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Résumé de l'article

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Arbitration in reinsurance

by

Mohez Remtulla*

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The expression that a reinsurance agreement involves "utmost good faith" is not a hollow term, but serves as the cornerstone upon which decisions are made. It signifies that the people involved are conscious of their moral obligations and are individuals of integrity.

Most commercial businesses have tried to resolve disputes through the concept of *Alternate Dispute Resolution* — which refers to ways of resolving disputes outside the traditional methods of using court ordered judgments. There are a number of such methods available but the two most commonly used forms today in North America are *mediation* and *arbitration*.

It is important to understand the differences between arbitration and mediation. In an arbitration, the disputing parties

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appear before a neutral third party (the arbitrator) who, upon hearing evidence under strict rules, makes a legally binding decision in favour of one side or the other. In virtually every circumstance, there will be a winner and a loser — no different from the traditional litigation format.

In mediation, the parties meet with a neutral third party (the mediator) who has absolutely no decision power at all. The goal of a mediator is to help the disputing parties reach a decision that they find acceptable. In this type of process, there are no losers at all!

The traditional method of resolving some insurance disputes and the vast majority of reinsurance disputes is by way of arbitration. Most reinsurance contracts contain an arbitration provision that refers disputes arising out of the contractual obligations to an arbitration panel instead of a court of law. The decision to arbitrate or litigate a dispute under a reinsurance contract must be based upon a consideration of the circumstances and issues applicable to each case, such as whether the designated locale for the proceeding is suitable, whether a court or a panel of arbitrators may be more inclined to accept one's claims or defence, whether the presence or absence of companies or witnesses who are not bound to arbitrate the dispute will advance or hinder each party's case and whether compulsory discovery of testimony and evidence from parties or witnesses is desired.

A standard arbitration clause reads as follows:

1. If any dispute shall arise between the Company and the Reinsurer in respect of the Agreement or the validity thereof, it shall be referred to Arbitration.

2. Arbitration shall be initiated by delivery of a written notice requesting Arbitration by one party to the other.

3. Each party shall then appoint an Arbitrator and the two so named shall, in writing, before they enter upon Arbitration, appoint an Umpire who has at their request agreed to act.

4. The Arbitrators and the Umpire shall be disinterested, active or retired executive officers of insurance or reinsurance companies.

5. In the event of one party failing to appoint an Arbitrator within 30 days of the other party requesting it to do so, or, in the event of the Arbitrators failing to appoint an Umpire within 30 days of their own appointment, the President of the Insurance Bureau of Canada or if this person is unwilling or unable then the Superintendent of Insurance for the Province where the head office of the Cedent is located, shall make the necessary appointment.

6. Each party shall, within 30 days of the appointment of the Umpire, submit its case in writing to its Arbitrator.

7. If an Arbitrator or Umpire, subsequent to the person's appointment, is unwilling to act, a new Arbitrator or Umpire shall be appointed to replace this person by the procedure established in this clause.

8. The Arbitration shall be held in a location agreed upon by the two Arbitrators and the Umpire.

9. The two Arbitrators shall consider from the written cases submitted to them what disputes exist between the parties and should they fail to agree on any point(s) they shall inform the Umpire of the point(s) on which they have agreed and shall consider with this person the point(s) still unresolved and shall generally make available to the Umpire all information in their possession relating to the Arbitration.

10. The Arbitrators and the Umpire shall make their award with regard to current insurance and reinsurance market practice rather than in accordance with a literal interpretation of the language of this Agreement. They shall interpret this Agreement as an honourable engagement rather than only as a legal obligation and may abstain from judicial formalities and from strictly following the rules of law.

11. The Arbitrators, if they agree on all items in dispute or, otherwise the majority of the Umpire and one of the two Arbitrators shall make their award in writing within 60 days of the appointment of the Umpire, failing which, new Arbitrators and a new Umpire shall be appointed by the procedure established in this clause.

12. The award agreed upon by the two Arbitrators or by the majority of the Umpire and one of the two Arbitrators shall be final and binding on both parties. The award shall direct by whom the cost of the Arbitration shall be paid.

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By analyzing the standard clause, such as the one provided above, some clarification is necessary.

1. The arbitration agreement refers to all legal disputes arising out of a reinsurance contract addressed to an arbitration panel. It is designed to allow the arbitrators to judge both the facts of the issues and the legal consequences to be drawn therefrom. The right to arbitrate can be waived by conduct of the party that is inconsistent with a decision to proceed with arbitration.

2. The arbitration process provides for three individuals. The qualification for arbitrators and umpires often become the subject of dispute between the parties. Usually, each party appoints one person of its own choice, and the two arbitrators are then required to agree to an umpire. Should they fail to reach an agreement within a stipulated period, the umpire is appointed by a neutral authority. Commonly the tribunal comprises insurance or reinsurance practitioners. Such a provision stems from a belief that "market personnel" are more likely to reach an informed, commercially aware decision. In addition, having market practitioners as arbitrators reduces the need for, and therefore the cost of, expert witnesses.

3. Arbitration proceedings are relatively liberal and unrestricted. To initiate arbitration, either party to an agreement is only required to send a registered notice to the

other party. Litigation is an expensive exercise, especially for the loser who must not only pay his own costs, but also the majority of the winning party's costs. While there is often little difference in cost between litigation and arbitration, a perceived advantage of arbitration is greater flexibility.

4. Arbitration is governed by the jurisdictional law. Here in Canada, arbitration has been an integral part of the legal system for many years. Every province and territory has an Arbitration Act, and one has also been adopted by the Parliament of Canada for federal purposes.

The principles of law that apply to reinsurance are identical in most instances to those found in the law of insurance. When the Courts are called upon to construe reinsurance contracts, they utilize the same principle used in construing other contracts. Even though the Courts are desirous of giving effect to the intention of the parties, they will not add a new condition into a reinsurance agreement because of custom and usage. As a matter of custom and practice in the industry, parties generally agree on an exchange of documents and records and may even permit depositions of witnesses employed by them or under their control.

It is often said that one of the main advantages of this process is that it is quicker. The parties can agree the procedure to be adopted by the tribunal, and even where the procedure chosen is similar to that of commercial litigation, the parties may follow their own timetable rather than that imposed by the courts.

It has recently been recommended to add a preamble to the standard arbitration clause which would read as follows:

"If a dispute between the Company and the Reinsurer concerning the interpretation, performance or breach of this Agreement, including its formation or validity, and whether arising before or after termination, cannot be settled by

negotiation, both parties agree to try to settle it by non-binding mediation before resorting to arbitration."

This recommended wording introduces the mediation concept which is now being used more and more by corporate Canada and to some extent by the insurance industry.

There are a number of issues that remain unresolved with regard to arbitration and more thought needs to be given than has traditionally been the case in some areas as outlined below:

586 Generally, it is difficult for parties to a reinsurance agreement with an arbitration clause to avoid arbitration, unless one party can show that there was fraud in the inducement of the clause itself. The availability of arbitration when one of the parties is in liquidation is unclear. The right to arbitrate may be nullified by the intervention of insolvency proceedings. A reinsurer may be unable to enforce an arbitration clause against its ceding company's liquidator based on an overriding public policy vesting the liquidation court with exclusive jurisdiction over all matters affecting the insolvent company. As a general rule, a liquidator of an insolvent company is not required to submit to arbitration under an arbitration clause in a reinsurance contract. To enable the liquidator to effectively and efficiently marshal the assets of the insolvent company in the forum specified by the liquidation statue, many courts have ruled that the liquidator is not bound by the arbitration clauses and that he can compel reinsurers to litigate their claims in the court presiding over the liquidation. A reinsurer or an insurer confronted by the insolvency of a cedent or a reinsurer should therefore seek legal advice on whether any dispute with the liquidator can be arbitrated or may only be heard by the liquidation court.

Often the parties to an arbitration want an arbitrator experienced in the area in which the dispute has arisen. Unfortunately, neither the arbitration clause nor the Arbitrations Act give any direction on how an arbitration is to proceed after the arbitrator is appointed. By contrast with domestic arbitration, procedures for the conduct of international arbitrations held in

Ontario are set out in great detail in the International Commercial Arbitrations Act. In domestic arbitrations the parties are free to agree on any procedure which meets their needs subject to the minimal requirements of the Arbitrations Act of the jurisdiction. In practice the parties often use a modified adversarial process though the arbitrators have the power and authority to follow any lawful procedure which meets the needs of the parties and the minimum requirements of procedural fairness.

As a matter of custom and practice in the industry, parties generally agree on an exchange of documents and records and may even permit depositions of witnesses employed by them or under their control. When a discovery agreement is not reached, there may be a question about whether the arbitrators have the authority to compel discovery. There is simply no guarantee that discovery, informal or otherwise, will be available in arbitration, which is a substantial risk.

Reinsurance agreements are based upon the concept of an honourable undertaking between the parties. As a result, the dispute resolution mechanism in the reinsurance industry has traditionally been arbitration rather than litigation. Reinsurance is a business relationship and, therefore, disagreements can arise. Choosing to arbitrate a future or present dispute may be wise, particularly where a dispute may arise in the context of an ongoing business relationship. Arbitration may be the most effective means of resolving disputes involving a highly technical area of expertise or an issue surrounding a custom as is so common in the insurance industry.

Being aware of various factors involved in the process of arbitration will at least enable a party to a reinsurance contract to make an informed decision about the best way to proceed.