

“Settlement of Insurance Claims through Mediation”

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This paper’s objective is to provide an overview of why mediation may be the best alternative to settle disputes related to insurance claims, by considering the essential issues related to these claims, presenting the advantages offered by mediation, and speaking about a Brazilian leading case of Dispute System Design involving insurance.

The Insurance and Reinsurance sector has been affected by an increase in the diversity and number of disputes involving insurance claims. There are several reasons for this phenomenon. Amongst the most important are the tighter regulation put in place after the economic crisis, consumers becoming increasingly aware of their rights, the impact of globalization that increased trade and, therefore, the need for insurance, and the integration of larger insurance consumer following the economic development of the emerging markets.

In short, disputes involving insolvency, contested coverage, and reinsurance recoveries have been increasing in their frequency, complexity, and scale.

Whether the subject matter relates to finance, energy, construction, product liability, or even our life insurances, disputes are often complex affecting large groups of policy holders, underwriters, brokers, claims managers, and reinsurers.

In addition to their complexity, those disputes usually involve repeated players such as the same insurance and reinsurance companies, large corporations and insured clients. When each of these insurance disputes arises, the parties’ best interests become to resolve it in an effective, efficient, fast, and inexpensive way. It is clear that the current court systems are not equipped to handle these cases via litigation.

It seems, therefore, that implementing alternative ways to address these disputes is key to the insurance industry. In this scenario, Mediation seems to be the most obvious choice as it can deliver a basket of benefits that no other dispute resolution method can.

Some of these benefits are:

- **Minimizing Time and Costs.** The first and most evident benefit of mediation is that it can save parties considerable amounts of time and money compared to other alternatives to dispute resolution that will involve lawyers, expert advice, judiciary costs, etc.

- **Flexibility.** Another very important advantage when we are talking about disputes with this complexity is Flexibility . Mediation allows participants to take different approaches to creative problem solving and to resolve disputes in any basis they see fit to their interests.

- **Party control of the process.** While courts and arbitration tribunals are expected to resolve disputes on the basis of the evidence, the law, and, in some cases, industry practice, they are not generally able to resolve disputes taking into consideration commercial concerns of the parties such as the preservation of their continuing business relationships, something important when you deal with repeated players.

Mediators, on the other hand, are not constrained by the facts or the law applicable to a given dispute. The best mediators are experts in facilitative thinking and in helping people to develop a process of dispute resolution tailored to the case at hand.

- **Party Control of the outcome.** In addition, in Mediation parties take control of the outcome of their dispute, instead of relying on a third party's binding determination of right or wrong for them. Parties are the final decision makers making them more likely to comply with the reached settlement.

- **Preserving and maintaining relationships.** Mediation can create an opportunity to preserve relations when a continuing relationship is desirable or inevitable for the parties. This means that, after the dispute is settled through mediation, the business relationship is more likely to continue and the parties can still conduct their business by leaving the dispute, and the bad feelings associated to it, behind.

- **Image.** Last, but not least, the use of Mediation may help insurance companies to build and maintain a good public image by showing their concerns and efforts in achieving fair and sustainable solutions for the disputes at hand. Mediation may help insurance companies to be perceived as trustworthy, reliable organizations, which are extremely important and positive qualities for any company in any business.

In addition to the advantages of the Mediation proceeding itself, the mediator's role as a neutral third party is also very important in dealing with Insurance claims.

There are at least 3 important aspects of how Mediators can help to resolve insurance disputes (Golann, 2009, pp. 294-301) :

- **Flow of information.** The flow of information is a key factor in the successful resolution of a conflict, and mediators work to help the parties uncover important, and sometimes neglected, information (Golann, 2009).

However, at the same time, mediators who work with insurance claims must be careful about this respect and blend openness with the realization that the parties and lawyers consider information to be valuable commodity and the release of it to be a strategic decision (Golann, 2009).

Therefore mediators can assist by promoting a discussion about the nature of the information, the pros and cons of holding or releasing it, and the likely consequences of either decision (Golann, 2009).

- **Case Analysis.** Most of us cannot think of everything that could possibly go wrong with a case or every interpretation of the facts or law. Therefore, some case analysis discussion will be appropriate and helpful, even when the parties have been prepared carefully (Golann, 2009).

Mediators help lawyers and their clients by posing important and probing questions to come to grips with the realities of their case. Mediators can translate the thoughts of one side to the other in such a way that each side can listen to and consider the analysis of the other (Golann, 2009).

Mediators are agents of reality.

- **Stall of negotiations.** When parties try to settle disputes which involve monetary compensation they often have a hard time in starting the process ("who goes first?"), they have a hard time keeping it going when they find that their ranges vary widely, and they grow resentful as they make concession after concession in an effort to settle their case at no avail (Golann, 2009).

When parties react strongly to the other side's proposal, the mediator can understand the basis of the reaction and to reflect that basis back to the participant in such a way that the participant knows that the mediator understands him/her (Golann, 2009).

Litigants are more likely to get back to the business of proposal making if they have the experience of being understood by the mediator (Golann, 2009).

Parties who react strongly to a proposal from the other side lose sight of the fact that they have many tools at their disposal to further the objective of settlement. Mediators can help the reacting party identify a number of ways of dealing with the situation other than by leaving or making no proposal at all (Golann, 2009).

One good example of how Mediation may be used to settle complex and challenging insurance claims was the Brazilian Dispute System Design (DSD), designed to provide an efficient and just system to compensate the victims of a terrible plane accident which occurred in Brazil in 2007, TAM flight 3054, in which 199 people lost their lives.

This DSD was created for the unique needs of this concrete case, to advance the interests of the families of those who lost their lives, and to avoid the enormous costs of the Brazilian court system.

This claims resolution facility was opened in 2008 and featured an assistance division, to assist the beneficiaries in filing their claims. Neutral representatives were present at every meeting the family members had with the companies.

The DSD also included an advisory arbitration committee, in which the public authorities would issue nonbinding opinions to help the parties resolve their disputes. This reduced the distrust and unrealistic expectations among the beneficiaries, while protecting them from eventual opportunistic offers.

One year after they opened the facility, 200 people—the beneficiaries of around 55 victims—were compensated. The neutrals also assisted the beneficiaries in litigation, leading 90 percent of them to settle.

At the end of the process, the airline and the insurance companies saved on legal fees while focusing on better compensating families than they would have under the old model. In short, the claims were resolved more quickly and more efficiently at much lower costs.

At the same time, consumer satisfaction was clearly maximized. The victims' family members reported that the system's transparency and impartiality helped them get through their ordeals with more tranquility.

In a situation that involved complex business and economic problems, compounded by the tragic and emotional consequences of irreparable losses of life, this DSD clearly demonstrated how Mediation was an important component in fixing complex problems by changing the way a dispute is approached from a litigating mood to a collaborative model.

In conclusion, mediation may contribute to add value to the insurance industry by resolving the inevitable disputes more quickly and at lower costs, both economical and emotional.

When applied to insurance claims, Mediation may solve seemingly untreatable problems with a creative approach, participation of all parties involved in the dispute in the search of a reasonable and mutually agreeable solution, and the recognition that "One size does not fit all".

Mediation may just be the tool to insure the insurance companies that their customers feel that they are being listened to and treated fairly when a dispute arises. From the insurance industry standpoint, mediation is not only a way to resolve dispute. It is an investment with almost guaranteed returns.

Reference

Golann, D. (2009). *Mediating Legal Disputes - Effective Strategies for Neutrals and Advocates*. ABA Publishing.