BEST PRACTICES IN MANAGING REINSURANCE DISPUTES

by Paul Moss and F. Peter Phillips

The legal profession has become so mesmerised with the stimulation of the courtroom contest, that lawyers have forgotten that they ought to be healers - healers of conflict, and not warriors nor hired guns. There are times when a coverage issue or other complex claim situation should be resolved through formal litigation because the industry needs judicial guidance and legal precedent for future reference.

It's a basic tenet of claims management: "An open litigation file is an expensive file." Litigation files in reinsurance are not only expensive – they are divisive, belligerent, self-defeating, uncertain, high-value, maddeningly slow, corrosive to the efforts of the underwriting side, and any number of other nasty attributes. Worst of all, they too frequently leave the control of the claims manager and are handled as legal rather than business matters, inviting Dickensian outcomes and where in certain cases, legal fees can threaten to exceed liability!

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Chief among these is both cost and uncertainty. Litigation is, of course, to be avoided at all costs, for a variety of reasons including the uncertainty of outcome. The traditional method of dispute resolution, incorporated into the majority of reinsurance contracts, has been arbitration. But arbitration can be – and regrettably increasingly proves to be — time consuming, slow, expensive and more uncertain than litigation.

However, there is a new movement afoot in part driven by the need to seek savings in litigation spend. Smart lawyers have already detected that clients believe that there is good reason for a shift in thinking; smart lawyers recognise a significant change is about to happen; and smart lawyers have sought to re-skill, and train in the art of mediation. Therefore, the time has come for the reinsurance industry to embrace mediation instead of constantly litigating its way through costly disputes.

Maybe you've heard that view before – but this time something concrete is being done about it. There is a new initiative called the International Reinsurance Industry Dispute Resolution Protocol, aimed at achieving significant savings in legal costs while at the same time helping to take the hostility out of the dispute. Nowadays, ceding companies rightly seek value added claims services from their reinsurers. In turn, the reinsurer must keep 'customer focused' and learn more about using alternative dispute resolution solutions in helping to preserve valuable commercial relationships. Therefore, it must make sense to have a dispute resolution protocol added to the Litigation Management Tool Box.

To become an effective mediator, claims staff will also need to learn new skill-sets – it now being imperative to having a trained mediation capability built in to the claim function resource. To underpin this, there ought to be a user-friendly, best practice tool, to help avoid regrettable outcomes in litigation.

The CPR Protocol has been the subject of two well-attended presentations and roll-out sessions recently: one at Lloyd's and the other at the London Underwriting Centre. A key question was why mediate? Rhys Clift, a partner with Hill Dickinson LLP said because it works, it is quick, it preserves relationships and it saves money. The success rate in mediation is very high. Some say 75% - 80% either on the day or shortly after.

His presentation covered a range of issues: What is mediation? How does mediation differ from arbitration? When should mediation be used (not used)? Why is mediation effective? Why does mediation fail and therefore how can failure be avoided? together with some conclusions. Arbitration in England and Wales is in many ways excellent and probably essential but (and this applies as much in the UK as abroad) it is as a broad generalisation slow, costly, adversarial and risky where-

as, again as a broad generalisation, mediation is quick, inexpensive, collaborative and reduces risk to a minimum.

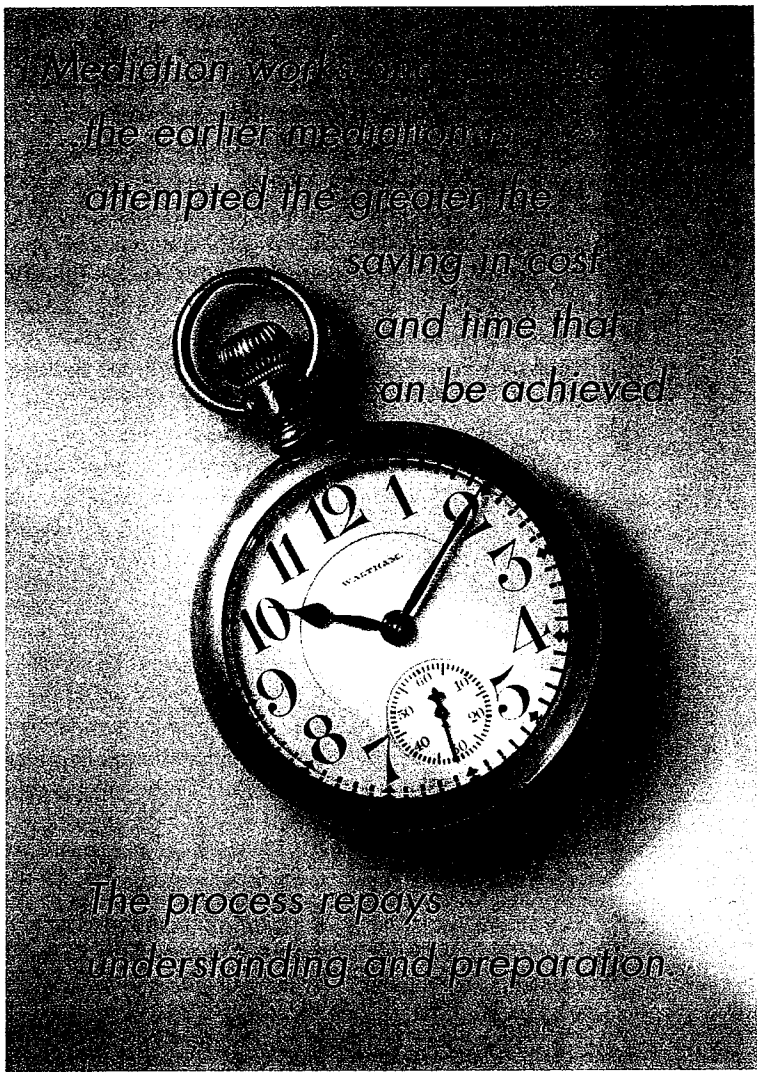
The presentation compared arbitration and mediation against certain further criteria: arbitration is compulsory, the Arbitrators have powers over the parties, arbitration is a private process (but privacy can be lost on appeal, by indemnity claim and by enforcement), at the conclusion there will be a determination of the issues and an award with winners and losers (and costs consequences).

By contrast mediation is entirely voluntary, strictly without prejudice and private and confidential. Broadly nothing created for and nothing said at the mediation will find its way into the public domain. Mediators have no power over the parties nor do they issue any award of adjudication. In mediation a neutral third party (the Mediator) assists the parties to settle their dispute; it is a process of managed negotiation, not a decision making process (unlike arbitration).

Mediation is effective because of the involvement of a third party (the mediator), because it involves client decision makers (not just lawyers) because of its timetable, structure and dynamics (in contrast to negotiation) and because of a shared sense of purpose which it engenders. Further, there is also scope for unusual deals going beyond adjudication of the dispute. It is also a substitute to a day in Court (or arbitration) without the risk and expense.

The general reasons for failure in mediation are (primarily) lack of preparation by the parties, lack of realism or authority on the part of those participating and lack of adequate contact with the mediator beforehand (excluding of course those cases where one party is determined not to settle). With proper planning these difficulties can be eliminated. Mediation should be used when all or both parties to a dispute wish to resolve the matter. Mediation will not protect a time bar nor secure jurisdiction. Mediators cannot grant protective orders (like freezing orders against banks or search and seizure orders for documents). If they are necessary, protective steps should be taken so that the parties can go into mediation, from a position of confidence.

Mediation works and cases settle. Subject to any other considerations, the earlier mediation is attempted the greater the saving in cost and time that can be



achieved. The process repays understanding and preparation. A standard clause and procedure would expand its use, for example inclusion in insurance and reinsurance contracts. Whilst it is neither a universal panacea, nor suitable in all cases, mediation does have enormous scope.

Peter Schwartz, a partner with Mayer Brown Rowe & Maw LLP recently outlined the approach of the English Commercial Court to mediation and the potential sanctions, even to successful litigants of unreasonably refusing to mitigate. He also reported upon the increased popularity of ADR strategies and techniques amongst corporate General Counsel. According to a recent survey (by Grant Thornton), 8 out of 10 external lawyers and 9 out of 10 corporates believe that more cases will be resolved by ADR, over the next few years. Yet – there was presently no consistent approach by the reinsurance industry to mediation.

Peter expressed the view that mediation is a powerful, speedy and cost effective tool in the toolbox of potential remedies for reinsurers involved in potentially long run-

ning and expensive arbitration or litigation. It is potentially suitable for resolving local or international disputes. To repeat, it is not a panacea; some disputes are plainly unsuitable for mediation or, an attempt at mediation might be premature. However, since the mediation process involves flexibility, "double" confidentiality and a broad scope for a constructive party – negotiated solution, (unrivalled by other dispute resolution machinery), reinsurers would be well advised to consider an industry based approach to the formulation and adoption of key mediation clauses, protocols and practices. As always, education is key. Care needs to be taken in the drafting and application of terms – particularly in relation to the potential enforcement of mediation settlements in outwards reinsurances. With greater market wide education in mediation techniques, reinsurers are likely to enhance their professional skills, preserve and develop market relationships and affect major cost savings to their balance sheet.

Experience in other industry sectors suggests that a market wide approach to considering mediation as an appropriate remedy for reinsurance disputes would be beneficial – either by inclusion of the appropriate terms at inception, in accordance with contract certainty principles or, to consider at the appropriate stage when a reinsurance dispute has arisen. Not only is mediation ripe for take-up but it has potential for significant cost savings.

Consequently, a group of market participants has been working with the International Institute for Conflict Prevention and Resolution ("CPR") to articulate such a recommended path, and to that end there has recently been published the CPR International Reinsurance Industry Dispute Resolution Protocol.

The term "Protocol" is used advisedly, because the document (available at www.InsuranceMediation.org) suggests a comprehensive method of identifying reinsurance claims disputes early on; agreeing upon a rigorous but rational method of exchanging adequate information concerning the claim; and engaging in structured negotiation (and, if necessary, mediation) to resolve it on a businesslike basis rather than in arbitration or litigation. And it does so without any party's waiving the right to arbitrate or sue, if needed. Thus, the CPR Reinsurance Protocol is less a dispute resolution method than an elegant management tool, permitting the efficient administration of a portfolio of reinsurance exposures that is driven by business concerns and informed by commercial realities.

One hallmark of an effective reinsurance protocol, then, would be to quicken the time when a company knows what to reserve, and even – in a perfect world – to minimize the period of contingency altogether. The CPR Protocol calls for notice and exchange of information within 30 days, negotiation commenced a fortnight thereafter, and private confidential and nonbinding mediation brought on if the matter cannot be resolved within another 15 days.

The drive for contract certainty is another contributing factor. Nearly all reinsurance agreements at present contain arbitration clauses, but the desire for certainty and control of outcomes is ensuring that an agreed-upon procedure for exchange of information, assurance of timely and direct negotiation, and mediation if needed, is beginning to be viewed as a viable alternative. The industry is much more aware of other ways to resolve disputes, and companies are taking more control of the situation rather than leaving it to the discretion of outside lawyers. The CPR Protocol thus meets a trend and provides further impetus to management efforts to preserve shareholder value.

Learning about the principles in the Protocol will not by itself make the difference, however. Clearly, the key to successful implementation is the willingness of underwriters to incorporate dispute management wordings such as those in the CPR Protocol into contacts of reinsurance.

We have already started to see Dispute Resolution clauses being adopted. Dispute Resolution Clause BEN 1004 (Benfield) states:

Where any dispute or difference between the parties arising out of or in connection with this Reinsurance including formation and validity and whether arising during or after the period of this Reinsurance has not been settled through negotiation, both parties agree to try in good faith to settle such dispute by non binding mediation, before resorting to arbitration in the manner set out in this Reinsurance Agreement.

The CPR International Reinsurance Industry Dispute Resolution Protocol is a major step forward to complement and support such mediation clauses being incorporated within reinsurance agreements. The CPR group are in the process of working with CEDR (The leading European Dispute Resolution body) to produce a training module for insurance and reinsurance professionals who wish to become accredited in mediation.

There is one inescapable conclusion: In an industry such as insuring against unforeseen loss, there are so many contingencies that we cannot control, that it seems silly not to control the ones that we can! ⏮

Paul Moss

Paul Moss has been engaged in the insurance and reinsurance business since 1967. He has held claim positions of increasing importance in various London market companies, including AXA Corporate Solutions, Charter Reinsurance Co. Ltd., Scan Re, British National Insurance Co. Ltd., JB Izod Solicitors and Excess Insurance Co. Ltd. Paul currently serves as Head of Claims of QBE European Operations. He is also a non-executive director of Navigant Consulting UK.

Paul has chaired several reinsurance steering committees involved in dispute resolution efforts and has served as an expert, a party appointed arbitrator and an umpire. He chairs the LMA Reinsurance Claims Group and is an active speaker and presenter at reinsurance conferences in both Europe and the US. Paul is a member of the British Insurance Law Association and the Excess/Surplus Lines Claims Association. He actively supports mediation efforts through his memberships of CEDR and the CPR Institute for Dispute Resolution.

F. Peter Phillips

F. Peter Phillips is Senior Vice President of the International Institute of Conflict Prevention and Resolution ("CPR Institute") in New York City. He is responsible for convening committees of CPR's members to devise protocols and tools for the use of alternative dispute resolution ("ADR") procedures in specific industries and practice areas. He also heads efforts to work with CPR members and ADR institutions outside of North America. In particular he is the staff liaison for CPR's work in Europe and with the Conciliation Centers of the China Council for Promotion of International Trade.

Mr. Phillips has assisted in the creation and administration of ADR programs in the property casualty insurance industry, employment disputes, the franchise industry, Business-to-Business E-Commerce, construction defect disputes, reinsurance, multiparty litigation, and other areas.

Mr. Phillips has appeared on programs offered by the American Bar Association, the Society of Human Resource Managers, the Practicing Law Institute, and numerous corporations and law firms throughout the United States, as well as in England, Argentina, Germany, China and Russia. He is the author of several articles on business applications of ADR. He has also written law review articles on various topics in labor and employment law and is the main author of two books, How Companies Manage Employment Disputes and Resource Book for Managing Employment Disputes.

Mr. Phillips is a cum laude graduate of Dartmouth College and a magna cum laude graduate of New York Law School. He was associated with the law firms of Cahill Gordon & Reindel and Schulte Roth & Zabel, both of New York City. While in private practice he was engaged in a wide scope of litigation matters, including employment, securities, commercial contract, corporate governance and insurance insolvency disputes. He is a member of the bars of the states of New York, New Jersey, and California, as well as of the United States Supreme Court.

CPR Institute is a nonprofit coalition of member corporation and law firms whose mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. It accomplishes that mission through an integrated program of convening leadership, publishing research and information, and assisting in the resolution of particular disputes.