Arbitration Clauses in Reinsurance Contracts

Dr. Shahar Weller

Reinsurance Working Party ,
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Why Do Reinsurance Contracts Contain Arbitration Clauses?

- Decision based on industry custom and practice;
- The dispute resolved by a panel of industry experts;
- Confidential proceedings.

A Typical Example of Arbitration Clause

ARIAS ARBITRATION CLAUSE

The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Claimant, one to be appointed by the Respondent and the third to be appointed by the two appointed arbitrators.

The Arbitrators shall be persons…with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

The Tribunal may in its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

Open Issues

- Consolidation
- Arbitrator Disinterest
- Conflicting Clauses
- Adverse Appointments of Arbitrators

Consolidation

The Consolidation issue often arises in reinsurance arbitrations, where many contracts involve several reinsurers sharing a certain risk ceded to them by a single insurer.

Consolidation

- When the contract contain a consolidation clause there won't be any doubt regarding consolidation.

- A consolidation clause in a reinsurance contract may appear as follows:

"If more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause"

Consolidation

- When there is no consolidation clause the court will be reluctant to enforce consolidation.
- When there is consolidation clause, courts in the U.S held that consolidation was an issue of contract interpretation and arbitration procedure - matters that parties would expect arbitrators to decide

Consolidation

Referring the issue of consolidation to the arbitrators is not free of doubt: it is unclear how separate arbitrations could be consolidated by one of the arbitrators.

Arbitrator Disinterest

Arbitration agreements generally require arbitrator to be “disinterested”.

When a party receives a favorable ruling, it often desires to reappoint the same arbitrator in subsequent arbitrations regarding the same or similar issues.

Arbitrator Disinterest

In Trustmark *v*. Hancock, the district court ruled that an arbitrator was not “disinterested” as a result of knowledge gained from a previous, related arbitration between the same parties.

The court also ruled that the confidentiality agreement didn’t contain arbitration clause and therefore, arbitrators has no power to construe a confidentiality agreement.

Arbitrator Disinterest

The Seventh Circuit overruled the district court:

1. "disinterested" party is one who lacks a financial or other personal stake in the outcome;

2. Knowledge of the dispute is not an "interest" in the dispute (The court stated the "[n]othing in the parties' contract requires arbitrators to arrive with empty heads."

3. Knowledge acquired in a judicial capacity does not require disqualification…Likewise with knowledge acquired in arbitration."

Arbitrator Disinterest

The Seventh Circuit:

4. Although the confidentiality agreement did not contain an arbitration clause, it was nevertheless related to the reinsurance dispute that the parties had agreed to arbitrate.

Conflicting Clauses

Sometimes reinsurance agreements contain both an arbitration clause and a service-of-suit clause.

The service-of-suit clause is typically applicable only to reinsurers (or insurers) outside the United States.

Conflicting Clauses

A typical service-of-suit provides:

"It is agreed that in the event of the failure of the Reinsurer hereon to pay any amount claimed to be due hereunder, the Reinsurer…will submit to the jurisdiction of a court of competent jurisdiction within the United States…

Conflicting Clauses

In first glance there is a contradiction between service-of-suit clause to arbitration clause.

In fact, the two clauses can be read as being compatible with one another: The service-of-suit clause aim is to allow the parties to use the courts so designated to enforce the arbitration provisions of the reinsurance contract and enforce any arbitration award issued without having to fight a jurisdictional battle

Conflicting Clauses

The claim that the service-of-suit clause replaced arbitration as the mandatory dispute resolution mechanism would render the arbitration provision superfluous.

The same result may be achieved by the following clause:

Any disputes and differences between the [parties]shall be submitted to arbitration... However, for any disputes arising from non-payment of confirmed or undisputed balances due… the ordinary courts in Israel shall be competent.

The Adverse Appointment of Arbitrators

Arbitration clauses frequently require each party to appoint an arbitrator within a specific period of time. If a party fails to do so, these clauses may permit the other party to appoint the second arbitrator.

The Adverse Appointment of Arbitrators

In the U.S there are two opposing views:

1. **The Prejudice View**: Adverse appointment clauses are not to be strictly enforced in the absence of prejudice;

2. **The Strict Construction View**: Having an adversary appoint another party's arbitrator is the result the parties bargained for.

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The Adverse Appointment of Arbitrators

In support of the prejudice view : When delay in appointing isn't due to bad faith, and the other party did not suffer any prejudice, there is no good reason to force arbitration.

In support of the strict construction view: When the agreement is subject to New York Convention the prejudice rule would frustrate one of it's primary objectives – securing uniform standards by which agreements to arbitrate international disputes are governed.

Concluding Remark

In most cases, carful draft of the arbitration clause will absolve the parties from complex litigation.

The issues of consolidation and rules concerning the arbitrator appointment should be addressed specifically in the arbitration clause.