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Recent Developments in Bermuda Arbitration

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Bermuda, one of the three largest insurance and reinsurance markets in the world, continues to grow in expertise and reputation as an international arbitration centre. The past year has seen an increasing number of class 4 reinsurers[1] writing policies governed by Bermuda law with disputes to be resolved by reference to arbitration in Bermuda. Meanwhile, as discussed further below, the Bermuda Commercial Court has continued to demonstrate a strong desire to support two key areas of arbitration law and practice: enforcement of the parties' agreement to arbitrate; and the arbitrator appointment procedure.

Enforcement of agreement to arbitrate

The Bermuda Commercial Court remains prepared to grant anti-suit injunctions to enforce the parties' contractual agreement to arbitrate, whether in Bermuda, or, as in the 2006 case of *OAO 'CT Mobile' v IPOC International Growth Fund Ltd, LV Finance Group Limited v IPOC International Growth Fund Ltd*,[2] outside of Bermuda.

In the June 2007 decision of *ACE Bermuda Insurance Ltd v Continental Casualty Company*,[3] the Bermuda Court was prepared to grant an anti-suit injunction against a non-party to an arbitration agreement. The plaintiff, ACE, and the defendant, Continental, had both issued excess liability insurance policies to the Minnesota Mining and Manufacturing Company (3M). Continental had commenced proceedings in the District Court for the Fourth Judicial District of the State of Minnesota (the Minnesota proceedings) against, inter alios, its insured, 3M, seeking a declaration as to the scope of its liabilities under certain excess liability policies issued to 3M at various times between 31 December 1969 and 1 January 1986. Continental had joined, as defendants to the Minnesota proceedings, more than 60 other insurers (including ACE) on the basis that 3M had purchased potentially applicable insurance policies from them. As Bell J explained, the Minnesota proceedings impacted on ACE's contractual rights:

> *The policies which Continental issued to 3M pertain to liability in respect of claims arising from exposure to toxic substances caused by 3M products. In the nature of such claims, complex questions arise as to when liability under particular insurance policies was triggered and as to the appropriate allocation between the various policies … Continental seeks declarations in relation to the issues of triggering and allocation in relation to the various underlying insurance policies issued by the Defendant Insurers, as well as a declaration that Continental's policies have not been triggered by the exhaustion of the underlying insurance. This … will necessarily require the Minnesota Court to determine, so far as ACE is concerned, the contractual rights and obligations between ACE and 3M with regard to the terms of their contract and the extent of coverage thereunder.*

Bell J upheld an order giving leave to serve notice of the Bermuda proceedings out of the jurisdiction, which had originally been granted ex parte by the Chief Justice of Bermuda, and continued an anti-suit injunction to restrain Continental from pursuing the Minnesota proceedings against ACE in the Minnesota courts. The judge accepted ACE's argument that the Minnesota proceedings were unconscionable since they would decide in a final and binding manner the issues between ACE and 3M, in clear breach of an arbitration clause in the ACE policy that provided for arbitration of any disputes under that policy in Bermuda.

Continental, unsuccessfully, challenged the jurisdiction of the Bermuda court to grant an injunction against it, on the grounds that it was not a party to the arbitration agreement between ACE and 3M. The relevant jurisdictional rule (RSC Order 11, rule 1(d) (iii)) provided that the court could grant leave to serve proceedings out of the jurisdiction on a foreign defendant, where the plaintiff's claim 'affected' a contract governed by Bermudian law. Continental argued that, in order to find jurisdiction under that rule, there had to be a contract or a contractual nexus between the plaintiff and the defendant. Rejecting that argument, Bell J ruled:

> *… the Court has granted anti-suit injunctions to restrain a party from pursuing foreign Court proceedings in breach of an arbitration agreement for many years. In my judgment, the Court has such jurisdiction whether or not the party pursuing the foreign proceedings is itself a party to the arbitration agreement. It is the breach of the arbitration clause calling for arbitration in Bermuda that the Court has jurisdiction to restrain. Continental's suit in Minnesota is calculated to breach such an arbitration clause, and the Bermuda Court thus exercises jurisdiction.*

It is open to question whether this reasoning is correct. Where C is not a party to the agreement to arbitrate between A and B, how can it breach an agreement that it is not bound by? Nonetheless, we are of the view that the result in *ACE v Continental* may be justified on the basis that Continental's conduct plainly amounted to an unconscionable (and possibly tortious) interference with ACE's contractual rights.

In another 2007 decision, *Starr Excess Liability Insurance Company Ltd v General Reinsurance Corp*,[4] Bell J granted an anti-suit injunction to restrain proceedings commenced in New York, which purportedly were filed in breach of an arbitration agreement made by the parties that was governed by the procedural law of Bermuda. The facts were as follows: General Re (Gen Re) reinsured Starr Excess (Starr) under a casualty quota share reinsurance contract. That reinsurance contract was stated expressly to be governed by New York law. Clause A of the arbitration clause dealt with the appointment of arbitrators and an umpire and contained a mechanism for appointment of such arbitrators by a Justice of the Supreme Court of New York. However, clause B of the arbitration clause stated: 'The arbitration proceeding shall take place in Hamilton, Bermuda' and then dealt with a number of procedural matters. There was no express choice of 'seat' or procedural law.

A coverage dispute arose between the parties and Starr commenced arbitration proceedings against Gen Re. There then quickly followed a dispute between the parties as to the scope of the arbitration clause. Starr argued that the seat of the arbitration was Bermuda with the consequence that Bermudian procedural law applied (the Bermuda International Conciliation and Arbitration Act 1993 which applies the UNCITRAL Model Law). Gen Re, represented by a US firm not versed in Bermuda law, argued that New York procedural law applied and duly commenced litigation in New York to request

that the New York court interpret the arbitration clause. Bell J found that the seat of the arbitration was Bermuda, and the arbitration was therefore subject to Bermudian procedural law, not New York law. The judge noted that 'it is common in international arbitration for the procedural law to be different than the law governing the substantive dispute between the parties.' He went on to say:

> *… given that the parties reached an express agreement that the arbitration proceeding should take place in Bermuda, and there being no express choice of procedural law, the next question is whether [there] are any other pointers to offset the 'very strong pointer' that by agreeing to arbitrate in Bermuda the parties have implicitly chosen the law of Bermuda to be the procedural law of the arbitration.*

Granting an anti-suit injunction against the New York proceedings commenced by Gen Re, and having considered the terms of clause A of the arbitration clause, the judge concluded as follows:

> *I do not regard the default provision for appointing an arbitrator or umpire as being a matter which should be taken beyond its relatively narrow confines; it is, as Mr. Attride-Stirling submitted, a purely administrative provision, applicable only to the appointment of an arbitrator or umpire. In my view, it cannot justify an inference that it represents some wider choice of procedural law …*
>
> *In the circumstances, there is no part of the arbitration agreement which operates to counter the 'very strong pointer' that the parties' agreement on Bermuda as the place of the arbitration implicitly indicates their agreement that the procedural law of Bermuda should apply to the arbitration. I am therefore satisfied that their agreement to arbitrate their dispute in Bermuda the parties did implicitly agree that Bermuda procedural law (and only Bermuda procedural law) should apply to the arbitration, and I so find.*

A short comparison of Bermudian and US arbitration procedure

Starr v Gen Re represented a clear attempt by Gen Re and its US lawyers to 'hijack' a Bermudian arbitration and transform it into an American proceeding. In that case, Gen Re wished to engage in ex parte communications with 'their' arbitrator, which is common practice in the US, but anathema in Bermuda. This procedural culture clash underscores the need for parties to know the key differences between the Bermuda and US arbitration systems and inform their decision on which dispute resolution regime to opt for. The general point is that Bermuda arbitration is intended to resolve disputes by an impartial tribunal as quickly and cost-effectively as possible. The same cannot be said of US arbitration and significant differences lie in a number of procedural stages.

In relation to statements of case, Bermudian 'pleadings' will set out the facts of the dispute in detail and the relief sought. In the US, 'position statements' will be light on detail until they are superseded by 'pre-hearing briefs' after the discovery process. Discovery in Bermudian international arbitration will be limited in scope to those documents that are strictly relevant to the issues in dispute. In the US, it is standard practice to order large volumes of discovery and undergo an expensive and drawn-out deposition process, which does not exist in Bermuda. As for evidence, in Bermuda detailed written witness statements are exchanged in contrast to the oral depositions used in the US.

Arbitration awards also differ. In Bermuda awards will be reasoned unless the parties agree otherwise. In the US awards will only be reasoned if the parties expressly agree. The most significant differences however lie in the areas of appellate rights (where in Bermuda no right of appeal exists) and costs (where in Bermuda the winning party will be awarded his costs). Thus, deciding the arbitral 'seat' (ie, the procedural law) will have enormous cost consequences and a critical bearing on the duration of the arbitration.

Enforcement of Bermuda Form arbitration clauses

A growing number of reinsurance contracts are now written by a number of Bermudian reinsurers on the 'Bermuda Form', which was invented in the mid-1980s to respond to the critical lack of liability insurance coverage available to US industrial concerns at that time. Arbitrations arising under the Bermuda Form are, according to its arbitration clause, to be held in London (ie, subject to English procedural law) but governed by New York law.

The Bermuda Form was, for the first time, before the English Court of Appeal in December 2007 in the anonymously named case of *C v D*.[5] In that case, D was the liability insurer of C, a company based in New Jersey. C made a claim on the policy, which was written on the Bermuda Form, and D raised various defences to indemnification. The tribunal ruled in favour of C and dismissed D's defences. Following the hearing, C applied to the tribunal to 'correct' the award on the ground that the tribunal's findings constituted a 'manifest disregard of New York law' and were therefore reviewable by the US Federal District Court. The tribunal refused to 'correct' its award, saying that it had no power to do because the parties had expressly agreed to contract out of the right to appeal given by the (English) Arbitration Act 1996, section 69. A dispute therefore arose as to whether:

- English procedural law applied (ie, the Arbitration Act 1996), which permitted the contracting out of a right to appeal against arbitration awards; or
- because New York substantive law governed the contract, D had the right to draw upon the New York procedural law and appeal to the New York court on the ground of 'manifest disregard of New York law', which could not be excluded by agreement by the parties.

The Court of Appeal affirmed the judge's decision to grant a permanent injunction restraining D from appealing to the New York court. The central issue was not so much the proper law of the arbitration agreement (New York) nor the identification of the procedural law (which was clearly English) but whether or not the parties, by choosing London as the seat of the arbitration, must be taken to have agreed that proceedings on the award should be only those permitted by English law. The Court of Appeal ruled that the parties agreed to exclude an appeal to the English Commercial Court and, in view of that agreement, could not appeal to the New York court. The whole purpose of the balance achieved by the Bermuda Form was that judicial remedies in respect of the award should be only those permitted by English law. The remedies of the New York court were not available in tandem or parallel and to permit such a dual system would invite a rush by the parties to take advantage of the different and conflicting rules of the two jurisdictions, leading to conflicting decisions. The choice of arbitration seat must be the choice of forum for remedies seeking to attack the award.

Appointment of arbitrators and lot drawing

The most recent decision of relevance to Bermuda arbitration relates to the enforcement by the court of the parties' agreement to the arbitrator appointment process. *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd*[6] was decided in March 2008. In that case, our client Montpelier Re (a Bermudian insurer) was reinsured under two reinsurance contracts by Manufacturers Property & Casualty Ltd (MPCL). Those contracts contained identical arbitration clauses providing for resolution of disputes by a three-man tribunal, subject to Bermudian procedural law. The arbitration clause went on to set out the procedure for selection of the third 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 thirty (30) calendar days thereafter, the arbitrators may, upon mutual agreement, implement the ARIAS-U.S. Umpire Appointment Procedure to select the third arbitrator. Alternatively, each arbitrator will nominate three candidates and notify the other arbitrator of those nominations. The arbitrator receiving such notice will reject two of the candidates so nominated. The third arbitrator will then be chosen from the remaining two candidates by a lot drawing procedure acceptable to the two arbitrators, and the chosen candidate will be appointed.

This wording became controversial when Montpelier's appointed arbitrator, Bryan Kellett (an English former Lloyd's underwriter), was unable to agree a third arbitrator with MPCL's appointed arbitrator, Charles Foss (an American in-house lawyer). Mr Foss had proposed a number of candidates for the position of third arbitrator, all of whom were American and inexperienced in Bermuda arbitrations. Mr Kellett objected and refused to enter into the lot-drawing process. Montpelier applied to the Bermuda court to appoint the third arbitrator and thus resolve the impasse. The question arose as to what jurisdiction the court possessed to make such an appointment. Montpelier argued that the Model Law provided that the court could only order the appointment of a third arbitrator. It could not order the arbitrators to draw lots. Article 5 of the Model Law states:

In matters governed by this Law, no Court shall intervene except where so provided by this Law.

With specific reference to the appointment process, Article 11(4) of the Model Law states:

Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure…

any party may request the Court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.'

Article 11(5) then provides that there shall be no appeal from a decision made under article 11(4) above.

The judge found that article 11(4)(b) should be interpreted broadly and that the clear purpose of the provision is to empower the court to appoint an arbitrator where either the parties or two party-appointed arbitrators have been unable to effect the relevant appointment in accordance with the agreed procedure. The nature of the inability to reach an agreement was either irrelevant or subsidiary to the dominant practical concern that the appointment mechanism provided for by the contract has clearly broken down. The judge therefore appointed Michael Collins QC, an English lawyer very experienced in Bermuda arbitrations.

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An increasing number of (re)insurances are today written to include arbitration clauses providing for disputes be resolved by arbitration with a Bermuda seat or by reference to Bermuda substantive governing law. The Bermuda Form remains the exception, with governing law being New York law and disputes to be resolved by arbitration in London.[7]

There is a growing body of authority demonstrating the Bermuda Court's modern and sophisticated approach to enforcement and promotion of the utility and proper operation of international arbitrations proceeding in Bermuda under the Model Law. The *Starr Excess v General Re* and *Montpelier Re v MPCL* decisions of the Bermuda courts represent a resolute stand against the attempts by US parties and their attorneys to 'Americanise' Bermudian arbitration proceedings to those US parties' own ends. While it cannot be said that there is any 'home court advantage' for Bermudian companies to arbitrate in Bermuda it is plain that the courts will enforce party choice and intervene in arbitration disputes as little as possible. This is, after all, what arbitration was conceived to do and we welcome the Court's facilitative approach to allowing parties to resolve disputes according to the procedures that they have expressly bargained for.

Notes

1 Class 4 is the regulatory category given to the largest, most commercially diverse reinsurers underwriting international risks.
2 [2006] Bda LR 69.
3 [2007] Bda LR 38.
4 [2007] Bda LR 34 (our firm represented Starr Excess).
5 [2007] EWCA Civ. 1282.
6 [2008] Bda LR 9.
7 In view of recent English authority, heavily influenced by EU law, it remains to be seen how much longer London will remain the arbitration seat of choice.

About the Authors

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Peter is of counsel at Attride-Stirling & Woloniecki (ASW), where he specialises in insurance and reinsurance dispute resolution.

Peter is a graduate of the University of Durham (LLB Hons, 1995) and the College of Law, Guildford (LPC, 1996). He was admitted as a Solicitor of England & Wales in 1998 and gained Higher Rights of Audience (Civil Proceedings) in 2005. He was called to the Bermuda Bar in 2008.

Prior to joining ASW in July 2007, Peter spent nine years in London city firms (five years as a senior associate at Lovells) specialising in insurance and reinsurance. During his career Peter has represented both claimants and defendants based in the US, UK (Lloyd's and company markets), France, Australia and Hong Kong in a variety of international reinsurance disputes (arbitration and litigation) arising from funds mis-selling (D&O and E&O), US environmental and asbestos claims, aviation, pharmaceutical products, finite reinsurance and regulatory investigations (including a six-month client secondment with Gen Re in 2005). Peter has acted in a wide variety of insurance disputes arising from pensions mis-selling, professional indemnity (surveyors/brokers' negligence) and catastrophic injury claims. He also has insolvency experience (part VII transfers and solvent/insolvent schemes) and, since joining ASW, has advised international clients in Bermudian commercial litigation (fraud and securitisations disputes) and in relation to Bermuda form, Bermuda reinsurance arbitrations and subprime disputes.

Peter is a speaker at international reinsurance conferences, has authored a number of published articles in the insurance and reinsurance press and has acted in a number of reported English cases. Peter is also a French speaker and a member of the Law Society of England, the International Bar Association and ARIAS US.

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Jan W Woloniecki is head of litigation at Attride-Stirling & Woloniecki and specialises in complex civil litigation and international commercial arbitration, private international law, insurance, reinsurance and insolvency, banking law and telecommunications law. He is admitted as a barrister in England and Wales (1983) and a barrister and attorney in Bermuda (1991). Mr Woloniecki is a member of the Bermuda Bar Association, the International Bar Association, ARIAS (UK), ARIAS (US), COMBAR, the International Insolvency Institute, the International Association of Defense Counsel and the London Court of International Arbitration, and is a Fellow of the Chartered Institute of Arbitrators.

Mr Woloniecki has appeared as counsel before the Supreme Court of Bermuda and Court of Appeal for Bermuda in over 40 cases. In addition to his practice as an advocate before the Bermuda courts, he has an extensive international arbitration practice, and has accepted appointments as an arbitrator in international arbitrations (ICC/LCIA) and domestic (Bermudian) arbitrations. As counsel and arbitrator he has participated in arbitrations held in London, Singapore, Hong Kong, Bermuda and the US. He acted as an expert witness (on Bermudian and English law) in numerous cases before US courts and arbitration tribunals.

In 1999 Mr Woloniecki was the only lawyer in Bermuda to appear in the prestigious Euromoney *Best of the Best*, in which he is listed as one of the world's top 20 insurance and reinsurance lawyers. He continues to be ranked among the world's leading insurance and reinsurance lawyers in the most recent Euromoney *Expert Guides*. *Chambers Global* states: 'According to one international lawyer, Jan Woloniecki is "quite possibly the brightest and most able insurance lawyer on the island. He has the rare ability to combine good practical knowledge with a really sound understanding of the law and excellent oral presentational skills." Peers agree that he has played an important role in the growth of Bermuda as a location for hearing reinsurance disputes.' Mr Woloniecki is also listed in the Euromoney *Expert Guides* among Experts in Commercial Arbitration and The World's Leading Insolvency and Restructuring Lawyers, and in *The International Who's Who of Insolvency and Restructuring Lawyers,* published by Law Business Research.