CARLTON FIELDS

Is it time to include mandatory arbitration clauses in all reinsurance policies?

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Mandatory clauses could avoid unnecessary future disputes, argues Carlton Fields

Recent reports on the continued easing of collateral requirements for non-US reinsurers that operate in the US, raise the question: with the anticipated, increased presence of non-US reinsurers state-side, will more reinsurance policies be the subject of domestic litigation? In December 2013 the National Association of Insurance Commissioners (NAIC) approved Bermuda, Switzerland, Germany, and the UK as Conditional Qualified Jurisdictions so that reinsurers licensed and domiciled in those jurisdictions can now qualify for lower reinsurance collateral requirements under the NAIC's Credit for Reinsurance Model Law. A number of states have adopted the NAIC model law and states such as Florida already have reduced the collateral limits that eligible non-US reinsurers must post for their US liabilities. With the easing of collateral limits and the expansion of jurisdictions that qualify for lower requirements, there should be an increase in international reinsurance participation in US markets. With this increased participation comes the prospect of increased litigation involving reinsurers and their policies. Courts presented with disputes against foreign reinsurers have, in the past, dismissed some lawsuits based on a lack of jurisdiction over the reinsurer. In *Pacific Employers Insurance Co. v. AXA Belgium S.A., 785 F.Supp.2d 457 (E.D. Pa. 2011)*, for example, the court granted AXA Belgium's motion to dismiss a federal litigation brought by its ceding insurer, a Pennsylvania company, for a breach of contract arising out of the parties' quota share reinsurance agreement. That agreement did not have an arbitration, forum selection, service of suit, or choice of law clause. The court found it lacked jurisdiction over the dispute because AXA Belgium did not have sufficient contacts with Pennsylvania, was not authorised to do business in the state, and had not otherwise consented to jurisdiction in the state. But what if AXA Belgium had sufficient participation in Pennsylvania or had otherwise availed itself to the benefits of the state? Would AXA Belgium have been subject to the jurisdiction of the Pennsylvania court? The court certainly indicated it could be: "My analysis would be quite different if the parties had entered into the Quota Share Agreement in Pennsylvania or with any expectation that Pennsylvania would be somehow involved in their course

of dealings. In that situation, the contacts presented … may have been sufficient to exercise specific jurisdiction." Id. at 474, n. 23. In *Hollander v. XL Insurance (Bermuda) Ltd. et al., 2012 WL 4748956 (Cal.App. 2 Dist. Oct. 5, 2012)*, the insureds sued a Bermuda insurer, XL Insurance (Bermuda) Ltd. (XLIB), and alleged jurisdiction in California, based, in part, on XLIB's participation in a quota share reinsurance agreement. The insureds argued that because XLIB received premiums from California reinsureds and shared in California risks through that reinsurance agreement, XLIB had sufficient contacts to California to justify jurisdiction over it. The California court disagreed, holding that it did not have jurisdiction over XLIB. In doing so, however, the court cautioned that there was certainly a threshold that could be crossed where a foreign company "obtains such a benefit from its state contacts that an exercise of jurisdiction would be fair." Id. at 10. While Hollander and Pacific Employers were decided on jurisdictional grounds, the future dismissal of similar actions based on a lack of jurisdiction is unlikely as non-US reinsurers apply for, and obtain, certified reinsurer status and even consent to US jurisdiction to take advantage of states' collateral reductions. **Time for mandatory clauses?**

Is it time, then, for all reinsurance policies to contain mandatory arbitration clauses in order to avoid unnecessary and expensive litigation in courts when those policies are potentially triggered? Many reinsurance policies contain mandatory arbitration clauses, but not all do. When reinsurance policies lack such clauses, the parties might be subject to a court's jurisdiction that neither party particularly wants or a jurisdiction that one party finds particularly inconvenient. The Pacific Employers court, for example, suggested Belgium as an alternative forum for the litigation which, presumably, was convenient for AXA Belgium but not for Pacific Employers. Arbitration clauses can give both ceding insurers and reinsurers the ability to choose the location where their disputes will be heard, governing laws, decider of the disputes, formality or informality of the proceedings, procedural rules to follow, and remedies to award. At the same time, arbitration can ensure confidentiality and promote efficiency. Federal law in the US favours arbitration and federal courts have held that arbitration clauses in international insurance policies, including reinsurance policies, are valid and enforceable even if state statutes prohibit arbitration clauses in insurance contracts. These clauses might also be a way to protect ceding insurers and reinsurers when insureds seek to bring direct actions against reinsurers and/or go after their policies in court. Typically insureds do not have the right to sue a reinsurer. There are, of course, exceptions to this rule, for example, where the reinsurance policy contains a cut-through provision. There are also cases where insureds have sued reinsurers, seeking to "pierce the alleged reinsurance veil" (*G-I Holdings v. Hartford Fire Ins. Co., 2007 U.S. Dist. LEXIS 19060, at *41 (D.N.J. 2007)*), on theories ranging from agency to tort. **Avoiding litigation**

The inclusion of mandatory arbitration clauses in all reinsurance policies should help ensure that reinsurance policy proceeds are distributed according to the parties' intent and any dispute is heard by a panel of experienced industry arbitrators, without the unnecessary cost of litigation in any number of courts. While insurers and reinsurers might choose, for various reasons, to omit mandatory arbitration clauses in their individual reinsurance policies, and while disputes might arise that are outside the scope of the arbitration clause, without these clauses, reinsurance policies seem

to be an open invitation to future, unnecessary litigation. The language of the arbitration clause in a reinsurance policy is critical and any suggested language is beyond the scope of this article. *The article first appeared in the Spring 2014 issue of GR (www.gr-intelligence.com).*

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