impide la solicitud, por parte del deudor, que afecte a más de una de las entidades que integran el Grupo, facultándose también al acreedor para que amplíe la solicitud de apertura a cualquiera otra unidad del grupo, si se diesen en ella las condiciones para la apertura del procedimiento.

A los efectos de identificar el grupo, se exige la concurrencia de una unidad de dirección efectiva entre todos sus miembros y, eventualmente, la confusión de activos en el patrimonio del grupo: que no pueda identificarse con nitidez la titularidad de los bienes.

En el empeño por la definición sobre el centro de principales actividades, se manifiestan insalvables dificultades para fijar un criterio único y aceptable para todos. Ante tal obstáculo va respondiéndose con la pretensión de reforzar las medidas de coordinación y cooperación entre los tribunales, en el supuesto de que se abran procedimientos de insolvencia en diferentes Estados a causa de la diversidad geográfica que afecte a los miembros del grupo.

Respecto de los efectos del concurso se perfila la conveniencia de designar expresamente un representante compartido para la insolvencia de cada entidad del grupo, a fin de poder coordinar más fácilmente el procedimiento, sin que se descarte la designación de coadministradores para los casos en que concurran conflictos de intereses entre el Grupo. Lógicamente se consideró dotar al Juez de la insolvencia de facultades, con carácter sin embargo excepcional, para ampliar a las sociedades solventes del grupo la paralización de acciones que afecten a la insolvente. También se consideró conveniente la acumulación o consolidación de procedimiento en un Tribunal y la posibilidad de establecer un plan de reorganización común se pensó ventajosa.

También paulatinamente se avanza también en la financiación posterior a la insolvencia, cuestión cuya dificultad y mayor relieve resultan manifiestos.

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In the normal course of business, reinsurers typically assist insurance companies (hereinafter referred to as “Cedents”) in expanding their underwriting capacity through the mechanism of reinsurance. On occasions, reinsurers will assume a significant portion of a Cedent’s risk, by covering 95% or more of the Cedent’s policy limit either on a quota share or excess of loss basis. This is especially relevant when Cedents are entering a new line of business and do not wish to expose a great deal of their own capital. When an insurance company decides to cede most of its risk to a reinsurer, it often expects the reinsurer to provide both the expertise and infrastructure through which the Cedent can offer underwriting services and claims protection to its insureds. Indeed, it is only reasonable for the reinsurer to exercise adequate control over underwriting decisions and claims support where it has assumed most of the risk. In certain developing markets such as China, India and Latin America, a Cedent may rely on reinsurers to provide both expertise and infrastructure, regardless of the amount of reinsurance being placed. This may be particularly true in instances where the Cedent offers global protection to it insureds. Notwithstanding the amount of capacity a reinsurer provides, ultimately, the policies issued will be in the Cedent’s name and it is the Cedent who is responsible to the insured for all obligations under those policies. However, both the Cedent and the reinsurer must be cognizant of all of the consequences of an

The Advantages of Insurance Service Providers when Entering New Markets

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arrangement whereby a reinsurer provides the Cedent with an infrastructure that includes underwriting and claims support services. It is the intent of this article to examine such considerations.

Reinsurers serve very important and positive functions for the purposes of risk management. They provide capital to insurance companies, they enable insurers to maintain level balance sheets, they provide leverage for insurers to maintain a critical mass and they allow mature companies to provide diversification of risks. The capital that reinsurers provide plays a very important and often pivotal role to the Cedents; it is often the crucial vehicle for the development of new ventures, as well as new lines of businesses for established insurers. It also allows insurers to assume risks, while moderating the exposures they experience when those risks go bad.

Although reliance on reinsurers as a source of capital is appropriate, over reliance on reinsurers as service providers may not always be in the best interests of either the Cedents or the reinsurers. By providing infrastructure support, in circumstances where they have assumed most of the risks, reinsurers can sometimes find themselves in potential inter-company disputes with Cedents. This could result in communication breakdowns, which adversely impact the appropriate, and efficient adjustment of losses and which can also potentially adversely impact business relationships between reinsurers, Cedents and their insureds. Such disputes may be particularly problematical where a claim is filed in a foreign jurisdiction and the insured may be substantially reliant on the Cedent to ensure that the investigation and adjustment of the claim be undertaken quickly and with access to appropriate resources and expertise.

Conflicts can also arise in the normal day-to-day commercial interaction between reinsurers and Cedents. Indeed, whether the Cedent is reliant upon the reinsurer to provide infrastructure support or not, disputes will often arise over treaty interpretation and claims handling, among other issues. Where the Cedent is reliant upon the reinsurer to provide infrastructure support, these disputes could sometimes lead to reduced communications, mistrust and a contentious relationship adversely impacting the logistical and claim support a reinsurer may provide to a Cedent and upon which the Cedent is dependant. In extreme situations, this can compromise the quality of underwriting and claim services, which a Cedent would reasonably expect from its reinsurer.

Conflicts between a reinsurer and a Cedent can arise over such issues as: whether there has been late or proper notification of claim to the reinsurer; whether the Cedent properly and effectively asserted all defenses; whether the loss falls within the appropriate policy year and whether a claim payment is appropriate and reasonable. A reinsurer may not issue reimbursement payments if it determines that the Cedent had constructive notice of a claim prior to the treaty inception, that damages fell outside the policy period covered by the subject reinsurer, or that it fell in a policy period covered by other reinsurers. Where the reinsurer is reliant on the Cedent to provide accurate and timely notice of claim, a claim service provider may help insure that the Cedent's obligations to the reinsurer are fulfilled.

More significantly, a reinsurer may be rightfully entitled to damages if it can prove that late notification, improper claims handling practices, or improper payment caused additional exposure to the reinsurer. Indeed, the trend in modern American insurance law is to recognize that "a very high level of good faith" is required between Cedents and reinsurers,[1] and because the reinsurer relies on the Cedent for information in order to properly assess the risks, the good faith standard particularly applies to Cedents' timely notifying reinsurers of potential claims.[2] in *Certain Underwriters at Lloyd's London v. The Home Insurance Co.,*[3] The Home Insurance Company issued a liability insurance policy to the Hanna Mining Company in 1966, which provided coverage of five million dollars per claim for the period August 1, 1966-August 1, 1969. Home's policy was excess to Hanna's underlying policy with another insurer. Certain Underwriters at Lloyd's London and other reinsurers issued a reinsurance policy to Home. Under the policy, the reinsurers agreed to indemnify Home up to one million dollars on any claim for which Home was obligated to pay Hanna. According to the terms of the reinsurance policy, Home was obligated to notify the reinsurers of any claims against Hanna for which coverage might be triggered under its liability policy. In addition, the reinsurers had the right, after notification of a claim, to exercise total control over its investigation, processing and disposition. In 1984, Hanna informed Home that one of its mines, which Hanna owned and operated in the late 1960s, had suffered pollution damage. Because Hanna believed that its liability exposure could be in the millions of dollars, Hanna requested that Home notify all of Hanna's primary and excess liability insurers. Home, however, did not notify the reinsurers of this potential loss.

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Hanna eventually settled the outstanding claim and Home paid it under its liability policy. When Home sought reimbursement from the reinsurers, its request was denied on the basis that it breached the notification and claims control requirements of the reinsurance agreement. The court found that Home's breach of the notice requirement was a result of bad faith given: (1) Home's failure to maintain proper procedures, guidelines and controls to ensure appropriate notice to its reinsurers; and (2) Home's lack of awareness of its reinsurance policy with the reinsurers from 1984 to the time it paid the claim to Hanna, resulting from its lack of diligence and faulty procedures. The Supreme Court of New Hampshire ruled that Home breached the notice requirement of the reinsurance agreement and the reinsurers were therefore not required to reimburse Home.

When a Cedent is faced with a significantly large exposure, which may involve insurable losses spanning over several years, the concept of allocation becomes relevant. Allocation addresses situations where a number of wrongful acts arguably caused losses over several policy periods. This may become especially problematical when there is a loss covered by more than one reinsurer and each reinsurer has different exposures under different treaty periods, in different layers. Further, there can be ambiguities in the scope of coverage defining the reinsurer's obligations under a treaty. In such situations, a Cedent can face a protracted dispute with multiple reinsurers each trying to discern its discrete obligation. For example, *Gulf Insurance Company v. Transatlantic Reinsurance Company*[4] involved numerous disputes between Gulf Insurance Company and Gerling Global Reinsurance Corporation of America concerning a series of quota share treaties between Gulf on the one hand and Gerling and other reinsurers on the other, and a series of separate agreements between Gulf and each of the reinsurers individually. The reinsurers had agreed to reinsure a portion of Gulf's losses under a portfolio of automobile residual value insurance (RVI) that Gulf began issuing in 1996 to various policyholders, including First Union Corporation. In March 2000, First Union brought a coverage action against Gulf, and claimed Gulf owed it $418 million in RVI losses under the First Union policy. In February 2003, Gulf and First Union agreed to settle the litigation for $266 million. Shortly thereafter, Gulf submitted a bill to the applicable reinsurers, a group that did not include Gerling, for the treaty years 1996 through 1998. The reinsurers refused to pay and Gulf initiated a lawsuit to collect the monies it believed it was entitled to. In March 2004, Gulf submitted a second billing to the applicable reinsurers for later treaty years, and Gerling was among this group of reinsurers. Gerling refused to pay and in addition sought to rescind the 1999, 2000 and 2001 treaties it participated in on the basis of alleged nondisclosures and misrepresentations on the part of Gulf. Gerling also contended that although Gulf had billed losses to Gerling as if it were a participant in the 1998 treaty, no agreement existed between Gerling and Gulf with respect to the 1998 treaty. Gulf alleged that Gerling breached its indemnification obligations under the 1999 treaty by failing to pay its alleged share of the First Union settlement. Gulf also asserted that Gerling had failed to pay its alleged share of losses under the 1998, 1999, 2000 and 2001 treaties relating to RVI policies other than the First Union policy. Eventually, Gulf settled with all reinsurers other than Gerling, and the trial court and appellate court found in favor of Gerling.

Although protracted litigation can result from a reinsurance/Cedent dispute, those disputes are more typically resolved through arbitration. Arbitration proceedings will often be carried out according to the laws of the jurisdiction where the reinsurer is located. That could be alien to the laws to which the Cedent is accustomed. It could also result in biased arbitrators. While most other industries have adopted efficient arbitration procedures, the reinsurance industry continues to follow the methods and procedures that date back over 200 years. Traditionally, each side appoints their own party arbitrator and the two party arbitrators elect an umpire. Often the pool of available arbitrators is limited, because arbitrators are typically active and/or retired executives and officers of insurance or reinsurance companies. Insurance or reinsurance companies usually do not want their current employees to serve as arbitrators, thus further limiting the pool of available arbitrators. Typically, party arbitrators are partial to the side that appoints them, that leaves the dispute to be decided by an umpire, who may not be neutral himself, and may be sympathetic to the Cedent or reinsurer, depending upon his or her background and orientation. Because most arbitrators are appointed on an *ad hoc* basis, the process can be highly inefficient. Such inefficiency was exemplified in a recent case, *Employers Insurance Company of Wausau v. Certain Underwriters at Lloyds of London.*[5] In *Employers Insurance Company of Wausau (hereinafter "Employers"),* Employers provided property and general liability insurance to commercial and residential property owners. In March 1998 and March 1999, Employers and Certain Underwriters at Lloyds of London, QBE Reinsurance (Europe) Limited, Transatlantic Reinsurance Co., St. Paul Reinsurance Co. Ltd. and Unionamerica Insurance Co. Ltd. entered into contracts under which the defendants agreed to reinsure some of Employers' insurance policies. The contracts contained an arbitration clause and a choice of law clause that specified that the laws of Wisconsin were to govern and interpret the contracts. In 2001, the reinsurers refused to indemnify Employers for incidents occurring under policies that covered specific risks the reinsures believed they had not agreed to reinsure. In 2008, Employers served the reinsurers with a demand for arbitration. The reinsurance contracts provided for arbitration of "any dispute arising out of the interpretation, performance or breach" of the contract. The arbitration clause further provided for the selection of a panel of three arbitrators. Each party was to choose an arbitrator, and the two chosen arbitrators were in turn to choose an impartial and disinterested third arbitrator to preside at the hearing.

In accordance with the terms of the contract, each side selected a party arbitrator. After several months of discussion, the party arbitrators were unable to agree on a third arbitrator. The contract provided that in the event the two arbitrators were unable to agree upon the third arbitrator within 30 days of their appointment, a party could petition a judge of the federal court having jurisdiction to select the third arbitrator from a list of six individuals (three named by each arbitrator).

Each side submitted to the court a list of three names to be considered for the third arbitrator. Each candidate completed a questionnaire concerning his or her prior insurance and reinsurance experience and related matters. The questionnaires inquired about the candidates' possible biases and any connections they might have with the other parties involved in the arbitration. None of the six candidates escaped an argument from the other side that the candidate had the potential for being partial.

Moreover, in addition to being unable to agree on a third arbitrator, the parties were unable to agree on the appropriate level of neutrality required for their party-appointed arbitrators. The reinsurance agreements provided that if either party nominated an arbitrator whom the other party believes is interested or partial, the other party could petition the federal court for an order disqualifying the nominated arbitrator. Accordingly, the reinsurers petitioned the federal court for an order disqualifying the Cedent's party-appointed arbitrator. Although the court refused to disqualify the Cedent's party-appointed arbitrator on the basis of the evidence before it, the case illustrates the type of inefficiency (e.g., ancillary litigation) that may accompany arbitration proceedings in the reinsurance industry.

Although Cedent/reinsurer disputes are not common, a claims service provider may help to insure a reduction in the number and severity of conflicts between Cedents and reinsurers, by serving as a neutral third party. Reliance on a service provider as a buffer can reduce tensions between Cedents and reinsurers foster a smoother and timelier flow of information between the parties and help to enforce Cedents' obligations and reinsurers' treaty rights. This will lead to even more harmonious reinsurer and Cedent relationships and more effective claims handling.

Setting aside any potential compromise of support services in the context of a Cedent/reinsurance dispute, where a Cedent decides to rely on a reinsurer's infrastructure and support services, the Cedent may lose control of its underwriting and claims handling functions. This can potentially compromise a Cedent's reputation, especially when the Cedent intends to establish brand reliability and a consistency in the level of service it provides. It is clearly important for a Cedent to give the impression to its insured that it is the primary underwriter and claims handler, or it is at least in control of the underwriting and claims handling process. Unlike Cedents, reinsurers may be less interested in maintaining relationships with their various insureds or ensuring a high level of service since the business model is predicated on different considerations than the Cedents'. Even where a reinsurer is providing 95% of the Cedent's capacity, it is the Cedent's name in the public eye, and it is in the Cedent's interest to maintain its reputation and ensure a high level of service for its business.

Further, it is questionable whether a reinsurer is the best suited for effective underwriting and claims service. Although most reinsurers are staffed with a highly talented pool of professionals, they are often multifaceted. They look to protecting Cedents in a multitude of risks, from major property and casualty exposures, to professional liability claims and financial guarantees. Underwriters and claim professionals in these operations are not typically trained to handle specific categories of risks, but are generalists in nature. Reinsurers are typically very good at volume business, but, the more specialized the product and the more expertise required, the less services a reinsurer can provide. Even when a reinsurer has specialized support, that support is typically located in the home office, not necessarily in the jurisdiction where the insurer would be most dependent on this resource. For such complex products as professional liability insurance and financial guarantees, the services provided by highly trained experts in a specific area of risk are indispensable. As an example, a casualty claims examiner, responsible for handling third party actions, in a reinsurance company, cannot replace a specialty claims examiner trained to handle such specialty exposures as US securities class actions. The complexity of the lawsuits at issue, the sophistication of defense counsel in contemplating appropriate defense strategies and the intransigence of an experienced securities plaintiffs' lawyer, all militate in favor of the claim being handled by a highly experienced claims professional. The nature and structure of reinsurance companies typically do not support such specialized claims services.

Recently, there has been a noted increase in overlapping and parallel proceedings where two identical or very similar claims are litigated in two or more jurisdictions. We have seen parallel actions filed in such jurisdictions as the US and Canada, the US and Indonesia as well as in the US and the Netherlands in connection with antitrust matters, the restructuring of international debt, bodily injury claims, environmental claims and securities class actions. Courts are not always willing to dismiss or stay actions in order to avoid multiplicity of proceedings. For example, in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters,*[6] Teck sued its insurers in the U.S. for coverage in relation to environmental damage alleged to have occurred in Washington State, downstream from its British Columbia smelter site. On the same day Teck commenced its action, the insurers commenced parallel proceedings in British Columbia seeking declaratory orders regarding their obligation (or lack thereof) to defend or indemnify Teck. Each party took steps to obtain jurisdictional rulings in order to have the coverage matter adjudicated in the court each party preferred: The insurers filed a motion in U.S. District Court seeking an order to dismiss Teck's claims against them on the basis of *forum non conveniens,* and Teck filed similar motions in British Columbia seeking orders staying the British Columbia proceedings. The U.S. District Court denied the insurers' motions to dismiss Teck's claims, and the British Columbia Supreme Court refused to grant the stays sought by Teck. The Supreme Court of Canada eventually upheld the British Columbia Supreme Court's decision. Notably, the Court observed that policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the Canadian court's *forum non conveniens* analysis. The Court

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believed that adopting this approach would encourage a first-to-file system, where each party would rush to commence actions in the jurisdiction which it thinks will be most favorable to it, and at the same time work to delay proceedings in the other jurisdiction in order to secure a judgment in the party's preferred jurisdiction.

Accordingly, the globalization of commercial litigation may strain the resources of reinsurers to unprecedented levels. As commercial proceedings continue to increase in complexity, reinsurers may become less inclined to offer claims services and logistical support, as it may strain their own operations and cause reinsurers to lose sight of their principal business purpose, which is to assume the insurance risks Cedents underwrite.

Reinsurers are typically very good at volume business, but, the more specialized the product and the more expertise required, the less services a reinsurer can provide.

Periodically, a reinsurer will retain the services of an outside vendor to provide specialized underwriting and claims support. Indeed, it may be in the mutual interests of both reinsurers and Cedents to retain the services of specialty claims providers in a variety of situations. In fact, it may be prudent for Cedents and reinsurers to jointly retain outside vendors, specializing in claims and underwriting services to represent the interests of both parties, as a neutral and specialized resource. Such outside support services could be retained in the joint name of the Cedent and the reinsurer, with proportional control exercised over the service provider. The service provider could be accountable to both parties, ensuring technical expertise and continuity in the services provided, operating above the frays of any reinsurer/Cedent dispute.

Finally, a Cedent may be faced with the issue over whether it is more beneficial growing organically as opposed to retaining an outside service provider. There are distinct advantages in growing a business organically. The insurer will have more control as to how it would want to develop and direct the operation.

Notwithstanding these advantages, the disadvantages are numerous and quite obvious. For example, organically grown businesses require a sizable, long term, investment in time and financial commitment from the insurer, which could prove problematical during the early years of operation as well as in situations where the operation becomes uneconomical. To the extent that an organically grown company will be required to train its own staff, significant costs could be incurred in educating that staff both in terms of academic and clinical training. Typically, it would take several years for newly hired claim professionals to learn how to handle and resolve complex commercial litigation, especially in mature jurisdictions such as the US. Further, when an internal staff is retained, significant outward investments in salary, health and retirement benefits, human relations and governmental compliance support are required.

If the insurer decides to consolidate operations by reducing staff and physical offices, it will incur significant expenses in paying exiting staff, and in offering severance packages or other benefits payable upon termination. When dealing in a multinational setting, the insurer will need to become educated as to the local laws and customs, with respect to hiring and firing of employees and the closing of local offices.

In contrast, a service company which is staffed by a highly trained group of professionals with years of experience, will prove to be advantageous in underwriting risks, understanding liability and in knowing when and how to settle claims. A service operation, staffed with experienced professionals will also possess a working familiarity with the current underwriting issues and with the parties prosecuting and defending a claim. Further, the service corporation will be more flexible in setting up and closing down operations and more effective covering a territory and administering claims, than an organically grown operation and can also address any local licensing requirements.

While reinsurers offer a valuable service to Cedents and play a pivotal role for both emerging and mature companies, there are limitations and deficiencies in some of the services they offer. There are circumstances in which divergences will emerge between reinsurers and Cedents. Occasionally, such divergences will result in disputes, which can adversely impact their relationship and impede the underwriting and claim handling process upon which an insured may depend. A service corporation can serve both the Cedent and the reinsurer in handling an insurance company's specialty underwriting and claims operations more cost efficiently, more effectively and often with greater technical skill then a reinsurer. They are also removed from the day-to-day conflicts or other disputes, which Cedents and reinsurers may encounter. In addition, the service company can offer an effective alternative to a Cedent company contemplating organic growth by opening new offices in foreign jurisdictions. Although a Cedent company may be dependant upon a reinsurer to provide capital and help absorb the cost of a given risk, both the Cedent and the reinsurer should carefully consider all the consequences when a reinsurer agrees to provide the Cedent with an infrastructure that offers underwriting and claims support.

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[1] *Certain Underwriters at Lloyd's London v. The Home Insurance Co.,* 146 N.H. 740, 742, 783 A.2d 238 (2001).

[2] *Certain Underwriters at Lloyd's London v. The Home Insurance Co.,* 146 N.H. 740, 743, 783 A.2d 238 (2001).

[3] 146 N.H. 740, 783 A.2d 238 (2001).

[4] Nos. 6016023/03 and 601077/04 (N.Y. App. Div. Oct. 1, 2009).

[5] No. 09-cv-201 (W.D. Wis. Sept. 28, 2009).

[6] [2009] S.C.C. 11.