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Trending Clause: Mandatory Arbitration

by Isabelle Beaudoin, *Co-founder & Travel Insurance Specialist, First Rate Insurance Inc.*

At First Rate Insurance, we wish to honour our President and Co-Founder, Bruce Cappon's contribution and mourn his passing. We've seen an extraordinary show of emotions since his untimely departure on November 1st, 2016. Bruce was a true advocate for the Canadian consumer. He challenged the travel insurance industry's status quo on its flawed application process. He also identified many of the contractual pitfalls inherent to the majority of the travel insurance plans available on the marketplace. He spearheaded a review of the process by writing two submissions to the Canadian Council of Insurance Regulators (CCIR) urging for the need for improved regulations. On September 30th, 2016, the CCIR completed their extensive study and consultations. We look forward to reading their report and hope it will contain many of Bruce's recommendations in favour of the consumer.

As of late, Bruce became concerned with a new trend he identified in several travel insurance plans, namely the one barring consumers from seeking the courts' remedy and binding them to an arbitration process. Of further concern was the fact that the insured would agree the decision of the arbitrator is final and cannot be appealed to any court. Bruce coined this new policy lingo the "Mandatory Arbitration" or "Thou Shalt Not Sue" clause. He was also wondering whether a parallel justice system was being created and how this would impact the consumers' rights to a fair trial.

Bruce worried about wording cropping up in policy contracts such as: ***"Notwithstanding any clause in the present policy, the parties hereto undertake to submit to an arbitration procedure, to the exclusion of the courts, any present or future dispute relating to a claim.The arbitration proceedings shall be governed by an arbitration law in force in the Canadian province or territory of residence of the insured. The parties agree that any action will be referred to arbitration"*** .

How would such a clause interact or cohabitate with the applicable laws of your Canadian province or territory of residence? Bruce was concerned that the "Arbitration Clause" would supersede the right to sue because based on his research on new regulations implemented in law[1] ***"the general principle is that parties should be required to resolve their disputes by arbitration where they have agreed to do so"*** and ***"This non-interventionist approach is further reflected by Ontario's Arbitration Act, which has introduced major limits to the ability of Ontario courts to intervene regarding the content of arbitration clauses. The courts may now only intervene to ensure that arbitrations are conducted in accordance with the arbitration agreement: to prevent the unequal or unfair treatment of parties or to enforce awards."***

Bruce also wondered whether policies not requiring any medical questionnaire would be affected by such a clause. After an extensive research of some of the major plans, he concluded that non-medical policies contained the "Thou Shalt Not Sue" clause. Typically, he found this new clause located right after the "Misrepresentation Clause", (the one he named "One Strike and You're Out Clause").

In a nutshell, for those who think the "devil is in the details", as Bruce would say: "the devil is also in the Declaration"!

We updated our Safety checklist to include this new clause in order to alert Canadian travellers. Time will tell if this new trend is a positive step in favour of consumers' interests? In the meantime, we recommend you read the contract you are agreeing to before paying your premium (which binds you to the contract), and to move on if you encounter one of the problematic clauses identified in our Safety Checklist.

Of course, we continue to caution against policies

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vi) Recognize that you will be wrong (preferably not systematically!) and be comfortable with that. Recognize that facts and circumstances change, and be ready to factor them into your decision-making as you become aware. Try to anticipate the impact of events on your portfolio, deciding whether your original thesis for an investment has changed.

vii) Be patient. While there are arguments for being fully-invested over time in a passive investing style, and even in a world in which cash can be a "wasting asset" even in nominal terms, you need to recognize that it is not the frequency of success, but the magnitude that matters. As an individual investor, that does not mean putting "everything" into one investment, but it does mean being discriminating in terms of allocation and timing.

viii) Understand that if something is "consensus", money will already have flooded into it. As mentioned above, the edge comes from anticipating what will happen and become "consensus."

ix) Be greedy when others are fearful. That does not mean being "stupid" and rushing in to a forlorn hope as everyone heads out. It does mean understanding that many factors are cyclical; you have to recognize the point in the cycle, as well as the level of inherent volatility or leverage. Anyone who has followed the price of O&G stocks over the past two years or so should have observed and understood that.

x) And as Jeff Bezos has said: "You just have to remember that contrarians are usually wrong."

After the long list above, you may wonder, dear Reader, where "proof" comes into all this. Quite simply. You, as the individual investor and decision-maker, have to make sure that you create your own proofs, because, in reality, no-one else will do it for you unless their incentives are perfectly aligned with yours and that is very rare in the world of investment management.

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containing the "Misrepresentation Clause" whereby a simple mistake may void the entire contract, and the "Change of Health Clause", which voids certain policies when a new unreported change of health occurs between application and departure dates. In our view, these clauses are still at the top of the most punitive pitfalls. In fact, with respect to the change of health issue, I often hear clients tell me the doctor told them they were stable therefore there is no health change issue. I want to stress the importance in differentiating between what the medical and the insurance industry consider "stable". Stopping a medication may be great news for your health and an achievement to be proud of but from an insurer's perspective, your condition has just become "unstable". If it falls within your required stability period, that specific condition would NOT be covered. Some insurer will also void the whole contract at claim time if the change of health was not reported, which means you are left uninsured at a vulnerable time with no repatriation costs covered. If you report your change of health, prior to departure, your eligibility to the contract will be reassessed. If the contract is not cancelled, premiums may certainly be raised and the unstable condition will NOT be covered. Other more lenient insurers would give you the option to purchase a rider to cover the newly "unstable" condition up to $250,000. So always ask your broker or insurer the impact any change in your health has on your contract. If it voids your plan or excludes your unstable pre-existing condition from coverage, move on.

Our safety checklist is available on our website at:
www.firstrateinsurance.com

[1] "Arbitration" Iclg to: Insurance & reinsurance 2015 - **www.iclg.co.uk**