LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION

The Bermuda Form

SECOND EDITION

Richard Jacobs QC
Lorelle S Masters
and Paul Stanley QC

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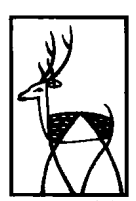
Second Edition

Richard Jacobs QC
Essex Court Chambers, London
Lorelie S Masters
Jenner & Block, LLC, Washington, DC
Paul Stanley QC
Essex Court Chambers, London



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Foreword

THOMAS R NEWMAN AND BERNARD EDER QC

The undersigned (TN and BE) have long been combatants on the battlefield of the Bermuda Form but—whatever their particular perspectives or differences of view may be—they are pleased to agree that this second edition of *Liability Insurance in International Arbitration: The Bermuda Form*, deserves to be in the library of anyone who is, or is contemplating becoming, a party to a Bermuda Form arbitration. While the Bermuda Form high-level excess insurance policy is now 25 years old, it is a complex document not always well understood by those who must deal with its intricacies, such as the so-called maintenance deductible portion of the 'occurrence' definition which finds no counterpart in the CGL policy or typical excess liability policies in use in the United States. Despite its complexity, it has become widely used in many different industries and by use of what is often described as the mid-Atlantic solution (that is a governing substantive law of modified New York law and dispute resolution process by way of arbitration governed generally by English or Bermudan law), it has provided a relatively common and efficient method of resolving disputes often involving many hundreds of millions of US dollars. This work is particularly valuable because awards in English arbitrations are confidential and there is no body of precedents to which one can turn for answers to the myriad issues that arise and must be litigated over and over again in disputes involving the Bermuda Form.

The authors, whom we have been associated with in some cases and opposed in others, have a wealth of experience with the Bermuda Form and the ability to share that experience with their readers in a clear and engaging style. There are significant cultural and procedural differences between a Bermuda Form arbitration conducted in London or Bermuda and the typical insurance or reinsurance arbitration conducted in the United States. Therefore, those who have never participated in a Bermuda Form arbitration will find especially useful the chapters 'Commencing a Bermuda Form Arbitration and Appointing Attorneys and Arbitrators' (Chapter 14), and 'The Course and Conduct of a Bermuda Form Arbitration in London' (Chapter 15).

Numerous issues considered by the authors are controversial and the undersigned do not necessarily agree with some at least of the views expressed by the authors. For example, insurers and their counsel may take issue with some of the authors' discussion of the governing New York substantive law pertaining to the frequently interposed 'expected or intended' (Chapter 7) and misrepresentation/non-disclosure defenses (Chapter 12), as does TN, but it cannot be gainsaid by anyone that the authors have given us a very valuable exposition of the arguments insurers can expect to be put against them and for which the first edition

of their book is constantly being cited by policyholders' counsel to support their submissions. Chapter 17, 'Interest and Costs', is a newly added discussion of an issue that involves very substantial sums in every arbitration that goes to a final award. In today's financial climate, insurers will no doubt resist use of the 9 per cent per annum simple interest rate prescribed by New York's CPLR 5004, but, again, it is useful and important for both policyholders and insurers to know the scope of the arguments which may have to be addressed in any particular case.

As in the first edition, the authors do not shirk in this new edition from addressing these (and other) controversial issues and, where appropriate, from expressing their views—and, whether or not we agree with the views expressed, they are to be warmly congratulated for engaging in their task.

Thomas R Newman
Bernard Eder QC

London and New York City

Preface

It is more than six years since we first set out to provide a reasonably comprehensive guide to the central terms of what had, by then, already become a widely used industry-standard form for the insurance of industrial and pharmaceutical liability risks, especially for US companies.

The Bermuda Form must, by many measures, be accounted a success. The companies that originally devised and promoted it – ACE and XL – have prospered. The Bermuda Form is now in regular use by many other insurance companies. Policyholders have expanded well beyond the companies who were the original investors in ACE and XL. The market pays it the compliment of taking it so much for granted that it turns up with various modifications (not always well-judged), which at least show that those in the insurance industry think they know what it means. In general, the Bermuda Form seems to have held up well in the face of the continuing challenges presented by the sometimes capricious operation of the United States tort system and ever-increasing demands for high levels of safety and compensation. It is not a panacea (what insurance policy form could be?); it has been necessary to combine it with increasingly professional and technical underwriting; and, even then, some risks have remained very difficult to manage, resulting – for some types of business – in increasing retreat to very high layers or insurers' withdrawal from the market altogether. But the Form has proved its worth.

It remains, we think, an embarrassment to commercial certainty that such an important and complex standard-form contract should be the subject of almost no significant reported decisions. A few reported cases exist, now, largely touching on tangential issues (such as the law governing the arbitration clause). However, most exposition continues 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 the question whether injury was 'expected or intended' or with 'maintenance deductibles' or aggregation and other issues. Although there are many advantages to private arbitrations (especially where the underlying tort claims may continue), the mystery resulting from the lack of any body of directly relevant case law is undoubtedly a disadvantage. The decision of the English Court of Appeal in *Wilson v Emmott*, which is now the leading English case on confidentiality in arbitration, contains reference to the problems arising from arbitration decisions which are known to some market participants but not others. However, a solution (such as the publication of anonymised decisions) seems far beyond the horizon.

In revising this book, we have tried to reflect, albeit necessarily indirectly, our developing experience of the issues that arise most frequently. Although we are conscious that it has sometimes been gently hinted (by those who represent insurers) that our conclusions may be unduly generous to the insured, we have attempted to be even-handed. Indeed, we know that the first edition has often been cited by insurers in response to arguments advanced by policyholders. We have revised our treatment of various topics, either to reflect changes in the general law (for instance, on notices of occurrence), or because our own views have developed in the light of further experience, or because, in the years since the last edition, practice has moved on – as it has, for instance, in relation to the procedures now generally used in London arbitration.

Liability insurance is based on a central conflict of interest. The insured needs it only because mechanisms to control risk are fallible; risks which were reasonably or unreasonably regarded as remote turn out to be serious, and problems which seemed controllable run out of control. But insurers can provide such insurance only if risks are predictable, at least in broad terms, and depend on the insured to keep risk under control. It is no surprise, then, that most cases turn ultimately on the investigation of the questions 'How did this happen?'; 'How was it that a sophisticated and experienced commercial enterprise lost control of this situation?

Most coverage disputes under the Bermuda Form turn out to be a post-mortem on these questions. Was this really so unpredictable (or was it expected)? When did it become apparent that the situation was at risk of spiralling out of control (misrepresentation, late notice)? Once that became apparent, did the insured engage in a reasonable exercise in damage limitation, or did it exploit its insurance (consent to settlement and reasonableness of any settlement)? Not surprisingly, the insured and the insurer often have very different starting-points and convictions. However clear the terms of the insurance are, these questions will never go away because they go to the heart of an essential conflict between the interests and perspectives of the parties to any liability insurance contract.

Many people have helped us in writing and revising this book, by discussing or commenting on various issues. So far as this edition is concerned, we would single out Tom Newman, Bernard Eder QC , Michael Collins QC, David Balmuth, the late Drew Berry, Thomas Ladd, James Collins, Richard Lord QC, Thorn Rosenthal and David Scorey (though their opinions are not always ours), along with the many other colleagues with whom we have had the privilege to debate many points. We have not always agreed with them, but we have always benefited from their acute understanding of the issues. We are grateful to Kim Gibbs, who helped prepare the manuscript, with an amazing and unending attention to detail; to Tricia Peavler and Stephen Mellin, who tracked down many references at our request; to Cheryl Olson, who proof-read the manuscript and tirelessly checked our many citations; and to Anton Dudnikov who read the typeset proofs. Without their help, our various errors would have been vastly greater in order of magnitude from those that we expect remain, despite our best intentions.

Our partners (Pamela, Jack, Daniel) and children (Rebecca, Benjamin, Hannah, Ian, Benedict and Zachary) have provided support and encouragement, and this book is dedicated to them.

Richard Jacobs
Lorelie S Masters
Paul Stanley

London and Washington DC
1 December 2010

About the Authors

Richard Jacobs QC was educated at Cambridge University and is a barrister at Essex Court Chambers in London, specialising in commercial law, including insurance and arbitration law. He appears as leading counsel in court and arbitration proceedings and has acted as arbitrator in various disputes including Bermuda Form arbitrations.

Lorelie S Masters was educated at Georgetown University and Notre Dame Law School. She is a Partner at Jenner & Block, LLP, in Washington, DC, where she advises and represents policyholders in insurance coverage and litigation. She is co-author of a treatise entitled *Insurance Coverage Litigation* (Aspen Publishers, 2nd Edition, 1999 and Supps).

Paul Stanley QC was educated at Cambridge University and Harvard Law School and is a barrister at Essex Court Chambers specialising in commercial law, including insurance and arbitration law. He appears as leading counsel in court and arbitration proceedings and is the author of *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008).

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