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INSURANCE & REINSURANCE ARBITRATION

Concluding our focus on Insurance Arbitration, we speak to Elaine Mason from Belvedere Mead. Elaine has been handling claims in the Lloyd's & London insurance and reinsurance market for nearly 40 years. Although not a lawyer, during her career she has been involved in numerous arbitrations, and mediations. Passionate about insurance and reinsurance claims she has always wanted to ensure fair and appropriate outcomes when claims are presented. In 2010, Elaine founded Belvedere Mead to support insurers, reinsurers, lawyers and others in ensuring that fair and appropriate outcomes are achieved in insurance claims. Elaine is a panel member of ARIAS (UK) and regularly acts as a volunteer mediator for a local mediation charity.

What changes have occurred within the UK's insurance dispute resolution sphere during the time that you have been involved with insurance disputes? What trends have you noticed?

When I started handling insurance and reinsurance disputes over 30 years ago, an arbitration provision was not standard in all types of insurance contracts. Reinsurance contracts at that time, almost always contained an arbitration clause which was not the case for insurance policies.

Historically, London has always been a strong base for commercial arbitration and naturally as insurance developed so did the desire to resolve disputes in an alternative forum to the Courts.

It is now common place for an arbitration provision to appear in all insurance contracts, even those for personal lines with relatively small sums insured.

For large commercial insureds, a dispute on an insurance policy, is as likely to be referred to arbitration as any other large commercial dispute. However I question the benefit for personal lines insurance claims. Giving the policy holder an alternative avenue to consider when agreement cannot be reached on a claim presentation may be seen as being fair, but will policyholders refer a matter to arbitration? How knowledgeable about arbitration is the average policyholder? Or will they simple prefer to use the Financial Ombudsman Service which is a no cost option for them.

Despite arbitration clauses having been commonplace in reinsurance contracts for a significant number of years, there is now a move away from including an arbitration clause within the contract.

This move away from including an arbitration provision is not being seen in large commercial insurance policies, particularly those for multi-national organisations. The inclusion of an arbitration clause allows agreement to be reached on, not only the choice of law the contract is under but both the seat of the arbitration and the usual rules to be followed. This flexibility allows the experience of London as a centre for arbitration to be used even if the actual choice of law is not that of England & Wales and possibly maintains s desired level of confidentiality.

Have the changes been positive or negative? Why?

The answer to that question, depends on the type of insurance policy and the dispute itself.

A conclusion to a dispute is beneficial for all concerned, allowing closure and releasing executives to concentrate their time and effort on running their business. However, arbitration can be expensive and lengthy, perhaps more so than actual litigation. There needs to be more focus on what made arbitration so successful in the past. Consideration needs to be given to ensure the arbitration process in insurance disputes can achieve a satisfactory resolution in a cost efficient and timely manner.

What are the costs involved in using arbitration as a form of dispute resolution within insurance disputes?

Arbitration proceedings progress along a very similar path to that of litigation. In both arbitration and litigation, each party to the dispute spends significant funds ensuring the appropriate position is plead to maximise the possibility of success. However, in arbitration the parties also have to pay for significant additional costs; those of the arbitrators and for the venue with significant retainers being paid early in the life of the arbitration.

Further costs are incurred if there is a need to instigate proceedings against a third party, say a negligent broker, as they cannot be added as a Part 20 defendant within the arbitration proceedings.

Due to the nature of reinsurance contracts, the same dispute may exist across a number of different contracts. Each dispute will need a separate arbitration with an exponential effect on the costs.

How often is arbitration unsuccessful in resolving a dispute? How complex can the process become when is the case?

The Arbitration Act 1996 provides only a very limited right of appeal and as such once the arbitration has been concluded the matter is usually final. Whether both parties would regard this as successful is another matter entirely.

Are there any reasons as to why mediation or conciliation might be a more suitable form of dispute resolution than arbitration?

As an arbitration is at least as, if not more, costly and as lengthy as litigation but producing a only partial resolution where it is then necessary to pursue subrogation or contribution, one must ask whether there is a better alternative.

Insurance companies appreciate that to maintain customer loyalty, disputes must be kept to a minimum. Customer retention is key to any business. Recent legislation and the Financial Conduct Authority has certainly ensured that focus is given to the customer and it is better to achieve a negotiated compromise agreement with the customer to resolve differences in a less confrontational way.

Using mediation to facilitate such discussion is definitely on the increase and is a process that can be used in a very cost effective manner. **LM**