

Mechanisms for resolving disputed claims

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Why are claims disputed?

- Stakeholders (Insured, Insurer, Broker, Loss Assessor, Loss Adjuster, Lawyer, Forensic Accountants etc.)
- Complexity
- Communication / misunderstanding :–
 - involvement of broker
 - Insured badly informed
 - Lack of focus on role of insurance until something goes wrong
- Ambiguous policy drafting

What happens when claims are disputed?

- **Insurance Ombudsman**
- **Arbitration**
- **ADR (inc. negotiation)**
- **Litigation**

Insurance Ombudsmen

- Ombudsman is a Scandinavian word meaning “grievance man”
- Financial Ombudsman Service (FOS)
 - Free
 - Independent
- Statutory Ombudsman scheme covering most areas of personal finance
 - Most common areas referred to Ombudsman – motor, household, life, warranty, travel.

Ombudsman – Criteria

- Private individuals
- Businesses with annual turnover of less than £1 million
- Legal / arbitration proceedings have been discontinued
- Only available once claimant has referred their complaint to the very highest levels of insurer's management and they remain dissatisfied

Ombudsman – Insurers' obligations

- In event of dispute must advise the insured of the FOS service – normally do so in policy
- Insurers abide by Ombudsman's decision up to awards of £100,000
- Provide Ombudsman with full particulars of policy

Ombudsman –

Options and obligations of Ombudsman

- May seek professional assistance and advice
- Must make decision on basis of what is “fair and reasonable” in the circumstances, taking into account:
 - The law,
 - The FSA rules and guidance
 - Good insurance practice
- May reject any complaints
- Publishes an annual report (www.financial-ombudsman.org.uk/publications/annual-reviews.htm)

Arbitration

- Arbitration Act 1996
 - Sweeps away all previous legislation on arbitration in England, Wales and Northern Ireland
 - Came into force 31 January 1997
 - 3 pillars on which the Arbitration Act 1996 is built:
 - General principals (Section 1)
 - General duty of the tribunal (Section 33)
 - General duties of the parties (Section 40)

Arbitration

General principles which govern all arbitration (Section 1)

The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense

and

The parties should be free to agree to agree how their disputes are resolved, subject only to such safeguards that are necessary in the public interest

and

The court should not intervene except as provided by the Act.

Arbitration

- Arbitrators' general duties (Section 33)
 1. The Tribunal shall –
 - (a) Act **fairly and impartially** as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
 - (b) Adapt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

It goes on to say that:

the Tribunal shall comply with that general duty in conducting the proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

Arbitration

- The parties' duties (Section 40)
 - (a) Complying without delay with any determination of the Tribunal as to procedural or evidential matters, or with any order or directions of the Tribunal and
 - (b) Where appropriate, taking without delay any necessary steps to obtain a decision of the court on the preliminary question of jurisdictional law.

Arbitration: Key features

- Private
- Arbitrator(s) chosen for their experience/expertise in particular class of business
- Arbitrator can refer to court to make a decision on a legal point before proceeding
- In the policy?
- Arbitration agreement can:
 - Name arbitrator
 - 3 arbitrators
 - Sole arbitrator : s15(3) "If there is no agreement as to the number of arbitrators the tribunal shall consist of sole arbitrator"

Arbitration

The Process

“Calderbank” letter - sealed offers (arbitrator does not know what offer is), means of pressing a plaintiff to settle

- If eventual award is less than offer then arbitrator likely to order that plaintiff pays all costs of action since receipt of “Calderbank” offer

Arbitration

The award

- In writing
- With reasons
- But remember – these are private!

Arbitration Appeal

- No appeal to an issue of fact
- Challenge on basis of “lack of jurisdiction” (s.67)
- Can appeal on basis of “serious irregularity”
- Can appeal on a question of law only if court grants leave

ADR

“ADR ... has its roots in the profound dis-satisfaction of many litigants with the current litigation and arbitration systems, and the experience of many involved in conflict that ‘there must be a better way’.

It would be wrong, however, to conclude that the appeal of ADR lies solely or even mainly in the absence of better alternatives. In its own right, ADR has staked out a new philosophical and practical ground, and challenged many of the traditional assumptions about conflict, not least in finding a structured way to redefine it as an opportunity, and in bringing to its resolution a significantly greater degree of creativity”.

Commercial Dispute Resolution – Mackie, Miles and March, Butterworths 1995 (page vii).

ADR

“... please God don't let the legislators get their hands on mediation or in no time at all it too will join litigation and arbitration as another process in which the procedural means become more important than the end – resolution of the dispute – to the detriment of the client in quality, time and costs terms”.

James Franks, Director of CEDR, CEDR
Newsletter, Autumn 1994.

ADR

Forms of ADR

- Negotiation
- Mediation
- Mediation-Arbitration
- Mini-trial or structured settlement procedure
- Expert appraisal
- Judicial appraisal
- Expert determination

ADR

Negotiation

“Negotiation is, of course, a form of dispute resolution and is probably the most commonly used and widespread form. Negotiation comprises any form of communication where parties who have opposing interests discuss them with a view to seeking some mutually acceptable resolution. The art, or perhaps science, of negotiation has been the subject of several learned treaties, the main topic of which seems to be the ways in which to ‘get to yes’”.

Alternative Dispute Resolution – The way forward for insurance industry? J. Abramson, M. Dillon and D. Smith – AIRMIC Conference 1997.

ADR

Negotiation

- Positional – each party takes a position, argues for it and makes concessions to reach a compromise

- Principled –
 - Developed by Harvard Negotiation Project
 - Decide issues on their merits rather than haggling
 - Seek mutual gain where possible
 - Where interests conflict result is based on fair standards independent of will of either side
 - Used by United States in Middle East peace negotiations at Camp David

ADR

Mediation

- Interchangeable with conciliation, only difference is that a conciliator will be more pro-active
- Written statements of both parties
- Mediator discusses case with each party individually and in private
 - Identify real issues of disagreement
 - Narrow the dispute
- Mediator suggests constructive solutions
- Essential that parties are represented by people who have authority to reach agreement on the day

ADR

Mediation-arbitration

- Parties submit to mediation
- In event that no agreement reach proceeds to arbitration
- Mediator goes on to be arbitrator – saves costs as avoids duplication
- Can mediators/arbitrators' position be conflicted?

ADR

Mini-trial or structured settlement procedure

- Neutral sits as chairman of a tribunal composed of chairman and a senior representative of each party
- Representatives should not be immediately connected with the dispute
- Review case details submitted by each party then negotiate with each other and independent chairman with a view to settlement

ADR

Expert Appraisal

- Parties refer to an expert in that particular field for an opinion
- Opinion is not binding
- Can influence the parties' approach to subsequent negotiations

ADR

Judicial Appraisal

- Run by Centre for Dispute Resolution (www.cedr.co.uk)
- Judges and Senior Counsel give preliminary view on legal position between parties
- Parties can decide whether or not opinion will be binding

ADR

Expert Determination

- Halfway house between ADR and arbitration
- H/w expert does not possess the powers of an arbitrator under the Arbitration Act 1996

ADR

Benefits to Insurer

Claims handling = managing claims and reducing insurer's costs

- ADR allows claims handler to retain control, in litigation control is devolved to lawyers.
- ADR achieves more settlements than not – reputational benefits for insurer.
- Cost savings (and time)

ADR

Other benefits

- Flexibility
- Cost savings
- Confidentiality
- Greater control retained by parties
- Stronger commercial focus
- Independence of mediator
- Greater speed of resolution

ADR

Disadvantages (1 of 2)

- Non-binding
- Non-enforceability (h/w can be if parties enter into contract on basis of ADR decision)
- Incomplete disclosure
- Non-universal application (not always appropriate, e.g. if client seeking an injunction)

ADR

Disadvantages (2 of 2)

- Information voluntarily disclosed during mediation cannot be taken back in event that mediation fails.
- Implications of *Commercial Union v NRG Victory* [1998] 2 All E.R. 434
 - Settlement agreed on advice of Texan lawyer
 - Reinsurers declined cover
 - Can be addressed by 'follow the fortunes' clause in reinsurance contract

Litigation Parties

- Claimant – commences litigation
- Defendant – insurer
- 3rd parties
- Litigation teams – claims manager, solicitors, barrister, experts

Litigation Advantages

- Parties have access to knowledge and experience of judiciary
- Detailed reasons for decision – help parties avoid similar mistakes in future
- Court's judgement is enforceable
- Costs follow event i.e. winning party awarded legal costs
- Involuntary
- Mechanisms for curtailing disputes:
 - Summary judgement (no defence)
 - Preliminary hearing (quantum)
- Court can award interest on damages

Litigation

Disadvantages

- Procedural requirements e.g. interviewing witnesses makes it expensive
- Slow – many years for complex disputes
- Public – lead to disclosure of commercially sensitive information
- Court can only resolve disputes by reference to the law – statute and precedent **NOT** commercial considerations
- Limited remedies

Litigation

Other features

- Woolf Reforms – 26 April 1999
- Civil Procedure Rules (CPR)
 - Statement of case
 - Particulars of claim
 - Part 36 offers
- Third party proceedings
- CPR encourages parties to use ADR and can impose cost sanctions if a party has unreasonably refused to do so
- Structured settlements - PI

How to avoid disputes?

- Unambiguous policy wordings
- Front-end advice to Insured re. coverage
- Clear procedures for Insured to follow in the event of a claim
 - Who to phone?
 - First 24 hours
 - Disaster recovery plans etc.
 - Attendance of loss adjuster
- Training of claims staff – constructive and responsive communication to claimant's concerns (at times of stress)

**Thank you for listening and
good luck with your studies**

Any further questions?

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