

## The more it changes, the more it stays the same



### Recent law on Arbitrator Qualifications under Reinsurance Contracts

Arbitration is very often the dispute resolution process of choice in insurance and, especially, reinsurance contracts. It has been predicted that it may become even more prevalent in a post-Brexit world if the mutuality of service and enforcement inherent in EU membership is not replicated by bilateral agreement. This is because all EU countries, and many others in the world, are parties to the New York Convention, which recognises and provides for the mutuality of enforcement of arbitration awards.

#### Arbitrator Qualification

Common to the arbitration laws of a large number of the world's countries is that the appointment of an arbitrator can be challenged in the Courts if the nominee does not possess the qualifications agreed by the parties. It is therefore important to get this right at the outset.

The qualifications which an arbitrator must have are generally set out in the Arbitration Clause of the contract concerned. A standard form of words from 1988 onwards in excess of loss reinsurance contracts has been the following Institute Joint Excess of Loss Clause ("JELC") CL400:

*"Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than 10 years' experience of insurance or reinsurance".*

There are variations of this provision used in other contracts, which have the same or similar requirements. One of these is the commonly used ARIAS (UK) Arbitration Clause, introduced in 1997, which states:

*"The arbitrators shall be persons (including those who have retired) with not less than 10 years experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry".*

A significant difference in the words used is immediately apparent – the addition of the words "... or as lawyers or other professional advisers serving the industry".

## Judicial consideration

In 2002, the High Court in a matter called *Company X v Company Y* (unreported) had considered whether a lawyer with more than 10 years' experience of acting in insurance and reinsurance matters qualified under the JELC's CL400. Mr Justice Morrison held that the clause envisaged a "trade arbitration" and required any arbitrator to have been employed in the insurance or reinsurance industry, such that a lawyer would not qualify (even with more than 10 years' insurance and reinsurance law experience). That therefore became the "settled meaning" and represented a significant difference between the JELC CL400 and the ARIAS (UK) clause.

Some 15 years later, in 2017, the issue was raised again in *Allianz Insurance v Tonicstar* [2017] EWHC 2753 (Comm), a case relating to the 9/11 losses. Allianz wished to appoint a well known QC with over 10 years' insurance and reinsurance law experience, but Tonicstar objected. Mr Justice Teare at first instance, whilst expressing reservations as to whether Morrison J's judgment was correct, considered that he should follow the precedent and so decided that the QC did not qualify. This time it went to the Court of Appeal.

The Court of Appeal, for which Lord Justice Leggatt gave the leading judgment, unanimously allowed the appeal. Commenting on the reasoning in Morrison J's judgment in *Company X v Company Y*, the Court of Appeal found that,

- although the clause was drafted by a "trade body" this did not mean that only members of the trade could be appointed;
- the fact that, in default of agreement, arbitrators were to be appointed by the Chairman of the London Underwriting Association, did not mean that the Chairmam could not appoint a lawyer; and
- giving the tribunal the ability to dispense with the strict rules of evidence was not found to be a significant consideration, especially as compared to the more important fact that the contract was subject to English law.

In short, the clear and unambiguous clause did not expressly confine the appointment to trade arbitrators and a lawyer would qualify. Lord Justice Leggatt observed:

*"... the practical and legal aspects of insurance and reinsurance are so intertwined that both market professionals and lawyers who have specialised in the field for many years are commonly appointed as arbitrators in insurance and reinsurance disputes ..."*

On a more general level, the Court of Appeal commented that:

*“While certainty is an important value in commerce, so too is the ability of the legal system to correct error, and contracting parties may be taken to know that a decision of a court of first instance is not immutable and is capable of being overruled”.*

#### **CPB comment**

In this case, it had taken some 15 years for the first instance decision to be overruled by a Court of Appeal considering the same point in a different case. It is ironic that just a couple of months earlier in December 2017, the JELC CL400 was replaced by JELC CL432, which is a replica of the ARIAS (UK) Arbitration Clause quoted above (and so expressly includes lawyers and market professionals with at least 10 years’ insurance and reinsurance experience). As Lord Justice Leggatt observed, the effect of the decision is that CL400 actually always had exactly the same effect as the new CL432 and the ARIAS (UK) Clause. This, of course, makes no difference to past or ongoing arbitrations in which the panel has been appointed (unless an arbitrator has to be replaced). However, disputes will continue to arise under contracts incorporating CL400 for a number of years to come, and in those disputes the pool of potential arbitrators will now include lawyers and other professional advisers, just as it will in arbitrations under CL432 and the ARIAS (UK) Clause.

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