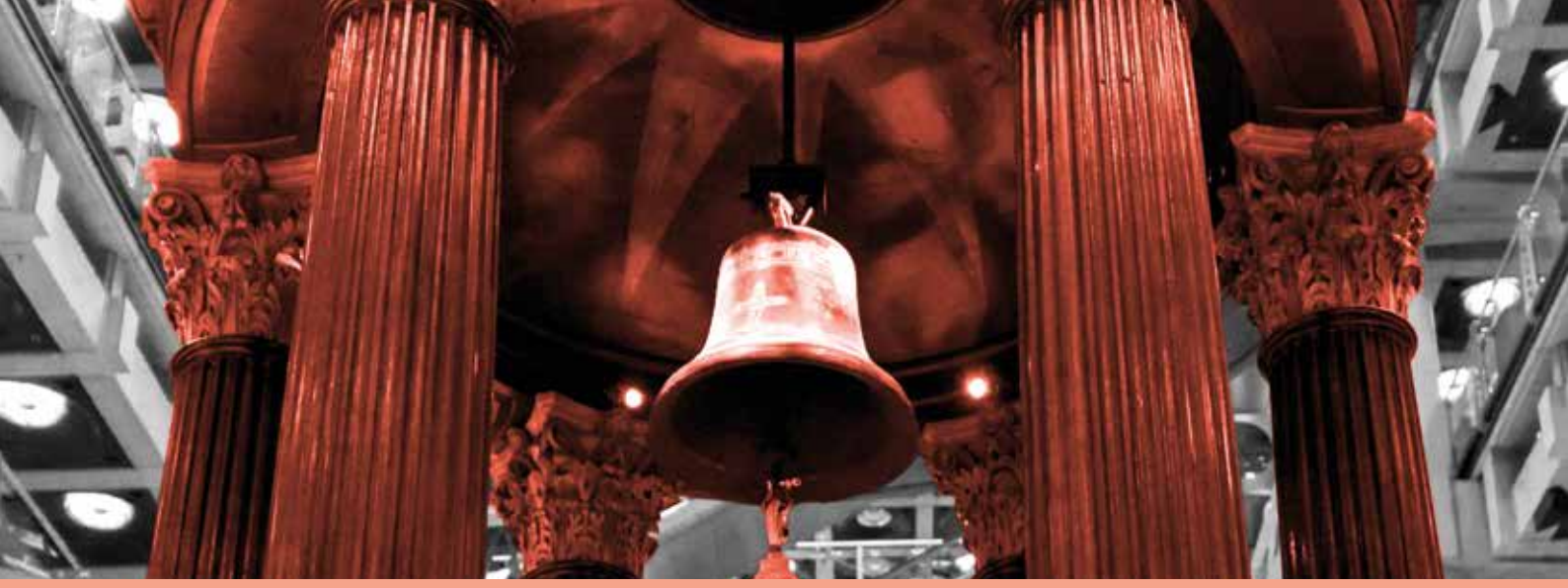

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Chapter 32

USA

Willkie Farr & Gallagher LLP

Christopher J. St. Jeanos

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The McCarran-Ferguson Act (the "Act"), passed by Congress in 1945, explicitly provides for state regulation of insurance. The insurance industry is, therefore, almost exclusively regulated by fifty individual states' governments. Each state has an insurance or financial services department which implements and administers regulations concerning a wide variety of matters, including, among other things, insurers' premium rates and policy forms, the amount and type of capital insurers must hold as security for their policy obligations, and insurers' financial reporting obligations. Most state regulators are members of the National Association of Insurance Commissioners ("NAIC") which is a regulatory support and standard-setting organisation that promulgates model laws and regulations in an effort to standardise and coordinate insurance regulation across the fifty states, the District of Columbia and US territories.

Under the recently passed 2010 Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Congress created a Financial Stability Oversight Council ("FSOC") and a Federal Insurance Office ("FIO"). While the FSOC and FIO do not have regulatory authority over insurers, they are responsible for monitoring the financial stability of the insurance industry, among others. As part of Dodd-Frank, Congress also enacted the Nonadmitted and Reinsurance Reform Act ("NRRA"), which, among other things: (1) provides that all insurance surplus lines transactions are to be regulated exclusively by the insurance department of the state where the policyholder is domiciled; (2) establishes federal standards for the collection of surplus lines premium taxes and insurer eligibility; and (3) pre-empts states from: (i) denying surplus lines eligibility to certain alien insurers approved by the NAIC; and (ii) imposing credit for reinsurance requirements on cedants not domiciled in the state.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The specific requirements for forming a new insurance company vary from state to state. The requirements of the state where the company will be domiciled generally control. All states, however, have adopted the Uniform Certificate of Authority Applications ("UCAA") – a system established by the NAIC that streamlines the application process by creating standardised application forms. Some states, however, still have specific filing requirements and each state performs an independent review of each application. The UCAA Primary Application, which a newly formed company would use to seek a certificate of authority in its domicile state, calls for the disclosure of information related to minimum capital and surplus requirements, statutory deposit requirements, name approval, a plan of operation (which includes financial statements and projections), holding company financial information, biographical information regarding officers and directors, and other similar matters.

Once formed in its domiciliary state, an insurer may gain admission in other states by filing an application in that state.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

A non-U.S. insurer can write business directly to policyholders in a state if it is admitted and licensed by the state's insurance department to write direct business.

A non-U.S. insurer may also write business directly on a non-admitted basis using one of two methods: (1) the insured purchases the policy out-of-state, with no part of the transaction taking place in the state, *e.g.*, solicitation of the policy, correspondence, and issuance and delivery of the policy; or (2) a non-admitted insurer writes a policy on a surplus lines basis when the type of insurance is not available in the admitted market. State regulation of surplus lines insurance varies widely, but the eligibility requirements for non-US surplus lines carriers have been simplified in recent years. Under the NRRA, which establishes federal standards for surplus lines coverage and other non-admitted insurance, non-U.S. carriers ("alien" insurers under the NRRA) may apply for inclusion on the Quarterly Listing of Alien Insurers, which is published by the NAIC. Applicants are required to establish a trust fund for the benefit of U.S. policyholders and to provide certain financial, organisational and operational information. The NRRA prohibits any state from refusing to allow NAIC-listed alien insurers from placing surplus lines coverage. The NRRA also created national eligibility standards for surplus lines insurers domiciled in a U.S. jurisdiction.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are many terms and conditions required by state laws and regulations to be included in, or omitted from, insurance policies. Courts have also interpreted terms to be implied in policies.

The types of terms and conditions required to be included under state

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insurance laws vary by state and line of business. Generally, however, required terms relate to the following matters: (1) cancellation and renewal; (2) notice of loss requirements; (3) incontestability clauses in life insurance policies; (4) prohibitions against mandatory arbitration; and (5) appraisal clauses in fire or property policies providing for the right of each party to a loss appraisal.

With respect to judicial decisions, courts have implied a prohibition against coverage for "known losses" into insurance contracts. This prohibition, read into insurance contracts by the courts of many states, recognises that insurance will protect only against fortuitous losses and thus will not cover losses that were known to the insured prior to the policy's inception.

Courts also have implied into policies a duty on the part of insurers to carry out their policy obligations in good faith and deal fairly and honestly with their policyholders. Various states recognise a cause of action against insurers (independent and separate from breach of contract claims) for violations of their duty of good faith and fair dealing, allowing insureds to seek damages beyond the limits of the policy, *e.g.*, exemplary or punitive damages.

Within the reinsurance context, courts have implied a duty of utmost good faith on the part of the cedent and the reinsurer. Under this duty, cedents have an obligation to share with reinsurers on a timely basis all material underwriting and claims information concerning the reinsured policies. Reinsurers, in turn, owe their cedents an obligation to professionally and timely respond to claims when presented by the cedent.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under the laws of all fifty states, corporations are permitted to indemnify directors and officers if the directors and officers acted reasonably and in good faith when carrying out their responsibilities on behalf of the corporation.

1.6 Are there any forms of compulsory insurance?

The types of compulsory insurance vary among the states. The most common types are automobile insurance, which requires the motorist to purchase insurance, and workers' compensation insurance, which requires employers to provide workers' compensation benefits to their employees. In addition, with the enactment of the 2010 Patient Protection and Affordable Care Act ("PPACA"), the federal government now requires individuals to carry some form of health care insurance, subject to certain exceptions.

Under the Terrorism Risk Insurance Program Reauthorization Act ("TRIPRA"), which has been extended until 31 December 2020, insurers writing certain types of commercial property and casualty insurance must make terrorism coverage available under their policies. Insureds, however, are not required to purchase cover for terrorist acts.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

There is no way to say categorically that in the U.S. the "substantive law" favours either insurers or insureds. Whether the insured or the insurer might have an advantage depends upon the issue in dispute, the facts, the state law governing the dispute and the location of any litigation between the parties.

For example, if the coverage dispute concerns the issue of late notice, the laws of a few states permit insurers to disclaim coverage of untimely claims without a showing that they were prejudiced. The majority of states, however, whether by statute or otherwise, require insurers to establish that they were prejudiced by claims notified on an untimely basis. Further, in cases involving non-disclosure, some states allow insurers to rescind a policy based on an insured's innocent misrepresentation whereas other states require the insurer to establish that the insured intended to mislead or conceal a material fact.

Whether an insurer or insured has an advantage in any dispute also depends on the various rules governing policy interpretation. Insureds, for example, must meet the initial burden of demonstrating that their claims are covered under the terms of the policy. Insurers, however, have the burden to show that an exclusion applies, which courts generally interpret narrowly.

In cases where policies have been determined to be ambiguous, courts will instruct juries, in certain instances, to apply the *contra proferentem* doctrine, which requires ambiguous terms to be construed against the insurer and in favour of the insured/coverage. In certain jurisdictions, the *contra proferentem* rule has come under attack, with insurers arguing it should not be applied in cases involving a sophisticated insured or a sophisticated insurance broker.

As respects the location of coverage disputes, there are certainly jurisdictions in the U.S. that may be considered less friendly to insurers and where there is a belief that courts and juries favour insureds. There are, however, other jurisdictions where courts and juries will not uncommonly resolve coverage disputes in favour of insurers.

2.2 Can a third party bring a direct action against an insurer?

Under common law, a third party generally has no right to bring a direct action against an insurer. Some states, however, have "direct action" statutes that allow injured parties to directly sue a tortfeasor's liability insurer. Those statutes usually permit the injured party to file a suit against the insurer only after it has obtained a judgment against the tortfeasor. A few states, however, allow an injured party to file suit against an insurer prior to obtaining a judgment against the tortfeasor. A third party may also be permitted to sue an insurer directly after the third party is assigned the insured's rights under the policy.

2.3 Can an insured bring a direct action against a reinsurer?

An insured typically cannot bring a direct action against its insurer's reinsurer due to the fact that the insured is not in privity of contract with the reinsurer. Courts have permitted direct actions against reinsurers, however, in fronting and other similar scenarios where the court found that the reinsurer essentially acted as a direct insurer. In addition, a reinsurer may also agree to a "cut through" clause in the reinsurance contract under which insureds may have a direct right of action against the reinsurer under certain circumstances, *e.g.*, in the event of the insurer's insolvency or failure to pay claims.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

If a policyholder makes a material misrepresentation or omission during the underwriting of the policy, the insurer may seek to rescind the policy. In the event an insurer is successful in its rescission

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claim, the policy would be rendered void *ab initio* and the premiums would be returned to the insured. In certain jurisdictions, insurers, *in lieu* of rescinding the policy, may deny the claim or cancel the policy based on an insured's misrepresentation. As noted above, in cases involving non-disclosure, rescission or non-payment of claims is a potential remedy, but some states require the insurer to establish that the insured intended to mislead or conceal a material fact.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The specific duties and responsibilities of an insured with respect to disclosure depend on state law. Generally speaking, however, an insured has no duty to disclose a fact about which the insurer has not inquired or has not otherwise identified as a material basis for the issuance of the policy. If the insured, however, has exclusive or peculiar knowledge of a material fact which it knows would influence the insurer in writing the policy, courts have found that the insured has a good faith duty to disclose such facts. In addition, courts have held there to be a duty of full disclosure when a party makes a partial disclosure of information and a full disclosure of information is necessary to prevent the underwriter from being misled.

In reinsurance, ceding companies have a duty to disclose all information material to the risk irrespective of whether the reinsurer asks for such information. This duty of full disclosure also exists in marine insurance.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

An insurer's right to subrogation may arise by operation of law ("equitable subrogation"), upon a contractual subrogation provision, or by statute. Subject to some exceptions, equitable subrogation will typically apply regardless of whether a contractual agreement exists and allows an insurer to recover against a third party tortfeasor. Statutory subrogation rights frequently arise in connection with government-mandated benefits and insurance such as workers' compensation, uninsured/underinsured motorist coverage, Medicare/Medicaid, and the federal Employee Retirement Security Act of 1974 (ERISA). Where a statute provides the right to subrogation, the statute's terms and conditions govern those rights.

3 Litigation - Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance coverage actions may be brought in state or federal courts depending on the facts and circumstances of the dispute. If the dispute involves an amount under $75,000 or involves adverse parties considered residents of the same state, then the case generally must be brought in state court absent any relevant federal statute permitting the case to be heard in federal court. If, however, the amount in controversy is $75,000 or more and there is a complete diversity of citizenship among adverse parties, then the case may be brought in or transferred to federal court.

In federal courts, under the Seventh Amendment of the U.S. Constitution, the right to a jury trial in civil cases exists for certain legal remedies, including breach of contract claims. The Seventh Amendment does not provide a right to jury trials for equitable remedies, such as rescission and injunctive relief. The Seventh Amendment does not apply to state courts, but, in practice, almost every state constitution grants a right to jury trials in civil cases in state courts substantially on the same bases as they are allowed in federal courts.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

The period of time it takes for a commercial case to be resolved depends on the jurisdiction in which the case is initiated as well as the type and number of issues and parties involved. Even within the same court, the length of time for commercial cases may vary depending upon the judges who preside over them. Generally, cases will take at least a year to resolve, although it is not uncommon for cases to last significantly longer than that, especially in certain states in which the state court systems have been impacted by budget cuts.

4 Litigation - Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

In the United States, prior to trial, procedural rules in federal and state courts permit broad discovery of non-privileged documents and testimony regarding any matter that is potentially relevant to a claim or defence in the litigation, or that could lead to the discovery of information that is relevant to an action. This applies to parties and non-parties alike. Party discovery is generally conducted simply by service of a request by the attorneys. Non-party discovery is generally conducted through the service of a subpoena. Again, depending on the jurisdiction in which the litigation is pending, the issuance of a subpoena can be undertaken by the lawyers in the matter without any involvement from the court. Although it is generally more limited, and more difficult to obtain, discovery of parties' and non-parties outside the jurisdiction – both within and outside the U.S. – also is available.

If a party refuses to produce documents or witnesses requested by the other side, the court has the power to compel production of the requested documents and/or testimony. There are limits to a party's right to discovery, however. For example, a court may limit discovery if it determines that: (1) the information sought is cumulative or can be obtained from some other source that is less burdensome; (2) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; and (3) the burden or expense of producing the requested information outweighs its likely benefit, considering the needs of the case, the amount in dispute, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. (In certain cases, the court may shift the expense of production to the party requesting discovery.)

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4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

In the U.S., communications between attorneys and their clients providing legal advice are generally privileged and shielded from disclosure. Similarly, materials prepared in anticipation of litigation are generally protected from disclosure under the attorney work-product doctrine unless the party seeking discovery can demonstrate: (1) a substantial need for the materials; and (2) the party's inability to obtain the substantial equivalent of the materials by other means without undue hardship. Whether the attorney work-product doctrine applies is determined by the nature of the work product at issue and the factual setting of its preparation, including, among other things: the circumstances that prompted its preparation; whether it contains analyses, opinions or purely factual data; and whether it was requested or prepared in response to a specific request of a client or an attorney, or in the ordinary course of business.

Documents concerning settlement negotiations typically may not be withheld from disclosure by a party. However, such documents are generally inadmissible at trial except for limited purposes, such as with respect to the credibility of a witness.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Courts generally have the authority to compel witnesses to testify either before or at the trial. The scope of the court's authority depends on whether the witness is a party or non-party and whether the testimony is sought before or during trial. The authority of the court to compel testimony may also be limited to those persons within the jurisdictional reach of the court.

Subject to certain procedural rules and requirements, subpoenas issued by courts in one state to compel the pre-trial testimony of non-parties residing in other states are enforceable. With limited exceptions, U.S. courts do not have the power to compel a foreign (outside of the U.S.) non-party witness to appear for deposition or trial. As a result, unless otherwise agreed, the testimony of a foreign witness must be obtained according to the Federal Rules of Civil Procedure or an international treaty such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention").

4.4 Is evidence from witnesses allowed even if they are not present?

The testimony of a witness who is not present at the trial is admissible under certain circumstances (and those circumstances may vary depending on the jurisdiction). The Federal Rules of Civil Procedure, for example, permit a party to use the deposition of a witness (whether or not a party) who is not willing to appear to testify at trial if: (1) the witness has died; (2) the witness is more than 100 miles from the place of hearing or trial or is outside the U.S.; (3) the witness cannot attend or testify because of age, illness, infirmity, or imprisonment; (4) the party offering the deposition testimony could not procure the witness's attendance by subpoena; or (5) upon a showing of exceptional circumstances. In addition, such testimony is allowed only if the adverse party had an opportunity to cross-examine the witness when the testimony was taken. So, for example, a party could not present in a trial against Party A the prior deposition or trial testimony of a witness taken in a case against Party B, if Party A did not have an opportunity to cross examine that witness.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party appointed experts?

The admissibility of expert testimony is governed by the evidentiary rules of the jurisdiction in which the case is pending, and those rules vary to some degree. However, in general, courts permit a witness who is qualified as an expert by knowledge, skill, experience, training or education to testify if: (1) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based upon sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the witness has applied the principles and methods reliably to the facts of the case. In insurance coverage disputes, parties may rely upon experts to testify regarding, among other things, industry custom and practice to aid in the interpretation of an ambiguous contract provision. Courts, however, generally find expert testimony regarding conclusions of law to be inadmissible. Courts have the power to appoint their own experts but rarely do so and it is much more common for the experts to be retained and presented by the parties. When courts do appoint experts, they typically do so in cases involving highly technical and specialised subject matter.

4.6 What sort of interim remedies are available from the courts?

In the U.S., interim relief is available through temporary restraining orders and preliminary injunctions. To receive such relief, a party must show that it is likely to succeed on the merits of its case and it would suffer irreparable harm if such relief were not granted (which generally means that the party seeking the relief could not be made whole through the payment of financial damages). In addition, some state statutes require non-admitted insurers to post security before answering a policyholder's complaint. Courts may also, in very limited circumstances, bar the removal of assets from a jurisdiction through the use of temporary injunctions and pre-judgment attachment.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In the U.S., the court of first instance is a trial court. The federal court system and most state courts have two levels of appellate courts. In the federal system, ninety-four judicial districts – known as District Courts – serve as the trial courts and are organised into twelve regional circuits. Each regional circuit (plus a nationwide "Federal Circuit") has a United States Court of Appeals, which is the intermediate appellate court in the federal system. The United States Supreme Court is the court of last resort. State courts are similarly structured with trial courts, intermediate appellate courts, and a court of last resort.

Subject to certain procedural requirements, which vary by jurisdiction, a party may appeal a final decision of a trial court to the appropriate intermediate appellate court. As a general rule, an interlocutory ruling of a trial court – or a ruling which does not finally determine a cause of action on the merits – is not appealable. The right to appeal a final decision of a trial court is automatic in most jurisdictions. In jurisdictions where there are two appellate levels, the right to appeal to the highest court is not automatic.

In general, appellate review is limited to issues raised in the court

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below. The standard of review applied – and deference granted to the lower court's decision – depends on the ruling under review. A trial court's rulings on issues of law (including contract interpretation) are reviewed *de novo* meaning that the trial court's decision is owed no deference. A trial court's findings of fact, however, are usually reviewed under a "clearly erroneous" standard. A ruling concerning a matter committed to the discretion of the trial court – including evidentiary decisions, scheduling orders, enforcement of local rules, and discovery rulings – are generally subject to review only for "abuse of discretion".

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in civil matters brought in federal and state courts in the U.S. Prejudgment interest may be applied by a court to an award to compensate for the loss of the use of monies for a period of time up until the date of judgment. It is generally for the court to determine the date when prejudgment interest begins to run, and the rate of interest (which can be as high as 10%) varies by jurisdiction and is typically determined by state statute or the parties' contract.

Post-judgment interest also is generally available and runs from the date of judgment until the time the award is paid. Post-judgment interest rates are typically established by statute.

4.9 What are the standard rules regarding costs? Are there any specific cost advantages in making an offer to settle prior to trial?

In the U.S., each party historically bears the burden of paying its attorneys' fees and costs for the lawsuit. However, through certain "fee shifting" rules, federal and state courts have carved out exceptions to this general rule.

In addition, several states have statutes which permit the recovery of attorneys' fees by policyholders in certain circumstances. Some of these statutes broadly allow for the recovery of reasonable attorneys' fees in any coverage action where the insured prevails, while others permit recovery of attorneys' fees only where the court determines that the insurer has acted in bad faith or in other limited circumstances.

Under Federal Rule of Civil Procedure 68 (and analogous state procedural rules), there may be an advantage to offering to settle before trial. If a defending party offers to settle more than fourteen days before trial (state rules may provide for longer periods of time), the offer is not accepted, and the final judgment after trial is ultimately equal to or less favourable than the original settlement offer, the plaintiff must pay for the costs incurred by the defending party after the offer was made. Courts interpreting these "offer of judgment" rules have reached different conclusions as to what "costs" are recoverable. In most states, recoverable costs are fairly limited. However, in certain states, such as Florida, costs can include attorneys' fees.

4.10 Can courts compel the parties to mediate disputes? If so, do they exercise such powers?

Courts often encourage parties to mediate their disputes. Many courts have discretionary authority to compel the parties to mediate and/or have mandatory mediation programmes for certain cases based on the type of case or the monetary amount. In mediation, the parties are required to participate in the mediation process in good faith but are not required to settle. The power to order parties to mediate, however, does not include the power to require the parties to actually resolve the dispute through mediation.

4.11 If a party refuses a request to mediate, what consequences may follow?

A party has no obligation to mediate a dispute when mediation is requested by another party. However, if a party refuses to materially comply with court-mandated mediation procedures, that party may be subject to noncompliance sanctions by the court. Many states prescribe sanctions in the form of mediation costs and/or attorney's fees. Courts in other states have broader powers to impose graver penalties, including dismissing an entire action or rendering judgment against the defaulting party. Again, it is important to note that a court cannot compel a party to any sort of binding mediation or to actually resolve a dispute through mediation. The court's power is generally limited to compelling the parties to participate in mediation in a good faith effort to resolve the dispute.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Under the Federal Arbitration Act ("FAA") and similar state arbitration acts, there is a strong bias in favour of enforcing parties' agreements to arbitrate. Generally, any doubt as to whether a dispute falls within the scope of the parties' arbitration agreement will be resolved by courts in favour of arbitration.

Court intervention in ongoing arbitration proceedings is rare. Instead, courts generally become involved only at the beginning or end of an arbitration. For example, parties may initially ask courts to compel another party to arbitrate if that party is refusing to move forward with arbitration. Courts, however, will generally refuse to hear any pre-arbitration award challenges regarding the suitability of arbitrators except to consider whether an arbitrator meets the qualification requirements under the arbitration agreement.

After an award has been issued, courts will, at the request of a party, either confirm or vacate an award as permitted under the FAA and/or state arbitration acts. Arbitrators' procedural and substantive decisions are given substantial deference by courts and are not readily subject to court reversal. Indeed, the FAA and state arbitration acts narrowly limit the courts' authority to overturn arbitration awards to instances where: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) 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 misbehaviour 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. Courts do not often vacate arbitration awards.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Parties must clearly express their intent to arbitrate disputes in their agreements. While no specific wording is necessary, there is common language frequently used by parties when drafting arbitration agreements.

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5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Generally, it is rare for courts to refuse to enforce an express arbitration clause, especially where both parties are sophisticated. The FAA expressly states that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract". However, roughly half of the states have statutes that prohibit or limit the validity and enforceability of mandatory arbitration clauses in insurance policies. For example, Missouri's arbitration act does not recognise arbitration clauses in insurance contracts (excluding reinsurance contracts) as valid and enforceable. Other states prohibit the use of mandatory arbitration clauses in certain types of policies, like life and health policies. Courts reviewing state anti-arbitration statutes have reached different conclusions as to whether or not these statutes are pre-empted by the FAA (for domestic agreements) or by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (for international commercial agreements).

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

As noted above in question 5.1, courts rarely intervene in ongoing arbitration proceedings, so interim relief generally is not readily available. Nevertheless, there are certain instances where interim relief may be granted including, without limitations: (1) the granting of preliminary injunctive relief to preserve the *status quo* until the arbitral panel rules on application for interim relief; (2) enjoining a party from disposing of or encumbering assets to satisfy any judgment or arbitration award; (3) compelling specific performance pursuant to terms of contract so as to maintain the *status quo* pending arbitration; and (4) granting a temporary restraining order to enjoin further state court proceedings pending federal court's decision regarding arbitrability of dispute. Granting orders of interim relief typically require a party to demonstrate that it: (1) will likely succeed on the merits; (2) will suffer irreparable harm if preliminary injunction is denied; and (3) has no other adequate remedies.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Absent a requirement in the arbitration agreement, arbitrators are not obligated to provide detailed reasons in support of their award. During the arbitration, however, parties can ask the arbitrators to provide a rationale for their award. If only one party makes such a request, then the arbitrators have the discretion to grant or deny it.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

As discussed in question 5.1, judicial review of arbitration awards is strictly limited under the FAA and state arbitration acts.

Acknowledgment

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