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The International Comparative Legal Guide to:

Insurance & Reinsurance 2013

2nd Edition

A practical cross-border insight into insurance and reinsurance law

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Chapter 13

England & Wales

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Financial Services Authority (FSA) is responsible both for approving the establishment of insurance and reinsurance companies and for monitoring and controlling their activities in the UK, pursuant to the Financial Services and Markets Act 2000 (FSMA).

Authorisation from the FSA is required to carry out 'regulated activities' in the course of a business. The key insurance-related regulated activities are the 'effecting' (i.e. entering into) and 'carrying out' (i.e. performing) of contracts of insurance.

For regulatory purposes, insurance business is divided into ten classes of long-term (life and related) business and eighteen classes of general (property, liability, guarantee, etc.) business. Separate permissions from the FSA must be obtained for each class of business being underwritten.

Lloyd's (a specialist insurance market) is regulated by the FSA. The FSA also regulates Lloyd's managing agents, members' agents and Lloyd's brokers, as well as other insurance brokers.

The UK government is in the process of reforming the regulatory system in the UK. The FSA will be replaced by the Prudential Regulatory Authority, which will be responsible for prudential regulation of (re)insurers; and the Financial Conduct Authority, which will be responsible for conduct of business regulation. The reforms are expected to be implemented in 2013.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

To establish a new (re)insurance company, an authorisation application must be made to the FSA for permission to carry out regulated activities under Part IV of the FSMA. This must include: a regulatory business plan; financial projections; details of financial resources; details of systems, controls and compliance arrangements; and details of personnel, including key individuals who will be performing "controlled functions" and of the controllers of the applicant. It must also contain an address in the UK for service of any notice or other document under the FSMA. In addition, an insurer must satisfy the FSA's Threshold Conditions, including: requirements as to legal status (being a body corporate, a registered friendly society or a member of Lloyd's); adequacy of financial and non-financial resources; and suitability, involving an assessment of whether the applicant is fit and proper to be an authorised person having regard to connections with other persons, the range and nature of its regulated activities, the competence and prudence of its management, and its ability to meet regulatory requirements.

Insurers must be able to demonstrate adequate financial resources pursuant to the capital requirements set out in the FSMA and the FSA Handbook. The FSA operates a two pillar risk-based capital framework. Under pillar 1, (re)insurers must meet requirements based on EU Directives, with refinements imposed by the FSA (the Enhanced Capital Requirement (ECR)). (Re)insurers must establish technical provisions consisting of an unexpired premium reserve, an unexpired risk reserve, and the claims outstanding provision. For certain prescribed categories of general insurance business, an equalisation reserve is also required. Under pillar 2, (re)insurers are required to hold capital based on their own assessment of their capital requirements (the Individual Capital Assessment, or ICA), which involves identifying the major risks the (re)insurer faces and the amount and type of capital it would be appropriate to hold to mitigate those risks. The FSA may prescribe an additional amount of capital to be held in addition to the ICA (called Individual Capital Guidance or ICG). The EU Solvency II project will require further amendments to the capital requirements and is currently scheduled to become effective on 1 January 2014.

Finally, individuals carrying out "controlled functions" in relation to a (re)insurer, which includes executive and non-executive directors and the chief executive, must be approved by the FSA. The FSA will assess the individual's honesty, integrity and reputation, competence and capability and financial soundness. Directors and CEOs will be interviewed by the FSA. An approved person is subject to the FSA's Statements of Principle and Code of Practice for Approved Persons.

The FSA must determine whether or not to approve an application within six months of receiving a properly completed application, subject to a longstop of twelve months.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under section 19 of FSMA, it is an offence for a firm to carry out a regulated activity in the UK without authorisation. It is possible to cover a risk in the UK without authorisation, provided insurance business is not carried out from within the UK.

Foreign insurance companies whose head office is elsewhere in the European Economic Area (EEA) are permitted to conduct insurance business in the UK directly on the strength of an authorisation in their Home State (under the so-called 'passport regime'). The FSA receives notice from the EEA Home State regulator that it has given

consent to the EEA firm to establish a branch or provide services in the UK, comprising permitted activities and in accordance with the insurance Directives. These arrangements have now been extended to reinsurers. The FSA is entitled to impose additional requirements on (re)insurers passporting into the UK where these are required in the interests of the general good.

A foreign (re)insurer whose head office is outside the EEA would not be able to carry on insurance activities from within the UK (or through an agent in the UK) without authorisation. This can be achieved by setting up a branch of the (re)insurer, or establishing a subsidiary. In each case, permission under Part IV of the FSMA will be required. In the case of a branch, in order to obtain authorisation, in addition to the usual requirements for authorisation, the (re)insurer must be a body corporate formed under the law of the country where its head office is situated and appoint an authorised UK representative. In the case of an applicant who is not a pure reinsurer, it must have admissible assets localised in the UK and in the EEA to a value specified in the Prudential Sourcebook for Insurers (INSPRU).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

As with any contract, terms may be unfair in contracts concluded between an insurer and a consumer by virtue of the Unfair Terms in Consumer Contracts Regulations 1999. Terms which are unfair for the purposes of the Regulations will be deemed to be void. Particular care must be taken when contracts are formed on standard terms of business because such terms will not have been individually negotiated and will therefore be regarded as unfair if they cause a significant imbalance in the parties' rights and obligations, to the detriment of the consumer.

In addition, the FSA's Insurance Conduct of Business Sourcebook details information which must be provided to consumers in writing before the policy is concluded. The FSA's Responsibilities of Providers and Distributors for the Fair Treatment of Customers Guide (RPPD) includes guidance on product design and governance.

The FSA has indicated its intention to implement a more interventionist approach in relation to consumer products, outlining a number of product features which it considers may be detrimental. It has also suggested that it (or its successor) may consider introducing other policies, such as pre-approval and pre-notification requirements, or mandating or banning product features, in the future. Under the new regulatory regime, it is proposed that the Financial Conduct Authority will have the power to ban products.

It has been suggested that a stipulation in a policy may be so capricious or unreasonable as to be unenforceable. However, this would be inconsistent with the basic English concept of freedom of contract. A condition in an insurance policy which is contrary to public policy is unenforceable, and a stipulation which is impossible to perform is a nullity.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Pursuant to the Companies Act 2006, a company may not indemnify a director against any liability arising from negligence, default, breach of duty or breach of trust in relation to the company of which (s)he is a director. However, a company is permitted to take out and maintain insurance against such liabilities. A company may indemnify directors against liabilities incurred to third parties, including in respect of proceedings brought by third parties (covering both legal costs and damages) and may take out Directors' & Officers' Insurance to this end; and liabilities incurred in connection with the director's role as trustee of an occupational pension scheme. The only exceptions are criminal penalties, penalties imposed by regulatory bodies (such as the FSA), and liabilities incurred in unsuccessful defence of criminal or civil proceedings (or unsuccessful applications for relief from liability).

1.6 Are there any forms of compulsory insurance?

An employer carrying on any business in Great Britain must maintain insurance against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment (section 1(1) Employers' Liability (Compulsory Insurance) Act 1969).

Motor insurance is also mandatory, pursuant to section 143(1) of the Road Traffic Act 1988.

Under Section 19 of the Nuclear Installations Act 1965 a licensee of a nuclear reactor must carry liability insurance or otherwise make suitable provision for compensation claims.

Section 1(4A)(d) of the Riding Establishments Act 1970 requires owners of horse riding establishments to insure against liability for injuries resulting from the hire or use of their horses.

Section 1(6)(iv) of the Dangerous Wild Animals Act 1976 requires a keeper of a dangerous wild animal to maintain insurance against liability for any damage caused by the animal.

Section 37 of the Solicitors Act 1974 and the Solicitors Indemnity Insurance Rules 2002 require solicitors to insure against professional liabilities.

The Merchant Shipping Act 1995 requires owners of ships carrying more than 2,000 tonnes of oil and entering or leaving a UK port or terminal, and owners of UK registered ships entering or leaving a port or terminal in any other country, to be insured against liability for pollution.

Aviation insurance for liability in respect of passengers, baggage, cargo and third parties is now compulsory under Regulation 785/04 of the European Parliament and Council (April 21, 2004 OJ L/138), as supplemented by the Civil Aviation (Insurance) Regulations 2005 (SI 2005/1089).

Certain medical professionals are also required to have liability insurance, as are insurance and home finance intermediaries and certain investment firms.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

English law is perceived to be fairly pro-insurer, since courts will enforce the bargain between the parties. The law relating to non-disclosure/misrepresentation, breach of conditions precedent and breach of warranties is generally felt to be advantageous to insurers.

However, note that there is some protection for consumers by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 (see question 1.4 above).

Additionally, in response to criticism that the current law is weighted too heavily in favour of insurers, reform is on the horizon in the form of the Consumer Insurance (Disclosure and Representations) Act. The Act replaces the duty of the consumer to volunteer material information with a duty to take reasonable care not to make a misrepresentation during pre-contractual negotiations

relating to a consumer insurance contract. The Act is expected to come into force in spring 2013. The Law Commissions of England and Scotland have also published proposals for amending the law regarding disclosure by business insureds but it is envisaged that insurers will be able to contract out of any changes. Proposals have also been made to alter the law regarding warranties. A further draft bill is expected by the end of 2013.

2.2 Can a third party bring a direct action against an insurer?

The Third Parties (Rights against Insurers) Act 1930 enables a third party who has a claim against an insured to bring a direct action against insurers in the event of the insured's insolvency. It is not possible for the parties to contract out of this provision.

The Third Parties (Rights against Insurers) Act 2010 received Royal Assent on 25 March 2010, but is not yet in force. It will simplify the procedure by which a third party who has suffered loss as a result of the actions of an insolvent insured can claim against the insurer, and will also improve the third party's rights to access information about the insurance policy.

Neither the 1930 Act nor the 2010 Act applies to reinsurance contracts.

2.3 Can an insured bring a direct action against a reinsurer?

There is no privity of contract between an insured and a reinsurer. Accordingly, if the reinsured becomes insolvent, the insured has no direct cause of action against the reinsurer. However, some reinsurance contracts contain clauses which purport to confer a benefit on the insured, and such clauses are now enforceable under the Contracts (Rights of Third Parties) Act 1999, subject to the rules of preference in insolvency. In such cases, the insured can enforce the contract against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Currently, in the event of either misrepresentation or non-disclosure, where an insured fails to disclose material facts which induced the insurer to enter into the policy on the terms agreed, the insurers will have the right to treat the policy as avoided (as if the policy had never been entered into). This is an inherent right and does not depend on any term within the contract itself.

If the insurer elects to avoid the policy, it must return the premium to the insured, unless the misrepresentation or non-disclosure was fraudulent.

The remedies for misrepresentation and non-disclosure will change for consumer insureds after the implementation of the Consumer Insurance (Disclosure and Representations) Act 2012 (see above). Broadly, if a consumer makes a careless misrepresentation, the insurer's remedy will be based on what it would have done had the consumer not breached his/her duty. That may result in the insurer being able to avoid the contract or to impose different terms or to reduce proportionately the payment to the consumer (because a higher premium would have been charged).

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

There is a positive duty on an insured to disclose all matters material to a risk irrespective of whether the insurer has specifically asked. The insured's duty extends from his actual knowledge to material facts which he ought to know in the ordinary course of business.

However, the insured is not required to disclose facts which he did not know and could not reasonably be expected to have known in the ordinary course of business, which diminish the risk, which were known or ought to have been known by the insurers, which were waived by the insurers, or which were covered by an express policy term. Moreover, the insured is not under any duty to undertake investigations unless he knows of circumstances which ought to have alerted him to the existence of possible material facts.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is an automatic right of subrogation which applies to all contracts of insurance which are contracts of indemnity, once the insurer has fully indemnified the insured. The doctrine of subrogation does not, therefore, apply to contracts of life insurance and personal accident insurance. The insurer acquires the right to use the insured's name to proceed against any third party responsible for the loss and claim from the insured any sums received by way of compensation from that third party.

The principle of subrogation may be excluded or amended by the terms of the policy.

3 Litigation - Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The claimant is, in theory, free to choose whether to issue proceedings in the High Court or a County Court. However, courts may, of their own initiative or following application by either party, transfer cases between the two courts.

Prima facie rules state that claims for £25,000 or less (or personal injury claims of less than £50,000) must be commenced in a County Court. In practice, claims worth less than £50,000 will generally be transferred to a County Court. However, a claim which falls within the County Court financial thresholds may nevertheless be commenced in the High Court if there is reason to believe it should be dealt with by a High Court judge. Relevant factors include: the financial value of the claim; the amount in dispute; the complexity of the facts; legal issues, remedies or procedures involved; and the importance of the outcome of the claim to the public in general.

An insurance dispute is a 'commercial claim' and is, therefore, likely to be brought in the Commercial Court, a specialist court in the Queen's Bench Division of the High Court.

Judges will allocate claims to one of three procedural 'tracks' (the multi-track, fast track or small claims track) at an early stage in the proceedings. In determining the track, judges will take into account: the financial value of the case; the amount in dispute; the complexity of the issues; the number of witnesses likely to be called; whether expert evidence is needed; intended applications; costs estimates; trial time estimates; settlement proposals; and pre-action exchanges. This information will be obtained from the parties through an allocation questionnaire. The fast track is suitable for any case worth between £5,000 and £25,000, where the trial is estimated to last not more than a day and where oral expert evidence at trial will be limited to one expert per party per field and expert evidence in two fields. The multi-track is suitable for any

case worth more than £25,000, where the trial is estimated to last more than a day and each party will need to adduce oral expert evidence from more than two fields or more than one expert in a particular field.

There is no right to a hearing before a jury, except in (rare) cases where an allegation of fraud has been made against the party making the application.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

Twelve to twenty-four months, depending on the complexity of the case and the number of witnesses involved, among other factors.

4 Litigation - Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

Most commonly the court will order standard disclosure. This requires a party to carry out a reasonable search for documents and disclose all the documents on which it relies, or which adversely affect its own case, adversely affect another party's case or support another party's case.

Accordingly, the parties are subject to an ongoing duty to preserve disclosable documents. Pursuant to the new Practice Direction 31B, documents should be preserved as soon as litigation is contemplated. If documents are not preserved, this may result in costs penalties, adverse inferences of fact may be drawn, the court may order the client to forensically retrieve deleted data, and there is even the risk of a strike out or criminal penalties. A solicitor is under a duty to advise clients of their obligations on disclosure and about the preservation of documents.

The duty of disclosure is limited to documents that are or have been in a party's 'control'. This includes documents for which a party has a right to call. The courts also have the power to order a non-party to disclose documents in its possession.

Disclosure usually takes place after statements of case have been served. However, before proceedings have commenced, disclosure may be ordered between likely parties to the proceedings and in very limited circumstances against non-parties.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

Parties are entitled to withhold privileged documents from production to a third party or the court. Legal advice privilege attaches to communications between a client and his or her lawyer for the purpose of giving and receiving legal advice. Litigation privilege attaches to communications between client and lawyer, or between either of them and a third party, for the dominant purpose of giving or receiving legal advice or collecting evidence for use in litigation, while litigation is pending or in the reasonable contemplation of the communicating parties.

Written or oral communications between the parties which constitute genuine attempts to resolve the dispute attract 'without prejudice' privilege. Privilege will attach to such communications regardless of whether or not the documents are marked 'without prejudice'. Mediation communications are protected by the 'without prejudice' rule, but the use of a document in mediation will not give it 'without prejudice' status if it otherwise lacked that status (for example, because it was produced for another purpose). However, the 'without prejudice' rule is not absolute and can be overridden where the justice of the case requires this.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court has the power to issue a witness summons requiring a witness to attend court to give evidence or produce documents on such a date as the court may direct. If a witness fails to comply he risks being found in contempt of court. The court can require a witness to attend the trial and any other pre-trial hearing, but a party must obtain the court's permission to have a summons issued for a witness to attend court on any date except the trial date and for any hearing except the trial. A witness summons must be served at least seven days before the witness is required to attend for it to be binding.

A witness abroad cannot be compelled to attend a trial. Therefore, if the court is satisfied that the witness is unwilling or unable to be present, the application is made *bona fide* and not so as to cause unreasonable delay and the witness can give substantial evidence that will be material to the case, an order for a deposition can be made. Part 34 of the Civil Procedure Rules 1998 permits a witness to be cross-examined at a hearing and then for a written record of that cross-examination to be submissible as evidence before a court in England.

Where a witness is resident or located in another EU state (except Denmark), the court may, upon application by a party, issue a letter of request to the relevant foreign court. The foreign court may only refuse the request in very limited circumstances, such as when the witness exercises a right not to give evidence that exists under the law of either the English courts or the relevant foreign court. Where a witness is resident or located in Denmark or outside the EU, a party can take a deposition from the witness by applying for an order for the High Court to issue a letter of request to the judicial authority of the country where the witness is.

4.4 Is evidence from witnesses allowed even if they are not present?

It may be possible to obtain an order for the examination of a witness under deposition if a witness cannot attend trial. This involves the witness giving evidence to the examiner as if the examination were the trial itself. There is, therefore, full opportunity for cross-examination. The evidence is then reduced to writing and the document is received into evidence at the trial.

Alternatively, it is possible to rely on a witness statement without calling the witness in person. Generally, the witness must be called to give oral evidence, unless the court orders otherwise, or the statement is entered as hearsay evidence. If the statement is to be entered as hearsay evidence, all other parties to the proceedings must be notified of this. Notice is given by serving a witness statement, informing the other parties that the witness will not be called and providing reasons for this. However, the party against whom the evidence in the statement is adduced can apply to the court for permission to call the statement maker for cross-examination.

In addition, the court has the power to allow a witness to give evidence through a video link or by other means.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The court's permission is required in order to call an expert witness. The expert's primary duty is to the court and this overrides any obligation to the instructing party. The expert must, therefore, remain independent of the instructing party. The court has the power to restrict expert evidence to what is reasonably required to resolve the proceedings. Accordingly, the court has the power under the Civil Procedure Rules 1998 to direct that evidence is to be given by a single joint expert where the parties wish to submit expert evidence on a particular issue. It is, however, far more common to have party-appointed experts only.

If the court directs that evidence is to be given by a single joint expert, the court will usually expect the parties to agree on the identity of the expert. If the parties cannot agree, the court will select an expert from the list drawn up by the parties or direct some other method for the selection of an expert.

Unless the court has given directions or the parties have agreed otherwise, all of the instructing parties are jointly and severally liable for paying the joint expert's fees and expenses.

4.6 What sort of interim remedies are available from the courts?

The court may make an order in favour of pre-action disclosure before a claim has been made if the matter is urgent, or it is otherwise necessary to make the order in the interests of justice, if certain conditions are satisfied. This is possible where: the respondent and the applicant are likely to be parties to subsequent proceedings; the documents sought would fall within the respondent's standard duty of disclosure if proceedings had started; and the pre-action disclosure is desirable because it will dispose fairly of the anticipated proceedings, will assist the dispute to be resolved without proceedings, or will save costs.

An injunction is an order of the court that requires a party to do or to refrain from doing a specific act, and may be sought, for example, to prevent a claimant pursuing legal proceedings or restrain a breach of contract. Injunctions may be granted where it appears to the court to be just, convenient and proportionate to do so. If an injunction is disobeyed, that party will be in contempt of court.

A prohibitory interim injunction, requiring a party to refrain from doing a specific act, can be sought at any time. It can be used, for example, to protect confidential information or to enforce a restrictive covenant.

It is possible to apply for a freezing injunction at any stage of the proceedings. It must be proved that: the applicant has a good arguable case; the defendant has assets in the jurisdiction; there is a real risk of dissipation of the assets (judged from an objective perspective); and the order is just and convenient in all the circumstances. The remedy is *in personam*. The applicant is not provided with security for his claim and has no proprietary rights in the assets in question. English courts will usually make orders only relating to property within the jurisdiction.

A search order in respect of documents will be granted only if there is a real possibility that the defendants will destroy the relevant evidence. There are four essential pre-conditions for making the order: first, there must be an extremely strong *prima facie* case on the merits; secondly, the respondent's activities must cause very serious potential or actual harm to the applicant's interests; thirdly, there must be clear evidence that highly material documents or materials are in the respondent's possession; and fourthly, there must be a real possibility that such material may be destroyed before any application can be made with notice. The terms of the order should be limited to no more than is necessary to achieve the legitimate object of the order. If entry is not granted, the respondent will be in contempt of court.

The court has the power to order the preservation or delivery up of property, pursuant to rule 25.1 of the Civil Procedure Rules 1998. This type of order requires: the defendant to make the item available to the claimant or some other person and includes orders for the detention, custody or preservation of relevant property; the inspection of relevant property; the taking of a sample of relevant property; the carrying out of an experiment on or with relevant property; the sale of property where it is desirable to sell quickly; and the payment of income until a claim is decided. An application can be made at any time and the procedure to be used is the same as for an injunction.

A Norwich Pharmacal order can be obtained at any time and requires a respondent to disclose certain documents or information to the applicant. The respondent must be either involved or mixed up in a wrongdoing, whether innocently or not, and there must be a need for an order to enable an action to be brought against the ultimate wrongdoer. The order will be granted only where it is necessary and in the interests of justice.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Permission to appeal must be obtained either from the lower court at the hearing at which the decision to be appealed was made, or from the appeal court itself. Permission will be given only where the court considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard. The appeal court will refuse to allow an appeal unless it considers that the decision of the lower court was wrong, or the decision of the lower court was unjust because of a serious procedural or other irregularity. The appeal is generally limited to a review of the lower decision and not a re-hearing.

The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court. If an application for permission to appeal made in the High Court is refused, a party can still apply to the Court of Appeal. In very limited circumstances there may be an appeal directly from the High Court to the Supreme Court.

A party may apply for leave to appeal a Court of Appeal decision to the Supreme Court. An application must first be made to the Court of Appeal and an application may be made to the Supreme Court only after the Court of Appeal has refused to grant permission to appeal. If the application is not made at the judgment hearing, a written submission must be made within twenty-eight days of the date of the order or judgment given by the Court of Appeal. Permission to appeal will be refused by the Supreme Court if it does not raise an arguable point of law of general public importance. The court's decision on the application will usually be made within eight weeks, and the appellant must then file notice of its intention to proceed within fourteen days.

Parties to an appeal cannot agree between themselves to extend any date or time limit set by statute, but it is possible to make an application to the appeal court to vary the time limit for filing an appeal notice.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

When a court awards damages, it has discretion also to award

simple interest for such periods and at such rates as it sees fit, pursuant to section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984. The court's discretion is limited to awards of interest starting no earlier than the day on which the cause of action arose and ending no later than judgment or sooner payment. The court's powers do not override any contractual provision on interest or interest due under the Late Payment of Commercial Debts (Interest) Act 1998.

The current interest rate in respect of commercial disputes before the Commercial Court is 1 per cent above base rate. The Court of Appeal examined this rate in the case of *F&C Alternative Investments v. Barthelemy* [2012], where it allowed a rate of 3 per cent over base rate for a "small businessman" but did not disagree that 1 per cent above base rate remained the appropriate rate of interest in commercial cases.

At the point of judgment, interest ceases to run on the principal sum but begins to run on the judgment debt (currently at 8 per cent) until it is satisfied. The court has flexibility in determining the periods by reference to which interest on awards is to be calculated and paid, and has flexibility in relation to the rate of interest on the judgment debt if judgment is in a foreign currency.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The starting point is that the loser pays the winner's costs. However, the court has complete discretion as to costs, except in limited specific circumstances when they follow automatically. In exercising its discretion, the court should have regard to factors such as the conduct of the parties and the extent to which the parties have followed any pre-action protocol. The court may award a percentage of costs to reflect partial success, or costs may be awarded each way.

Special rules apply where an offer to settle is made in accordance with Part 36 of the Civil Procedure Rules 1998. A party can make and accept a Part 36 offer before litigation has commenced. If a claimant declines to accept a defendant's offer and then fails to obtain judgment for an amount greater than the offer, the court will, unless it considers it unjust, order the claimant to pay any costs incurred by the defendant from the date on which the relevant period expired, plus interest on those costs.

If a defendant fails to accept a Part 36 offer and the claimant then obtains a judgment which is equal to or more advantageous than its offer, the court will, unless it considers it unjust, order the defendant to pay the claimant's costs on the indemnity basis for the period starting from the date on which the relevant period expired, with interest on those costs at up to 10 per cent above the base rate and interest on the whole or part of the sum awarded to the claimant at a rate not exceeding 10 per cent above the base rate, for some or all of the period starting from the date on which the relevant period expired. The defendant will also be ordered to pay the claimant's costs on the standard basis (with interest on those costs) from the beginning of the matter to the date on which the indemnity costs and enhanced interest started running.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

The courts will generally enforce a clear and express agreement to mediate and will grant a stay of litigation proceedings in order to ensure that such mediation takes place. If there is no enforceable agreement to mediate, the courts currently do not compel the parties to mediate. However, mediation is generally supported by the courts and there are schemes in the County Courts and Court of Appeal aimed at encouraging parties to mediate.

4.11 If a party refuses to a request to mediate, what consequences may follow?

If a party unreasonably refuses to mediate, the court can order costs sanctions, even if that party is successful. The classic case was *Dunnett v. Railtrack* (2002) and this has been more recently applied, for example, in *Rolf v. De Guerin* (2011).

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The English courts support arbitration as a dispute resolution mechanism. Under the Arbitration Act 1996, the role of the court is supportive rather than supervisory. The general approach of the courts is of intervention in arbitration only where the tribunal is unable to act effectively. The cases which have involved significant court intervention tend to have been *ad hoc* arbitrations in which the parties are unwilling or unable to agree a basic procedure for arbitration.

Pursuant to the Arbitration Act 1996, the court can aid arbitration by securing the attendance of witnesses. The court also has powers relating to: the taking of evidence of witnesses; the preservation of evidence; orders for the inspection and detention of property; orders for samples to be taken; the sale of any goods subject to the proceedings; and the granting of an interim injunction or the appointment of a receiver. If the case is urgent, the court can make such orders as it thinks is necessary for the purpose of preserving evidence or assets. Otherwise, application to the court is permitted only if the other parties consent in writing or the tribunal allows it.

The court also has the power to determine preliminary issues of law, remove arbitrators or fill a vacancy, and hear appeals from the arbitrators' award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

A right to arbitrate will arise only if there is an arbitration agreement. However, there is no specific form of words required to ensure that an arbitration clause will be enforceable. Arbitration clauses will therefore be construed in accordance with common law principles.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Express arbitration clauses are enforceable, but must use clear, unambiguous and mandatory language to avoid giving rise to disputes. It is not necessary for the parties to agree to arbitration after a dispute has arisen, and it is common for arbitration agreements to be concluded as part of the original contract.

Under the doctrine of separability, an arbitration clause is regarded as a separate agreement, independent of the larger contract. Accordingly, the invalidity of the larger contract will not necessarily result in the arbitration clause also being invalid.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The court has the same powers in supporting arbitral proceedings that it has in court proceedings and can make orders for the taking of evidence, the preservation of evidence, ordering the inspection and preservation of property, and the granting of an interim injunction or the appointment of a receiver (section 44(1) of the Arbitration Act 1996). In practice, however, the English courts are reluctant to intervene in arbitral proceedings (see question 5.1 above).

The courts are not empowered to grant pre-action disclosure in respect of disputes which are to be referred to arbitration.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Pursuant to section 52 of the Arbitration Act 1996, arbitration awards must contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

If the award does not include reasons, or the reasons are ambiguous, the parties can apply to correct the award. Under the Arbitration Act 1996, the parties are free to agree on the power of the tribunal to correct the award or make an additional award. Applications must be made within twenty-eight days of the date of the award, or within any longer period which the parties may agree. If the tribunal dismisses the application, the applicant may consider an application to the court. If the tribunal grants the application, it will issue corrections or clarifications to the award and these will take effect as part of the original award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Pursuant to the Arbitration Act 1996, a party may appeal an award on the basis that the tribunal lacked substantive jurisdiction or there was a serious irregularity affecting the tribunal, the proceedings or the award; or, if the parties have not agreed to waive the right, on a question of English law.

Any challenge or appeal must be made within twenty-eight days of the date of the award, although this time limit may be extended in exceptional circumstances.

It is very difficult to challenge an award on the basis that the tribunal exceeded its jurisdiction and successful applications tend to be limited to situations where there was no valid arbitration clause at all. Similarly, it has become very difficult to satisfy the test for serious irregularity.

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- Acts for Lloyd's Syndicates and London and international insurance companies on a wide range of issues, including personal accident, product liability, and property/casualty.
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She has advised on a number of high profile insurance insolvencies, solvent schemes of arrangement for London market insurers and reinsurers, on business transfers under Part VII of FSMA and cross border mergers. She also regularly advises on perimeter issues, including the restrictions on the activities non-EEA insurers can carry out in the UK; conduct of business issues; and all other aspects regulation under FSMA.

Recent experience:

- Advising a broker on compliance with the FSA's TC4 regime.
- Advising a broker on compliance with the FSA's requirements on third party payments.
- Euler Hermes - cross border mergers of three group entities and a Part VII transfer.
- GLOBAL General Insurance Company Limited - solvent scheme of arrangement.

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