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An American Abroad: The Divergent Worlds Of U.S. And U.K. Insurance Arbitrations

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Commentary

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Moriarty QC, and Thomas R. Newman. Responses are welcome.]

I. INTRODUCTION¹

Rooted in common beginnings, the American and United Kingdom legal systems are cousins with many similarities. As with most relatives perched on opposing branches of a family tree, however, there are numerous and significant differences. One example of how the two legal systems diverge exists in the realm of insurance arbitrations. This article focuses on some of the procedural and substantive concerns that arise in arbitrating insurance disputes in the U.K. (and Bermuda) relative to what one might expect when arbitrating in the U.S.² To provide the American lawyer a frame of reference, and where appropriate, the article discusses these concerns by highlighting the differences and similarities between U.S. and U.K. insurance arbitrations with an eye toward providing some practical guidance to the American lawyer arbitrating an insurance dispute in the U.K.

II. AMERICAN LAWYERS ACROSS THE POND

American lawyers have a role to play in English arbitrations. This is particularly so where the governing law is that of a U.S. state. Some features of English arbitrations may make the American lawyer feel at home, others will seem very odd. American lawyers do not have to retain English counsel. In London, American

lawyers may appear as advocates in arbitrations without a local license to practice law. The restrictions on legal practice, which are generally much less severe in the U.K. than they are in the U.S., do not apply to arbitration. Arbitration is a private dispute resolution procedure subject to the limited supervision of the English courts.

III. ENGLISH TURF, ENGLISH RULES

In a London arbitration, English choice of law principles apply. Under English choice of law rules, in theory, three different laws may apply in insurance arbitrations:

- a. the governing (or “proper”) law of the policy, which will determine the substantive legal issues and the principles of construction to be applied;
- b. the law of the arbitration agreement, which will generally be the same as that of the policy. The arbitration agreement may however survive the main contract (following e.g., repudiation) and will govern such matters as the interpretation, validity, avoidability, and discharge of the agreement to arbitrate. The law of the arbitration agreement may also control similar issues concerning the reference to arbitration and enforcement of the award; and
- c. the procedural law, which will generally be English in a U.K. arbitration. International insurance arbitrations having their juridical seat in London are governed procedurally by the English Arbitration Act 1996. Thus, English law will determine how the arbitrators are to be appointed; the role, if any, of the court; what law the arbitrators are to apply and how to do it; the procedural powers and duties of the arbitrators and the availability of judicial remedies, including the right to seek leave to appeal on a question of law (where not waived). The procedural law generally governs the determination of interest (pre- and post- award) and costs. Issues overlap because, for example, questions of remoteness and heads of damage (i.e., what kinds of loss can be recovered) are matters for the governing law but measure and quantification are issues governed by the procedural law.

Generally in most policies, the parties will have agreed what jurisdiction’s governing and procedural laws

apply. Even so, complications may still arise. For instance, what is the effect outside England when a foreign court takes a different view of what the governing law covers or, what is substantive versus procedural (where do questions of remoteness and of assessment overlap), or how does one define what the “governing law” is? A difference of opinion between English law and New York law over the proper of procedural law might well lead to difficulties in enforcing an arbitration award.

Furthermore, a feature classified as procedural under English law may be substantive under the governing law of the policy, or vice versa. For example, in disputes governed by the substantive law of a U.S. state but by English procedural law, the argument can be made that interest is an issue to be determined by the substantive law, where (as in New York) there is support for that proposition under the substantive law. An even more vexing example may be found in policies containing the following (or materially similar) language:

This policy shall be governed by the laws of the State of New York, except in so far as such laws may prohibit payment for punitive for damages *but the provisions of this policy are to be construed in an equally balanced fashion as between the insurer and policyholder and where the language of this policy is ambiguous or unclear the issue shall be determined without regard to authorship of language, without any presumption in favor of either the insurer or the policyholder and without reference to parol evidence.*

Have the parties actually selected New York as the governing law here? If so, are the italicized words at risk of being struck down under New York law as being inconsistent with public policy or for some other reason? Or rather, is this provision the selection of a self-contained regime of New York law, as varied by the language — the selection *not* of New York law per se but of a modified version of New York law? If the latter is right, then the governing law is that modified regime and it may or may not be possible to apply public policy or other New York legal considerations to strike down the italicized language (assuming there is one that prohibits it). On the other hand, there may be an issue as to whether or not the “modified version” is a system of law that can constitute a valid choice of law. There is also the question of how to apply New York

case law to an arbitration calling for such modified New York law, as New York case law has evolved, by definition, without such contractually specified modifications. Can New York case law be read and applied like the offerings on a buffet table, selecting only the parts to which the parties agree?

IV. THE ENGLISH VIEW

Whatever law governs the policy, one or more arbitrators in a U.K. arbitration are likely to be English lawyers or retired judges. With an English arbitrator comes an English approach to policy interpretation. Although the principles of contractual interpretation of many U.S. states and England are very similar in theory, in practice the approach can be very different. The English approach, traditionally, has been to take the policy in its factual setting, but to interpret the wording quite strictly, albeit with a healthy dose of common sense. Resort to extrinsic evidence has been very limited. In recent years, however, a more liberal and purposive approach to construction has been taking hold, with evidence of any background knowledge reasonably available to the parties being admissible for the purpose of ascertaining what the words used would mean to the reasonable person reading them.³ There is no need for the literal meaning of the words to be ambiguous before it is possible to adopt a commercially sensible interpretation.⁴ Reliance on case law, except where the policy wording is virtually the same as that being considered in the case, is sometimes limited.

V. ANATOMY OF AN ARBITRATION⁵

A. Serving The Demand

The demand or notice of arbitration must strictly comply with the parties' arbitration agreement. The party demanding arbitration may or may not be required to name its arbitrator in the demand. The demand will set forth the issues to be arbitrated, the relief sought, and a request that the other side designate its arbitrator within the time provided by the arbitration provision (usually 30 days).

B. Selecting The Arbitrators

The time limit to select an arbitrator is strictly enforced. Failure to make a timely designation of an arbitrator will usually open the door for the opposing party to designate a second arbitrator (or apply to the court to do so). Since in a U.K. arbitration, the party-appointed arbitrators usually choose the third arbitrator (or chair), failing

to designate an arbitrator in a timely manner may cause the "deck" to be stacked against a party from the start.

The arbitrators must meet the qualifications, if any, set forth in the arbitration agreement. In the U.S., for instance, most reinsurance contracts that contain an arbitration clause require the arbitrators to be active or retired executive officers of an insurance or reinsurance company or underwriters at Lloyd's (and occasionally, and rather surprisingly, this requirement sometimes slips into direct insurance policies).⁶ Some of the more recently drafted reinsurance contracts also accept attorneys knowledgeable in reinsurance. The parties are free to waive the contractual requirements if they agree on a particular individual who does not meet them.⁷

Often in international insurance contracts, the arbitration agreement will not contain express qualifications for the arbitrators other than that they are to be independent and neutral. That is the case, for example, with ad hoc arbitrations in London or Bermuda under a so-called "Bermuda Form," a high-level direct excess policy that applies New York law. Some direct insurance policies issued by London insurers require the arbitrators to be lawyers with at least ten years' experience. If the bargained-for process ceases to work, a party can seek relief in an English court. The English court will appoint an arbitrator, perhaps the first suitable nominee one of the parties succeeds in putting before the court. Arbitration Act 1996, § 18. Therefore, if there is a problem, get to court first. When appointed by the court, the arbitrators will often be retired judges from England, Canada, Australia, New Zealand or the U.S., senior barristers (Queen's Counsel), Underwriters at Lloyd's or U.S. attorneys with expertise in insurance/reinsurance.

All things being equal, in a London arbitration it is useful to have at least one arbitrator familiar with English procedure and one who knows the governing law. Policyholders will usually feel the need for at least one arbitrator familiar with the enormous practical and legal problems that beset U.S. companies in product liability and other mass tort litigation. There is no prejudice against non-English arbitrators, and there may be a case for U.S., Canadian, New Zealand, Swiss or even Scots to appear as arbitrators.

In the U.S., each state may have its own statute governing arbitration proceedings. However, since insurance

arbitrations involve commerce among the several states or with foreign nations, they are governed by the Federal Arbitration Act, 9. U.S.C. § 1 *et seq.* (FAA), which preempts state law. In both the U.S. and in the U.K., if there is no agreement in the policy on the number of arbitrators, the Tribunal shall consist of a sole arbitrator. FAA § 5; Arbitration Act 1996, § 15.

In a purely domestic U.S. arbitration, potential arbitrators may be contacted and interviewed (by telephone or in person). The interview is to determine the existence of conflicts and to inquire about the arbitrator's terms of engagement, whether the arbitrator has the time to devote to the matter, and also to learn what, if any, position the arbitrator may previously have taken on the same or a similar issue or even how they feel about the case and client. In the U.S., the party-appointed arbitrator is often not expected to be a strict neutral; in fact, quite the opposite. Party-appointed arbitrators are generally expected, in the first instance and before hearing the evidence, to be inclined toward the position of the appointing party. It is also expected, however, that at the merits hearing every arbitrator will be fair and open-minded and, if the evidence favors the other side, to vote accordingly.⁸

In contrast, in international arbitrations such as those governed by the English Arbitration Act 1996, the UNCITRAL Rules, the LCIA Arbitration Rules, and the International Bar Association Rules on Ethics for International Arbitrators, arbitrators may not act as advocates.⁹ All members of the Tribunal are expected to be strictly impartial. Indeed, the court may remove an arbitrator if circumstances give rise to justifiable doubts as to the arbitrator's impartiality.¹⁰ Consequently, no *ex parte* substantive discussion of the merits or issues is permitted during the pre-appointment interview or at any time thereafter. Pre-appointment inquiries are limited to determining the potential arbitrator's suitability and availability for the appointment and terms of appointment.

C. Choosing The Chair

This is one of the most important parts of the process. This is especially true in the U.S. where the party-appointed arbitrators are generally partisan and often the procedure to select the chair is not spelled out in the arbitration agreement. In the U.S., the two party-appointed arbitrators usually select the chair from among names proposed by and discussed with the

parties; each side usually proposes three. Thereafter, the parties may ask the candidates to complete a chair questionnaire, such as the ARIAS-U.S. form¹¹ providing information about their experience and listing all present and prior contacts with the parties or counsel and anything else that might bear on their impartiality.

If the parties are unable to agree on a choice from among the names proposed, there is a common solution. Each side can strike two of the other's three names and choose the chair from the remaining two, by lots or their equivalent (e.g., whether the digit immediately to the left of the decimal point on the Dow Jones closing averages as reported in the Wall Street Journal is odd or even). If the parties cannot agree on the procedure, they may apply to the court at the arbitral seat to appoint a chair, in accordance with the governing arbitration (i.e., procedural) law.¹² In the U.K., the two party-appointed arbitrators will select the chair, without input from the parties at that stage of the proceedings unless agreed otherwise. However, in practice, each of the arbitrators often will have a good idea of the type of person his or her appointing party would like to see as the chair.

Where the arbitration agreement calls for a Tribunal of three arbitrators, the third to be selected by the two party-appointed arbitrators, and the agreement does not set out a selection method in the event the two arbitrators are unable to agree, either party may apply to the court having jurisdiction over the arbitration to appoint the third arbitrator. FAA § 5; Arbitration Act 1996, § 18.

D. Applying For Judicial Relief

In the U.K., where circumstances give rise to justifiable doubts about an arbitrator's impartiality, failure to possess the necessary qualifications, physical or mental incapacity or a failure to conduct properly the proceedings, a party may commence judicial proceedings by filing pre-hearing applications with the court to remove the arbitrator. Arbitration Act 1996, § 24. It must be noted, however, that pre-award challenges to an arbitrator on the ground of partiality are rarely granted where the arbitrator has the requisite qualifications.

Generally, pre-hearing motions may also be made to the Tribunal to stay the arbitration for lack of jurisdiction, to consolidate arbitrations involving multiple parties or disputes among the same parties but involving

multiple contracts, and to sever or direct separate arbitrations. Unless otherwise agreed, in the U.K. the Tribunal has competence to rule on its own substantive jurisdiction, whether there is a valid arbitration agreement, whether the Tribunal has been properly constituted, and what matters have been submitted to arbitration in accordance with the arbitration agreement. Arbitration Act 1996, § 30(1).

Further, in the U.K., an objection that the Tribunal lacks substantive jurisdiction must be raised no later than the time for taking the first step in the proceedings to contest the merits of any matter in relation to which the Tribunal's jurisdiction is challenged. Any objection that the Tribunal is exceeding its jurisdiction during the course of the proceedings must be made as soon as possible. The Tribunal may rule on the objection to its jurisdiction before issuing an award on the merits or it may deal with the objection in its award on the merits. If the parties agree on which course to take, the Tribunal should follow that course. Arbitration Act 1996, § 31.

In the U.S., a challenge to a tribunal's subject matter jurisdiction must be brought before a federal court. However, in the U.S., the question of consolidation or severance is generally held to be a question for the arbitrators once the Tribunal is constituted. Under U.K. law, the Arbitration Act 1996 § 35 provides that the parties are free to agree to consolidate arbitral proceedings or hold concurrent hearings, but unless the parties confer such power on the Tribunal, the Tribunal may not order consolidation or concurrent hearings.

In the U.S., injunctions, attachments and other preliminary relief necessary to preserve a party's right to obtain meaningful relief in the arbitration may be obtained in federal court. Similarly, the Arbitration Act 1996, § 44 grants a U.K. court powers exercisable in support of arbitration proceedings, including granting an interim injunction or appointment of a receiver to preserve evidence or assets.

E. The Organizational Meeting Or Directions Hearing

When the Tribunal is constituted, it is common for it to convene an early "procedural conference" for the arbitrators to meet the lawyers and the party representatives, to meet and consult with each other, to issue procedural directions and to set an initial case schedule.

This initial conference often allows the Tribunal to find out, in a very preliminary sense, what the case is really about. It is prudent for both sides to submit a pleading before that meeting so the issues are clear and to maximize the prospect that the resulting procedural directions and case schedule will serve the parties' needs and interests. A first meeting may also resolve preliminary disputes. It is advisable to get the hearing dates locked in and then work back to set the rest of the procedural timetable. It is not always an easy task to coordinate the diaries of three arbitrators who are often much in demand – let alone, the schedules of parties and counsel. If hearing dates are not set until later, the dates set for the initial stages will often slip and lead to requests for extensions, which, in turn, may lead to difficulty in finding convenient and timely dates for the merits hearing.

Whether at this initial meeting or at a more formal organizational meeting later, the Tribunal will consider very early on the following procedural matters:

1. **Potential Conflicts.** The Tribunal members should disclose any potential conflicts, any prior or present contacts with any of the parties, their counsel or fellow Tribunal members. Ideally, these matters would have been sorted out before the arbitrators are retained.
2. **Discovery** (or disclosure, as it is called in the U.K.). The Tribunal will want to discuss whether, and if so what, document discovery is needed: underwriting and claim files, placing information, documents produced in or relating to the underlying claims, third party discovery, etc. and a schedule for discovery and objections. In the U.K., depositions are not used.
3. **Trial Witnesses.** The parties should discuss whether they intend to call live witnesses at the hearing. Many arbitration agreement provide that there shall be a hearing at which witnesses may be cross-examined. If the agreement is silent on the subject, the Tribunal has discretion to decide "whether and to what extent there should be oral or written evidence or submissions." Arbitration Act 1996, § 34(2)(h). The witnesses' direct evidence is given in the form of pre-hearing written witness statements, such that the vast bulk of live testimony is cross-examination.

4. **Expert Testimony.** If a U.K. Tribunal thinks expert evidence is necessary on any particular topic, it can ask the parties to call experts or, unless otherwise agreed, the Tribunal can call its own experts or legal advisers to report to it and to the parties. Arbitration Act 1996, § 37(1). Some Tribunals use their own expert but in large arbitrations this remains uncommon. And again, as with fact witnesses, the experts testify on direct in written form.
5. **A Briefing Schedule.** The Tribunal will urge the parties to confer to develop a briefing schedule. Usually there will be simultaneous exchange of pre-hearing briefs, followed by an exchange of reply briefs.
6. **The Form Of The Award.** The Tribunal will want to discuss the form of the award. For instance, whether the award must state the Tribunal's reasons or just the result, i.e., a monetary award or a declaration. The Arbitration Act 1996, § 52(4) calls for a reasoned award unless the parties agree to dispense with reasons.

It is now also common for tribunals hearing international arbitrations in London to adopt the IBA Rules on the Taking of Evidence, which set out the discovery process including the process by which witnesses are identified as trial witnesses and the effects of a witness's non-appearance at the merits hearing. Discovery and witnesses are discussed in more detail below.

F. Pleading Your Case

In the U.K., § 34(2)(c) of the Arbitration Act 1996 leaves it to the Tribunal (and any applicable arbitral rules or procedures specified by the parties) to decide what form of written statements of claim and defense the parties are to use, when they should be supplied and the extent to which they can be later amended. When the Tribunal is complete in the U.S., the chair will often ask the parties to prepare, simultaneously exchange, and submit to the Tribunal a short Statement of the Case (usually not more than 10 to 15 pages, plus the key documents attached as exhibits) outlining the issues that the Tribunal will be asked to resolve. In the U.S., formal pleadings are rarely required or used.

Pleadings in London arbitrations consist of a Statement of Claim, Points of Defense, a Reply and, sometimes, a

Rejoinder or even Sur-Rejoinder. The English pleading tradition places particular emphasis on precision, the need for an evidential basis before assertions are made in a pleading and avoidance of claims of fraud unless there is clear material to justify the claim. In addition, parties may ask for Further Information or Further and Better Particulars with respect to statements of fact in the pleadings. Leave to amend pleadings is usually liberally granted.

G. Disclosure and Evidence

Generally, on both sides of the Atlantic, discovery in arbitration is far more limited than the broad discovery allowed under Rule 26 and other Federal Rules of Civil Procedure and analogous state statutes, e.g., N.Y. Civil Practice Law & Rules § 3101, *et. seq.*¹³ Discovery and the form it will take is limited to the parties' agreement and what the Tribunal, in the exercise of its broad discretion, will allow.

1. Documents

In the U.K., applications for additional documents are made regularly and the Arbitration Act 1996, § 34(2)(d) gives the Tribunal the right to determine "whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage." There may be wide ranging document discovery if the parties agree or if the arbitrators see some real purpose in permitting it. When discovery is desirable, be prepared to have a list of what categories of documents are needed and why. Note that there is increasing recognition in England, however, that documentary discovery is time consuming and wasteful.¹⁴

2. Witness Testimony

Direct evidence from witnesses is typically taken in the form of written statements that are exchanged prior to the merits hearing. These statements, or direct testimony, should concentrate on factual issues and appear to be the product of the witnesses' own composition containing evidence and not argument. If in doubt keep these short. The other party may require witnesses to attend the merits hearing for cross examination. Bear in mind, that if a witness is summoned for cross examination pointlessly, there is a risk of antagonizing the Tribunal, which may result in an order to pay the costs of the exercise — even if you win the case.

3. Discovery Disputes

In a U.K. arbitration, it is vital to take some care at an early stage in securing the right form of order for

disclosure. Where the IBA Rules have been adopted each request must be supported by an offer of relevance. The Tribunal will then rule (often by completing what is known as a Redfern Schedule¹⁵) on the scope of a request for disclosure. This can be a detailed exercise but is still very much less extensive, typically, than if the parties agree to adopt (in effect) the standard disclosure that applies to English High Court actions (often referred to as disclosure in accordance with the Civil Procedure Rules or CPR).¹⁶ In a large international case it is sensible to agree that just one arbitrator, perhaps whoever is based in London, can rule on discovery disputes with a right of appeal to the full panel if necessary.

4. Expert Evidence

In theory, expert evidence regarding U.S. law is needed in an English arbitration because the issue is one of fact not law. It has been common for many years in London arbitrations for foreign law (particularly U.S. law) to be cited and argued by English or American counsel. In some cases, the law is not disputed and the issue may be purely factual (e.g., is the replacement for the sunken oil rig much better and more expensive than the original?) Where the issues of law are substantial however, there may also be a need for expert evidence.¹⁷

In practice, this should be obtained from lawyers of distinction, prominent academics, or retired judges. There is a no doubt ill-informed perception in England that retired federal judges are better than state ones. The job of the expert is to provide the law for the arbitrators to then apply to the facts. The more detached the expert appears to be the more useful he or she will be to the proponent's case. The expert should not express a view about the facts or the application of law to those facts. Most arbitrators genuinely welcome help from a distinguished expert but will be irritated by point scoring. If your only potential expert is poor or partisan, then consider forgoing his or her use. Remember also the human element (e.g., an arbitrator who is an 80 year old English retired Court of Appeal judge with a back problem is going to listen very carefully to an 80 year old retired U.S. appeals judge with a back problem).

5. Discovery From Third Parties

FAA § 7, by its terms, limits the arbitrators' powers to compel attendance of witnesses and production of documents to hearings that are held "before them." Some courts have upheld the authority of arbitrators to compel

pre-hearing document exchanges and depositions as implicit in the Tribunal's power to subpoena relevant documents for production at the hearing.¹⁸ Other courts, however, have limited the power of arbitrators to compel only attendance at the merits hearing.¹⁹ In the U.K., it is also possible to seek an order from the court against a third party such as a broker but this can only be enforced against non-parties who are in the U.K.

H. Hearing Preparation

Preparation of pre-trial briefs in a non-jury case in the U.S. and submissions in a U.K. arbitration are similar. Preparation of trial exhibits for a U.K. arbitration is, however, very different. The convention in London is for the parties to agree upon the files of documents that are to be compiled and used as a reference at the oral hearing. This set of files will typically include relevant inter-party correspondence, a chronological set of the key documents, files of key contractual documents, witness statements and expert reports. These are put into "bundles" that are sequentially paginated. Opinions on effectiveness and usefulness of this procedure vary widely. American co-counsel often find this process unduly cumbersome and wasteful; whereas, London lawyers would argue that it creates a discipline in determining the key documents.

VI. THE MAIN EVENT

A. Where, When, and How

Generally arbitration cases in London tend take at least 12 to 18 months to complete. Occasionally, if the issue in dispute is a discreet point of law without any significant factual issues, it may be possible to expedite the procedures, provided the arbitrators' schedules permit. Similarly, if the issues are purely legal, the substantive hearing may last a day or two. If, on the other hand, there are factual disputes, the merits hearings can last for weeks, generally in blocks of a week or two at a time. Arbitrators in London rarely work longer than 10:00 am to 4:30 pm with about an hour for lunch. There are many places in London at which arbitrations can and are held. If a case is to last more than a day or two, professional commercial arbitration buildings of which there are now several providing secretarial, catering and other services too are much better than other venues, however imposing or full of historic interest. The atmosphere of the merits hearings is generally low key – avoid histrionics and pause before employing a forensic device that you believe may have some dramatic effect.

B. Narrowing The Issues

Occasionally issues arise which, if determined preliminarily by the Tribunal, may be dispositive or significantly shorten the merits hearing or cause the parties to resolve their dispute, obviating the need for a hearing (e.g., contract interpretation). The arbitrators, in their discretion, may hear such preliminary issues and render a partial or interim award. It is a good idea to raise the potential of such an application at the organizational meeting, although such an issue may arise at a later stage of the proceeding.

C. The Merits Hearing

Many arbitration agreements will provide guidance and standards as to how the merits hearing shall be conducted. Reinsurance agreements will often say, "The Tribunal shall interpret the Agreement as an honorable engagement, and shall make its award with the view to effecting the general purpose of the Agreement in a reasonable manner rather than in mere accordance with the literal interpretation of the language." Reinsurance agreements may also provide that "the Tribunal shall make its decision considering the custom and practice of the applicable insurance and reinsurance business." Similarly, an arbitration agreement may provide that "The Tribunal shall be relieved of all judicial formality and shall not be bound by strict rules of procedure and evidence." Under English law, however, it shall be for the Tribunal to decide "whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion." Arbitration Act 1996, § 34(2)(f).

At the merits hearing, witnesses are handled very differently in English arbitrations than in U.S. arbitrations. A witness appearing at the merits hearing will be asked whether they stand by their pre-submitted written direct testimony, and whether the statement should be corrected or amended in any way. If there are no amendments or supplementations or corrections to the direct, the offering party tenders the witness to the opposing party for cross-examination. If a party refuses to make a witness available for cross examination, the other party may move the Tribunal to strike the pre-submitted written direct testimony. But, even if the direct testimony remains admissible, the witness's credibility may be seriously prejudiced. In contrast, in the U.S., parties will often offer, and the Tribunal will

accept, deposition transcripts of a witness who is not called to testify at the hearing but whose evidence was subjected to cross-examination.

With respect to the taking of oral evidence at the merits hearing, there are three specific areas where English and American practices differ significantly. First, when it comes to a witness's preparation before giving oral evidence, it is routine in the U.S. for counsel and witnesses to discuss matters about which he or she can be expected to be cross-examined. In England, the practice is quite different. Any rehearsal or practice with a witness regarding how he or she will testify on cross examination at the hearing is strictly prohibited. For example, the professional code of conduct applicable to barristers (known as the Bar Standards Board Handbook from January of this year) expressly provides, as guidance in relation to a barrister's "duty to behave ethically", that "you must not rehearse, practice with, or coach a witness in respect of their evidence" (Part 2, Guidance gC3).

Secondly, although not universal throughout the U.S., there are at least some jurisdictions in which there is no bar upon speaking to a witness about the case once he or she has started giving evidence at the merits hearing. In England, however, it is generally forbidden for a witness to discuss the case, or speak about the evidence, with his or her legal team (or indeed anyone else) until the evidence is completed. This can make it particularly difficult in re-examination/redirect where the lawyer may, therefore, have no idea how a witness will answer a particular question. In exceptional circumstances, however, as for example, when a wholly new point surfaces during the course of a witness's evidence, the Tribunal may give permission for the lawyer to speak to the witness about the new point in order to take instructions. Also, in the U.K., leading questions on redirect examination are frowned upon and the answers are generally disregarded.

Thirdly, there is also a significant practical difference in relation to the cross-examination of opposing witnesses. In the U.S., it is not necessary to give an opposing witness the opportunity to deal with points which may later be relied upon to cast doubt upon the reliability of the witness's evidence. Once again, the practice in England is quite different. A witness must be given the chance to deal with any material parts of the case on which his or her evidence is to be challenged, and an

English Tribunal may take a very dim view indeed if this does not happen (even, for example, precluding the lawyer from disputing the parts of the witness's evidence which were not challenged at the time). Where serious allegations are involved, not giving the witness a chance to deal with them can even amount to professional misconduct. In the case of barristers for example, the professional obligation "not to abuse one's role as an advocate" specifically includes a prohibition against making a serious allegation against a witness whom the barrister has had the opportunity to cross-examine unless the witness has been given the chance to answer the allegation in cross-examination (Bar Standards Board Handbook, Part 2, Rule rC7.2).

In both U.K. and American arbitrations, counsel will be permitted to make opening and closing statements.

VII. AND THE AWARD GOES TO . . .

Policies frequently provide for awards to be given within a specified time (e.g., 90 days after the last hearing). Place no reliance on such a requirement in London arbitrations. The arbitrators often ask parties to agree to extend these limits. Furthermore, once final submissions have been made there are obvious reasons why neither side likes to complain to the arbitrators except as part of a joint approach. Arbitration Act 1996, § 52(4) requires the award to "contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons."

Similarly, unless otherwise agreed, a U.K. Tribunal has the discretion to award reasonable costs of the arbitration to the successful party. In the U.K., an award of "costs" may, and usually does, include the "legal or other costs of the parties" as well as the arbitrators' fees and expenses. Arbitration Act 1996, § 59(1). In the U.S., arbitrators generally follow the "American Rule" that requires each party to bear its own legal fees and expenses with other expenses of the arbitration either split or awarded against one party. Some policies provide that each side will pay their own costs of arbitration proceedings. Beware of these provisions. Unless this agreement is renewed at the time the arbitration proceedings are brought, such a provision is void (Arbitration Act 1996, § 60) and the winner will become entitled to an order that the loser pay its costs (which, in a large arbitration, can amount to one half of 85% of the total fees), as well as all the costs of the arbitrators.

Arbitrators in England can and generally do award pre-award interest. Post-award interest is provided by statute. Unless otherwise agreed by the parties, a monetary award may include simple or compound interest on the whole or part of the award and from such dates, and at such rates, as the Tribunal "considers meets the justice of the case." Arbitration Act 1996, § 49(3).

In the U.S., unless the agreement provides otherwise (and many do), arbitrators have the power to award punitive damages. In the U.K., punitive damages are not recoverable in an arbitration.

VIII. ARE YOU DONE YET?

Arbitration agreements generally say that judgment may be entered upon the award in any court having jurisdiction. FAA § 9 confers power to confirm the award upon the court specified in the agreement or, if no court is specified, on the U.S. District Court for the district within which the award was made. In the U.K., the Arbitration Act 1996, § 66 grants the court power to enter judgment on the award.

In the U.S., the power to vacate or modify an award is found in FAA § 10. The statutory grounds for doing so are limited to the following:

1. where the award was procured by corruption, fraud or undue means;
2. where there was evident partiality or corruption in the arbitrators;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In the U.K., Arbitration Act 1996, § 67 allows a party to challenge an award because the Tribunal lacked substantive jurisdiction. Section 68 allows challenges for "serious irregularity affecting the Tribunal, the proceedings or the award."

IX. DIMINISHING THE APPEAL OF AN APPEAL

Many arbitration agreements provide that the award shall be final and binding and no appeal may be taken from it. Such a waiver of the right to appeal will be enforced. Unlike in the U.S., in the U.K., Arbitration Act 1996, § 69 allows an appeal to the court on a question of law arising out of the award. It is possible to exclude this right by agreement (in contrast to the right to challenge an award for lack of jurisdiction under § 67, or for serious irregularity under § 68, which are mandatory). However, such an appeal cannot be brought unless by agreement of all the other parties to the proceeding, or by leave of the court. Where the governing law to be applied by the arbitrators is foreign law (e.g., New York law), a ruling of the Tribunal in applying that law is a determination of fact, and not a question of law that may be appealed. If the parties have agreed to dispense with the reasons for the Tribunal's award, it is a waiver of the right to appeal to the court on a question of law arising out of the award. Arbitration Act 1996, § 69(1). In the U.S., there is no similar right of appeal on errors of law.

X. WHAT HAPPENS IN LONDON, STAYS IN LONDON

Subject to what the agreement to arbitrate provides, English law recognizes that confidentiality is an implied term of arbitration.²⁰ The full scope of what this means is unclear. Confidentiality extends to documents disclosed in the arbitration but not necessarily to the arbitration award itself if judicial recognition and enforcement are sought.²¹ Further, English courts have recognized implied exceptions to the common law confidentiality requirement where needed to comply with securities laws, reports to reinsurers, and the like.²² The trend in the English law is towards increased confidentiality. This is in contrast to that of similar jurisdictions, like Australia, that seem to be going the other way. In practice, the announcement of the existence of arbitration proceedings and the result is very common. Publicity about what is said during hearings is universally regarded as unacceptable.

For lawyers, one problem is that the reasoning in awards is confidential and rarely reported. For a policyholder, this is frustrating because the insurer will have access to all arbitration awards that it received. Insurers have been known to seek to rely on past arbitration awards in previous cases as being of precedential effect.

These should be subject to exclusion (perhaps after seeking discovery of all previous awards). Past awards involving others should have no value as legal precedents. Access to past awards does however provide invaluable intelligence. In the U.S., arbitration awards may be given collateral estoppel effect even in the absence of an identity of parties to the prior award.²³ In the U.K., mutuality of estoppel is required.

XI. CONCLUSION

In his entertaining memoirs, *DC Confidential*, Sir Christopher Meyer – Britain's Ambassador to the U.S. at the time of September 11 and the Iraq War – says:

Every year, in September, I used to address new arrivals at the embassy with their families. The core of my message was always the same: think of the U.S. as a foreign country; then you will be pleasantly surprised by the many things you find in common. . . . Think of America as Britain writ large, and you risk coming to grief.²⁴

If there is one top tip for an American lawyer coming to an English arbitration for the first time, it is to take this approach in reverse. We hope that the contents of this paper will at least have reduced the risk of coming to grief.

Endnotes

1. The following materials, in particular, were consulted in the preparation of this article: (a) David St John Sutton, Judith Gill QC & Matthew Gearing, *Russell on Arbitration* (23rd ed. 2007); (b) Nigel Blackaby, Constantine Partasides, Alan Redfern, & Martin Hunter, *Redfern and Hunter: International Commercial Arbitration*, (5th ed. 2009); (c) Richard Jacobs QC, Lorelie Masters and Paul Stanley QC, *Liability Insurance in International Arbitration, The Bermuda Form – 2012* (2d ed. 2011); (d) David Scorey, Richard Geddes & Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (2011); (e) The London Court of International Arbitration website: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx; (f) The International Bar Association website: http://www.ibanet.org/Publications/publications_

- IBA_guides_and_free_materials.aspx; and (g) P.T. O'Neill & Jan W. Woloniecki, *The Law of Reinsurance*, ch. 14, pp. 833-913 (3d ed. 2010).
2. In referencing U.K. arbitrations, the articles focuses on insurance arbitrations in London, including disputes involving the Bermuda Form. Bermuda insurance arbitrations are quite similar to English arbitrations, although governed by the Bermuda International Conciliation and Arbitration Act 1993 or the UNCITRAL Model Law on International Commercial Arbitration.
 3. See *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896.
 4. See *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900.
 5. Typically, arbitration agreements in insurance policies call for so-called *ad hoc* arbitration — that is, arbitration that is not administered by an arbitral institution, such as the Court of Arbitration of the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA). In *ad hoc* arbitration, the procedural rules are generally specified in the arbitration agreement itself and otherwise left to the discretion of the arbitrators, subject to the background procedural law (*lex arbitri*).
 6. It should be noted that it is fairly common for reinsurance agreements in the U.S. to contain arbitration clauses. It is less common for primary insurance contracts to contain arbitration agreements but some do. In the U.K., the inclusion of arbitration clauses in primary and reinsurance contracts is not uncommon.
 7. One can find potential arbitrators and their curriculum vitae by consulting such sources as the lists of the LCIA, the Chartered Institute of Arbitrators, ARIAS-U.S. certified arbitrators, as well as seeking input and recommendations from industry colleagues or other counsel. Where an arbitration is governed by institutional rules such as those of the LCIA, it will be important to examine the applicable nationality restrictions that aim to ensure the perception of a neutral tribunal.
 8. Practically, that may not always be the case, especially where the arbitrator has received repeated appointments by the same party and perhaps looks forward to more.
 9. The same would be true for U.S.-seated arbitrations subject to international rules and norms.
 10. Having said that, a nominated arbitrator will want to ensure that the points made on behalf of the appointing-party receive the Tribunal's proper consideration but will not go beyond that. It is unadvisable to nominate an arbitrator based on a certainty or expectation that the arbitrator will side with the appointing party. In practice, this becomes immediately apparent to the other two arbitrators and eliminates the arbitrator's credibility, often creating a built-in 2-1 majority against the appointing party.
 11. See <http://www.arias-us.org>.
 12. Other dispute resolution administrators may have their own rules for chair selection in case of an impasse. For example, ARIAS-U.S. will provide the parties with a list of 10 names, each may strike up to three names and rank the remaining candidates in order of preference. The person receiving the highest score will then be designated as the chair or third arbitrator.
 13. In the U.S., unless the parties' agreement limits the scope of discovery, discovery can be just as expensive and protracted as in any federal litigation.
 14. It is generally thought that discovery is more burdensome for policyholders than insurers. However, this is not always so. For instance, in many insurance arbitrations, disclosure in the underlying tort litigation will have generated literally millions of documents and the insured can simply direct the insurer to a warehouse where they are stored and may be reviewed.
 15. Such a schedule will contain columns with (i) the document request; (ii) a statement of relevance and materiality, (iii) the objections or observations, (iv) any reply and (v) the tribunal's decision on the request.
 16. An insurer will typically seek CPR disclosure rather than adopting disclosure under the IBA Guidelines since it may enable the insurer to argue for a wider test to be applied.
 17. Indeed, if you have chosen an arbitrator with substantial knowledge in the relevant area of U.S. law, there may be no need for expert testimony on that point.

18. See e.g., *In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 871 (8th Cir. 2000) (holding § 7 of FAA authorized Tribunal's issuance of deposition subpoena to third party proper.).
19. See e.g., *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008) (holding "section 7 [of the FAA] does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding.").
20. *Ali Shipping v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643, 650 (CA); *Hasneh Ins. Co. v. Mew* [1993] 2 Lloyd's Rep. 243, 247 (Colman, J.).
21. Whereas, in the U.S., hold harmless agreement and agreements for confidentiality of briefs, testimony and documents produced may be necessary to protect the confidentiality of proceedings.
22. *Associated Elec. & Gas Ins. Servs. Ltd. [AEGIS] v. European Reinsurance Co. of Zurich*, [2003] 1 All E.R. (Comm.) 253, 1 W.L.R. 1041 (Privy Council).
23. *Feinberg v. Boros*, 99 A.D.3d 219, 221, 951 N.Y.S.2d 110, 111 (1st Dept 2012). ("We therefore find that where, as here, an issue has been fully and vigorously litigated, no limiting agreement as to an arbitration award may bar the assertion of a collateral estoppel defense by a third party as to that issue"); *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 267-68 (2d Cir. 1997).
24. Christopher Meyer, *DC Confidential* (2006). ■

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