

# How to stop costly litigation from ruining your results

The bespoke nature of fac makes it a great creator of reinsurance disputes and costly litigation. Here, renowned global experts **Paul Moss** and **Peter Phillips** explain a new best-practice mediation protocol that should help you to avoid blowing all your hard-earned cash on legal fees

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 or hired guns. Of course, 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 a legal precedent for future reference.

But it's a basic tenet of claims management that "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 possess any number of other nasty attributes. Worst of all, they are too frequently left to the control of the claims manager and are handled as legal rather than business matters, inviting Dickensian outcomes where, in certain cases, legal fees can threaten to exceed liability.

## Mediation versus litigation

Chief among the problems here are cost and uncertainty. Litigation is 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 increasingly proves to be — time-consuming, slow, expensive and even 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 there is good reason for a shift in thinking; they recognise a significant change is about to happen and have sought to become appropriately skilled by re-training 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



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actually being done about it. There is a new initiative called the International Reinsurance Industry Dispute Resolution Protocol, which aims to achieve 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 makes sense to have a dispute-resolution protocol added to the litigation-management toolbox.

To become an effective mediator, claims staff will also need to learn new skills — it is now imperative to have 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.

## Why mediate?

The conflict prevention and resolution (CPR) protocol has been the subject of two well-at-

tended 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, answered that the reasons to mediate are because it works, is quick, it preserves relationships and saves money. Also, the success rate in mediation is very high — some say 75–80%, either on the day or shortly after.

Mr Clift's presentation covered a range of issues, for example: What is mediation? How does mediation differ from arbitration? When should mediation be used (and not used)? Why is mediation effective? Why does mediation sometimes fail, and how can failure be avoided? He also offered some conclusions, to wit: arbitration in England and Wales is in many ways excellent and is probably essential, but it is, as a broad generalisation, rather slow, costly, adversarial and risky, whereas (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); and at the conclusion, there will be a determination of the issues and an award with winners and losers (and cost consequences).

By contrast, mediation is entirely voluntary, strictly without prejudice, private and confidential. Generally, 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) as a result of its timetable,

■ **The best way NOT to tie up your funds is to practice mediation, argue Paul Moss and Peter Phillips.**

structure and dynamics (in contrast to negotiation); and because of the shared sense of purpose it engenders. Further, there is 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) a lack of preparation by the parties; a lack of realism or authority on the part of those participating; and a lack of adequate contact with the mediator beforehand, excluding 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 (such as 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.

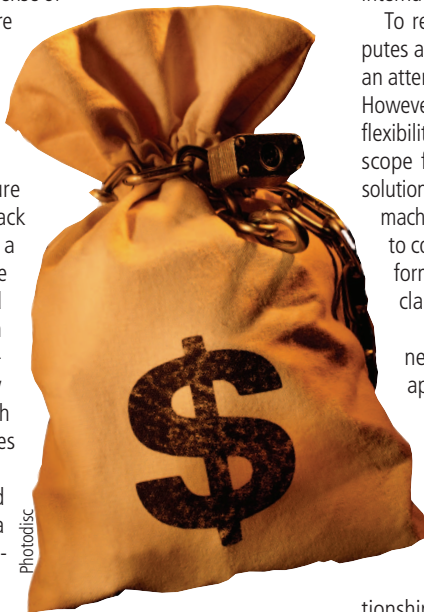
Mediation works and cases settle. Subject to any other considerations, the earlier mediation is attempted, the greater the saving in cost and time that can be achieved. The process repays understanding and preparation. A standard clause and procedure would expand its use — for example, inclusion in insurance and reinsurance contracts. While it is neither a universal panacea nor is it suitable in all cases, mediation offers enormous scope.

### A powerful tool

Peter Schwartz, a partner with Mayer Brown Rowe & Maw, 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 on the increased popularity of alternative dispute-resolution (ADR) strategies and techniques among corporate general counsel.

According to a recent survey (by Grant Thornton), eight out of 10 external lawyers and nine out of 10 corporate lawyers believe that more cases will be resolved by ADR over the next few years, yet there is presently no consistent approach by the reinsurance industry to mediation.

Mr Schwartz expressed the view that mediation is a powerful, speedy and cost-effective tool in the toolbox of available remedies for reinsurers involved in potentially long-running and expensive arbitration or litigation. It is



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also 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 formulating and adopting 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 reinsurance. 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 by consideration at the appropriate stage when a reinsurance dispute has arisen. Mediation is ripe for take-up, with potential for significant cost savings.



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### The CPR reinsurance protocol

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

The term 'protocol' is used advisedly, because the document (available at [www.InsuranceMediation.org](http://www.InsuranceMediation.org)) suggests a comprehensive method of identifying reinsurance claims disputes early on; agreeing on a rigorous but rational method of exchanging adequate information concerning the claim; and engaging in structured negotiation (and, if necessary, mediation) to resolve claims disputes on a business-like basis rather than resorting to arbitration or litigation. It also 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 minimise 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 non-binding 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, and 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 of resolving 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 CPR Protocol will not by itself make a difference, however. Clearly, the key to successful implementation is underwriters' willingness to incorporate dispute-management wordings such as those in the CPR Protocol into reinsurance contracts.

### A major step forward

The CPR Protocol is a major step forward in helping to complement and support the need for mediation clauses to be incorporated within reinsurance agreements. We have already started to see dispute-resolution clauses being adopted — for example, 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 group are in the process of working with the Centre for Effective Dispute Resolution to produce a training module for (re)insurance professionals who wish to become accredited in mediation.

There is one inescapable conclusion: in an industry that involves insuring against unforeseen losses, there are so many contingencies beyond our control that it seems silly not to control the ones we can. **fac**