The Right to Appeal Arbitration Awards in Coverage Disputes

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Introduction

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Insurance and reinsurance policies commonly require arbitration of coverage disputes. The advantages of arbitration in the context of a coverage dispute include the relative privacy of the arbitral process, hearings and award. Due to the limited grounds on which an award can be challenged in the English Courts, sensitive information addressed in such disputes often remains confidential even after the conclusion of proceedings.

The finality of the arbitral award and the benefits in terms of avoiding further costs and delay provides further justification for choosing arbitration. However, a consequence of this is that the insurance industry is deprived of a growing body of case law in respect of coverage issues. There is also a risk of inconsistent decisions by arbitral tribunals when faced with similar issues.

In light of the limited right to appeal such decisions, the potential for injustice is clear and some consider that parties should be afforded greater rights to appeal. This article highlights the relevant factors and questions whether the current balance between achieving finality and permitting limited appeals is right.

Grounds of challenge

Under the Arbitration Act 1996 (the Act), an arbitration award can be challenged in the English Courts on three grounds:

- Challenging the tribunal's substantive jurisdiction (Section 67 of the Act);
- Challenging the award on the grounds of serious irregularity affecting the tribunal (Section 68 of the Act); and
- An appeal on a point of law (Section 69 of the Act).

The rights of appeal under sections 67 and 68 are "mandatory provisions" and the parties are unable to "contract-out" of them. They would cover extreme cases, such as lack of consensus in choosing arbitration, or bias on the part of a panel member.

The right to appeal on a point of law, under section 69 of the Act, does not allow findings of fact or procedural errors to be reviewed. Issues of foreign law will not be reviewed as they are considered to be questions of fact; therefore where the governing law of an insurance policy is not English law, for example in a Bermuda-form policy, there will be no right to appeal under this section of the Act.

The parties are free to exclude rights to appeal on a point of law and it is common for such rights to be waived or circumscribed by the arbitration agreement or the relevant rules of arbitration. The same result can be achieved by the parties agreeing that the award shall not be supported by written reasons (a course rarely adopted in English coverage disputes).

Wordings

A typical arbitration clause would provide that:

> *"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1996…"*

In the absence of any additional wording on the subject of the parties' rights to appeal, this wording would preserve the parties' rights to appeal the tribunal's award on a point of law. Often the following additional wording is included (such as in the XL004 form),

> *"the parties waive any right to appeal to the fullest extent permitted by applicable law*".

This wording would be effective to exclude the right to appeal on a point of law, under section 69 of the Arbitration Act.

Arbitral rules

The LCIA and ICC Arbitration Rules both provide exclusions to the right to appeal on a point of law under the Act, in the following terms:

The LCIA Rules:
Article 26.9
All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

ICC Rules:
Article 34.6
Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

Procedure

Even if the parties' rights to appeal on a point of law have not been excluded, the process is not straightforward and can only be brought with the agreement of all parties to the arbitration proceedings (s.69(2)(a)) or with the leave of the court (s.69(2)(b)). A challenge must be brought within 28 days of the award.

Leave to appeal will only be given by the Court if all of the following statutory requirements are satisfied: (1) the determination of the question will substantially affect the rights of one or more of the parties; (2) the question of law is one which the tribunal was asked to determine; (3) on the basis of the findings of fact, the decision of the tribunal is obviously wrong; or the question is one of general public importance and the tribunal's decision is open to serious doubt, and (4) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper for the court to determine the question.

Case law

In light of these points it is unsurprising that appeals from arbitration awards in respect of coverage disputes are rare. When they do occur, the court has demonstrated a clear desire to uphold arbitration awards.

A significant example is the case of *IRB Brasil Resseguros SA v CX Reinsurance Company Ltd*.[1] CX Re settled a number of US liability claims and sought recovery from its excess of loss reinsurer, IRB Brasil Re, who refused to pay. Arbitration proceedings were subsequently initiated and the tribunal found in favour of CX Re. The award was appealed on the grounds that the tribunal had made various errors of law including that (1) it referred to the settlements being "arguably" within the terms of the insurance and reinsurance rather than "on the balance of probabilities", the correct standard of proof in England; (2) it made no reference to relevant case law or the period clause, in determining that the losses sought to be recovered under the reinsurance contract fell within the cover for the relevant period; and (3) it referred to the losses stemming from a single "cause" rather than "event" in concluding that the losses had arisen out of a single event.

The court found there had been no error of law and upheld the award on the grounds that (1) although the arbitrators had used "infelicitous" wording, they had reached a decision on the balance of probabilities; (2) it had not been necessary for the arbitrators to spell out the period clause or to make express reference to case law and this did not mean they had adopted an approach which was inconsistent with it; and (3) whilst the arbitrators had wrongly referred to whether the loss stemmed from a single cause, they intended to say that the loss stemmed from a single event.

There was a similar outcome in the more recent case of *AIOI Nissay Dowa Insurance Company Limited v Heraldglen Limited and Advent Capital (No 3) Ltd*,[2] a reinsurance dispute which focussed on whether aviation liability losses arising out of the 9/11 attack on the World Trade Centre arose from one or two "events" under the relevant policies. In their award, the tribunal concluded that the insured losses caused by the attacks on the WTC arose out of two events and not one. On appeal, the arbitration award was upheld by the court. The Judge found that the tribunal made no error of law in reaching their conclusion, which it was open to them to reach.

An alternative

[1] [2010] EWHC 974 (Comm).
[2] [2013] EWHC 154 (Comm).

The parties' ability to "opt-out" of their rights to appeal in the arbitration agreement and/or the relevant rules of arbitration is addressed above. It is also permissible for parties to agree their own criteria for the grant of permission, effectively an "opt-in" to extend the parties' rights to appeal. For example, the parties may agree that a right to appeal arises where the award includes a question of law of general interest or importance to the insurance industry.

Such an option is available under the ARIAS Arbitration Rules ("AAR"), a set of procedural rules which have been specifically designed to cater for insurance and reinsurance disputes. Whilst the (unamended) AAR do not specifically address the parties' right to challenge an award, ARIAS has specifically acknowledged the difficulty with appeals. It has prepared an additional paragraph that may be added to an arbitration clause by contracting parties who wish to permit an appeal where the arbitrators themselves consider that the industry would benefit from judicial consideration of specific legal issues. The clause provides,

> *The parties are deemed to have agreed that there will be a right of appeal to the Courts but only where the tribunal certifies in its award that the dispute between the parties involves a question of law of general interest or importance to the trade or industry in question. For the avoidance of doubt this provision does not apply to any ruling by a tribunal in relation to its own jurisdiction or otherwise restrict the parties' rights under Section 69 of the 1996 Act.*

Whilst such agreements remain voluntary, it is unclear as to how popular they are in practice. Indeed, the proposition is not an altogether attractive one: the parties are being asked to agree to finance additional litigation for the greater good of the insurance industry. We can also envisage the parties disputing whether a point is of general interest or importance, and this may not be a straightforward yardstick to apply, although of itself this should not be permitted to prevent appeals save in extreme cases.

Is the balance right?

During a recent lecture organised by the Insurance Institute of London, Lord Saville (who led the reforms leading to the Arbitration Act 1996) launched a spirited defence of the Act, including the freedom of the parties to agree the terms of an arbitration clause. While in theory it is true that the parties are free to agree the terms of the clause including the rights of appeal, the commercial reality may be very different. An arbitration clause will often be inserted into a policy wording or reinsurance contract by the broker, or simply as part of a standard-form policy over which one party has no realistic power to negotiate. Where there is a risk of inconsistent decisions between panels and the Court has shown a clear reluctance to disturb awards, the potential for injustice is clear. Further, in light of the substantial sums at stake in some disputes, notably liability claims under Bermuda-Form policies, the financial repercussions can be extreme.

Finality, speed and privacy are often regarded as justifications for restricting appeal rights from arbitration awards. Although arbitration can be swifter than litigation, in practice arbitration is not a swift procedure. Is it more important to seek some potential saving of time or should we look again at whether the present procedure could do more to ensure that the right solution is achieved?

As for privacy, we would question how effectively this operates in practice, particularly within a narrow industry sector. If parties are given greater access to appellate courts, practical steps such as anonymising awards and judgments could go some way to allaying privacy concerns. If the issues are truly sensitive then an application to hear the appeal "in camera" may be made.

Should the parties' rights of appeal should extended to strike a fairer balance? In the author’s view, they should. As a minimum, it should be the norm that parties to coverage arbitrations should be entitled to appeal where the award includes a question of law of general interest or importance to the insurance industry. We also question whether viewing foreign law, when it governs the parties' rights, as a question of fact can be justified. Whether changes are effected by way of further statutory intervention or by way of market practice, a concerted approach needs to be adopted by the insurance industry in order to strike a fairer balance between protecting the key characteristics of the arbitration process and the parties' rights that their dispute be determined justly.