

A Guided Tour Of London And Bermuda Arbitrations

Law360, New York (September 20, 2010) -- American companies that require large limits of first-party property and liability insurance coverage often find themselves looking overseas to London or Bermuda-based insurance companies to fill their needs.

Some of those insurers are loathe to be dragged into the U.S. courts, or even a U.S.-based arbitration, out of a fear that they will be subjected to pro-policyholder rules of policy interpretation. So, their policies contain clauses which mandate that all disputes be resolved under arbitration rules and acts of their own jurisdictions. For good measure, those clauses often contain substantive choice-of-law and policy interpretation provisions that are unfavorable to policyholders.



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Seemingly making things worse, the overseas arbitration proceedings can differ dramatically from arbitrations in the U.S. American companies need a good roadmap to navigate their way through the various minefields presented by such arbitrations — but policyholders who are properly prepared can get a fair hearing, and should not capitulate to unreasonable settlement demands simply because they fear that they will be at a disadvantage in a foreign arbitration.

The Arbitration and Choice-of-Laws Clauses: Stacking the Deck Against the Policyholder

Many excess liability insurance policies seek to give the insurers an advantage in the resolution of any dispute by including provisions requiring the arbitration of disputes in London and the application of New York law. The choice of venue allows London-based underwriters to arbitrate on their home turf and provides a forum for certain Bermuda-based insurers which attempt to insulate themselves from the jurisdiction of the U.S. courts. However, applying U.K. law to coverage for risks located in the U.S. might not survive challenge in the courts of either country, so the law of an American jurisdiction was needed.

New York law is favorable to insurers in some respects when compared to that of most other states. Indeed, New York law can be quite draconian toward policyholders, yet the insurers go even further to make sure there can be no advantage given to their insureds by inserting language into the choice of law provision that removes any conceivable legal presumption in favor of coverage. Moreover, this provision prohibits the introduction of parole or other extrinsic evidence to aid in the interpretation of the policy.

Clearly, the combination of a U.K. forum, New York law and an extra provision that changes New York law is intended to give the insurer a significant advantage when a dispute arises. That advantage need

not be determinative of the outcome, but it certainly could be detrimental if the policyholder is not prepared for the rarified world of the London arbitration.

Two Peoples Separated by a Common Language

The most common, and potentially disastrous, mistake made by American policyholders is assuming that they know how to proceed because they have been in arbitrations at home. Do not go into a London arbitration thinking it will be just like arbitrating in the U.S. From the selection of arbitrators to the drafting of briefs and the presentation at the hearing, London arbitrations are conducted in their own unique way under England's Arbitration Acts.

The arbitration panels, which usually consist of three members, will likely include at least two Queen's Counsel ("QC"), the highest level of barrister, i.e., litigator. As a result, the arbitration will probably follow a standard protocol which incorporates a particular set of English practices, rather than the more common approach followed in arbitrations elsewhere of structuring the proceeding at the initial stage with the participation of the parties.

All three arbitrators must serve as neutrals. Each party appoints one member of the panel, and those appointees select the chairperson. The insurance company will probably select a Q.C. as its party-appointed arbitrator. The policyholder need not select a Q.C., and should in fact base the decision whether to choose a Q.C., an ordinary barrister or an arbitrator with different qualifications upon the circumstances of the particular case.

Indeed, the policyholder may be well served by selecting an arbitrator from the U.S. if the law of New York or another U.S. jurisdiction is to be applied. If a U.S. arbitrator has considerable stature, such as that of a retired appellate court judge from a well-regarded court, he or she ought to be viewed as an expert on U.S. law, and should therefore be able to speak with authority on legal issues during the hearing and in panel deliberations. The selection of the panel may be the most important part of the arbitration, and it should be done with the assistance of experienced U.S. and U.K. counsel.

Typically, there is little or no discovery or live testimony in a London arbitration. Written submissions are thus the principal means of presenting evidence to the panel. The briefs are not drastically different from those presented in U.S. arbitrations, but a higher level of civility is expected, and care must be taken not to invade the province of the panel by arguing too directly for the ultimate conclusions a party wants adopted. For many U.S. disputants, this is an alien concept that requires some getting used to.

With a few idiosyncrasies, hearings are conducted much like those in U.S. arbitrations. Perhaps most unusual from a U.S. perspective is the practice of counsel and panel members having the entire evidentiary record and all legal authorities in front of them in binders (called "bundles"), and extensively reading aloud from cases, as well as insurance policies and other evidence. Counsel should be prepared to give a very thorough discussion of the cases, and to read into the record every passage from a decision that is relied upon.

How to Pick Your Hired Gun

There is a difference of opinion among policyholder counsel on the issue of whether the client should be represented at the hearing by U.S. or U.K. counsel. Certainly both have a role to play in the preparation of the case. If U.S. law is to be applied, a strong argument can be made for having a U.S. policyholder-appointed arbitrator, and if so, having U.S. counsel present the party's case at the hearing. On the other

hand, if the panel consists of three individuals with backgrounds in British law, the policyholder usually should be represented at the hearing by English counsel.

Regardless of who makes the oral argument before the tribunal, the policyholder will likely want U.S. counsel to do as much of the preparation work as possible, both because U.S. law will be applied and because, believe it or not, a New York lawyer charges hundreds of dollars per hour less than his or her English counterpart!

The English Rule For Payment of Attorneys Fees

Although a London Arbitration Panel may apply New York law, it will also follow the English procedure of requiring the losing side to pay the opponent's attorneys fees and costs, and all of the arbitrators' fees and costs. This can create a powerful incentive for both sides to settle, provided the claims are not enormous.

Often, though, the claims are so large that the prospect of paying another million dollars or so in costs is not significant. Policyholders must be careful not to assert make-weight claims or counterclaims, because even if they prevail on the key claims, if they lose on others they might be required to pay some of the insurer's attorneys' fees and costs.

Just Do It!

Companies frequently include arbitration provisions in their commercial contracts, but often have a strong negative reaction when a coverage dispute arises and they are required to arbitrate. This is due in large part to the fact that the arbitration clauses in insurance policies typically contain unfavorable choice-of-laws provisions.

It is certainly worth the effort to try to remove such provisions from policies, but the market for excess liability insurance has surprisingly few participants, and except in the softest of insurance markets, it may be impossible to achieve that objective. However, being required to arbitrate a coverage dispute in London, even with a pro-insurance company choice-of-law provision, is no reason to settle cheaply based upon the assumption that the policyholder will not be treated fairly.

The caliber of arbitrator found on the panels is typically quite high and their decisions are generally well-reasoned. While the results of the arbitrations are confidential, the policyholder bar does not perceive a trend favoring insurers. Moreover, it should not be assumed that a London arbitration panel will at best "split the baby."

Often, London arbitrations turn primarily upon issues of contract interpretation and result in awards that are entirely in favor of one side or the other. Therefore, policyholders should evaluate each claim on its merits, and pursue a recovery without feeling that it is at a disadvantage. Cheers!

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