy nor purely a claims-made policy. Instead it is a distinctive mixture of certain features of each, using as the ‘trigger’ for coverage the concept of an ‘occurrence reported’. In other words, the policy is triggered by the notice of an Occurrence within the policy period.

Numerous carriers in Bermuda, the US and Europe have adopted the Bermuda Form and now use a version of the Bermuda Form to provide coverage. Insurance policies written on the Bermuda Form have a distinctly international flavour. The policyholder and the insurers are often based in different countries. The policy includes an express choice of New York law (with certain modifications), and customarily provides for disputes to be settled by arbitration either in England or Bermuda.

Coverage
The Bermuda Form policy sits above a significant self insured retention and/or a primary insurance program and covers a policyholder’s liability from damages on account of personal injury, property damage and/or advertising liability. It can also provide D&O and other types of coverage and may be used for reinsurance, particularly for reinsurance captives. The basic period of cover is defined as Coverage A (the Policy Period), while the option to purchase an extended ‘reporting’ or ‘discovery period’, known as Coverage B (Discover Period). If ‘B’ is purchased, the policyholder has extra time to report occurrences which took place during the currency of ‘A’.

Key Provisions
The Bermuda Form distinguishes between two types of Occurrence.

1. Type 1 relates to injury or damage caused by an event or exposure to conditions which does not involve the Insured’s products; and

2. Type 2 relates to injury or damage caused by the Insured’s products.

With a Type 1 Occurrence, the event must commence after the inception or retroactive date of the policy and before the termination date, while a Type 2 Occurrence must take place during the policy period.

Notice
A policyholder’s notice of occurrence fulfills two related, but distinct, functions. It first operates to ‘trigger’ coverage. Secondly it fixes the limits and retentions that will be applied to a claim or set of claims. The notice provision also seeks to impose a requirement that notice of an occurrence should be given promptly. Insurers consider this an important protection. The requirement that the
insurer receives notice of occurrence or claim during the policy period is stated up front. Once a policyholder becomes aware of an Occurrence, written notice must be given to the Insurer “as soon as practicable”, either during the Policy Period or the Discover Period, if applicable. Claims reported thereafter will fail to trigger coverage. Modern Bermuda forms allow for permissive notice of an Occurrence to be given at any time during the Policy Period or Discover Period, and also for permissive notice of an Integrated Occurrence. A policyholder may, at its option, give written notice of any Occurrence as an Integrated Occurrence by designating it as such. Once the policyholder gives notice of Integrated Occurrence, all personal injury or property damage that falls within the Integrated Occurrence shall be treated as such for all purposes under the policy.

“Integrated Occurrence”
Integrated Occurrence provisions give the policyholder the ability to batch multiple losses into a single claim under certain circumstances so that where damage results (or allegedly results) from a common defect, all the injuries resulting from that common defect are treated as forming one occurrence. This is necessary in order to aggregate injuries over a longer period. Integrated Occurrence provisions benefit the policyholder by allowing it to access the high excess limits of its policy’s coverage using a group of claims that, individually, would not exceed the retention.

Governing law
Arbitrations arising under the Bermuda Form usually nominate London or Bermuda as the seat of arbitration. Where the seat of arbitration is London, the arbitration is held under English procedural law. Where the seat of arbitration is Bermuda, then Bermuda procedural law applies. In either case however, the Bermuda Form applies its governing law a modified form of New York law, which has been termed by arbitrators as ‘New York Law Minus’. Challenges relating to arbitration awards are heard by the London or Bermuda Commercial courts, depending on the seat of the arbitration. Any such appeal would be heard by the court local to the seat of arbitration which would be required to apply domestic procedural law, and New York Law Minus substantive law as appropriate.

Although the Bermuda Form applies New York law as the substantive law of the contract, it seeks to carve-out and exclude from application certain rules as applied by New York courts. For instance, the internal laws of the State of New York apply to the policy subject to the following exceptions and/or qualifications:

(1) New York law is excluded in so far as it prohibits the payment of punitive damages.
(2) Notwithstanding any contrary principles of New York law, the provisions of the policy “are to be construed in an evenhanded fashion between the Insureds and the Insurer.”
(3) Where the language of any policy provision is deemed to be ambiguous or unclear, “the issues shall be resolved in the manner most consistent with the warranties, terms, conditions, exclusions and limitations viewed as a whole (without regard to authorship of

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the language and without any presumption or arbitrary interpretation or construction in favour of either the Insureds or the Insurer).

General Bermuda Arbitration Law

Governing Legislation
There are two statutes governing arbitration in Bermuda:

(1) the Arbitration Act 1986 (the 1986 Act); and
(2) the Bermuda International Conciliation and Arbitration Act 1993 (the 1993 Act).

The 1986 Act is now used principally for domestic arbitrations. The 1993 Act enacts the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). The Model Law governs any international commercial arbitration where the parties have chosen Bermuda as the place of arbitration. A key distinguishing factor between the two Bermudian legislative regimes is the appeal and judicial review process under each regime. The balance of this discussion will be focused on the Model Law.

Model Law
Under the Model Law, the powers of the Court to interfere with the arbitral process are reduced to a minimum. The arbitral tribunal is competent to rule on a challenge to its jurisdiction (Model Law, Article 16(3)). If the tribunal finds that it has jurisdiction, there is a single right of appeal to the Supreme Court of Bermuda. Apart from a challenge to the tribunal’s jurisdiction, the 1993 Act (section 25(a)) permits an application to be made to the Supreme Court of Bermuda in only very limited circumstances.

The Bermuda courts will uphold arbitration agreements. Court proceedings brought in breach of an arbitration clause governed by the Model Law will be stayed under Article 8. An injunction will be granted to restrain a party subject to the jurisdiction of the Bermuda Courts from suing abroad in breach of an arbitration clause. The Supreme Court of Bermuda has refused to enforce a foreign judgment obtained in breach of a Bermuda arbitration clause, which the foreign court had held was not binding (Muhl v Ardra [1997] Bda LR 36, Mr. Justice Ground).

In Bermuda there exists a user-friendly international arbitration law and a judiciary committed to upholding the arbitral process making Bermuda an attractive venue.

Appointment of Arbitrators
If an arbitration clause does not stipulate that there must be one arbitrator, and if the parties do not agree to using a single arbitrator, an arbitral tribunal will consist of three arbitrators. In the standard Bermuda Form the selection is begun by one party demanding arbitration and nominating its party-appointed arbitrator. The opposing party then has 30 days to nominate its party-appointed arbitrator. The two party-appointed arbitrators then agree on the third. If there is no agreement, the
default is for the third arbitrator to be appointed an agreed designated appointing authority, or if none, then by a Bermuda Supreme Court judge.

The constituted arbitration panel may be varied. Policyholders often appoint senior US lawyers or retired US judges, while the Insurers tend to appoint English lawyers or retired English judges. The chairperson may be either, but sometimes is from another common law jurisdiction, in particular Canada.

All arbitrators must be independent and impartial. This is an area of frequent confusion and one of the areas where Bermuda arbitration is most distinguishable from US arbitrations. In the US the practice varies widely, with some arbitrators (and those who’ve appointed them) seeing their role as advocates for the party appointing them. Arbitrators in Bermuda may not be partisan or advocates (this follows the English/international model). In fact, in Bermuda, such behaviour could be grounds for setting aside an award. Further, there can be no ex parte communications with a party appointed arbitrator. When appointing an arbitrator one is permitted to discuss with him issues as to his retainer and payment and to ensure that there are no client-conflicts of interest. There can be no discussion as to the merits of the case, or the arbitrator’s view on a particular factual scenario or point of law. The tribunal must treat both parties with equality.

**Challenge of Appointment**
An arbitrator’s appointment may be challenged if: (i) the arbitrator does not possess the qualifications agreed by the parties; or (ii) there are justifiable doubts as to his impartiality and independence (Article 12 of the Model Law) – which shall be decided by the other arbitrators or the Bermuda court (Article 13). It is sufficient to prove that there were justifiable doubts about an arbitrator’s partiality. It is not necessary to show that the arbitrator in question was actually impartial. Under the 1993 Act, unless the parties agree otherwise, the challenging party must, within 15 days of either becoming aware of the constitution of the Tribunal or becoming aware of any circumstance as referred to above, send a written statement of the reasons for the challenge to the Tribunal. Interestingly, the Tribunal will hear any such challenge - even if the Tribunal consists of a sole arbitrator. In other words the arbitrator who is subject to challenge will essentially decide his/her own fate. If the challenge is rejected, there is a right of appeal to the Supreme Court of Bermuda - but no further right of appeal. During the pendency of any appeal, the arbitration can continue with the challenged arbitrator in place.

**Discovery**
This is another area where US and Bermuda arbitrations vary massively. Here the Bermuda model is the same as that in the UK. Discovery is limited however to documents – there is no oral discovery (i.e. no depositions). The general practice is to narrow the scope of document discovery to documents that are strictly relevant to the issues in dispute and necessary for the proper resolution of those issues. The parties each should serve a List of Documents which they intend to
rely on at the arbitration hearing. To the extent that either party desires further discovery, they are free to apply to the Tribunal for specific documentary discovery requests. Arbitrations are intended to be faster and more efficient than court litigation. Reasonable requests for documents should be met promptly. The question of what is and what is not privileged, although strictly speaking a procedural law question (therefore a Bermuda law question), is often treated as a question of substantive, i.e. the arbitrators will have regard to the foreign law where the legal privilege arises.

Following the English practice, it is common to use written witness statements, which stand as evidence in chief (i.e. no direct examination) with cross examination and re-examination at the arbitration hearing. Experts’ reports are generally exchanged in advance of the hearing.

**Evidence**

Evidence in Bermuda form arbitrations follows the English practice, which calls for the exchange of detailed pleadings. One cannot introduce evidence of any fact not pleaded. The usual practice is for the Claimant to serve a Points of Claim, followed by Points of Defence (and Counterclaim if any) to be served by the Respondent. The Claimant then serves a Reply (if any) and Defence to Counterclaim (if any), followed by a Reply to Defence to Counterclaim (if any) by the Respondent. After this, the pleadings are deemed to be closed. There is generally a 14 day gap between the service of each pleading. The parties can agree a shorter or longer period. If a party requests from the other party, a short extension of time, the usual response is to permit such reasonable requests. There are no pre-hearing briefs.

Since questions of disclosure are procedural, questions of privilege are governed by English or Bermuda law, depending on the seat of arbitration. Legal advice or legal professional privilege applies to all communications passing between client and lawyer for the specific purpose of obtaining or giving legal advice. Litigation privilege however, may include documents that pass between the client, its legal adviser and a third party. Litigation privilege applies to documents that are prepared for the dominant purpose of arbitration, particularly where the document comes into existence for obtaining evidence to be used in litigation, or for obtaining information which might lead to the obtaining of evidence. The privilege is applied where arbitration was reasonably in contemplation. Examples include communications with potential witnesses or experts, draft witness statements or expert reports. The fact that a document is confidential is not equivalent, under Bermudian or English procedural law, to claim for privilege.

**Awards/Costs**

The arbitration panel is required to hand down a reasoned award, within 90 calendars days following conclusion of the hearing, unless the parties agree otherwise (Article 31 of the Model Law). This differs from arbitrations in the US where the arbitral panel will often only hand down a reasoned award if it is agreed in the arbitration clause – which is rare.
In Bermuda the Tribunal has discretion in relation to the issue of costs. Generally, the rule is that costs will be awarded to the winner, i.e. the loser pays the legal costs (including legal fees and arbitration costs) of the winner. Section 32 of the Arbitration Act 1993 allows the panel to order one party to pay the other side’s costs. Under Section 31 of the Arbitration Act 1993, the panel also has the power to award interest and has discretion as to the amount of interest and the period for which interest must be paid. In US arbitrations the parties bear their own costs.

**Judicial Review**

The judicial review of arbitration awards is within the exclusive jurisdiction of the Court of Appeal for Bermuda. The grounds for challenging an award under the 1993 Act are set out in Article 34 of the Model Law and include:

1. incapacity of a party to the arbitration agreement;
2. invalidity of the arbitration agreement;
3. improper notice of the proceedings or that a party was unable to present its case;
4. the award deals with a dispute not contemplated or does not fall within the Tribunal’s remit;
5. improper composition of the Tribunal, or the arbitral procedure is contrary to the agreement between the parties;
6. the subject matter of the dispute is not capable of resolution by arbitration; or
7. the award is in conflict with public policy.

It is very unusual for arbitration awards to be subject to challenge, since there can be no appeal based on mistake of fact or mistake of law. This is one of the key differences between arbitrations in Bermuda and the UK, where one can still, in particular cases, appeal on a point of law.

An application to set aside an award must be made within 3 months of receipt of the award. There is no right of appeal to the Privy Council.

**Enforcement**

RSC Order 11, rule 1(1)(m) confers jurisdiction on the Bermuda Court in cases where “the claim is brought to enforce any judgment or arbitral awards”.

Article 36 of the Model Law provides the grounds upon which recognition and enforcement of an arbitral award may be refused. These grounds closely mirror the grounds upon which an award may be set aside under Article 34 of the Model Law, differing only in that Article 36 includes a ground which allows recognition or enforcement of an award to be refused if the award has not yet become binding on the parties, has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. The grounds in Article 36 of the Model Law mirror the grounds in the 1958 New York Convention, however Article 36 goes further in
that it not only applies to arbitral awards issued outside the state in which enforcement or recognition is sought, but also to awards that are issues in international commercial arbitrations taking place within the enforcing or recognizing state.

Foreign arbitral awards are enforceable in Bermuda:

2. In any case where the award is not within the scope of New York Convention, but is made in an international arbitration (as defined by Article 1 of the Model Law), is enforceable irrespective of the country in which it is made under Chapter VII of the Model Law.
3. At common law.

The 1958 New York Convention was originally given legal effect in Bermuda by virtue of the Bermuda Arbitration (Foreign Awards) Act 1976 (derived from the UK Arbitration Act 1975). The enforcement of arbitral awards made in states which are parties to the New York Convention is governed by section 40 of the 1993 Act. In advancing an application for enforcement of an award, the applicant party must produce the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement.

At common law an arbitration award, like a foreign judgment, is enforced by an action on the award. Given that a number of states are now parties to the 1958 New York Convention, proceedings at common law are likely to be comparatively rare. There is no reported case in Bermuda concerned with enforcement of a foreign award at common law.

As arbitrations are confidential arbitration awards are generally not for use as future precedents.

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