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Insurance & Reinsurance 2020

A practical cross-border insight into insurance and reinsurance law

Ninth Edition

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1 Regulatory

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

The regulation of insurance companies is split between the states and the federal government. Each of the 50 states regulates the operations of insurance businesses within its borders and has its own laws concerning the appropriate contractual terms that parties to an insurance contract are allowed to enter into. For example, states are responsible for regulating insurance rates, licensing insurance companies and brokers, employing financial examiners to investigate an insurer's accounting methods, and providing consumer service support to their residents. State insurance regulators are also members of the National Association of Insurance Commissioners ("NAIC"), an organisation that standardises the regulation of insurance among the states and facilitates the sharing of best practices among them.

In comparison, the federal government has a more modest footprint in insurance regulation because the McCarran-Ferguson Act, passed in 1945, assured that states would have the primary role in regulating insurance. Nevertheless, there are some significant federal regulations concerning interstate insurance commerce. The 2015 National Association of Registered Agents and Brokers Reform Act streamlined approval for non-resident insurance sellers to operate across state lines. The 1986 Liability Risk Retention Act allowed individuals and businesses with similar risk profiles to form groups in order to lower costs and increase market choice for insurance consumers by making it easier to compare policies that fit their profiles.

Furthermore, after the 2008 financial crisis, the federal government started to regulate the financial elements of insurance companies. The 2010 Wall Street Reform and Consumer Protection Act ("Dodd-Frank") created two review councils within the Department of Treasury – the Financial Stability Oversight Council ("FSOC") and the Federal Insurance Office – to monitor the stability of the insurance industry. FSOC has the ability to designate certain insurers as "Systemically Important Financial Institutions" ("SIFIs") so they may be regulated by the Federal Reserve Board. SIFIs are subject to heightened financial oversight – they must meet higher capital requirements, take stress tests, and submit "living will" bankruptcy plans for review. (While initially six insurers were identified as being "systemically important", all were eventually dedesignated, and currently there are none with this designation). In 2017, in a shift towards deregulation, the Treasury Department recommended changing the designation process for SIFIs, and in 2019 FSOC proposed moving from an entity-based approach to a holistic activities-based approach. Under the new approach a company would only be designated as an SIFI if FSOC believed that attempts by state and federal regulators to address the risks of their activities were not sufficient.

Dodd-Frank also included the Nonadmitted and Reinsurance Reform Act ("NRRA"), in order to make it easier for surplus-line insurers and brokers to conduct business across states.

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

Each state has its own unique requirements for setting up a new insurance company, but all states accept the Uniform Certification of Authority Application ("UCAA"), a model application offered by the NAIC. The UCAA requires the applicant to provide information about its business plan, corporate bylaws, financial statements, and officers, as well as to identify the type of insurance it plans to offer (*e.g.*, life, disability, property). Each state imposes requirements in addition to the UCAA. For example, states generally require a certain level of financial health before licensing a corporation. Each state has different capital and surplus requirements, and some may require a corporation to have prior experience or pass accreditation standards before being allowed to sell certain forms of insurance. States will also usually require companies to pay fees to fund regulatory agencies depending on the type of insurance an applicant wishes to offer. For example, to conduct business with workers' compensation or automobile insurance, many states require companies to pay fees to an oversight board.

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

The NRRA allows foreign insurers to conduct business within the states without being admitted if they are included in the "Quarterly Listing of Alien Insurers", which is maintained by the NAIC. Among other requirements, the NAIC requires applicants to file financial statements, copies of auditors' reports, names of their US attorney or other representative, and details of their US trust account to show that they have (1) a minimum shareholders' equity amount of $45,000,000, (2) a US-based trust fund, and (3) a management team with "a proven and demonstrable track record of relevant experience, competence, and integrity".

A company may also choose to become licensed by a state government. Alternatively, a non-admitted insurer can, subject to certain requirements, write a policy on a surplus line basis in cases where the insured's risk is too high for an admitted insurer

to underwrite. For example, catastrophe insurance for natural disasters is frequently bought on a surplus line basis due to its risk.

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?

Each state has its own rules limiting the parties' freedom of contract. Many states require insurance policies to contain mandatory clauses. For example, insurance policies are often required to contain: (1) cancellation and renewal terms; (2) notice of loss requirements; (3) incontestability clauses (in life insurance policies); and (4) appraisal clauses (for fire or property insurance). As with other insurance regulations, states may vary in how aggressively they will regulate the parties' freedom of contract. For instance, the majority of states mandate that insurers give the insured notification for a conditional renewal of the policy, but a minority – like Massachusetts, Michigan, and Hawaii – do not.

Courts also read in certain substantive limitations into contracts, such as restrictions to protect the insurer from unforeseen consequences not contemplated by the insurance contract. For example, California and Nebraska law read a "proximate cause" requirement into contracts to restrict claims that were not foreseeable. Similarly, many states impose "known loss" requirements where the insured is not protected against losses that were known to the insured before the policy started. States may also mandate that a reinsurer pay for obligations under the contract regardless of whether the insurer is solvent. These "insolvency" clauses lower the moral hazard in insurance transactions because they reduce the ability of a reinsurer to agree to policies without having to pay for the underlying risk.

Finally, the same restrictions that govern any contractual dealing are implicated. These include common law concerns like procedural and substantive unconscionability, proper assignment of rights, and the covenant of good faith and fair dealing. Some of these restrictions are broadly accepted – all jurisdictions impose some version of the requirement that an insurer settle a claim against an insured in good faith. Others are quite divisive. Mandatory arbitration clauses in insurance agreements, for example, are enforced by only about half of the states.

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

Most state corporate laws, including Delaware's, allow for indemnification. For example, under Delaware law, a director has access to both discretionary and mandatory indemnification. The board of directors in a Delaware corporation must indemnify a director for fees spent in defending a derivative suit if the suit is successful on the merits. The board of directors has the option but not the obligation to indemnify a director for expenses, fines, and judgments provided that the director acted in good faith. Under Delaware law corporations are not permitted to indemnify directors and officers who have acted in bad faith. A Delaware corporation also has the option to purchase insurance for its directors and officers.

Although a state's local law may permit indemnification, regulatory agencies may limit a corporation's ability to indemnify an officer. This limitation is intended to create a deterrent effect. For example, in civil enforcement proceedings, the Securities and Exchange Commission and the Consumer Financial Protection Bureau sometimes bar an executive from seeking indemnification in the settlement order. Within the insurance context, the Federal Deposit Insurance Corporation also has the power to prevent deposit institutions from making indemnification payments to individuals who have been fined, removed from office, or required to take or refrain from taking certain actions by any federal banking agency.

1.6 Are there any forms of compulsory insurance?

States often require individuals and businesses engaged in certain activities to purchase insurance related to their actions. For example, motor vehicle owners are required to purchase automobile insurance in every state except for New Hampshire and Virginia. Subject to certain conditions, employers are required to carry workers' compensation insurance in every state. Some states, like California, Hawaii, New Jersey, New York, and Rhode Island, as well as the territory of Puerto Rico, require employers to purchase some form of disability insurance for their employees.

The federal government also requires some forms of compulsory insurance. The Terrorism Risk Insurance Act ("TRIA") and Terrorism Risk Insurance Program Reauthorization Act of 2015 require insurers of commercial property and casualty insurance to make terrorism coverage available under their policies. TRIA expires in 2020, and legislation to extend the programme has not yet been introduced in Congress, although the programme has wide support. Uniquely, the 2010 Patient Protection and Affordable Care Act mandates every individual to purchase health insurance if they are not covered by a sponsored health or government health plan. In December 2019, however, the Fifth Circuit Court of Appeals found the individual mandate for health insurance unconstitutional. An appeal to the United States Supreme Court is expected. While the federal tax penalty associated with the individual mandate was repealed, some states have individual coverage mandate penalties. Massachusetts, New Jersey and the District of Columbia have penalties in effect in 2019, and California and Rhode Island will impose penalties in 2020.

2 (Re)insurance Claims

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

Whether the law favours the insurer or the insured depends on the particular substantive issue.

When concerns about fairness and disparate bargaining power are implicated, insureds are generally granted more formal protections. For example, many states construe ambiguous contractual terms in favour of the insured. Similarly, insurers often have a duty to settle their claims against the insured in good faith and a duty to provide the insured with defences to claims made under a liability policy.

In contrast, state legislators have been wary of foisting moral hazards or unforeseen burdens onto insurers. Proximate cause and known loss rules protect insurers from unpredicted liabilities that were not contemplated during the contract's formation.

Furthermore, each field of insurance law creates separate substantive rules that benefit the insured and insurer differently. For example, for disability insurance, some jurisdictions may actively favour the insured. California, for instance, defines "total disability" as an insured's inability to perform the substantial and material duties of his or her own occupation, even if the disability policy expressly conditions coverage on being unable to

perform "any other" occupation as well as one's own. Similarly, for motor vehicle insurers, many states favour the insured by statutorily limiting an insurer's ability to cancel policies and by setting minimum coverage requirements. In contrast, workers' compensation insurance for workplace injuries arguably provides benefits to both the insured and insurer. Although an insurer may in some instances be bound by the decision of a workers' compensation board, it creates a streamlined, predictable process for the insurer over piecemeal tort litigation.

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

Generally, a third party does not have the right to bring a direct action against an insurer. However, there are two ways a third party may do so. First, an insured may assign a right to a third party that allows it to sue the insurer. All states allow for some right of assignment for an insurance claim, although a few states limit the assignability of certain rights. For example, in Georgia, a statutory claim for a bad-faith settlement can be pursued only by the insured and is not assignable. Second, most states also have direct action statutes, allowing for an injured party to sue the tortfeasor's liability insurer if the injured party has won the underlying substantive dispute against the insured. A minority of jurisdictions allow for suit without first winning the underlying substantive dispute.

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

The general common law rule is that an insured is not in privity of contract with a reinsurer and thus has no right of action against the reinsurer. However, certain contracts may provide for the reinsurer's liability through "cut-through" or "cutoff" clauses. These clauses are often negotiated when there are concerns about the direct insurer's solvency. Separately, in certain jurisdictions, such as New Jersey, a reinsurer may be liable to the insured if the reinsurer intervenes in the defence and management of suits brought against the direct insurer. Similarly, a reinsurer may be liable if it enters into a "fronting" agreement with an insurer. In these arrangements, a primary insurer cedes the risk of loss to a reinsurer and the reinsurer controls the underwriting and claims handling process of the policy.

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

The harshest remedy available to an insurer in these circumstances is rescission, where the policy is declared void *ab initio* and the premium returned. To access the remedy of rescission, an insurer must usually show that the misrepresentation or omission was material and there was an intent to deceive. Other remedies available to an insurer for misrepresentation or non-disclosure include non-payment or the ability to cancel a policy.

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?

Material omissions that are the equivalent of a misrepresentation may expose an insured to rescission of the policy or other contractual remedies. Moreover, insureds are generally bound by a duty of good faith to disclose information. This duty is implicated in particular when an insured has exclusive or peculiar knowledge of a material fact that may influence the writing of a policy. However, insurers have a duty to investigate representations on applications before taking action. Courts have invalidated an insurer's decision to rescind a policy without investigation when further examination would have revealed no misrepresentation. With respect to reinsurance firms, ceding companies – companies that transfer the risk from an insurance portfolio to a reinsurance firm – have an affirmative duty of good faith to disclose all material information even if the reinsurer fails to ask.

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?

There is no generally applicable, automatic right of subrogation. Instead, the right arises in certain conditions. First, the contract with the insured may itself include a right of subrogation. Second, an insurer may move for a judicially crafted remedy known as equitable subrogation that allows an insurer to sue a third-party tortfeasor. Although available in all states except Louisiana, the grant of equitable subrogation is discretionary. Courts generally look to whether the party claiming subrogation: (1) paid its underlying debt; (2) paid its debt only because of some legal obligation; and (3) is secondarily liable for the debt. Moreover, as an equitable remedy, the court will also inquire as to whether injustice will be done by granting subrogation. Third, certain statutes, such as Medicare/Medicaid and the Employee Retirement Income Security Act of 1974 (commonly known as ERISA), may also provide a right of subrogation.

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?

Both state and federal courts are sites of insurance disputes. By itself, the value of a dispute does not determine what forum is appropriate – high-value disputes are litigated in both federal and state courts, though federal and state courts have various minimum dollar thresholds for jurisdiction. Instead, the choice between federal and state courts is often driven by strategic considerations as well as jurisdictional requirements. State courts are courts of general jurisdiction and are empowered to hear all manner of claims, including insurance disputes. In comparison, federal courts have a number of jurisdictional requirements the parties to a suit must meet. The most foundational of these requirements are proper subject matter and personal jurisdiction over the parties. A court has subject matter jurisdiction either if the parties are litigating a federal law with a right of action or if the parties are members of different states and the amount in controversy is over $75,000. A federal court has personal jurisdiction if the defendant is domiciled in the state of the federal court or has significant minimum contacts with that state, a test of a defendant's ties to the forum state in relation to the underlying dispute.

The right to a jury trial varies between federal and state courts. The Seventh Amendment of the United States Constitution provides a right to a jury trial in civil cases for some legal claims, including those for money damages. However, the Seventh Amendment right does not pertain to equitable relief, meaning

a party has no right to jury trial for remedies like an injunction, garnishment, or rescission. In comparison, while the Seventh Amendment right does not apply to the States, nearly every state guarantees some form of a civil jury trial for legal claims.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In federal district court there is a $400 filing fee to begin a civil action. If a party is unable to pay, they can petition the court for leave to proceed *in forma pauperis*. Section 1915(a)(2) requires all parties seeking to proceed without paying the fees to file an affidavit regarding their inability to pay.

The filing fees in state court range from $100 to several hundred dollars, with a number of states assessing higher fees if a jury trial is requested. Many states also employ a graduated filing fee based on the value of the claim.

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

The time a civil case may take depends on each case's unique factors as well as the court and the judge responsible for the dispute. The median length of an insurance case in federal court is 265 days, but an insurance case that implicates other statutes and complex commercial dealings may last significantly longer. For instance, the median length of multi-district insurance litigation is 386 days.

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?

As compared to foreign jurisdictions, courts in the United States have significant powers to order discovery of documents in commercial actions. The Federal Rules of Civil Procedure allow parties to obtain discovery regarding any non-privileged matter that is relevant to a claim or defence in the action and proportional to the needs of the case, taking into account the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery to resolve issues, and whether the burden of discovery outweighs its benefit. State rules authorising discovery are generally similarly expansive. To begin discovery, the parties usually exchange and negotiate discovery requests. A court will rule on any disputes and may compel production of a valid request. At times, a court must limit discovery if it determines that a party seeks information that is duplicative or can be obtained from a less burdensome source, a party has had a significant prior opportunity to obtain the information, or when the burden of producing the information outweighs its benefits.

Discovery from non-parties requires a subpoena. Both federal and state procedural rules detail certain service and geographical requirements in obtaining and executing a subpoena. Moreover, courts are sensitive to the costs imposed on non-party discovery and require a party seeking third-party discovery to take reasonable steps to avoid imposing undue burden or expense on non-parties.

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?

Documents containing communications between lawyers and their clients are shielded from disclosure by the attorney-client privilege. However, a party cannot claim the privilege if the communication does not seek, provide, or otherwise reflect legal advice or if the communication involves a third party that breaks the privilege. Similarly, a party can assert the work-product protection to withhold from disclosure materials created in anticipation of litigation, regardless of whether they are created by attorneys. However, the work-product privilege is not absolute and a discovering party may seek disclosure of such documents if it demonstrates a substantial need and the inability to obtain the substantial equivalent of the materials by other means without undue hardship.

Documents produced in the course of settlement negotiations are not always protected from production. While they are generally protected at trial as an evidentiary rule, the assertion of the settlement rule as a "settlement privilege" varies from court to court. The majority of courts do not recognise the privilege, but some have endorsed a limited application of the privilege if the production of certain documents may chill settlement discussions.

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

As a general matter, a court can require a witness to testify in a civil case through a subpoena. However, this power is limited by jurisdictional and evidentiary concerns. For instance, Federal Rule of Civil Procedure 45 limits a court's subpoena power geographically to within 100 miles of where a witness resides, is employed, or regularly transacts business unless certain other conditions are met. Moreover, a witness can assert various privileges – such as the Fifth Amendment right against self-incrimination or the spousal privilege – to abstain from testifying.

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

In general, depositions of witnesses not present at trial may be used as evidence in federal court as long as their use satisfies several conditions enumerated under Federal Rules of Civil Procedure 32, the most significant of which is that the use is permissible under the Federal Rules of Evidence. In other words, the deposition must at least be relevant and fall within an exception to the hearsay rules or not be subject to hearsay rules in order for it to be offered for truth. For example, if a witness cannot be present at court due to death, illness, significant physical distance, or refuses to attend even if subpoenaed, his or her deposition can usually be introduced as evidence. In addition, statements made by an opposing party, or that party's agent or employee within the scope of that relationship, are often admissible as a party admission independent of hearsay concerns.

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?

A court must certify an expert before he or she is allowed to present expert testimony. State and federal law diverges over

the proper standard for certification. Federal courts and the majority of states follow the *Daubert* test, a four-part standard that inquires whether: (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 expert has applied the principles and methods reliably to the facts of the case. In contrast, some states like New York and California use the common-law *Frye* test that only looks to whether the expert's testimony is based on scientific methods "sufficiently established to have gained general acceptance".

Although courts are allowed to appoint experts, they rarely exercise that power. Instead, it is more likely that the parties will submit their own experts for approval. Experts in an insurance dispute can provide helpful specialised knowledge, such as calculating the magnitude of damages or reconstructing accidents.

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

Interim relief often takes the form of provisional relief to preserve the *status quo* before a final judgment. For example, in a breach of contract dispute, a party can petition the court for a temporary restraining order or preliminary injunction to prevent future occurrences of the alleged breach before the end of the litigation. A party may also move to freeze a portion of its adversary's assets to preserve them for an award. While the standards for these forms of equitable relief vary, a party must generally show that it is likely to succeed on the merits of the underlying case and would suffer irreparable harm without such relief.

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?

A party has the right of appeal for final decisions to an appellate court and for orders granting, modifying, or refusing a preliminary or permanent injunction. Most interlocutory decisions – those decided on issues that do not dispose of a case on its merits – are appealable only on a reviewing court's discretion and if they contain a controlling issue of law. A "controlling issue of law" is an issue that would lead to reversal on appeal if decided erroneously or is otherwise important to the conduct of the litigation. Some states allow a broader set of interlocutory orders to be appealed – New York, for instance, allows interlocutory orders that "affect[] a substantial right" or "involve[] some part of the merits" to be appealed.

A party's grounds for appeal are similarly constrained by the type of issue being challenged. With the exception of foundational procedural and jurisdictional issues, a party cannot raise issues for the first time on appeal. Moreover, an appellate court applies different standards of review to different types of decisions. Questions of law, such as contract interpretation or analysis of a legal standard, are reviewed "*de novo*" with no deference to the trial court. In contrast, questions of fact are reviewed for "clear error" and an appellate court gives a trial court substantial deference. Other discretionary standards like evidentiary or discovery rulings are reviewed only for "abuse of discretion", a more lenient standard of review that gives considerable deference to the decision in the court of first instance.

The stages of appeal are governed by a three-layer court structure. In federal court, the trial courts – also known as the District Courts – serve as the courts of first instance. A District Court may also review decisions by a specialised court, such as a magistrate or bankruptcy court. District Court decisions are reviewed by the Court of Appeals, a set of regional circuit courts that review cases in panels of judges. The United States Supreme Court serves as the final court of appeal, and appeal to the Supreme Court is largely discretionary. States courts have a similar three-tiered structure.

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

Pre- and post-judgment interest are generally both recoverable. Pre-judgment interest creates an award to compensate the use of monies between a date before a trial and the judgment date. Post-judgment interest creates an award for the use of monies from the judgment date until payment is received.

The interest rate differs from federal and state courts. There is no federal pre-judgment interest rate – it is instead determined on a case-by-case basis based on a court's determination of an amount that will compensate the plaintiff for the defendant's use of its funds. The federal post-judgment interest rate is based on calculating the average one-year constant maturity Treasury yield for the calendar week preceding the date of entry of the judgment along with the judgment value. In contrast, various states have created their own floors and ceilings for pre- and post-judgment interest rates. Currently, there is significant variation from state to state, but many states' post-judgment interest rates range from 6 to 12%.

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

The default rule, often referred to as the "American rule" to contrast it with other systems, requires each side to pay for its own legal fees. In the insurance context, most states allow a policyholder to recover attorneys' fees in some circumstances. For example, an insured who prevails in a coverage action and shows that the insurer acted in bad faith or demonstrates a breach of contract by the insurer can sometimes recover fees. Moreover, some procedural rules incentivise pre-trial settlement. Under Federal Rule of Civil Procedure 68, if a defendant offers settlement more than 14 days before trial and the plaintiff rejects the offer and the final judgment is equal to or less than the settlement offer, the plaintiff must pay the defendant's costs incurred after making the offer. "Costs" under this arrangement are limited to miscellaneous printing and court expenses, and they do not include attorneys' fees unless the statute creating the cause of action defines costs to include attorneys' fees. State procedural rules have similar cost-shifting mechanisms.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

While courts often encourage mediation, the power of courts to compel mediation varies. Federal courts have power under the Alternative Dispute Resolution Act of 1989 ("ADRA") not only to compel mediation but also require good faith participation in the process, pursuant to Federal Rule of Civil Procedure 16(f), 28 U.S.C. § 1927, and the local rules of various districts. Each federal district court must devise and implement an alternative dispute resolution ("ADR") programme, and provide at

least one type of ADR, including arbitration and mediation, to parties. Under the ADRA, district courts require civil litigants to consider ADR, and the court can compel parties to engage in non-binding types of ADR such as arbitration. Many district courts use settlement conferences pre-trial. Many state courts also have the authority to compel mediation. In some states like Minnesota and North Carolina, some type of ADR is mandated in most civil cases, and in New Jersey parties must participate in mediation before they can pursue a case in court. Although courts may have the ability to compel participation in mediation, they cannot force the parties to come to a settlement in mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In federal court a party that refuses to follow court-ordered meditation or one who participates in mediation in bad faith may face sanctions for failing to comply with a pretrial order under Federal Rule of Civil Procedure 16(f). In many states, like Minnesota, the courts also have the power to sanction a party who does not participate in a mandatory component of ADR. If a party refuses mediation, a court will often determine the reasonableness of the party's choice. Among other reasons, if the nature of the dispute, the success of past settlement attempts, and sums at stake in the litigation point in favour of mediation, courts may impose monetary sanctions against a party who refuses mediation. Similarly, a court may monitor the mediation process to determine if the parties are attempting to reach a resolution of their dispute in good faith. Of course, when a court does not impose mediation and one party merely requests it, the other is not obligated to accept the offer.

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?

Court intervention in arbitration is generally rare because arbitration itself is an alternative to the judicial system. The Federal Arbitration Act ("FAA") establishes a policy that favours enforcement of arbitration agreements and expressly limits a court's ability to intervene in a proceeding. There is, however, legislation pending in Congress which would amend the FAA and restrict mandatory arbitration agreements. Courts do sometimes intervene in arbitration for procedural reasons; for example, in selecting an arbitrator when an unplanned third party enters or when a multi-party arbitration is consolidated. Similarly, a court may force arbitration if there is a prior, mutual arbitration agreement one party refuses to follow.

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?

The only requirement is that a contract's arbitration clause should be clear in expressing the parties' intent to arbitrate their disputes. Many arbitration agreements include provisions addressing procedures to notify the other party of arbitration, a time limit for when arbitration may start, and procedures for selecting arbitrators.

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

With some exceptions, many jurisdictions will enforce express arbitration clauses. The Supreme Court in *AT&T Mobility LLC v. Concepcion* held that state regulations that disrupt the "fundamental attributes of arbitration" are unenforceable because they interfere with the FAA. 563 U.S. 333, 344 (2011). Supreme Court decisions since Conception have shown strong support for arbitration. States courts in Ohio, Florida, Illinois, Texas, and Wisconsin have read *Concepcion* to require judges to enforce nearly all arbitration agreements. Nevertheless, courts have still declined to uphold arbitration clauses in some instances.

Some courts have applied general contractual concepts like fraud, duress, or unconscionability to strike down certain arbitration agreements. The *Concepcion* Court left open this possibility by suggesting that these concerns do not implicate arbitration itself. The Ninth Circuit found that the FAA did not pre-empt a California law that prohibited a party from seeking public injunctive relief in any forum, because the state law did not specifically obstruct arbitration. In Kentucky, the state Supreme Court held that a state law barring employers from making arbitration a condition of employment was not pre-empted by the FAA because the statute was not an arbitration statute, but rather an anti-employment discrimination one. The U.S. Supreme Court declined to take the case. The Kentucky legislature subsequently passed a law overruling *Snyder* and reaffirming the enforceability of arbitration clauses.

Certain states, like California, Washington and Missouri, have subsequently invalidated arbitration clauses on the grounds of unconscionability or duress, albeit with narrow readings of *Concepcion*. Moreover, even states like Ohio or Alabama that generally enforce arbitration agreements have declined to do so when a litigated issue was outside the arbitration clause or when the original contract was void.

In addition, some federal courts have concluded that state regulations limiting insurance arbitration agreements are still valid. At least 13 states have banned mandatory arbitration clauses within insurance contracts and at least three have restricted mandatory arbitration through regulation. Although the FAA broadly applies to arbitration agreements, the McCarran-Ferguson Act specifically leaves states as the primary regulator of insurance law over the federal government. Therefore, some courts have concluded that a state's regulation over insurance arbitration agreements is still applicable even if its regulations over other forms of arbitration clauses are not. Several Federal Courts of Appeal have applied this theory to invalidate various insurance arbitration agreements.

Outside of its domestic law, the United States also has a similarly mixed approach in enforcing foreign arbitral awards. Although it is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, US federal courts will refuse to enforce a foreign arbitral award if it believes there to be a procedural concern with the award. For example, some federal courts have declined to enforce an award based on concerns that the United States is not a proper venue for the matter. Moreover, the Convention itself allows a party to resist enforcement of an award if the arbitral agreement is invalid or if the tribunal exceeded its authority.

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

For most jurisdictions, interim relief in arbitration functions like it does for court proceedings: it primarily serves to help preserve the *status quo* before the arbitration judgment is rendered. Thus, a party may request a court to issue an injunction to prevent an activity it claims is in breach of contract or an order of attachment to prevent its adversaries from using funds that it may need to pay a judgment in support of arbitration. Moreover, if the arbitrability of a dispute is at issue, a party might often move to stay other court proceedings pending a court's determination.

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?

Under the FAA, arbitrators do not have a general, affirmative obligation to provide a reason for their awards. If the parties request a finding of fact or conclusion of law, there is no obligation for the arbitrator to provide a conclusion. However, in an arbitration agreement itself, both parties can require an arbitrator to provide a reasoned decision.

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?

The FAA creates a narrow right of appeal to courts. A party must show: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) there was arbitral misconduct, such as refusal to hear material evidence; or (4) the arbitrators exceeded their powers, or so imperfectly executed their powers that they failed to render a mutual, final and definite award. Moreover, the Supreme Court has recognised another ground for appeal, allowing the parties to claim the arbitral award "manifestly disregarded the law". The "manifest disregard" standard applies if a party can show an arbitrator was aware of and disregarded clearly established law. Federal circuit courts are split over whether manifest disregard serves as an independent ground of appeal, but a party has no other right to appeal beyond these grounds. The Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.* confirmed that even if two parties grant themselves other avenues for appeal – such as the option to have a District Court overturn an arbiter's award based on the substance of his or her reasoning – that right is invalid. 552 U.S. 576, 584, 592 (2008).

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