

PANEL APPOINTMENT OF EXPERTS

by

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I. Introduction

While reinsurance arbitration panels usually consist of individuals very experienced in the business, it may difficult for any one or any three individuals to have all the expertise required decide all the issues involved in a particular case. Thus, a panel may benefit from the assistance of experts on certain topics. Given that experts tend to agree with the party that hired them, on rare occasions their opinions are so fundamentally different or impossible to understand that they tend to obscure rather than illuminate. This presents the panel with difficult choices *e.g.* simply ignore the experts or find some way to salvage useful input from experts. One way to accomplish the latter is for the panel to appoint its own experts.

From discussions on this topic, I am aware that parties and their counsel, generally, are strongly opposed to a panel appointing its own experts. They cite costs and loss of control of the arbitration proceeding which, certainly, are legitimate concerns. Fortunately, it is extremely rare for the issue to arise. After serving on over 100 arbitration panels, and discussing the matter with colleagues, I am aware of only one instance in which a panel appointed experts. That instance is examined in the following section.

II. *U.S. Life Ins. Co. v. Superior National Ins. Co. et al.*, 591 F.3d 1167 (9th Cir. 2010).

This case involved Phase II of a long-running arbitration. Phase II focused on the quality of the cedent's workers compensation claim handling on over 12,000 files. The panel could not reach a decision based on the divergent opinions of the experts on 500 sample files and retained two experts ("reviewers") to assist.

The panel and the parties exchanged correspondence discussing what review process to use. Ultimately, the panel determined that the following process would be used: (1) the reviewers would review 162 of the 500-claim sample . . . ; (2) the reviewers would meet with the panel for three days (hereinafter, "the ex parte meeting") and no transcript would be prepared of the ex parte meeting; (3) reviewers would provide their conclusions in writing to the panel and the parties; (4) the parties could submit briefs responding to the reviewers' conclusions; (5) a two-day hearing would be held during which the parties could question the reviewers, under oath, for five hours each as to

their qualifications and the reasons for their conclusions, but not as to the ex parte meeting; and (6) the parties could submit post-hearing briefs to the panel.¹

At the conclusion of this process, the panel decided, by majority vote, that the claims were properly handled.

The reinsurer contended that the procedure adopted by the panel violated § 10 of the Federal Arbitration Act in that closing the meeting of the panel with the reviewers constituted a refusal by the panel to hear pertinent and material evidence in the form of commentary from counsel. The reinsurer also charged procedural misbehavior, all to the prejudice of the reinsurer.

Noting the broad protocols for the submission of evidence adopted by the parties, the court ruled that there was no procedural misbehavior:

[A]fter discussions with counsel, the panel unanimously determined that it would hold an ex parte meeting with the reviewers, the reviewers' written conclusions would be shared, pre- and post-hearing briefing would be allowed, and questions regarding the reviewers' qualifications and conclusions would be permitted. Because of the broad authority granted by the protocols to the panel, we hold that this process does not constitute misbehavior. . . . It is noteworthy that [the reinsurer's] party arbitrator agreed to this process and that he did not mention arbitral misconduct or misbehavior in his dissent [on the merits].²

Similarly, the court ruled that there was no violation of substantive due process:

The panel advised the parties of its dilemma and determined what process to use only after receiving input from counsel through extensive and detailed correspondence. The process employed ensured due process by allowing the parties to present their respective arguments regarding the reviewers' conclusions by (1) reviewing the written conclusions, (2) submitting briefing addressing these conclusions, (3) questioning the reviewers about their qualifications and conclusions, and (4) submitting post-hearing briefing. Although the parties were not privy to what occurred during the ex parte meeting, the panel gave the parties ample opportunity to discover and critique the reviewers' conclusions.³

Finally, the court found that the reinsurer had not demonstrated the necessary element of prejudice by the use of neutral experts or the procedures related thereto.⁴

III. Related Case Law Concerning Ex Parte Communications and Arbitrator Misconduct

A. Case Law Vacating Awards

Gulf Coast Industrial Workers Union v. Exxon Co., 70 F.3d 847 (5th Cir. 1995) involved an arbitration related to the dismissal of a worker for violation of the employer's drug policy. The arbitrator indicated that the relevant drug test was admitted into evidence but later ruled that it had not and dismissed for lack of evidence. The court vacated the award stating:

In the instant case, not only did the arbitrator refuse to consider evidence of the positive drug test, he prevented Exxon from presenting additional evidence by misleading it into believing that the [test] had been admitted as a business record. Exxon attempted to establish the [test] as a business record, but the arbitrator stopped it, stating that the test was already admitted. . . . The arbitrator used Exxon's failure to present evidence that he told Exxon not to present as a predicate for ignoring the test results. Such misconduct falls squarely within the scope of Section 10 [of the FAA], and is grounds for vacatur.⁵

An arbitration over a collective bargaining agreement was interrupted in *Teamsters Local Union No. 506 v. E.D. Clapp Corp.*, 551 F.Supp. 570 (N.D.N.Y. 1982). The arbitrator issued an award without completing the arbitration. The court vacated holding:

Here, the Court finds that the arbitrator violated section 10 (c) [of the FAA] by refusing to hearing evidence pertinent and material to the controversy.

After the close of the hearing . . . , the Union was not given an opportunity to complete its presentation of proof regarding the arbitrability and/or merits of the grievances then under consideration. In view of the agreement to allow simultaneous consideration of the merits along with arbitrability, principles of fundamental fairness required that the Union be given a full opportunity to present its case to the arbitrator for consideration.⁶

An arbitration concerning a ship charter provided the backdrop for *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979). After the close of the arbitration hearing and during deliberations, the arbitrators determined that they needed verification of the earnings of the vessel in question and they placed an ex parte call to the vessel owner. The panel adopted the figures supplied by the vessel owner without an opportunity by the opposing party to challenge such figures. The court vacated the award holding:

After the arbitration panel improperly extended the scope of the arbitration to include charter hire, the extent of Totem's liability hinged on the determination of the earnings of the [vessel] The ex parte receipt of evidence bearing on this matter constituted misbehavior by the arbitrators prejudicial to Totem's rights in violation of 9 U.S.C.A. § 10 (c).⁷

Mor Katz v. Hugo Uvegi, 187 N.Y.S.2d 511 (S.C.N.Y. 1959) involved an arbitration in which the panel ordered the respondent from the hearing room for one-half hour during which the petitioner provided testimony that the respondent was unable to rebut. The court declined to confirm the subsequent

award stating: “Arbitrators cannot conduct ex parte hearings or receive evidence except in the presence of each other and of the parties, unless otherwise stipulated.”⁸

B. Case Law Declining to Vacate Awards

An arbitration concerning a union grievance for a dismissal for failing a drug test was the fact situation involved in *Glass, Molders Local 182B v. Excelsior Foundry Co.*, 56 F.3d 844 (7th Cir. 1995). The arbitrator ordered that the employee be reinstated if he completed a drug rehabilitation program in 60 days but there were ambiguities concerning who would pay for the program and when the 60 days was to start. The union enlisted the employer’s help in sorting these issues out with the arbitrator but the employer was uncooperative. The union explained the problem to the umpire in an ex parte conversation and the arbitrator sorted it out. The court declined to vacate the arbitrator’s award:

An ex parte contact is not an automatic ground for invalidating such an award. The contact would have to trigger one of the recognized grounds for vacation, such as partiality on the part of the arbitrator and this is not argued.⁹

Sunshine Mining Co. v. United Steelworkers Local 5089, 823 F.2d 1289 (9th Cir. 1987) involved the arbitration of a dismissal of a miner for insubordination. The arbitrator’s award contained several options dependent on the results of a subsequent psychiatric report. The employer sought to vacate the award on the basis that it was dependent on evidence to be received after the conclusion of the hearing. The court found no due process violation from the fact that the employer did not have the opportunity to cross-examine the psychiatrist since the issue of the employee’s mental condition had been present throughout the proceeding. However, the court did rule that the arbitrator should re-open the record to include the psychiatric report and then arrive at a final award.

IV. Summary

The dangers of accepting evidence in an ex parte fashion and similar forms of questionable behavior are amply demonstrated by the case law in § III A., above. Due process requires a fundamentally fair hearing which means that each party must be able to know and address the evidence and arguments that are being considered by the panel.

Clearly, it is undesirable for arbitration panels to appoint expert witnesses and this should be considered only under very unusual and extreme circumstances *i.e.* when expert testimony is necessary to the proper resolution of the dispute and the expert testimony offered is useless for this purpose. Should these extreme circumstances occur, and the relevant arbitration procedures allow, *U.S. Life Ins. Co. v.*

Superior National Ins. Co. demonstrates the stringent efforts the panel should adopt to provide due process to the parties.

ENDNOTES

¹ 591 F.3d 1167 at 1171-2.

² *Id.* at 1176-7.

³ *Id.* at 1175.

⁴ *Id.*

⁵ 70 F.3d 847 at 850.

⁶ 551 F.Supp. 570 at 578.

⁷ 607 F.2d 649 at 653.

⁸ 187 N.Y.S.2d 511 at 518.

⁹ 56 F.3d 844 at 846 (internal citations omitted).