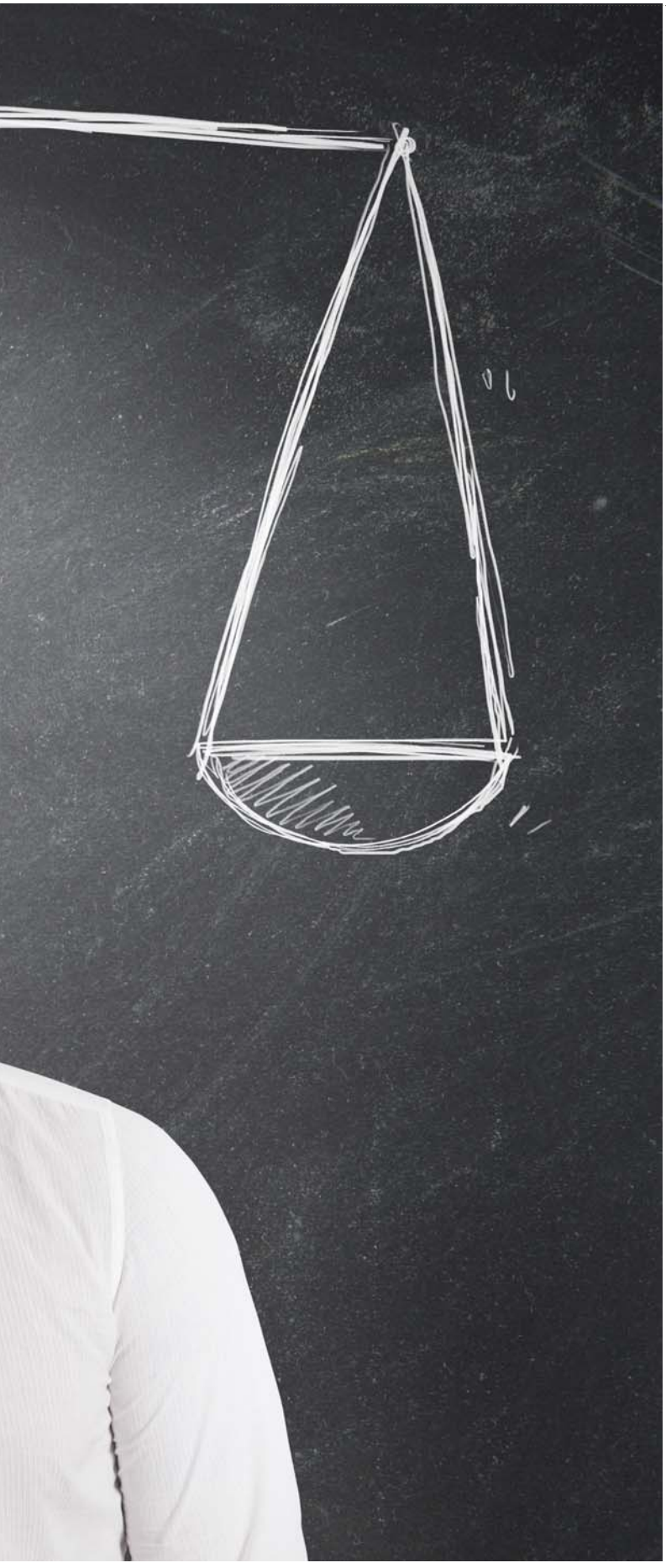

Cox Hallett Wilkinson

Arbitration: what to consider

Arbitration offers captives and other insurers the opportunity to reach relatively speedy and informed decisions in insurance and reinsurance disputes. Here, we discuss the pros and cons of arbitration vs. litigation with David Kessaram.

Arbitration is the usual method for the resolution of disputes covering a range of issues including coverage and, in some cases, the validity of insurance contracts in the captive and commercial insurance market. The usual arbitration clause in an insurance contract will specify the seat of arbitration as well as the law governing the arbitration (if not the same as the law governing the insurance contract). Arbitration is the preferred method of dispute resolution as it offers privacy and relative informality, explained David Kessaram, head of the litigation department at Bermuda law firm Cox Hallett Wilkinson.

It is rare to see substantive insurance issues (as opposed to procedural and enforcement issues) being dealt with by judges in court. But, as he explained, there are nevertheless occasions when the courts need to become involved in arbitration proceedings. Such involvement usually relates to issues such as interim measures (eg, obtaining an injunction to prevent the removal of assets pending a reference to arbitration) or obtaining the evidence of witnesses in other jurisdictions rather than the substantive merits of an individual claim.

"A WELL DRAWN ARBITRATION CLAUSE WILL STIPULATE NOT ONLY THE GOVERNING LAW OF THE ARBITRATION, BUT ALSO THE SEAT OF THE ARBITRATION."

The opportunities to have recourse to a court of law to appeal an arbitration decision in court are very limited or (depending on the arbitration regime adopted) non-existent. Under the Arbitration Act 1986 —contrast the position under the Bermuda International Conciliation and Arbitration Act 1993—it is possible to challenge a decision on a pure point of law in court. However, even under the 1986 Act, the parties are at liberty to decide to exclude such appeals. Under the Bermuda International Arbitration and Conciliation Act of 1993, however, it is not possible to appeal the arbitral tribunal's decision even on a point of law.

Turning to the enforcement of arbitration awards, Kessaram said the courts in most western countries support such awards by recognising and enforcing them in the same way as they would a judgment of their own courts. He said that there are "certain defences that can be raised to resist enforcement of an award", but said these are "very limited". Kessaram was clear however that both arbitration awards and judgments rendered by courts "enjoy equal efficacy in law", with arbitration awards being easily converted into judgments and enforced as such.

Going down the arbitration route does offer the captive a number of distinct advantages over litigation. As Kessaram explained, arbitration allows both parties to pursue their grievances behind closed doors. Arbitration also involves industry practitioners in the decision-making process, rather than a judge who may be unfamiliar with the custom and practices of the insurance and reinsurance industry. The members of the arbitral tribunal will have a firm understanding of the case presented before them, said Kessaram, without having to be educated with regard to the issues by the parties' lawyers.

Pursuing an action through the courts tends to be "slow, formal and public"—factors that tend to encourage parties to opt for arbitration clauses.

The existence of an arbitration clause in an insurance or reinsurance contract prevents a party to the contract pursuing a resolution of a dispute in the courts against the will of the other party. Unless both parties agree that the forum for such a dispute is to be a judicial (as opposed to an arbitral) one, contractual stipulations for arbitration will ensure that the forum is an arbitration. Kessaram said that he often sees companies pursuing litigation through the judicial courts only to be restrained by an injunction and compelled to follow the arbitration route. Unless both parties agree that litigation is to be the method of resolving disputes, whether at the time of entering into the insurance contract or after a dispute has arisen, arbitration remains the generally accepted forum for dispute resolution.

A choice of venue

Arbitration as a means of dispute resolution is an important consideration for captive insurers, particularly considering their international footprint. As Kessaram outlined, many re/insurance contracts stipulate the place where the arbitration will be held (the seat of arbitration)—with London historically proving a popular choice. But as Kessaram made clear, "Bermuda is making something of a resurgence as a venue for arbitration." Considerations when choosing the seat of arbitration generally include the existence of a known and acceptable arbitral law and institutions that will support and help regulate the arbitral process. Matters of convenience, he said, may also play a part in the decision, eg, the location of witnesses, arbitration experts and company headquarters. Generally the venue is specified in the arbitration clause of the insurance contract but there are opportunities for both parties to agree on a new venue for proceedings if they so wish. As Kessaram explained, a well-drawn arbitration clause will stipulate not only the governing law of the arbitration, but also the seat of the arbitration, whether it is Bermuda, New York, London, or elsewhere.

Captives will also need to consider whether to incorporate in their arbitration agreement a system of rules to govern the arbitral proceedings. Kessaram explained that each of the established arbitral institutions (such as the London Court of International Arbitration) has a body of procedural rules which may or may not be stipulated in the arbitration agreement to govern. The International Chamber of Commerce, located in Paris, another well-regarded international arbitral institution, has its own body of rules which may be incorporated expressly in the arbitration clause. It is not vital to stipulate what rules are to govern as the parties are at liberty to agree on a set of rules even after a dispute has arisen and, if they are unable to agree, the arbitrators may decide how the arbitral process is to be regulated.

What is more important is that the law of the place of arbitration chosen by the parties be a well recognised and familiar set of laws supporting the efficacy of arbitration as a means of dispute resolution. Bermuda is well served in this respect with the UNCITRAL Model Law being incorporated in our domestic law by the Bermuda International Conciliation and Arbitration Act 1993. ●

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