Understanding the pathways to resolving claims disputes efficiently – put yourself in the best position

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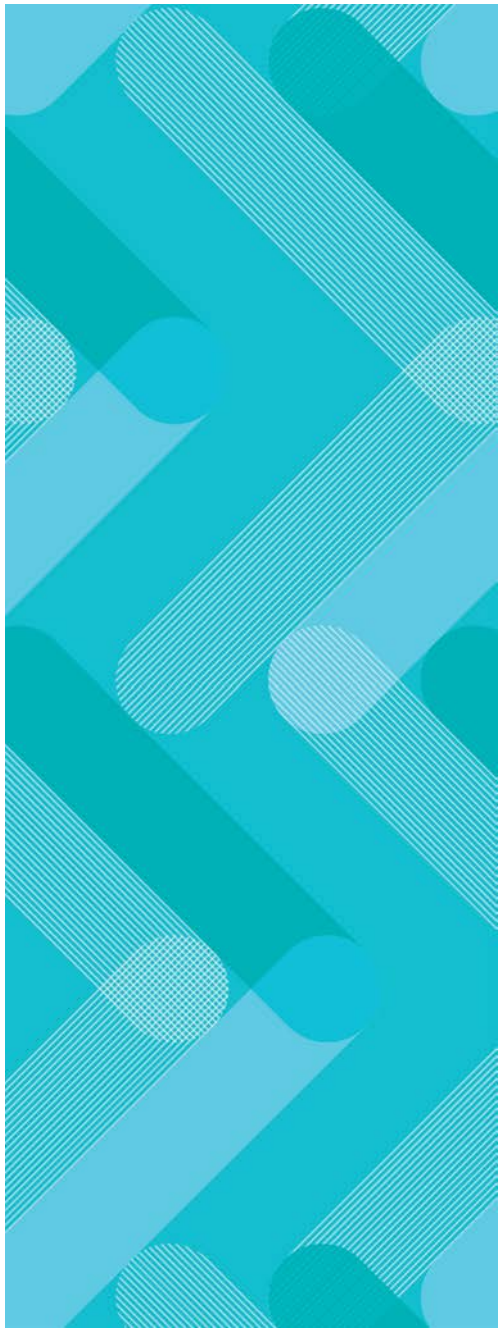
AGENDA

Part A: What you need to know

- **Initial negotiations**
- **Common Dispute Resolution (DR) processes**
  - Mediation
  - Expert determination / QC clauses
  - Litigation
  - Arbitration
- **DR clauses**
- **Impact of Brexit**

Part B: War Stories

PART A: WHAT YOU NEED TO KNOW



Initial negotiations

- Key points to consider:
  - Is there a claims handling protocol?
  - What is the limitation period for starting formal proceedings?
  - Do I need a standstill agreement in place whilst negotiations continue?

- Don’t underestimate the impact of commercial relationships

- Privilege
  - Understand the risks of non-privileged documents to your claim
  - Use of brokers: can play a valuable role in negotiations but note broker communications are unlikely to be privileged

- Funding – understand your options as the way disputes are funded is changing

Privilege – a quick recap

Need to establish that at the time the relevant confidential communication took place or document was created:

LITIGATION PRIVILEGE

- litigation was in reasonable prospect
- document was prepared for dominant purpose of that litigation

LEGAL ADVICE PRIVILEGE

- it was a lawyer / client communication
- to give or obtain legal advice

www.hsfnotes.com/litigation/privilege-guide

Litigation privilege – more difficult than before

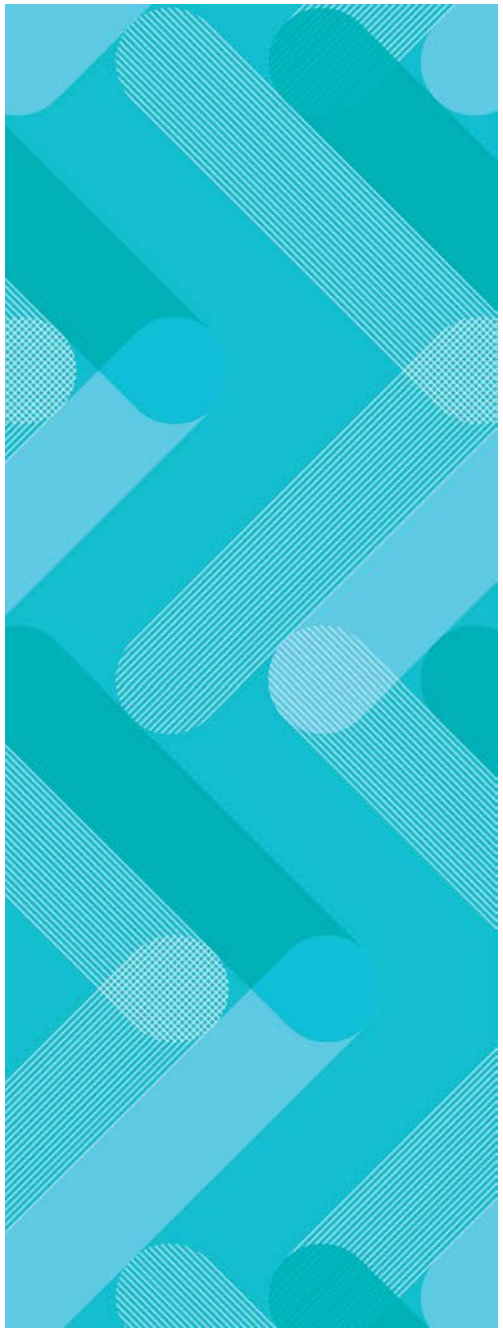
- A recent court decision found that emails between Board members to discuss a potential settlement proposal were not covered by litigation privilege (*WH Holding v E20* [2018])

- Dominant purpose must be obtaining advice or information in relation to the conduct of litigation

- Not sufficient if for conducting litigation, in broader sense (e.g. strategy, funding, cost control, reputation management?)

- Practical implications for internal settlement discussions – take steps to seek to cloak these discussions in privilege

Common Dispute Resolution Processes



Mediation

Facilitated negotiation by a third party neutral mediator

Pros

- Private
- Informal and flexible
- Parties can select mediator(s)
- Quicker and cheaper than litigation or arbitration
- Party focussed
- Settlement enforceable

Cons

- Does not determine the dispute
- Is dependant on willingness to co-operate

Expert determination / Queen's Counsel clauses

Neutral third party with expertise in the subject matter makes a (usually) final binding decision

Example of a QC clause from a Professional Indemnity policy:

"The Insured shall not be required to contest any legal proceedings unless a Queen's Counsel (or by mutual agreement between the Insured and the Insurer a similar authority) shall advise that such proceedings could be contested with the probability of success."

Pros

- Considered opinion may assist negotiations and encourage parties to step away from deadlocked positions
- Quicker than litigation or arbitration and flexible as to procedure

Cons

- Risk of unfavourable decision
- No appeal
- Usually limited time for issues to be considered

Litigation

Bringing an action in the English court so that a judgment can be made by a judge

Pros

- Court generally has extensive powers i.e. joinder of third parties, procedural orders, interim remedies
- Appeals on points of law generally possible
- High quality decision-making/judicial experience
- Good support services and facilities

Cons

- Public
- Formal
- Parties cannot select the judge
- Potentially lengthy and expensive
- Enforceability varies – can be more limited than for an arbitration award
- Adversarial

Arbitration

Bringing an action in front of an arbitrator or panel of arbitrators (the Tribunal) so that a binding award can be made by the Tribunal

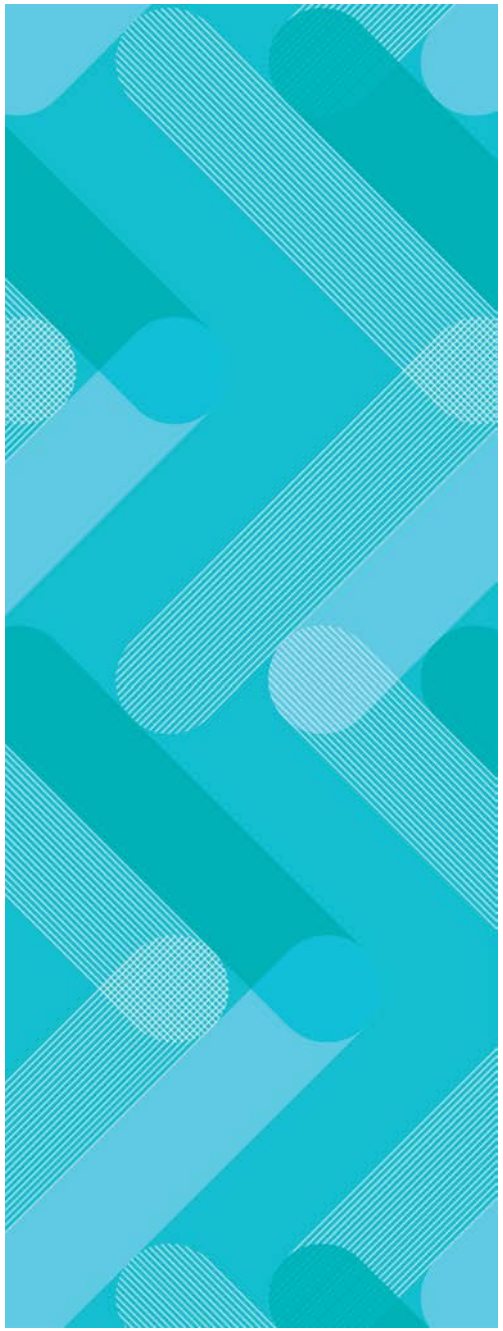
Pros

- Private (provided no appeal)
- Informal and flexible
- Parties can select arbitrator(s)
- Theoretically quicker and cheaper than litigation
- Enforceable through the courts in most countries
- Greater autonomy to agree the procedure

Cons

- Limited prospects of appeal
- Can take longer and be just as expensive as litigation
- May be significant dispute/delay in selecting arbitrator(s)
- Quality of decision may vary
- No ability to order consolidation – only by consent
- Unable to compel witnesses/third parties

Dispute Resolution clauses



Choice of law

What is it?

Contractual term in which the parties specify that any dispute arising under the contract shall be determined in accordance with **the law** of a particular jurisdiction

Why does it matter?

- Some countries require their law to be chosen
- Some systems of law are more favourable than others e.g. insurability of civil fines
- Nature of the legal system (civil vs. common law) and the extent of jurisprudence for certainty

Example:

This agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.

Choice of jurisdiction

What is it?

- A term of a contract in which the parties specify that any dispute arising under the contract shall be determined by **the courts** of a particular jurisdiction

- Choice of jurisdiction clauses can be exclusive or non-exclusive

Example:

The Parties agree that all actions and proceedings arising out of or relating directly or indirectly to this Agreement shall be litigated solely and exclusively in the courts of England and Wales.

Exclusive vs. non-exclusive jurisdiction clauses

Exclusive

- A party can only bring proceedings against another in the courts of the country agreed
- Provides certainty
- Provides protection – less likely another court will accept jurisdiction

Non-exclusive

- A party can bring proceedings against another either in the courts of the chosen country, or in the courts of any other country which has jurisdiction over the dispute
- Provides flexibility but uncertainty
- Risk of parallel proceedings

Does the choice of law and jurisdiction need to match?

No, e.g. the policy can be subject to the laws of New York but the courts of England and Wales

This could be helpful….

- E.g. the laws of a jurisdiction might be more favourable in a different jurisdiction to the one where the court is based e.g. some US states cover fines and penalties which is a grey area in English law

But it could also be a hindrance…

- Expert witnesses might be needed to prove the foreign law as fact, increasing costs

Mediation clauses – factors to consider

- Whether one is included or not
- Mandatory or voluntary
- Discretion of the policyholder
- Governed by rules e.g. the ICC Mediation Rules or not
- Prohibition of proceedings being brought whilst mediation is pending
- Time limit to settle the dispute, failing which the matter gets referred to litigation or arbitration
- Circumstances in which mediation should be submitted to
- A minimum number of sessions
- Venue
- Choice of mediator
- Mechanism for triggering the mediation process
- Allocation of costs

Arbitration clauses – factors to consider

- Must be an unequivocal agreement to submit to arbitration
- Governing law
- Seat of arbitration
- Governed by rules e.g. the UNICITRAL rules or not
- Number of arbitrators
- Appointment of arbitrators
- Language
- Scope of disputes covered
- Multiple parties

Service of suit clauses

An agreement whereby insurers agree to nominate a representative (e.g. attorneys in the US) to accept service of litigation proceedings on their behalf within a jurisdiction, usually for policies issued by the London market to US policyholders

- Avoids duplication of litigation in the US and UK
- Wording often also allows insurers to initiate proceedings and preserves their right to seek to transfer an action to a Federal court or another State court

Service of suit clauses v dispute resolution clauses

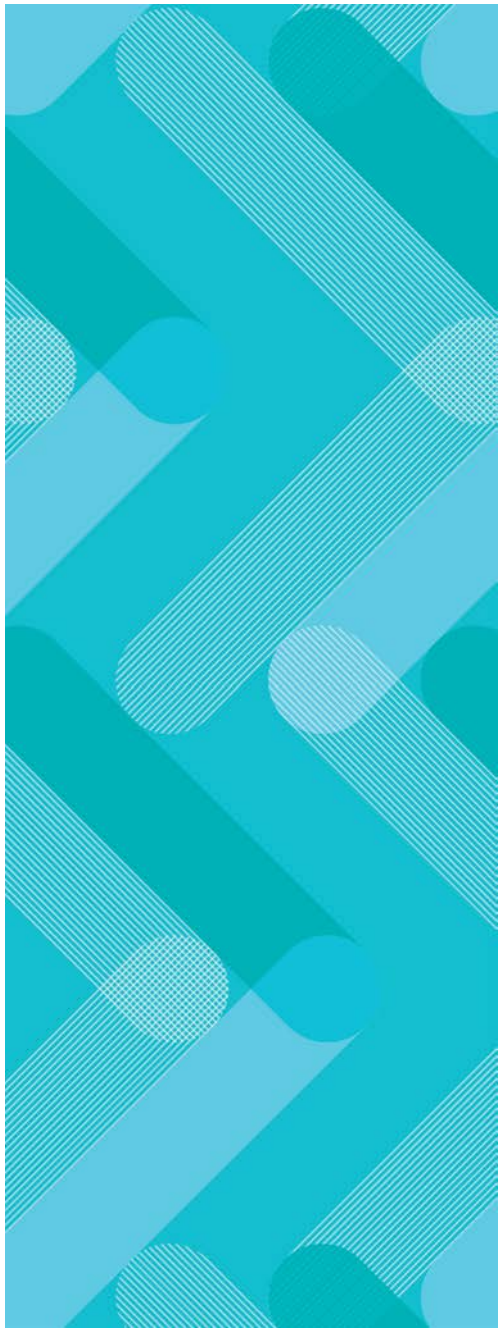
Warning…

- Policies often include a dispute resolution clause with a choice of jurisdiction/law as well as a service of suit clause – which one should a dispute be brought under?
- English and US courts often hold that the dispute resolution clause takes precedence over a service of suit clause
- A service-of-suit clause tends to provide an auxiliary role to the arbitration clause e.g. a party can take the arbitration award to a US court to declare the validity of the award
- However, courts may not always decide this

Solution:

- Include wording stating the service of suit clause does not override the parties' right to resolve the dispute as per the choice of jurisdiction/law clause

Impact of Brexit



Impact of Brexit

No impact on:

Choice of law

Under Rome EU Regulation I on the law applicable to contractual obligations, the courts of an EU member state will generally give effect to the parties' choice of governing law – post-Brexit, EU member states will generally continue to give effect to a choice of English law to the same extent as currently exists

Impact of Brexit

In the event of a no-deal Brexit, there will likely be an impact on:

Choice of jurisdiction

Enforcement

As things stand, if an exclusive English jurisdiction clause is entered into:

- Post-1 November 2019: EU member states would respect an exclusive English jurisdiction clause where the 2005 Hague Convention applies and English court judgments would be enforceable in the EU under the 2005 Hague Convention
- Between 1 October 2015 and 31 October 2019: English court judgments may be enforceable under Hague but the position is uncertain at present – otherwise jurisdiction and enforceability would depend on local laws in each EU country
- Pre-1 October 2015: jurisdiction and enforceability of English court judgments would depend on local laws in each EU country

As things stand, if a non-exclusive English jurisdiction clause is entered into:

- Jurisdiction and enforceability of English court judgments would depend on local laws in each EU country

Impact of Brexit

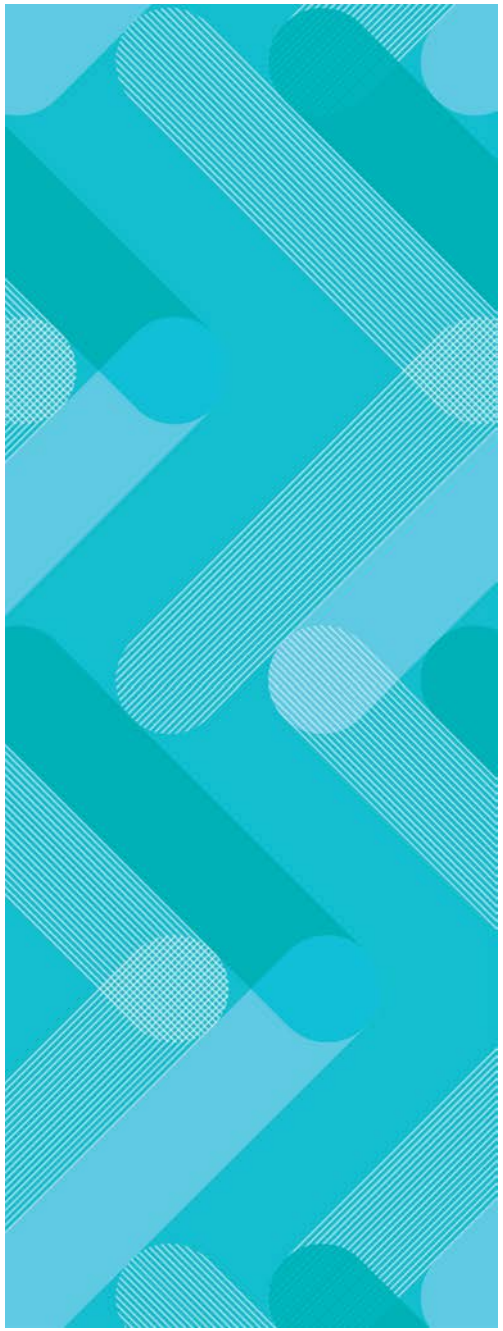
Two key questions to ask if you are considering English jurisdiction:

Is it important that any judgment can be enforced in an EU member state?

Is there a risk of proceedings in an EU member state that needs to be avoided?

- If no to both, no need to consider further
- If yes to either, consider the position in the previous slide

PART B: WAR STORIES



Conflicting DR clauses within the coverage tower

Example:

Policy	Governing law	Jurisdiction
Primary	New Jersey	New Jersey
First Excess	New York	England
Second Excess	New York	Arbitration
Third Excess	New York	Arbitration

Issues:

- 3 sets of lawyers may be needed = costs x 3:
  - one set in New Jersey to advise on New Jersey law and procedure;
  - one set in New York to advise on New York law; and
  - one set in England to advise on English procedure

- Risk of inconsistent judgments

- Inability to consolidate proceedings

Various dispute resolution clauses within single policy

Example:

Jurisdiction and Governing Law

It is agreed that this Policy is governed by English Law and any dispute arising under this Policy shall be litigated solely and exclusively in the English Courts.

Dispute Resolution

Any controversy arising out of in connection with this policy shall be finally settled by arbitration. Such arbitration proceedings shall take place in London in accordance with the Rules of the London Court of International Arbitration, by three arbitrators appointed in accordance with the said Rules. The proceedings shall take place in the English Language.

Arbitration

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 in common agreement between Insurers and the Insured. Where any difference is so referred, the making of an award shall be a condition precedent to any right of action against the Insurers. Such arbitration shall take place in London.

Interplay of DR clauses in local and global policies

Example:

Policy	Governing law	Jurisdiction
Local policy	Vietnamese law	Vietnamese courts
Global policy	English law	English courts

Issues:

- Even if the wordings are aligned, risk of mis-match in coverage position:
  - different laws may produce different results
  - local courts may take a different (sometimes political) view

- Difficulties can also arise due to different procedural rules e.g.:
  - limitation periods
  - disclosure
  - timeframes and procedural hurdles

- Are there any solutions available?

Driving mediation use in the claim

- Policy contained English law and exclusive jurisdiction clause
- Major property loss: insurers delay the investigation and adjustment
- Insurers refuse mediation pre-action
- Once litigation underway insurers refuse mediation, but court orders it anyway…
- …which initiates a settlement process (and second mediation)
- Policyholder includes mediation clause (at their option) in policy on renewal

Dangers of not having a dispute resolution clause

- **A higher chance of conflict**
  - between the insured and the insurer over both the applicable law and the court/tribunal that has jurisdiction to determine the underlying coverage dispute

- **A higher chance of anti-suit injunctions**
  - these are orders issued by a court or arbitral tribunal that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum

- **A higher chance of pre-emptive declaratory proceedings**
  - these allow parties to seek the court's direction at the early stages of a dispute when they are uncertain of their legal obligations or rights

Dangers of not having a dispute resolution clause

Example: *AXA Corporate Solutions Assurance SA v Weir Services Australia Pty Ltd*

- Global policies were issued in England and a local policy issued in Australia
- The global policies contained a choice of English law and the local policy contained a choice of Australian law

However…

- Neither policy contained a choice of jurisdiction clause
- Weir brought proceedings in New South Wales against AXA seeking an indemnity under the local policy, alternatively under the global policies
- AXA brought proceedings in the English court seeking a declaration that Weir was not entitled to an indemnity under the global policies
- AXA applied to the English court for an anti-suit injunction to restrain Weir from pursuing the Australian proceedings in relation to the global policies
- Weir applied to the English court for an Order setting aside the Order granting AXA permission to pursue English proceedings out of the jurisdiction

Dangers of not having a dispute resolution clause

Example: *AXA Corporate Solutions Assurance SA v Weir Services Australia Pty Ltd*

- Held: the global policies were written in England and subject to English law – these were factors in favour of English jurisdiction
- This meant that proceedings would be on foot in both England and Australia
- But since AXA was only liable under the global policies to the extent that indemnity was not available under the local policy, determining the position under the local policy was a logical first step, and the proceedings in England were stayed pending resolution of the claim under the local policy

Dangers of not having a dispute resolution clause

Example: *Faraday Reinsurance Co Limited v Howden North America and anor*

Facts:

- Asbestos liability claims were brought against Howden – Howden sought to recover the costs and liability for these claims from its insurers
- Howden's other insurers had commenced litigation in Pennsylvania
- Howden notified Faraday of the claim and Faraday pre-emptively issued proceedings in England and sought a declaration of non-liability
- Permission to serve the English proceedings on Howden out of the jurisdiction was granted – Howden then challenged this

Issue:

- Underlying policy in the dispute did not contain choice of law or choice of jurisdiction clauses
- Differences between English law and Pennsylvanian law would have resulted in substantial differences in insurers' liability

Dangers of not having a dispute resolution clause

Example: *Faraday Reinsurance Co Limited v Howden North America and anor*

Held:

- The policy was written in London so should be governed by English law
- As it was governed by English law, England was the proper place to bring proceedings despite related litigation in Pennsylvania being on foot for years

Key takeaways

1. Don’t treat DR clauses as simply boilerplate clauses. Give them the consideration they deserve at renewal
2. Consider what DR processes you wish to have and on what basis
3. Ensure the DR clauses across the primary and excess layers are consistent and proceedings can be consolidated
4. Consider carefully the terms of any arbitration or mediation clause

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