ALL-NEUTRAL ARBITRATION PANELS

by

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I. Introduction

Reinsurance arbitrations are commonly criticized as having become too long, too expensive and too much like litigation. Parties, counsel and arbitrators all must assume part of the responsibility for this development. Beyond behavioral changes, however, there are structural changes in the arbitration process which also may produce beneficial change. The purpose of this article is to examine how the use of party arbitrators increases the partisan nature of the proceeding creating a structural barrier to efficiency and how this would be ameliorated by the use of an all-neutral panel, such as that offered by the authors.

II. The Current System - An Overview

A. The Mechanics of the Process

Virtually all arbitration clauses in reinsurance contracts call for each party to appoint a party arbitrator and for them to select a third arbitrator commonly referred to as the "umpire." However, in practice, party arbitrators, by themselves, rarely select the umpire. Rather, each party puts forth its list of candidates. Infrequently, there is a match and the umpire is thus the consensus of the parties. More often, candidates are posed, some struck, and, of the remaining, one is chosen by random selection. Then, the panel and counsel hold an organizational meeting to review the issues and establish a schedule for discovery, briefs and the hearing. Typically, counsel are allowed to confer with their party arbitrator up to the filing of the first brief for the hearing on the merits. After the hearing, sometimes directly after the hearing, the panel issues an order resolving the dispute.

B. Conflicted Role of the Party Arbitrator

Arbitrators who are unknown quantities are seldom selected as party arbitrators. The party wants its position to prevail and its counsel is ethically required to zealously represent the party's interests. To maximize their chance of success, a party and its counsel often choose a known quantity. This includes professional knowledge and interactive skills but may also include a personal relationship and shared values and experience.

This often leads to some degree of identification by the party arbitrator with the interests of the party which selected him or her. The manner in which the party arbitrator deals with this varies from individual to individual. A few merely echo the positions of counsel. Most work hard to be fair. However, all struggle, either consciously or unconsciously, with a potentially conflicted role in an adversarial process.

III. Impact of Partisanship on the Stages of an Arbitration

A. Umpire Selection

There are some who believe that the outcome of the dispute is determined once the umpire is selected. While this is seldom actually the case, this belief has enough credence to make umpire selection a critical stage in the arbitration process.

Industry knowledge and arbitration experience are usually (but, sadly, not always) high on a party's list of desirable qualities for an umpire. However, relationship and shared experience with the party, counsel or appointed arbitrator may be viewed as equally important. The implicit, but seldom stated, assumption is that these personal relation based qualities will better enable the party arbitrator to impart a favorable view of that party's position to the umpire. Thus, there is often a partisan agenda in umpire selection.

B. Timing of Hearing

A rapid resolution of the dispute is often desirable to the cedent which is claiming reinsurance recoverables. It is less desirable to the reinsurer both for cash flow reasons as well as the need for discovery. Sometimes, it is impossible for the reinsurer to prove its defenses without significant discovery.

Party arbitrators sometimes view the proper timing for the hearing in terms of the priorities of those that appointed them. It follows that the timing debate can often consist of exploring a middle ground between the partisan positions of the parties rather than an evaluation of the time necessary to complete discovery.

C. Discovery Rulings

Some of the most difficult issues encountered by arbitration panels revolve around the scope of document discovery and the number of depositions to be conducted. Reinsurers often desire broad document discovery since the documents needed to prove their defenses are usually in the possession of the cedent. Cedents typically wish to limit document discovery narrowly to the issues and transaction at issue. The parties' positions on the number of depositions reflects these different perspectives.

Party arbitrators tend to begin their evaluations of discovery issues with the appropriateness of the requested discovery to support the position of the party that appointed them. This can differ considerably from an evaluation of what type and level of discovery is likely to develop evidence which the panel will view as probative.

Discovery disputes typically occur during a time period when ex parte communications exist, which heightens the partisan atmosphere. This is unfortunate since discovery disputes often require the application of technical expertise (e.g. on privilege, non-party discovery and extent of a panel's subpoena power) plus considerable dispute resolution judgment (e.g. how much and what kind of discovery is likely to produce probative evidence). Partisanship impedes the ability of the panel to collaborate freely on such issues and to make sharp and well reasoned rulings. Instead, panel discovery rulings are often compromises that, in most instances, unduly lengthen the discovery process, and, at other times, preclude necessary discovery.

D. Length and Focus of Hearing

The length of a hearing is usually designed to allow each party to provide what it feels to be appropriate focus on each of its arguments. Party arbitrators usually feel an obligation to make sure that the party that appointed them has a full opportunity to make its case. However, this may cause hearing time to be devoted to argument on issues that the panel believes are marginal or obvious from the briefs. The result

can be hearing time wasted on irrelevant issues and insufficient focus on matters of most interest to the panel.

E. Panel Deliberations

There is a good deal of variation in the manner in which panels deliberate. Some party arbitrators put aside all partisan issues, others feel obligated to make sure their party's arguments are fully explored as a prelude to deliberative give and take and still others merely repeat the arguments of counsel. It can be very difficult for an umpire to assure that the right decision is made, or to develop a consensus when party arbitrators react in a partisan manner.

During the hearing, generally there is little discussion among arbitrators as to the merits of the case until testimony is complete. The partisan role of party arbitrators can detract from the ability of the panel to freely exchange their thoughts about the case and to direct testimony to those matters of most interest to the panel. Only after the parties have rested is there substantive indication of the thinking of the party arbitrators and, more importantly, of the umpire.

F. Panel Rulings

When there is a lack of consensus among the panelists, drafting a crisp and understandable order can be a difficult chore. Sometimes the result is merely an identification of the winner and an amount to be paid which bears little resemblance to the amounts demanded.

Given multiple issues with varying merits, it is not unusual for each party to win some issues. Sometimes, however, the results strongly favor one party. In those circumstances, personal relationships sometimes mitigate the results. Knowing the difficult debriefing process to be faced by the arbitrator whose party lost decisively, the panel will sometimes be motivated to give him or her some minor victory with little economic consequence. While understandable on a personal level, such compromises driven by the partisan nature of the party arbitrator process can inappropriately skew final results.

G. Comments

The use of party arbitrators lends a partisan element to the arbitration process which influences each element thereof. This creates a structural barrier to efficiency. Notwithstanding good faith efforts by party arbitrators to be fair, they are in a conflicted role. For some, the default role is sometimes to give in to partisan pressures. The inevitable result is longer, more expensive and more contentious arbitrations. Moreover, the ambiguous role of party appointed arbitrators can also, at times, detract from the panel's ability to fully draw upon its collective knowledge and experience to reach the best possible decision on the merits.

IV. Benefits of an All-Neutral Panel

A. Different Role of the Panelists

With an all-neutral panel, there are no party arbitrators and, therefore, no ambiguity about their roles. Their purpose is to make the best decision on each interim and ultimate issue without scoring, balancing or mitigating wins and loses for each side. The umpire is no longer the critical vote on a partisan panel. He or she is one of three equals but has some additional administrative burdens. In addition, there is less need for each panelist to have both heavy arbitration experience along with industry expertise as is the case now for party arbitrators. This will, in turn, provide more opportunities for new entrants into the arbitrator field.

B. Decisions Making Benefits

Without a partisan element, decisions about timing for the hearing and discovery would turn solely on the nature and merits of the dispute rather than extraneous considerations. An all neutral panel can better focus counsel on the critical issues to be examined at the hearing and identify those issues that merit lesser treatment. Most important, the panel can consider the best ultimate solution to the dispute without having to contend with the burden of partisanship.

C. Reduced Start Up Time

If the parties pick a fixed panel (*see* § V. *supra.*), the panel members will be acquainted with each other and in general agreement on procedural approach, and thus are prepared to immediately launch into the proceeding. Further, any conflict issues can be cleared in advance by the parties' respective disclosures of their relationships with each of the three members of the fixed panel.

With the advanced thought and lack of partisanship involved in an all-neutral panel, organizational meetings can be immediately convened. In many instances, the meeting may be held telephonically thus avoiding the weeks or even months sometimes necessary to gather all appropriate parties together for an on-site meeting. Further time efficiencies can be gained by dispensing with written position statements, and substituting counsel comments which would become part of the record. In most instances, this would be more than sufficient for the panel to deal with the usual administrative matters, particularly if counsel are asked to meet and confer on a schedule before the organizational meeting. If there are matters in dispute, such as security motions and scheduling, these can be subject to later written submissions of counsel which describe in more detail why the dispute merits such a treatment. This process allows discovery to begin immediately after the organizational meeting, which could be held within a week of notification to the panel. In this fashion, months can be trimmed from the typical time required to bring the matter to a conclusion.

D. Full Application of Panel Expertise

The intent of commercial arbitrations is to put decision making into the hands of industry experts rather than juries or generalist judges. In theory, three person arbitration panels are designed to bring the collective knowledge and experience of three industry experts to bear in resolving business disputes. Unfortunately, the ambiguities created by the party appointed arbitrator process can undermine the achievement of this objective. Umpires, in such three person panels are often reticent to speak out until near the end of deliberations, and often view with a certain skepticism the input of the party appointed arbitrators because of the potential partisanship created by their ambiguous party arbitrator role.

All-neutral panels eliminate the potential for hidden arbitrator agendas, and thus would free the panel to fully, and collaboratively, share the insights derived from their personal knowledge and experience. This would be particularly true with panels of arbitrators who have worked together before, and who have a mutual respect and trust for each other. In addition, an all-neutral panel would facilitate choosing a panel with a range of expertise and business experience that is both relevant to the dispute at issue, and is complementary - and additive - to the expertise of the other panel members. Such a well-rounded panel could cooperatively work together, without fear that a member might be tempted to advance a partisan agenda.

E. Efficiency from Optimum Use of Panel Expertise

With a neutral panel in which there is mutual respect and trust, it is not necessary that all panel members spend the same amount of time on each issue. Some disputes (*e.g.* privilege) can be very time consuming

and require considerable technical expertise but can have relatively modest probative impact on the ultimate dispute. It would be more efficient for the panel, and less costly to the parties, to have one panel member with the proper expertise review the dispute in detail and make recommendations to the rest of the panel. Without the partisan element, there is no motive for a panel member to use individual expertise as a weapon and no need for other panel members to react accordingly.

F. More and Better Focus to Discovery and Hearings

When a dispute has reached the arbitration stage, one or both of the parties must have a fairly developed idea of the nature of the dispute. A neutral panel has more ability to require an articulation of this dispute so that there is a demonstrable nexus between the dispute and the nature and scope of discovery. While this does not preclude the development of theories of claim or defenses which become evident during discovery, it tends to reduce the incidence of fishing expeditions in the form of document and deposition discovery.

In the course of resolving discovery disputes, a panel often acquires a level of knowledge concerning the manner in which the issues between the parties are developing. Obviously, this level of knowledge develops rapidly during the briefing process.

Without partisan influences, the panel is free to discuss the case and the arguments that are being pursued by the parties, subject, of course, to the presentation of evidence at the hearing. Through their discussions, the panel can direct counsel toward the most probative issues and away from the most marginal in order to save time and expenses. This benefit can be realized by constructing a schedule which allows a pre-hearing meeting with counsel and parties. At this meeting, the panel can engage in a dialogue with counsel as to the type of evidence which would be most useful and the order and manner in which it would be presented. By sharpening the focus of the evidentiary proceedings, substantial savings might be realized.

G. Better Rulings by the Panel

Without a partisan need to play one's cards close to one's vest, the panel can begin their discussions of the case while the hearing is ongoing and the evidence is fresh in their minds. Using their collective experience and intellect, the panel can identify key areas of testimony which are present or lacking in the hearing. Should questions arise, counsel are available to comment.

Following the hearing, the panelists can commence deliberations based on a more focused record than would usually be the case. Moreover, panelists will interact without the concern that partisan arbitrators start from a predetermined position putting the umpire always in the position of tie breaker. In this way, panelists can better and more easily seek the right answer to the dispute before them.

H. Option for Written Reasoned Opinions

The authors believe that written reasoned arbitration awards, including reasoned dissents, can often be quite useful. A reasoned award helps assure that rulings are based on the evidence and sound analysis, and in the experience of the authors, the exchange of such written analyses between panel members on significant issues in dispute has proven of great value even when the reasoning has not been shared with the parities. Sharing the panel's reasoning may be useful to the parties in both understanding the award and in evaluating similar future disputes. An all- neutral panel facilitates reaching a reasoned opinion that is independent of partisanship and represents the best thoughts of the experts selected to resolve the dispute.

V. Methods of Obtaining an All-Neutral Panel

The authors offer themselves to serve together as such a panel and are individually willing form or participate in a neutral panel. A joint communication (no ex parte contact) would be sufficient to start the process.

In addition, the parties and their counsel can select three respected individuals without identifying who selected whom and to ask them to act in a neutral manner. Alternatively, the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes contain a procedure for the selection of an all-neutral panel.[i] Whatever the vehicle, however, all-neutral panels offer unique opportunities to eliminate partisanship and improve the quality of reinsurance arbitrations.

VI. Conclusion

The use of party arbitrators lends a partisan element to arbitration process which increases its cost and contentiousness of reinsurance arbitrations and, probably, decreases the quality of decision making. The use of all-neutral panels, however achieved, is likely to reduce the cost and increase the speed of the arbitration process while increasing the quality of the results of the process.

ENDNOTES

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[i]. *See* § 6.3 of the Procedures which can be found on website: www.ArbitrationTaskForce.org.