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The Bermuda Form and its Chamber of Secrets

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Introduction

1. About every two weeks, my younger daughter tries to persuade me that I have to read all the Harry Potter books before it's too late, and it was shortly after seeing the latest Harry Potter film that BILA asked me to provide a "snappy" title for my BILA lecture. I struggled with "Deathly Hallows". It might be an expression used by American plaintiffs' lawyers to describe to juries a policyholder's religious pursuit of profit by selling murderous products; leading juries to award damages, or policyholders to settle cases, in the litigation which leads ultimately to claims on Bermuda Form insurance policies. But it seemed difficult to tie in to a lecture about the Bermuda Form itself. But "Chamber of Secrets", the second Harry Potter title, encapsulates a number of real and problematic features of the Bermuda Form and the arbitrations which are held, principally in London, in order to resolve claims which each year amount to hundreds of millions if not billions of dollars.

2. The Bermuda Form has been around for 25 years. The two companies which used it initially, XL and ACE, have prospered and expanded well beyond providing the personal injury and property damage liability coverage desperately needed by US corporations during the 1985/6 liability crisis which had led to the creation of XL, Ace and the Bermuda Form. That crisis arose from massive claims, in respect of asbestos and pollution, which threatened the survival of Lloyd's and destroyed other insurers, and illustrates the devastating impact on both policyholders and insurers that personal injury and property damage liability problems can create.

3. Not only are Ace and XL an astonishing success story, but the Bermuda Form is itself a success. Now in its fourth iteration (commonly described by reference to the XL designation "004"), it is widely used by other insurers for excess liability business, often with adaptations which are not particularly well-suited or thought through. For example, the substitution of English law for New York law can create unexpected problems, since the Form has been designed with New York law in mind. A knowledgeable friend of mine from AIG described these adaptations as being like opening up a well-crafted Swiss watch, taking some parts out and putting in a bent paper clip, and hoping that it would work better. Other types of policies, such as professional liability and first party property, utilise Bermuda Form concepts, in particular the concept of dispute resolution in London but applying modified New York law. This wide utilisation and adaptation is certainly a compliment to the Form.

4. The key coverage provided by the Bermuda Form is coverage for liability for personal injury and property damage. The policy covers what are sometimes referred to as "booms" and "batches": for example explosions or collisions, and mass torts arising from

the sale of products. Typical cases include personal injuries from the use of drugs with serious side-effects; hospital medical malpractice on a large number of patients; property damage from defective products; and injury and damage caused by collisions or explosions. The policy provides high level catastrophe cover, for example losses in excess of US 50 million or US$ 100 million, and even higher for some policyholders. (Rather to my surprise, I've seen coverage starting as low as US$ 3 million). The main purchasers are large US or multinational corporations, principally concerned about their liability exposure in the US.

5. Since the Form has been widely used, and disputes are inevitable, a number of practitioners in both the US and England have become extremely knowledgeable about the Form, and there are arbitrators who are regularly appointed in Bermuda Form disputes. Yet although disputes are common, and arbitrations are frequent and perhaps increasing, there is no case-law on the Bermuda Form, whether in the US or in England, which is available to assist the parties, or an arbitration Tribunal, on its interpretation.

6. It is, I would suggest, an embarrassment to commercial certainty that such an important and complex standard-form contract should be the subject of almost no significant reported decisions. There are a few cases in England, now, largely touching on tangential issues (such as the law governing the arbitration clause). But most exposition continues to take place behind the closed doors of arbitration hearings, relatively inaccessible to everyone, and especially inaccessible outside the small circle of the regular participants in such arbitrations. If the walls of the International Dispute Resolution Centre in Fleet Street could speak, they would tell a story of the frequent re-invention of various wheels, as successive groups of lawyers grapple with important and recurring questions; procedural issues such as what law to apply to issues of privilege, and substantive issues such as whether injury was "expected or intended" or how to approach the key concepts of occurrence and aggregation under the Form. Although there are many advantages to private arbitrations, especially where the underlying tort claims may continue, this is undoubtedly a disadvantage.

7. Indeed, it is the sort of problem to which Lord Justice Thomas in the Court of Appeal was referring in what is now the leading decision on confidentiality in English arbitration, *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184. An exception to the obligations of parties to keep confidential arbitration awards and documents generated in the context of arbitration proceedings, is where it is in the *public interest* that confidentiality should be overridden. Lord Justice Thomas's comments may, perhaps, foreshadow a widening of the public interest exception in the context of Bermuda Form awards, although this is still a long way off:

> "Although the essential nature of the obligations are by now, in my view, becoming clear, their application is at an early stage and particular difficulties apply in relation to awards (which were not an issue that arose in this appeal). Some examples may

illustrate the problems. ***If an insurer which uses a standard form of its own devising with an arbitration clause, arbitrates issues arising on that standard form and has a body of arbitral decisions on that standard form, can a broker who knows of them use them to advise a new client contemplating using that insurer's standard form? In a market where most of the standard forms are considered in arbitrations and participants in the market will as a matter of practice know what they are, should potential entrants to the market have these made available to them so as to provide for greater transparency and competition in a market? If there are a large number of disputes in a market arising out a common factual substratum, to what extent should materials in the arbitration and awards remain private?*** (cf the litigation arising out of the personal accident spiral – *Sphere Drake v EIU* [2003] EWHC 1636 (Comm)) and *Sun Life v Lincoln National* [2004] EWCA Civ 1660 ([2004] 2 Lloyd's Rep 606 at paragraphs 68 and 83). These and similar issues relating to the insurance and reinsurance market were raised in discussions with the Department prior to the passing of the Act. Absent institutional rules (which are however making a real headway in many markets), such issues will, no doubt, be determined as the law is developed on a case by case basis." (emphasis supplied)

8. The purpose of this article is to explain why it is that secrecy surrounds Bermuda Form arbitrations and to question whether it is necessary. In order to do that one needs to understand the background to the Form and the bitter experience of insurers in the US courts in the 1980's. I will also give a broad introduction to some of the key features of a Form which is a curious hybrid; an insurance form governed not by pure New York law, but New York law modified so as to strip out certain principles, and then arbitrated in London, usually before a panel which is unlikely to contain more than one New York lawyer.

Why no cases on the Form come before the courts

9. At the time of the "liability crisis" in the mid 1980's, the insurance market for liability insurance largely dried up. Ace and XL rose from these ashes, and their initial shareholders were the very US corporations who desperately wanted the liability insurance which the existing market was unwilling to provide. Those corporations provided the capital for the new companies, which aimed to provide high level excess coverage; XL attaching at excess of US$ 25 million, and Ace at $ 100 million. Ace and XL were the brainchildren of the US broking firm, Marsh and MacLennan and the investment bank JP Morgan. The Bermuda Form itself is usually credited to a lawyer at Cahill Gordon in the US, Thorn Rosenthal.

10. The thinking at the outset was that if the newly created companies were to survive, it was essential that disputes should be removed from the US court system which was perceived by insurers as being too pro-policyholder and unwilling to give effect to the

language used in their policies. The drafters of the Form therefore looked outside the US for dispute resolution. The choice of London rather than Bermuda, and arbitration rather than the English courts, reflected various factors. First, even 10 years before the 1996 Act, London was a recognised centre for international arbitration, albeit that back in 1986 it was unusual for there to be international arbitrations on direct insurance policies governed by the law of one of the states of the United States. Secondly, London offered a ready supply of experienced QC's who were available as potential arbitrators, and who (it was thought) would be willing to apply the policy language, and perhaps take a black-letter approach to it, rather than searching for some more elusive intent of the policy in order to favour the policyholder. To this day, insurers' arbitrators of choice remain English QC's, together with retired English judges; although it is easy to forget that in 1986, the idea of an English judge retiring and then sitting as an arbitrator was unheard of, and Sir Michael Kerr raised establishment eyebrows when he returned to his old chambers as arbitrator in 1989. Thirdly, the choice of arbitration rather than the English courts provided something which would likely be viewed as more acceptable by US policyholders who might be unwilling to buy policies whose dispute resolution involved litigation in foreign courts. In addition, it meant that no body of precedent adverse to insurers would be built up.

11. By agreeing London arbitration, claims brought in the US court system were liable to be stopped. I do not know of any US court decision where there has been a successful challenge to the effectiveness of the Bermuda Form arbitration clause, although it is not wholly unusual to find the insurer nevertheless taking pre-emptive action by seeking, as claimant in London arbitration proceedings, a declaration of non-liability.

12. London arbitration does not of itself prevent cases reaching the English court system. For example, there is an extensive body of law on the New York Produce Exchange charterparty form, which contains an arbitration clause, and where the courts have (even after the more restrictive gateways for appeals implemented following the 1979 and 1996 Arbitration Acts) permitted appeals to be advanced under what is now section 69 of the Act. However, s. 69 only permits appeals on issues of English law. The substantive law of the Bermuda Form is New York law, and in fact a modified version of that, and a s.69 appeal is therefore out of the question. Furthermore, the arbitration clause in more recent versions of the Form contains an effective exclusion of the right to take court proceedings by way of appeal.

13. Accordingly, there are no court decisions which aid an understanding of the Form. In so far as issues have arisen before the English courts, they are relatively tangential. There is an unreported decision of Aikens J, in *XL v Toyota Motor Sales* (14 July 1999) concerning the selection of a chairman following the inability of the parties' arbitrators to agree. Mr. Justice Aikens decided to appoint an English chairman on the facts of the case, which does not stand for the more general proposition that an English chairman should always

be appointed. And there have been three cases, culminating in the decision of the Court of Appeal in *C v D* [2007] EWCA Civ 1282, which have decided that the proper law of the arbitration agreement contained in the Bermuda Form is English law. This is of some importance in that it puts an end, at least as far as the English courts are concerned, to possible arguments that the arbitration agreement is ineffective because of failure to comply with the formal requirements of New York law. It also means, because of the liberal interpretation of arbitration clauses mandated by the House of Lords decision in *Fiona Trust v Privalov* [2007] UKHL 40, that even esoteric disputes are likely to fall within the scope of the arbitration clause. But in the context of the issues which are of real importance to the parties in Bermuda Form cases, this handful of authority is of relatively little interest.

14. The consequence is that if you are a newcomer to the Form, there are no authoritative decisions to which you can turn. That is certainly a problem. It is always helpful to lawyers advising their clients, and arbitrators who are resolving disputes, to know how similar problems have been addressed in the past. Our system of precedent in court proceedings is designed to lead people to know where they stand, and avoid the unnecessary expense of rearguing points which have been decided. There can be no doubt that arbitration tribunals, and indeed the parties themselves, would be greatly assisted by being able to see, consider and review the approach taken by other tribunals to similar issues; particularly if one bears in mind that the individuals on Bermuda Form panels are often very distinguished and experienced. Although the Bermuda Form is on the whole very well drafted, there inevitably remain areas which are controversial and unclear. One cannot help feeling that an arbitration tribunal is more likely to come to the right conclusion if it were able to see what had previously been decided.

15. On the other hand, it can be said that these particular problems do not cause any real unfairness. Awards are not binding on subsequent arbitration panels, and in the event of a dispute both parties can put their respective cases to a new panel of its choosing. The insurance industry cannot be criticised for deciding, if this is what it wishes, that it does not want a body of precedent to be built up in relation to its contract form, and that it should be free to argue issues, if necessary again and again, before different arbitration panels.

16. What in my view creates a more difficult problem is that because the Form has been around for 25 years, and because there have been a substantial number of arbitrations which have considered the Form, a newcomer will soon become aware that there is in fact quite a substantial body of "precedent" in existence, that there are companies, lawyers and arbitrators who are familiar with it or at least substantial parts of it, but that it is not accessible and available. Thus there exists the undesirable situation (see Lord Justice Thomas in *Wilson*) where some market participants know what points on an important standard form have been decided in arbitration awards, and which way they have been

decided by which arbitrators, but other participants do not. The English courts have, in *Locabail UK Ltd. v Bayfield Properties Ltd.* [2000] QB 451 and subsequent cases such as *Amec Capital Projects* [2004] EWCA Civ 1418, decided that the independence of a judge or arbitrator is not compromised by having previously decided an issue in a particular way, even though that means he is likely to reach the same conclusion second time around, provided that his views have not been expressed in such trenchant terms as to cast doubt upon his ability to approach the matter with an open mind. An arbitrator who has been party to one or more previous Bermuda Form arbitration decisions, raising issues similar to those which arise on the case before him, is under no obligation to reveal his prior decisions to the parties, and would likely feel that the confidentiality of prior arbitrations actually prevent him from doing so.

17. The consequence is that there can be, in these cases, an imbalance of knowledge between some participants and others. This imbalance also operates before there is any dispute. When the policy is purchased, decisions need to be made by risk managers or other responsible executives of corporations as to what coverage to purchase, and whether the policy on offer is likely to provide the protection for which substantial sums are paid. As Lord Justice Thomas said, there would be greater transparency and competition if all participants in a market had knowledge of the decisions which were, in practice, being made on a widely used policy form.

18. But although it is easy to identify the problem, it is not easy to provide a solution. Institutional arbitration bodies such as ICC and ICSID can decide to publish awards, if necessary on an anonymised basis. But Bermuda Form arbitrations are "ad hoc": no body can decide that awards should be published. Furthermore, confidentiality does remain an important attraction of arbitration, not just for insurers: it may be particularly attractive to a policyholder who may need simultaneously to fight plaintiffs' lawyers in the United States and insurers in London. Furthermore, if English law were to permit the liberal availability of arbitration decisions, it is not difficult to see insurers deciding to rewrite their standard form so as to provide for arbitration in a country more protective of confidentiality. All of us in London should remember that we don't have any automatic right to have interesting big money insurance cases, emanating from US liability problems, arbitrated here. There must be a real possibility that the wider availability of awards, were English law to go in that direction, might simply lead to a transfer of business to other jurisdictions. A less far-reaching change, which would at least correct the imbalance of knowledge to which I have referred, would be for arbitrators to be required to disclose (in anonymised form) their prior decisions on similar issues.

19. Whilst I might welcome greater transparency, it is important not to lose sight of the circumstances which led to the creation of XL, Ace and the Bermuda Form. It was the hammering of insurance companies in the US that led to the liability crisis, and it is to the disadvantage of potential policyholders if insurance coverage ceases to be available. If

the confidentiality of Bermuda Form arbitrations, and the lack of a body of precedent, has helped to preserve the market, then it can certainly be argued that that is a good thing.

The governing law clause

20. The policy contains an unusual governing law clause; New York law, but modified in a number of respects[2]. This captures in a microcosm many of the points already outlined.

21. First, there is the choice of New York law rather than English law. In *C v D*, Lord Justice Longmore suggested that this might have reflected a certain disenchantment with English law, and in particular its much criticised rules enabling policies to be avoided for non-disclosure. In fact, New York rather than English law was chosen because it was familiar to the US corporations who were the intended purchasers of insurance on the Bermuda Form. US policyholders might have been less inclined to buy insurance from Ace and XL if the policy was governed by English law, with which risk managers would likely be unfamiliar. In addition, New York law was acceptable to insurers, because (when compared to the law of many other US states), it is less pro-policyholder and more "even-handed".

22. Secondly, there is the disapplication of various principles of contract interpretation. The list of principles has grown through successive versions of the Form. For example, it is not permitted to rely upon contra proferentem (the principle which in practice means that ambiguous terms are to be construed against the insurance company as the drafter of the policy), nor upon extrinsic evidence such as what was said during pre-contractual negotiations. This aspect of the clause again has its origins in the historically pro-policyholder approach taken by the US courts, and their perceived unwillingness to apply the policy language in accordance with its terms. The requirement of the Bermuda Form as to how to approach ambiguities – essentially looking for an interpretation most consistent with the language used and the policy as a whole – is in contrast to the general approach in the United States that ambiguous clauses are to be construed in favour of coverage, coupled with (in the case of the courts in some jurisdictions) a liberal approach to the finding of an ambiguity.

23. But this governing law provision itself gives rise to an unresolved controversial issue, namely the extent to which it remains relevant to look at New York law at all. For although there is no body of Bermuda Form law to which one can look, there is at least a substantial body of principles of New York insurance law which, as with English insurance law, is largely developed through case-law rather than legislation. The problem arises because, at least in some areas of the law, the case law can itself be said to be "infected" with principles of interpretation which are forbidden, such as the contra proferentem principle. Does this mean that the New York case-law should be disregarded in its entirety, because the cases represent the fruit of a poisonous tree? [3]

24. I think that the answer to this question is "no". There are many principles of New York insurance law which cannot realistically be said to be dependent upon any of the forbidden principles of interpretation; for example, the rule that a policyholder can recover for a reasonable settlement of an underlying liability without having to prove liability against itself. An area of greater difficulty concerns the Bermuda Form's exclusion clauses, many of which are similar if not identical to exclusions which have been the subject of interpretation by the New York courts applying contra proferentem principles. My own view is that where New York law has established an interpretation of a particular term commonly used in insurance policies generally, one may presume that the terms are being used in the same sense in the Bermuda Form; and that remains the position even if archaeology into the reasoning by the New York courts would reveal the use of the forbidden canons. Thus, where clear New York authority exists, it arguably transcends its origins. However, different panels may have different views on this point, and the absence of published decisions contributes to a lack of commercial certainty on an issue – whether and how to approach and apply New York case-law – which could scarcely be more fundamental.

The interplay between the arbitration clause and the governing law clause

25. A further set of complications arises from the interplay between the arbitration clause and the governing law clause. Which issues are governed by English law, and what issues are governed by New York law? When I gave a draft of an article which I had co-authored on this topic to the draftsman of the Bermuda Form, he was rather astonished at the range of issues to which this apparently simple question gave rise. This is because the English case-law has distinguished between a large number of potentially relevant laws, including: the law governing the arbitration agreement; the legal rules which govern the conduct of the arbitration; the system of law that provides judicial supervision of the arbitral process; the legal rules that govern substantive issues of conflict of laws; and the legal rules which govern the substance of the dispute. Some basic propositions can, however, be stated without too much difficulty.

26. First, English law will govern issues as to the scope of the arbitration agreement. If one party alleges that a particular dispute falls outside the scope of the agreement to arbitrate, English law will determine that question. This point was finally decided, as far as the English courts are concerned in *C v D*. In practice, disputes as to the scope of the arbitration agreement are rare, particularly since English law now takes an expansive view of the disputes encompassed by the arbitration clause.

27. Secondly, the basic distinction is between issues of substance (which are a matter New York) and procedure (English law). Often, this distinction is relatively straightforward. New York law will govern issues which relate to the interpretation of the policy. It will also govern ancillary issues, such as waiver and (probably) estoppel. New York law also governs issues which relate to the circumstances in which the policy can be set aside

because the negotiation for the policy was tainted by misrepresentation. The policy can only be avoided if there is misrepresentation applying New York law principles. English law principles, which permit avoidance for pure "non-disclosure" will therefore not apply. By contrast, it is English law which governs the arbitration procedure: for example, the scope of the arbitrators' powers to order discovery of documents. In fact, English law in the shape of the Arbitration Act 1996 gives arbitrators almost complete discretion as to how the proceedings are to be conducted. Judicial supervision of the arbitral process is also a matter for English law. The English court will expect any challenge to the award to be made in England in accordance with the Arbitration Act 1996. Accordingly in *C v D*, the English court injuncted a losing party that sought to set aside an award in the courts of New York.

28. Although the position is usually straightforward, it is sometimes not easy to determine whether a particular issue is a matter of substance rather than procedure. An important area of some difficulty concerns the award of interest. The general approach of the English courts is to treat the rate at which interest is to be awarded as a *procedural* matter, and to award interest at the rate which a borrower in a similar position to the successful claimant would have to pay in order to borrow the money that should have been paid earlier. By contrast, there is a New York statute which provides for simple interest at the rate of 9% to be awarded to a successful claimant; a rate which, for some years now, has been very substantially in excess of the rate which would be paid by a commercial borrower. As a matter of New York law, this entitlement to 9% is probably a *substantive* rather than a procedural right. Many arbitrations raise the question of whether a claimant is entitled, either as a matter of right or discretion, to an award at the 9% rate. Is this a procedural issue governed by English arbitration law, or a substantive right governed by New York law? To my knowledge, this issue – which can itself involve many millions of dollars – has given rise to different approaches by different arbitration tribunals. My own view is that a London arbitration tribunal is probably not bound to award the 9% rate, but does have a discretion to do so. Under s. 49 of the 1996 Act, arbitrators have a discretion to award interest at appropriate rates that meet the justice of the case. This will often result in an award at US prime, sometimes compound rather than simple interest. But there is no definitive or uniformity of approach, and some panels have awarded interest at 9% reflecting the substantive right under New York law.

29. Another recurring area of controversy, not unique to Bermuda Form arbitrations but is particularly important, is what law to apply to the issue of whether documents are privileged. In a typical Bermuda Form case, the defence of the underlying actions will have been conducted by the policyholder itself, without any involvement from the high-level Bermuda Form insurer who (unlike a primary insurer in the US market) has no duty to provide a defence on behalf of the policyholder. Inevitably, a considerable amount of documentation will have been generated as between the insured and its

attorneys in relation to the defence of the underlying cases, and the Bermuda Form insurer may be very interested in seeing those materials. Is the question of whether the documents are privileged to be decided in accordance with English law principles of privilege, New York law, or the law with which the documents themselves are most closely connected? Arguments can be advanced in favour of all these potentially applicable systems.

Coverage provided by the Bermuda Form:

(1) An occurrence reported policy

30. The policy is an "occurrence reported" policy. In order to have coverage, it is not sufficient for there be an occurrence within the policy period, but the occurrence needs to be reported to the insurer during the policy period. It is therefore a hybrid of an "occurrence" policy and a "claims made" policy. If an occurrence takes place during the policy period, and it is not reported before the expiry of the policy, then there can be no claim. Similarly, if there is no occurrence during the policy period, the mere fact that it is reported is not sufficient for the purposes of coverage.

31. The need for the occurrence to be reported is again a consequence of US Court interpretation of policies which, prior to 1985, were written on an "occurrence" basis. The policies which led to the 1980's liability crisis were the pure occurrence policies which had been written during the many decades prior to the 1980's. An asbestosis sufferer breathed in asbestos dust over a period of 30 years, and this gave rise to occurrences in each of the years of exposure to asbestos, not simply to the year in which the disease manifested itself. The consequence was that policies responded years or decades after each occurrence, in circumstances where the insurer's books had been closed and where, as became apparent, insufficient reserves had been established to meet claims in the future. The same problem arose in relation to environmental pollution, where the act of polluting was the occurrence, and this had taken place over many decades, and each policy in place during the period of incremental damage was potentially responsive.

32. By requiring not simply an occurrence, but the reporting of an occurrence, a Bermuda Form insurer can know far more readily what his exposure is; it is only to those claims which have been the subject of a notice during the policy period. Anything else is not his concern.

(2) Aggregation

33. A second major problem which the Bermuda Form addressed was the problem of "stacking" An insurer who had written a policy to an asbestos producer for a number of years could find that each year's policy would be exposed and required to pay for the

policyholder's liability and massive defence costs. Even if a policy contained an aggregate limit, the policyholder could often simply exhaust that aggregate limit and then turn to the next year's policy. This meant that all the insurer's limits were in practice cumulative, with insurers finding themselves liable on each year's policy up to the the policy limits.

34. Anti-stacking is a cornerstone of the Bermuda Form. This is achieved in two ways. First (see above) it is an essential part of the trigger of coverage that the occurrence should not simply take place, but that it should be reported to the insurer. Accordingly, coverage is not actually triggered until the reporting takes place; it is not triggered simply by the underlying occurrence itself. Secondly, the policy contains aggregation provisions, often referred to as "batching" or "occurrence integration" provisions, which positively require the policyholder to sweep all related injuries into the occurrence which has been notified. Accordingly, in very broad terms (and there are complications here[4]) if there is a common set of problems, there is only one occurrence – an integrated occurrence – and this common set of problems does not trigger multiple limits. The policy limits are, generally, those applicable in the year when the occurrence is reported. (The policy can in fact continue for many years).

35. The batching provision also benefits the policyholder in that it enables it to add together a large number of small individual occurrences and thereby exceed what are usually quite substantial per occurrence retention amounts. Thus, in the case of products liability, it would be unusual for a single injury to result in a liability exceeding $ 100 million, but far from unusual for a serious mass tort, for example in the pharmaceutical industry, to produce that result.

(3) What is an occurrence?

36. Stripped to its essentials, and bearing in mind that the definitions have altered through successive versions of the Bermuda Form, the 004 Policy Form covers two types of occurrences. It is easiest to explain these by way of illustrations.

37. First, there is coverage for an "event or continuous, intermittent or repeated exposure to conditions". An example of an event is a collision between trains, or an explosion at a factory. A continuous, intermittent or repeated exposure to conditions might cover the release over a period of time of a toxic chemical, although one should bear in mind that the policy contains a pollution exclusion which circumscribes recoveries for pollution.

38. The policy prescribes the time when the occurrence must take place. The event or conditions must "commence on or subsequent to the Inception Date and before the Termination Date of Coverage A". Coverage A is best thought of as the basic policy period, commencing on the inception date of the policy, which is usually at or around the time that the policy is purchased. The parties often agree a "retroactive" earlier start date; often, in earlier policies, a start date of 1986. Coverage A is to be contrasted with

Coverage B which is best thought of as an extended period for reporting occurrences which have taken place during Coverage A. If the policyholder decides to purchase Coverage B, then he has further time to trigger coverage by giving notice.

39. Secondly, there is coverage arising from the use of the "Insured's Products"; in other words, products liability coverage. The timing for an occurrence here, subject to the impact of the aggregation wording and related provisions, is when the actual or alleged injury or property damage takes place: it must do so on or subsequent to the Inception Date and before the Termination Date of Coverage A.

40. Both aspects of the occurrence definition (the event coverage and the products coverage) are subject to the requirement that the actual or alleged injury or property damage must not be "Expected or Intended by any Insured". The "expected or intended" concept is not used in English law policies; one reason why it is not a particularly good idea to make these policies subject to English law. But "expected or intended" has long been used in US CGL (Comprehensive, later Commercial General Liability) liability policies from which much of the terminology used in the Bermuda Form is derived. There is also a provision, colloquially known as the "maintenance deductible" which explains or qualifies the expected or intended language.

41. The occurrence definition refers to actual *or alleged* personal injury or property damage: in other words, it is intended to cover injuries which may or may not have actually been suffered. If the policyholder has made a reasonable settlement of its liability to an underlying claimant or group of underlying claimants, then New York law does not require the policyholder to prove that there was an actual liability to that claimant. The policyholder is thus not required to prove liability against itself: see e.g. *Luria Brothers v Alliance Assurance* 780 F 2d 1082 (2d Cir). The position is different under English law: e.g. *Enterprise Oil v Strand Insurance* [2006] EWHC 58. If, as sometimes happens, the parties decide to alter the governing law clause, so as to make the Bermuda Form policy governed by English law, the question arises as to whether it then becomes necessary for the policyholder to prove liability against itself; possibly a very difficult undertaking in a situation where there is mass tort litigation, perhaps concluding with a class settlement.

Issues commonly arising

42. English insurance cases tend to be dominated by issues of avoidance for non-disclosure and misrepresentation. But avoidance is a comparatively rare issue in Bermuda Form cases, because New York law, unlike English law, does not in this context require disclosure of material facts. An insurer who seeks to avoid the policy must therefore identify a positive misrepresentation, and also show that but for the misrepresentation it would not have issued the policy in question. Bermuda Form cases therefore tend to concern issues of coverage rather than avoidance. Commonly recurring issues are:

(a) Whether the injury, damage or liability was "expected or intended". Very often, the underlying claims involve the pursuit by plaintiffs' lawyers of allegations, designed to obtain punitive damages, that the policyholder's conduct (for example in selling a product) was worse than negligent, but was reckless or worse. These allegations then are frequently replayed, in the insurance claim, as a case that the policyholder "expected or intended" what happened. This gives rise to a range of issues, including what is meant by "expected", whether the test is subjective or objective, where the burden of proof lies, and whether (if for example some claims were expected) what actually happened was "vastly greater in order or magnitude" than the insured's expectation; the latter being a reference to the preservation of coverage, in circumstances where some injury or claims were expected, colloquially known as the "maintenance deductible".

(b) Whether the policyholder's notice of occurrence, even though given during the policy period, should have been given earlier. There is a policy condition which requires notice not simply during the policy period, but also as soon as practicable after the insured becomes aware of an occurrence that is likely to impact the policy. New York is unusual, amongst US states, in that it does not require the insurer to show that it is prejudiced by the lateness of notice. Although there has been recent legislation in New York to reverse this "no prejudice" rule, that legislation is unlikely to significantly affect Bermuda Form policies, because it applies only to policies issued or delivered in New York. In my experience, however, insurers rarely succeed on a late notice defence.

(c) Whether particular injuries can properly form part of an integrated occurrence. There may, for example, be a debate as to whether two different side effects produced by a drug were sufficiently related so as to enable all claims to be batched. A different point of considerable importance concerns injuries which take place after Coverage A has expired, for example in a situation where the insurer has declined to extend the policy or has imposed an exclusion. If notice of occurrence is given, then the policyholder's existing or other insurers may require an exclusion for the particular problem that has given rise to the notice. There is a controversial question as to whether injuries taking place after the termination of Coverage A can count towards the integrated occurrence. It is important to the policyholder that they should do so, because otherwise he may well be unable to obtain insurance for a product which is the subject of notice of occurrence.

(d) Whether a claim is barred because the insurer's consent to settlement was not obtained. Although the policyholder's settlements are covered without the need for the policyholder to prove liability against itself, the Bermuda Form contains a "Loss Payable" clause which provides that liability attaches in relation to settlements when they have been approved in writing. Very frequently, the insurer has taken a hands-

off approach to the underlying claims, perhaps reserving rights on numerous bases and in effect leaving it to the policyholder to act as a prudent uninsured. Issues arise as to whether the insurer can say that there is no coverage for settlements to which he has not consented.

43. The above involves some simplification of the issues that commonly arise. But I return to the topic with which I started, which is the fact that different tribunals may give different answers to these recurring questions. The unusual feature of Bermuda Form cases is that there are these recurring questions; in contrast to maritime arbitrations, for example, one does not see the same legal issues arising time and time again, not least because there is usually a well-established body of precedent which guides the answer. One of the purposes of this article is, without providing an answer or solution, to explore the question of whether it is desirable that there should be greater transparency in relation to decisions on this important policy form. I hope that in so doing I have explained some of the things which are hidden in the Chamber of Secrets.

Endnotes

1 Richard Jacobs QC is a barrister at Essex Court Chambers, and co-author (with Lorelie Masters and Paul Stanley QC) of *Liability Insurance in International Arbitration: the Bermuda Form* (2nd edition – published by Hart Publishing in January 2011). This article is based on a BILA lunchtime lecture delivered on 14 January 2011.

2 "... 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, where the language of this Policy is deemed 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, and without any presumption or arbitrary interpretation or construction in favour of either the Insured or the Insurer or reference to the 'reasonable expectations' of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence)."

3 See further, *Liability Insurance in International Arbitration: the Bermuda Form*, Ch 4.

4 *Ibid*, Ch 6 for further discussion of these issues.