

Arbitration Options Put Global Insurers In The Driver Seat

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Law360, New York (May 11, 2017, 5:07 PM EDT) -- Globalization of the insurance market has seen an increase in the use and enforcement of international arbitration agreements in insurance policies. When tragedy strikes or loss occurs, insurers have a variety of options to enforce their rights, including everything from a negotiated stay of proceedings, to an anti-suit injunction and everything in between. The specific arbitration provision of the policy and the goals of each insurer will guide the decision making process.

Voluntary Waiver

The first option to consider is whether to enforce the international arbitration provision at all. Voluntary waiver of arbitration might be attractive to an insurer interested in avoiding the increasing cost and duration of international arbitration, which can be especially costly with three-person panels. The outcome of arbitrations can also be unpredictable, and there is often no right to an appeal, unless specifically negotiated. However, some insurers may not be able to avail themselves of the waiver option, as tax or other legal constraints prevent them from submitting to a United States jurisdiction. Still others may prefer arbitration because of its confidentiality, finality and simplified procedures. Further, recent reforms may make arbitration more attractive. For example, the International Court of Arbitration now requires a decision within three months under penalty of discounted arbitration fees. Other institutions are also offering expedited arbitrations and statistics at the beginning of a case to estimate time frame and cost.

Tolling Agreement

Another option is the negotiation of a voluntary tolling agreement, which is used by sophisticated parties who recognize the strong judicial disposition in favor of arbitrations and want to avoid protracted litigation on the enforcement of these provisions. A tolling agreement allows for the most expedient and cost effective way of proceeding when there is a market of insurers, but only a handful of them have an international arbitration provision. A common tolling agreement stays claims against those insurers with international arbitration provisions and awaits the outcome of litigation against the other litigants. All applicable statutes of limitation are tolled until the termination of the agreement. If an insured is not



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inclined to enter into a tolling agreement, for whatever reason, an insurer can pursue enforcement in other venues.

Federal Court Proceedings

The primary venue for enforcement of international arbitration agreements in the United States is the federal court system. Chapter 2 of the Federal Arbitration Act grants federal jurisdiction at any time before trial for an action involving an international arbitration agreement under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Convention). A commercial arbitration agreement comes within the purview of the New York Convention if it involves a foreign party, property situated in another country, or contemplated performance or enforcement abroad.

The FAA advances a liberal policy favoring the enforcement of international arbitration agreements and is generally the preferred venue for compelling arbitration. For example, when parties execute an agreement with an arbitration provision, it may not be clear whether a specific dispute under the contract was intended to be resolved through arbitration. In light of the strong federal preference for arbitration, some federal courts have concluded that any uncertainty concerning the scope of intended arbitration should be resolved in favor of arbitration.

This liberal policy is not without limitation. Contract law is a matter of state concern, and federal courts must apply state substantive law to contract disputes in diversity. Whereas the FAA prevents states from adopting law that specifically invalidates arbitration agreements, these same provisions can be invalidated through application of generally applicable rules on fraud, duress, unconscionability and waiver. In the event an insured asserts any of these issues, the arbitration analysis can become more complicated.

State Court Proceedings

State court has its own set of benefits and challenges. State courts hearing cases involving the FAA are free to apply state procedural law to FAA disputes. These rules can give courts discretion to stay arbitrations pending litigation or the ability to refuse their enforcement to prevent duplicative litigation or conflicting rulings. For example, many state courts have refused to enforce valid arbitration clauses that are unconscionable or that violate state public policy.

Differing procedural rules between state and federal court may also impact outcomes. Some states require consent to judicial confirmation of an arbitration award, but this requirement is uncertain in federal court. The Ninth Circuit has found explicit consent-to-confirmation requirements in the FAA, while other courts have held otherwise. The Second Circuit concluded consent is not required under the New York Convention. Further, some states require that confirmation be filed within different time frames as those mandated in federal court.

Anti-Suit Injunction

Another enforcement option for insurers outside the United States is an anti-suit injunction, which is an order preventing an opposing party from commencing or continuing a lawsuit in a foreign tribunal. This strategy requires contract language that specifies that arbitration is to occur in a forum outside the United States. It has distinct advantages, but it also wades into the tricky area of international comity and must be pursued quickly when suit is first filed. While there has been a proliferation of arbitration venues out of places like London and Bermuda to many Asian jurisdictions, London is still a highly favored venue for arbitrations, especially for insurers.

English courts are likely to enforce London-based arbitration clauses, but the court must be able to assert jurisdiction over the plaintiff in the United States and be convinced of the propriety of such action. The plaintiff in the United States must be physically present in England or have submitted to the jurisdiction of English courts. The propriety inquiry is very fact specific and involves questions about whether both cases relate to the same issues, there is a valid arbitration clause, special circumstances exist to preclude relief, and the procedural posture of the United States case.

Filing an anti-suit injunction in London risks the pursuit of a counter anti-suit injunction in the United States. The purpose of a counter anti-suit injunction is to guard the validly invoked jurisdiction of United States courts and to prevent the violation of United States public policy. A United States plaintiff can also pursue an anti-arbitration injunction where a party is not a direct signatory to the arbitration agreement or it does not cover all the claims in the lawsuit. While an anti-suit injunction has the advantages of providing a familiar forum for many international insurers, it also risks stoking the ire of dueling courts and sparking an epic battle over the reach of each court's jurisdiction.

Conclusion

The choices for enforcing arbitration involve a complicated decision-making process. It is important for global insurers to consult with knowledgeable counsel to explore all options before pursuing any particular path. Insurer goals, the specific facts, and the arbitration language and signatories will in many ways guide the analysis. With a detailed strategy, insurers can enforce their right to arbitration in a variety of forums and achieve their most important strategy goals.

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