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ARBITRATION IN THE ENGLISH INSURANCE INDUSTRY

INTRODUCTION

The arbitral process was formally recognised by the Act of 1698 and supplemented by the Civil Procedure Act of 1833 and the Common Law Procedure Act 1854. Until 100 years ago, however, arbitration was frequently condemned in legal circles as an "attempt to oust the jurisdiction of the Courts". The last 100 years have seen a change in this attitude and the Courts are now recognising the arbitral process as a complementary system under which disputes of a technical nature are referred to arbitration in preference to the Courts. This change has been underlined by the effects of the Arbitration Act 1889 followed by those of 1934 and 1950. The Acts of 1924 and 1930 related to the carrying out of international arrangements and the 1975 Act implemented the enforcement provisions of the New York convention.

The London Commercial Court is advised by a Committee whose members represent both branches of the law, various City interests such as banking, shipping, insurance and the commodity markets and arbitration bodies. Towards the end of 1977, this Committee made certain recommendations to the Lord Chancellor concerning - inter alia - the "Special Case" procedure. They reported that some parties domiciled abroad were reluctant to agree to arbitrations in London because of the right to request a special case which was frequently employed as means of securing delay in implementation of an award. The Committee therefore proposed that the law be amended to permit "contracting out" of the right to request a special case in "supranational" contracts such as large construction contracts between British contractors and an overseas Government or Agency.

The Arbitration Act 1979 includes more fundamental changes. Case stated (and an appeal against an award for an error on its face) have been abolished and substituted by a limited right of appeal on questions of law which may necessitate "speaking" awards. The majority of such appeals will be limited to the High Court - unless an important legal principle is involved. Detailed provisions are made for the right to "contract out" of an appeal but a distinction is drawn between the time of negotiation of such an agreement - that is whether it may be permitted as a condition of the original contract arbitration agreement or only applicable after a dispute has arisen. Broadly speaking, international contracts fall within the first category and domestic ones the second. But there is separate provision for contracts relating to shipping, insurance and commodities, If any of these is subject to a foreign law, "contracting out" before a dispute has arisen may feature in the contract but otherwise it can only be allowed after the difference has occurred.

Insurance or Assurance

There is frequent confusion and misunderstanding of the distinction between "insurance" and "assurance" - especially in the names of some insurance companies. Technically an "Insured" pays his premium for protection against something which may or may not occur (hopefully not) whereas an "assured" will inevitably be paid when the event occurs - in this case certainty as determined either by death or by the effluxion of time. This is because conventional life and endowment assurance premiums have an investment content. Nonetheless further confusion can arise because "Term assurance" - so designated because no payment is made if the life survives the term - is really "insurance". Moreover the Lloyd's S.G. policy form which has been used to provide marine insurance cover for hundreds of years refers to "The Assured, their executors, administrators and assigns" and its amending clauses which developments have promoted also refer to the "Assured". On the other hand the Marine Insurance Act 1906 commences with the words "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the Assured.." In English the word "Assurance" has also a personal connotation - for example something in the nature of a promise. However, the logic of the French "Assurer, Assurance Assure etc." seems to cover all aspects - commercial and otherwise.

Marine Insurance

Marine insurance is the oldest form of insurance. There has never been an Arbitration Clause in the S.G. policy and related Clauses mentioned above (all of which are standard wordings used by both Lloyd's and the Insurance Companies) but these parties also approve the standard form of Salvage Agreement on a basis of "No cure no pay" - that is payment is conditional on a successful salvage operation. If the contractor (i.e. the Salvor) does succeed he advises the Committee of Lloyd's the amount of remuneration he requires. Pending provision of an appropriate security, the Contractor has a line on the property salved. Within 42 days of payment of the security any of the following parties can make a claim for arbitration: the owners of the ship, the owners of the cargo or any part thereof, the owners of any freight separately at risk or any part thereof, the contractor or any other party who may have an interest. The Arbitration shall be held in London according to English law and the remuneration for the services shall be determined by an Arbitrator appointed by the Committee of Lloyd's. It is perhaps worth quoting in full the paragraphs relating to the Conduct of the Arbitration which reads as follows:

"The Arbitrator shall have power to obtain call for receive and act upon any such oral or documentary evidence or information (whether the same be strictly admissible as evidence or not) as he may think fit and to conduct the Arbitration in such manner in all respects as he may think fit and shall, if in his opinion the amount of the security demanded is excessive, have power in his absolute discretion to condemn the Contractor in the whole or part of the expense of providing such security and to deduct the amount in which the Contractor is so condemned from the salvage remuneration. Unless the Arbitrator shall otherwise direct the parties shall be at liberty to adduce expert evidence at the Arbitration. Any Award of the Arbitrator shall (subject to appeal as provided in this Agreement) be final and binding on all the parties concerned. The Arbitrator and the Committee of Lloyd's may charge reasonable fees for the services in connection with the Arbitration whether it proceeds to a hearing or not and all such fees shall be treated as part of the costs of the Arbitration. Interest at a rate per annum to be fixed by the Arbitrator from the expiration of 21 days (exclusive of Saturdays and Sundays or other days observed as general holidays at Lloyd's) from the date of the publication of the Award by the Committee of Lloyd's until the date of payment to the Committee of Lloyd's shall (Subject to appeal as provided in this Agreement) be payable to the Contractor upon the amount of any sum awarded after deduction of any sums paid on account. Save as aforesaid the statutory provisions as to Arbitration for the time being in force in England shall apply".

The standard form makes provision for Appeal facilities: any of the parties mentioned previously (including of course the Contractor himself) can appeal to the Committee of Lloyds within 14 days of the Award and a Cross-appeal must be sent to Lloyds within 7 days of receipt of Notice of Appeal. The Committee have power to refer the appeal to "a person or persons selected by it" and "Any appeal shall be final and binding on all the parties concerned". It should be noted that salvage charges are different from what are known as "Sue and labour" charges (those incurred by the Master of the Vessel to avoid or minimise the effects of an insured peril) and "General Average expenditure" which involes the deliberate sacrifice of one of the interests involved for the safety of the venture as a whole.

A marine insurance policy affords the owner of a vessel a rather limited cover compared with the scope of a motor or aircraft policy. The reason is historical. It was only as a result of a case in 1836 that underwriters agreed to cover collision liability to the hull and cargo of another ship and to avoid negligent navigation this cover was limited to three-quarters of the liability. It was also limited by the sum insured on the vessel. In order to recover the remaining one-fourth the Shipowners set up their own "Clubs" operated on a mutual basis. Partly because of this and also because marine underwriters were reluctant to accept liability for loss of life, the system of Protection and Indemnity Clubs has developed. The "Protection" aspect indemnifies a shipowner against liability for loss of life or personal injury,

damage to objects on land, one-fourth Running-down liability and life salvage. The "Indemnity" function reimburses shipowners for liability to cargo owners as a result of faulty stowage, non-delivery and also includes payments for sickness and repatriation of crew plus a large variety of other contingencies. The Clubs also supplement the marine insurance market in providing War risks cover.

The constitution of a P & I Club resembles that of a partnership, although in the Rules the "partners" are usually referred to as "Directors". Appended is a typical Arbitration Clause in the current Rules of a P & I Club - paragraph (c) has a considerable significance in the history of English arbitration.

DISPUTES

(a) If any difference or dispute shall arise between an Owner and the Association out of or in connection with these Rules or any contract between them or as to the rights or obligations of the Association or the Owner there-under or in connection therewith, such difference or dispute shall in the first instance be referred to and adjudicated uponby theDirectors. Such reference and adjudication shall be on written submissions only.

(b) If the Owner concerned in such difference or dispute does not accept the decision of the Directors it shall be referred to the Arbitration in London of two Arbitrators (one to be appointed by the Association and the other by such Owner) and an Umpire to be appointed by the Arbitrators, and the submission to arbitration and all the proceedings therein shall be subject to the provisions of the English Arbitration Act, 1950 and any statutory modification or re-enactment thereof.

(c) No Owner shall be entitled to maintain any action, suit or other legal proceeding against the Association upon any such difference or dispute unless and until the same has been so referred to the Directors and they shall have given their decision thereon or shall have made default for three months in so doing, and, if such decision be not accepted by such Owner or if such default be made unless and until such difference or dispute shall have been referred to arbitration as hereinbefore provided and the Award thereunder shall have been published and then only for such sum (if any) as the Award may direct to be paid by the Association, and the sole obligation of the Association to such Owner under these Rules and any contract between them or otherwise howsoever in respect of any such dispute or difference shall be to pay such sum as may be directed by such an Award."

SCOTT v AVERY

During the 1850's, Scott, a shipowner, had a claim against Avery who was operating a P & I Club in Newcastle. The Club's lawyer had introduced a clause into the Club Rules making it a condition precedent that the plaintiff should first obtain an arbitral award in his favour before he could prosecute an action against the Club. (A rather similar wording to that in Paragraph (c) under the heading 'Disputes'.) Scott was not satisfied with the sum offered in settlement and so sued the Club which pleaded that a suit was barred because there had been no arbitration. This defence was rejected by the Court whereupon Avery appealed to the Exchequer Chamber (the then equivalent of the Court of Appeal) consisting of eight judges (as against four in the Court of first instance) which unanimously reversed the verdict and so Scott took his case to the House of Lords. Although opinion was not unanimous, the majority view was that Scott should first have obtained an Arbitral Award. It was said that the effect of the clause resembled the rule common at race meetings where the decision of the stewards is final.

The Scott and Avery decision (1856) had a pronounced effect on Arbitration Clauses in insurance policies generally. In the case of Viney versus Bignold (1887) the policy stated that "any dispute arising in the adjustment of a loss should be submitted to arbitration, that the award of the arbitrator should be conclusive evidence of the amount of the loss and that the party insured should not be entitled to commence any action until the amount should have been referred and determined and then only for the amount awarded". Because the loss had not been referred or determined this was held to be a good defence against a suit.

CONDITION PRECEDENT

Three insurance cases of importance occurred within a few years of each other about the end of World War I and it is interesting to note that they involved all three non-marine branches of the business - fire, burglary and life.

The first of these - Jureidini v National British & Irish Millers Insurance Co. Ltd. (1915) - concerned a claim for a fire which had occurred in suspicious circumstances in a warehouse in Costa Rica. The policy contained a Condition (12) which read:

> "If the claim be in any respect fraudulent or if any false declaration used in support thereof..... or if the loss or damage be occasioned by the wilful act or with the connivance of the insured all benefit under this policy shall be forfeited".

There was also an Arbitration Clause (17) on the lines of Scott v Avery reading:

> "If any difference arises as to the amount of any loss or damage, such difference shall, independently of all other questions, be referred to the decision of an Arbitrator... and it is expressly stipulated and declared that it shall be a condition precedent to any right of action

or suit upon this policy that the award by such arbitrator of the amount of the loss or damage, if disputed, shall be first obtained".

In the Court of first instance, a special jury found that plaintiffs did not set the premises on fire (or connive at it), that the claim was not fraudulent and awarded £3,000 against a claim of £6,250. The defence that no award had been made in accordance with Condition (17) was not accepted by the Judge. The Court of Appeal reversed this on the ground that "Ascertainment and award of the amount of the claim pursuant to Condition (17)" was a condition precedent to maintenance of the action.

However, the House of Lords subsequently ruled that by repudiating liability on the ground of fraud and arson under Condition (12), the Company had disentitled themselves to rely on the Arbitration Clause. Lord Haldane said "when there is a repudiation which goes to the whole substance of the contract, I do not see how that person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced". (In the case of Heyman v Darwins (Not an insurance case) in 1942 the House of Lords discussed the application of "Approbate and reprobate" to a contract with an Arbitration Clause and stressed that because the Clause "Did not impose upon one of the parties an obligation in favour of the other" repudiation of the contract did not debar arbitration).

In relation to the Jureidini case, Mr. J.B. Matthews, K.C. in an address to the Insurance Institute of London in 1920 commented "It will be observed that the result of the judgment was precisely the same as it would have been had the Company repudiated for fraud antecedent to and inducing the issue of the policy" and goes on to say that "A Safe and sure way to steer clear of the difficulty created by Jureidini is to have only one clause of arbitration and to make that clause applicable to questions of liability as well as to questions of amount". We shall see why this concept has never been implemented.

The case of Stebbing v Liverpool London & Globe (1917) involved a burglary claim for which the Insurers sought to repudiate liability because of mis-statements in the answers to the proposal form questions. A case was stated as to whether the Arbitrator had jurisdiction if such mis-statements had vitiated the contract and the Court found in favour of the Company. The claimant sought to use the Jureidini argument but the circumstances here were of course quite different i.e. because the contract itself was void.

Woodall v Pearl Assurance (1919) concerned a mis-statement in a life assurance proposal and the policy contained an arbitration clause which was a condition precedent and "in the widest possible terms". Upon action being brought, the Company applied under Section 4 of the 1889 Act for a stay but a Judge in Chambers refused this on the ground that the case was not like Jureidini.

The trial judge held that Jureidini did apply and that the company by repudiating liability had disentitled themselves to the benefit of the Arbitration Clause. He also found as a fact that there had been no mis-statement and judgment against the Company was entered. The Court of Appeal reversed the decision on the application of the Arbitration Clause. During this process, Lord Justice Warrington gave his classic differentiation as between types of Arbitration Clause.

SIMPLE ARBITRATION CLAUSES

Under this type of clause, a Company-if sued- is entitled under Section 4 of the 1889 Act (also Section 4 of the 1950 Act) to apply for the proceedings to be stayed provided the applicant "is ready and willing to do all things necessary to the proper conduct of the arbitration." This is to ensure that the parties resort to the procedure to which they originally agreed. However, under Section 14 of the Arbitration Act 1934 - consolidated in Section 24 (2) of the 1950 Act the court has the power to refuse to stay such proceedings where there has been any suggestion of fraud. This aspect is, of course, of fundamental import to the insurance world.

CONDITION PRECEDENT CLAUSES

These were originally classed by the Lord Justice as clauses under which an award relating to liability and quantum is a condition precedent to any right of action with a second category under which an award on quantum only (as distinct from liability) fulfils the condition precedent. (Theoretically there is the obvious third category where an award on liability as distinct from quantum has to be made).

POWER OF COURT TO STAY

There is no difference in the application of this to either class of Clause and it is here worth noting that Section 25 (4) of the Arbitration Act reads as follows:

> "Where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the High Court or Court of Appeal if it orders (whether under this section or any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute".

INDEMNITY AND SUBROGATION

In the case of Digby v General Accident 1943, a car owner had instituted proceedings for personal injuries against her chauffeur who claimed indemnity in terms of Section 36 (4) of the Road Traffic Act 1930, under her policy which contained a Condition Precedent Arbitration Clause. He requested and received a "stay" and the arbitration condition was upheld on a case stated, although the eventual outcome turned on a different issue.

A rather different case was that of Smith v Pearl Assurance (1939) in which the Insurers sought and obtained a "stay" against which the claimant appealed on the ground that he was a "poor person" who could not obtain legal aid to prosecute an arbitration. He subsequently sought compensation under the Third Parties (Rights against Insurers) Act 1930 but the Court of Appeal declined to decide whether Section 25 (4) of the Arbitration Act applied.

This is perhaps not surprising since the purpose of the 1930 Act was to safeguard the position of innocent third parties when an insured became insolvent. It was thus that a year previously (in 1938) in Dennehy v Bellamy the plaintiff had obtained a judgement against a firm which had gone into liquidation after commencement of an arbitration (under a policy with Scott Avery clause) and the defendants took out a summons to stay. The Court of Appeal held that the Scott Avery clause bound the plaintiff since it was a condition precedent to the rights to which he was subrogated.

THE JENKINS COMMITTEE

In 1955, a Committee was set up under the Rt. Hon. Lord Justice Jenkins to report on legal aspects of "Conditions and Exceptions in insurance policies". There were five terms of reference and it is interesting to note - en passant - that four of these corresponded with points which were the subject of recommendation to Insurers as a "quid pro quo" for the exclusion of insurance policies from the Unfair Contract Terms Act 1978. These areas were non-disclosure, question and answer on proposal forms, promissory warranties and procedure after a loss. A Law commission working paper issued in 1978 relates to non-disclosure and breach of warranty. The subject of arbitration clauses was the fifth item referred to the Jenkins Committee whose report was issued in January, 1957.

As in a case already cited, the point was made that because the cost of an arbitration is not available to a legally-assisted person, it could operate to his or her disadvantage. Moreover (quoting the report) "A variety of circumstances may entitle an Insurer, after a loss has occurred, to repudiate liability as against an honest and at least reasonably careful insured. Although such abuses had in fact sometimes occurred, it was forecefully represented to us that no reputable Insurer would rely on a purely technical defence to defeat an honest claim. However, this does not alter the fact that the ease with which a technical defence may be found means that in many cases an Insurer is able to substitute his own judgement of the claimant's bona fides for that of a Court. But this is the product of express contractual stipulations rather than rules of law in the ordinary sense: any proposal to alleviate such situations in the interest of the Insured would involve interference with the liberty of contract of the Insurer. The desirability of some legislation seems to us a broad question of social policy outside our competence".

The report then announced that since their enquiries had been initiated, the position had materially changed because the member Companies of the British Insurance Association and Lloyd's underwriters Association had agreed to refrain from insisting on the enforcement of arbitration clauses if the Insured preferred to have the question of amount (as distinct from that of liability) determined by a Court in the United Kingdom. The undertaking did not, however, include the following:

(a) Specially negotiated or specially agreed clauses;

(b) Reinsurance (see below);

(c) Certain aspects of aviation insurance;

(d) Mariné insurance. (In this connection the report commences with the comment that "the general public is not interested in marine insurance and we have no reason to believe that the business circles who are concerned with the subject are in any way dissatisfied with the law as it stands")

SCOTLAND

The Law Reform Committee for Scotland(Chaired by the Hon. Lord Walker) issued a report in December, 1957 in somewhat similar terms to the findings of the Jenkins Committee. "Arbitration conceals from public scrutiny the conduct of insurance companies with regard to disputed claims and permits them if they wish to use the law in a harsh and inequitable manner to do so away from the glare of publicity and the embarrassment of judicial censure. It also prevents doubtful legal decisions being clarified by the process of judicial decision. While arbitration clauses may afford some protection to unscrupulous insurance companies the advantages which they offer are not necessarily all on the side of the Insurers.

If there were any evidence tending to suggest that insurance companies were indulging in unfair practices there would be much to be said for legislation to deprive them of the protection of obscurity afforded by the arbitration clauses but there is no such evidence and accordingly it is not recommended that any alteration in the law with regard to arbitration clauses be made. We do not believe that arbitration clauses in insurance contracts are, in general, unfair and so long as the insurance industry continues to be competitive we doubt whether obviously unfair clauses of this sort would ever become a common feature".

There is a radical difference between English and Scottish law because of the old English common law doctrine that a contract to "oust the jurisdiction of the Courts" was against public policy and invalid (eventually vitiated by the Arbitration Act 1889). If parties in Scotland have agreed to go to arbitration they are obliged to do so. With regard to repudiation, if one party alleges repudiation of a contract containing an arbitration clause and the other party denies it, the question whether there has been repudiation or not is one for the arbiter (as he is called in Scotland) to decide. If repudiation is admitted, then the arbitration falls away with the contract. (This seems more definitive than the "grey" area which prevails in England).

"STANDARD" ARBITRATION CLAUSES

During the 19th century, the Fire Offices Committee (which administered the tariff) had a profound influence in the market and companies tended to conform to the tariff wording when using arbitration clauses in policies for classes of business other than fire. The traditional standard wording reads as follows:

> "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator, one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or, in case the arbitrators do not agree, of an umpire appointed in writing by the arbitrators entering upon the reference. The umpire shall sit with the arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. After the expiration of one year after any destruction or damage the company shall not be liable for any claim therefor unless such claim shall in the meantime have been referred to arbitration".

Although the 1889 Act was applicable at the time, the Court had authority to stay proceedings pending an award and would normally grant the stay in the absence of fraud (which as we have seen is now the subject of special provision). It was considered equitable that an Insured accused of fraud should have the right of clearing his character in open court while Insurers in turn were obliged to exercise restraint in proceeding since failure to prove fraud might result in adverse judicial comment on their action. On the other hand, an insured who had lodged a fraudulent claim might welcome the privacy of an arbitration:

after a Court appearance the Judge might pass the papers to the Director of Public Prosecutions while accounting evidence could attract the attentions of the Inland Revenue. The worst that could result from an arbitration would be an award of costs against him.

Following the 1956 Agreement referred to by the Jenkins Committee, a new arbitration clause was drafted as follows:

> "If any difference shall arise as to the amount to be paid under this policy (liability being otherwise admitted) such difference shall be referred to an arbitrator to be appointed by the parties in accordance with the statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the insurers."

While continuing in the Scott/Avery tradition, the new clause contains important features as follows:

(a) Only a single arbitrator is to be appointed. In terms of Section 10 of the 1950 Act the Court has power to appoint if the parties cannot concur in a nomination.
This change introduces a considerable potential saving in Cost;

(b) The time limit of one year for a referral has been deleted;

(c) An insured confronted with a defence of fraud has a right of action automatically;

(d) Restriction to questions of amount ensures that any important legal issue (which might become obscured in an arbitral award not involving a case stated) is brought to the notice of the insurance market generally and so enables them to amend their contracts if thought advisable.

TYPES OF POLICY INVOLVED

Because of the "Amount" restriction, the new clause has no relevance to and is omitted from all types of liability policy since the measure of indemnity thereunder is the subject of independent action. However, it is interesting to see that there is such a clause in some "package" policies which cover a variety of perils such as household and motor contracts. (The standard UK private car policy provides a measure of personal accident cover and the arbitration clause specifically excludes arbitration under that section).

It is also worth noting that Consequential Loss (possibly better known as Business Interruption) policies contain a condition precedent to the effect that the material damage Insurer must have admitted and paid for a claim under his policy. Because of this the Arbitration Clause in a Consequential Loss Policy is qualified as follows:

"The Company shall not be liable for any claim under the policy after the expiration of

(a) One year from the end of the indemnity period or if later

(b) three months from the date on which payment shall have been made or liability admitted by the Insurers covering the damage giving rise to the said claim, unless such claim shall, in the meantime, have been referred to arbitration".

LONG TERM BUSINESS

"Ordinary long-term" business includes not only life and endowment assurances but also pensions, annuities, permanent health insurance and a variety of new contracts such as income bonds and unit-linked policies. With the exception of "term" cover as already explained all this comes under the "assurance" category. However, it is necessary to distinguish between the "Ordinary" and the "Industrial" branch.

"Industrial" Assurance features the twin elements of payments at less than two monthly intervals and collection at the homes of the policyholders. It has developed from the 18th century burial and sick Clubs which suffered from mismanagement and fraud and was consequently brought under government supervision. This class of assurance is the equivalent of the French "Branche populaire".

Although "Industrial" Assurance is handled by some of the major companies it may also be transacted by Registered Friendly Societies and is supervised by the Industrial Insurance Commissioner who also functions as the Registrar of Friendly Societies. His supervisory responsibilities are administrative as opposed to the actuarial and technical controls of the Insurance Companies Acts.

Provision for procedure in the event of disputes has to be specified in the Articles of Association of a company or in the rules of a Society transacting industrial life assurance. Unless there is a specific obligation to proceed to arbitration, the aggrieved party can apply to the County Court or if the amount claimed is less than £25 to a magistrates court for a hearing. Providing there is no suggestion of fraud and that the validity of the policy is not in question a unilateral appeal to the Commissioner can be made where the claim does not exceed £50 and if both parties agree the Commissioner can otherwise determine amount or liability. He then assumes all the powers of an Arbitrator in terms of the 1950 Act and may, on the request of either party, "state a case" for the Court's opinion, although he is not compelled to do so.

"Industrial" Assurance may only be transacted in Britain and in terms of premium volume it cannot compare with that generated by "Ordinary" long-term" business.

Because of the undertaking by members of the British Insurance Association (which embraces practically all companies issuing contracts of the nature specified in the first paragraph of this section) to restrict arbitration to question of quantum such policies do not contain an arbitration clause. Even before the undertaking was made, the life offices usually preferred to have any legal issues settled in the Courts and would combine to support a defendant company by contributing to its costs.

ARBITRATION IN PRACTICE

Fortunately the advent of the professional Loss Adjuster has tended to "oust" the Arbitrator just as arbitration was accused of "ousting the Courts" 100 years ago. One of the advantages claimed for arbitration (apart from economy, speed and privacy) is that the losing party entertains no resentment against his adversary. This is almost certainly true of the informal type of arbitration described below but it is hard to imagine a claimant who loses on an arbitration renewing his insurance with the respondent company. And all this notwithstanding the slanting of costs in his favour. In a paper delivered by Mr. L.P. Whatley, B.A. to the Insurance Institute of London in 1961 he says:

> "Where a dispute is as to amount only it may not be so easy to discern who in fact is the successful party. An insured may have claimed £20,000 and the insurers have contended that the adjusted loss is £10,000. If the Arbitrator awards the insured £15,000 it might be said that both parties are equally successful - or unsuccessful. In practice an Arbitrator commonly awards costs to the insured against the insurers if the amount of his award exceeds that offered by the Insurers even by a comparatively small amount. The Insurers having offered less than the amount awarded are regarded as the unsuccessful party"

Mr. Whatley goes on to discount the use of the "sealed envelope" (for costs) technique in such cases and concludes that compared with a court action, there is unlikely to be any saving in costs. "If the dispute is as to amount, the Insurers will be called upon to pay not only their own costs but those of the insured as well".

LOSS ADJUSTING

In England - even today - there is a large degree of misunderstanding in regard to the function of the Loss Adjuster. Because the Insurers pay his fee, it is assumed that he will be biased in their favour in his discussions with the claimant. In fact the very word "adjuster" produces the image of a grocer assiduously balancing quantity against either the weight or the price requested. It is also not without significance that scales appear in the motif of both the Institute of Loss Adjusters and the Institute of Arbitrators. A loss adjuster is really a "Conciliator" and here again (as in the case of "insurance and assurance") the word "Arbitrator" is often wrongly applied to the person who has been appointed a "Conciliator" in an industrial dispute.

The first task of a Loss Adjuster is to satisfy himself that the claim is genuine and that the circumstances are such as to bring it within the scope of the policy having regard to any special warranties which may apply. He will then proceed to reach an amicable agreement with the Insured who is invited to sign an Agreement of Loss. It is inevitable that difficulties and arguments occur but seldom to an extent that an arbitration is sought. More usual solutions to such problems arise from the influence of the broker, the prospect of the loss of a large account or by means of an "Ex gratia" payment.

The existence of small claims Courts and "Consumerism" has also tended to discourage arbitration, although it has been suggested that an Insurance "Ombudsman" be appointed for the sake of public relations. However, investigation often shows that a complaint is entirely due to delay and incompetence in the offices rather than a refusal to pay.

UNOFFICIAL ARBITRATION

The status of Lloyd's is one of universal respect and international renown. Within its organisation there exists a scheme for the solution of internal disputes (as between one underwriter and another or as between Syndicates) which works admirably. It is rare for either of the contestants to fail to agree on the suitability of an Arbitrator but the scheme provides that in such an event the Committee of Lloyd's will make a nomination. In the absence of special circumstances there is no appeal from an award.

The "Knock-for-Knock" agreement between insurance companies was the prototype of a number of inter-office agreements involving the consequences of collisions. Another version is the "halving agreement" and there is of course the Third Party claims sharing agreement. All these make provision for arbitration and the Arbitrators appointed are usually well experienced in claims handling.

REINSURANCE

Reinsurance is a field in which the past decade has seen enormous developments. The need for better protection of the Reinsurer against the effects of inflation has been matched by their insistence on the provisions of technical information which hitherto was regarded as privy to the original writer. One of the major difficulties in operating a world-wide Treaty is the question of Jurisdiction and the appended wording has been drawn up with the approval of the Reinsurance Offices' Association, Lloyd's Insurance Brokers Association and the Committee of Lloyd's Underwriters Association. Because of the international relations so frequently involved it is desirable that an Arbitrator appointed under this type of agreement should be experienced in the field of arbitration generally as well as being technically equipped in all aspects of reinsurance law and practice.

STANDARD REINSURANCE TREATY ARBITRATION CLAUSE

1. All matters in difference between the reassured and the reinsurer (hereinafter referred to as "the parties") in relation to this agreement, including its formation and validity, and whether arising during or after the period of this agreement, shall be referred to an arbitration tribunal in the manner hereinafter set out.

2. Unless the parties agree upon a single arbitrator within thirty days of one receiving a written request from the other for arbitration, the claimant (the party requesting arbitration) shall appoint his arbitrator and give written notice thereof to the respondent. Within thirty days of receiving such notice the respondent shall appoint his arbitrator and give written notice thereof to the claimant, failing which the claimant may apply to the appointer hereinafter named to nominate an arbitrator on behalf of the respondent.

3. Should the arbitrators fail to agree, then they shall within thirty days of such disagreement appoint an umpire to whom matters in difference shall be referred. Should the arbitrators fail within such period to appoint an umpire, then either of them or either of the parties may apply to the appointer for the appointment of the umpire.

4. Unless the parties otherwise agree, the arbitration tribunal shall consist of persons employed or engaged in a senior position in insurance or reinsurance underwriting.

5. The arbitration tribunal shall have power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which it may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of documents, examination of witnesses and any other matter whatsoever relating to the conduct of the arbitration and may receive and act upon such evidence whether oral or written strictly admissible or not as it shall in its discretion think fit.

6. The appointer shall be..

7. All costs of the arbitration shall be in the discretion of the arbitration tribunal who may direct to and by whom and in what manner they shall be paid.

8. (a) The seat of the arbitration shall be in.............................. and the arbitration tribunal shall apply the laws of .... as the proper law of this agreement.

   (b) The award of the arbitration tribunal shall be in writing and binding upon the parties who covenant to carry out the same. If either of the parties should fail to carry out any award, the other may apply for its enforcement to a court of competent jurisdiction in any territory in which the party in default is domiciled or has assets or carries on business.