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The Reinsurance Research Council
Le Conseil de Recherche en Réassurance

ARBITRATION CLAUSE

1. Any irreconcilable difference of opinion arising between the Company and the Reinsurer in respect of this Agreement or its validity shall, as a condition precedent to any right of action, be referred to arbitration as set out below.
2. Arbitration shall be initiated by delivery of a written notice by one party to the other requesting arbitration. Within 30 days of the written request for arbitration, each party shall appoint an Arbitrator and the two so named shall, within a further 30 days, appoint an Umpire who has agreed to act.
3. The Arbitrators and the Umpire (the Arbitration Panel) shall be disinterested current or past executive officers of insurance companies, reinsurance companies, or Syndicates at Lloyd's.
4. In the event of one party failing to name its Arbitrator within 30 days allowed for in 2 above, or, in the event of the Arbitrators failing to appoint an Umpire within 30 days of the appointment of the second Arbitrator, the President of the Insurance Bureau of Canada, or his or her appointee, shall make the necessary appointment of a person qualified as set out herein.
5. If an Arbitrator or Umpire subsequent to his or her appointment is unwilling or unable to act, a new Arbitrator or Umpire shall be appointed in his or her stead by the procedure set out herein.
6. Within 30 days of the appointment of the Umpire, each party shall submit its case in writing to the Arbitration Panel.
7. The Arbitration Panel shall have power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which they may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of the documents, examination of witnesses and any other matter whatsoever relating to the conduct of the arbitration and may receive and act upon such evidence whether oral or written as, in their discretion, they think fit.
8. The Arbitration Panel shall interpret the Agreement as an honourable engagement and not merely as a legal obligation and shall make its award with regard to current insurance and reinsurance market practice and not necessarily in accordance with a literal interpretation of the language of the Agreement.
9. The Arbitration Panel shall make its decision in writing within 90 days of the appointment of the Umpire, failing which, unless an extension is agreed to by both parties, a new Arbitration Panel shall be appointed in accordance with the procedure set out in this Article.
10. A decision shall be rendered by the majority of the Arbitration Panel and shall be final and binding on both parties. Unless otherwise directed by the Arbitration Panel, each party shall bear its own arbitration costs and shall jointly and equally bear with the other party the cost of the Umpire and the remaining incidental costs of the Arbitration. Judgment may be entered upon the award in any court having jurisdiction.
11. The arbitration shall be held in the town or city where the Canadian Head Office of the Company is located, unless otherwise agreed.
12. If more than one reinsurer is involved in the same irreconcilable difference of opinion, such reinsurers may consolidate and act as one party for the purposes of this Article. Communications by the Company shall be made individually to each reinsurer, including any acting as one party. Nothing herein shall impair the rights of any reinsurer under the terms of this agreement to assert separate rather than joint defenses or claims nor change the liability of reinsurers from several to joint.

Notes to accompany the Arbitration Clause

In recent years, RRC has encountered a variety of arbitration clauses containing phraseology *known* to produce problems. This recommended wording is the product of sub-committee review supported by considerable helpful input from the major Canadian brokers. Notes are presented on a clause by clause basis.

1. *Any irreconcilable difference of opinion arising between the Company and the Reinsurer in respect of this Agreement or its validity shall, as a condition precedent to any right of action, be referred to arbitration as set out below.*

   "As a condition precedent to any right of action" (AKA the Scott versus Avery clause) contractually obliges the parties to arbitrate without (illegally) denying either party access to the courts. Action is effectively thwarted however, inasmuch as courts will endeavor to uphold the arbitration decision. Note the use of the word "action" replacing the incorrect but often used "recovery."

   This clause does not inhibit the use of other forms of dispute resolution, such as mediation or the appointment of a single arbitrator.

   The words "or its validity" counter the argument that Arbitration is unworkable if one party seeks to void the treaty agreement *ab initio*. Courts have determined that, even though the arbitration clause may be contained within the disputed treaty, it is nevertheless a distinct and separate agreement undertaken by the parties. Therefore, the arbitration clause can be used to rule on the validity of the agreement in which it is contained.

2. *Arbitration shall be initiated by delivery of a written notice by one party to the other requesting arbitration. Within 30 days of the written request for arbitration, each party shall appoint an Arbitrator and the two so named shall, within a further 30 days, appoint an Umpire who has agreed to act.*

   In the absence of specific time limits such as those stated in the various sections of this Article, a dissenting party can easily frustrate an arbitration.

3. *The Arbitrators and the Umpire (the Arbitration Panel) shall be disinterested current or past executive officers of insurance companies, reinsurance companies, or Syndicates at Lloyd's.*

   This clause reflects the goal of arbitration to judge issues based on an in-depth knowledge of reinsurance and an appreciation of reinsurance practice. (See section 8 below.) If circumstances suggest the need for special expertise, the arbitration panel can introduce expert testimony. If the dispute can be better handled by specialists such as claims or actuarial personnel, this article does not inhibit other forms of dispute resolution, nor does it prevent mutual agreement to broaden the selection criteria.

   Though redundant, the phrase "Syndicates at Lloyd's" has been included for clarity.

   Thought was given to the use of the term "impartial" as opposed to "disinterested." The words are synonymous but the latter would appear to be in widest use. More detailed selection criteria such as "not under the control or common ownership of any party to this dispute" were considered unnecessarily restrictive. The inappropriateness of a panel member is one of the few things that can upset an arbitration award in court, a fact which should encourage self-regulation in the selection process.

4. *In the event of one party failing to name its Arbitrator within 30 days allowed for in 2 above, or, in the event of the Arbitrators failing to appoint an Umpire within 30 days of the appointment of the second Arbitrator, the President of the Insurance Bureau of Canada, or his or her appointee, shall make the necessary appointment of a person qualified as set out herein.*

   The current President of the Insurance Bureau of Canada is aware of and has agreed to this clause.

5. *If an Arbitrator or Umpire subsequent to his or her appointment is unwilling or unable to act, a new Arbitrator or Umpire shall be appointed in his or her stead by the procedure set out herein.*

   A time limit of a further 30 days may be inferred from "the procedure set out herein."

6. *Within 30 days of the appointment of the Umpire, each party shall submit its case in writing to the Arbitration Panel.*

   This brief clause replaces what is often a lengthy description of procedure. Common is the requirement of each party to submit its case to its respective arbitrator who then submit to the umpire only those questions upon which they disagree. It is inappropriate to impose this level of direction on an as yet unknown dispute. Such wordings tend to cast each arbitrator in the role of advocate. Those clauses requiring one party to submit its case *before* the other produce an inappropriate and counter-productive "plaintiff/defendant" atmosphere.

7. *The Arbitration Panel shall have power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which they may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of the documents, examination of witnesses and any other matter whatsoever relating to the conduct of the arbitration and may receive and act upon such evidence whether oral or written as, in their discretion, they think fit.*

   By their very nature, arbitrations allow the arbitration panel latitude beyond that of the court. This widely used clause has been amended by omitting the words "strictly admissible or not" following "oral or written." The words are redundant in a clause that already gives the arbitration panel power to decide what is admissible.

8. *The Arbitration Panel shall interpret the Agreement as an honourable engagement and not merely as a legal obligation and shall make its award with regard to current insurance and reinsurance market practice and not necessarily in accordance with a literal interpretation of the language of the Agreement.*

   This section goes to the heart of reinsurance arbitration, and it is not surprising that there is more dialogue and case law surrounding this section than any other aspect of arbitration. Several issues have been considered.

   "Honourable engagement"

   Treaties are entered into as honourable engagements in utmost good faith. Necessarily, the contract cannot capture the full panoply of events and circumstances that might befall the subject business or the parties to the agreement. For this reason, arbitrators will attempt to restore the parties to the position they would be in had the disputed action never occurred, or failing that, will make their award based on subjective guiding principles such as intent and market practice.

   "not merely ... a legal obligation"

   However much it galls the legal mind, an arbitration panel is free to interpret the Agreement as "an honourable engagement and not merely as a legal obligation." Arbitrators are thus allowed "to view matters of construction more leniently and with regard more generally to commercial considerations than would be permissible in a Court of Law." (Orion Cia -v- Belfort Maats, on Appeal)

   "abstain from ... following the ... law"

   RRC has encountered arbitration clauses containing potentially dangerous language such as a direction that the arbitrators "may abstain ... from strictly following the rules of law." Such clauses have the potential of thwarting the arbitration process (if not the entire treaty), or at the very least, delaying the arbitration while courts rule on the legality of this clause. The clause recommended by RRC has been used extensively over many years and has proven itself in Court.

9. *The Arbitration Panel shall make its decision in writing within 90 days of the appointment of the Umpire, failing which, unless an extension is agreed to by both parties, a new Arbitration Panel shall be appointed in accordance with the procedure set out in this Article.*

   The decision is made "in writing." Note that the recommended clause does not direct the degree of detail in the award nor require explanation for the decision.

   A "new Arbitration Panel," while causing delays and increased costs, ensures that the ultimate objective to arbitrate will prevail. Reasonable cause for extension will likely be treated as such, but unreasonable delay, used as a deliberate tactic, will be limited by this clause.

10. *A decision shall be rendered by the majority of the Arbitration Panel and shall be final and binding on both parties. Unless otherwise directed by the Arbitration Panel, each party shall bear its own arbitration costs and shall jointly and equally bear with the other party the cost of the Umpire and the remaining incidental costs of the Arbitration. Judgment may be entered upon the award in any court having jurisdiction.*

    The umpire and incidental costs of arbitration such as secretarial and meeting rooms will normally be shared equally. Each party will bear its own cost arbitrator, lawyers, expert witnesses and other similar expenditures. One party can not abuse the process of arbitration at the expense of the other, and the arbitration panel retains the ability to direct expenses to one party if appropriate.

    "Judgment may be entered . . ." strengthens the power of the arbitration, allowing the party favoured by the judgment to bind the other party via the court system.

    A suggestion was made that the RRC recommended wording allow the Arbitration Panel to award interim partial payments. The arbitration panel is not prohibited from securing mutual party agreement at the outset of an arbitration. However, incorporating this power as a standard could prove to be counter-productive in specific cases.

11. *The arbitration shall be held in the town or city where the Canadian Head Office of the Company is located, unless otherwise agreed.*

12. *If more than one reinsurer is involved in the same irreconcilable difference of opinion, such reinsurers may consolidate and act as one party for the purposes of this Article. Communications by the Company shall be made individually to each reinsurer, including any acting as one party. Nothing herein shall impair the rights of any reinsurer under the terms of this agreement to assert separate rather than joint defenses or claims nor change the liability of reinsurers from several to joint.*

    This clause recognizes the growing number of shared treaties. A reinsurer may arbitrate individually, but the courts have given no clear indication that the other reinsurers on the treaty will be guaranteed equal treatment.