REINSURANCE ARBITRATIONS IN RECEIVERSHIPS:

AN ARBITRATOR'S PERSPECTIVE

By

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I. Introduction

As one with both insurance industry and receivership experience, I have participated in twelve arbitrations involving insurers in receivership as an arbitrator, umpire or counsel. In the majority, I have served as party arbitrator or counsel for the receiver.

There is considerable disagreement between receivers and reinsurers as to whether receivers are legally obligated to arbitrate disputes with reinsurers. While the legal issues can be debated elsewhere,[i] behind the debate is a persistent concern among receivers that reinsurance arbitration is inherently biased against insurers in receivership. The purpose of this article is to explore this concern based on my experience and observations.

II. Are Arbitration Panelists Inherently Biased Against Receivers?

Since arbitration clauses require that arbitrators have experience as insurance company executives, some receivers conclude that such arbitrators are inherently biased in favor of the solvent party to the dispute and against the receiver. This results, so the theory goes, with unconscious identification with the economic interests of the solvent party or conscious recognition of the possibility of future work for such party. This concern is exacerbated by several factors. The first is the tendency of some receivers to take positions with no basis in fact, law or physics arguing simply that they (the receiver) should prevail since creditors need to be paid.[ii] Other relevant factors include the tendency of some reinsurers to use: (a) receivership as the trigger for due diligence which should have been performed at the outset of the relationship; and (b) different standards for insolvent clients than for solvent ones.

No matter how overreaching a receiver or how recalcitrant a reinsurer, it is impossible for either to be completely wrong, always, on every issue. Arbitrators learn to block out industry gossip and even past experience and focus on doing justice to the parties under facts of the dispute at issue. Moreover, the issues arbitrated are seldom receivership specific - most often they are common business issues that have little or no relationship to receivership law or procedure (*see Section II, infra*). Finally, IAIR maintains a list of arbitrators with both industry and receivership experience. These individuals, presumably, would be free of any residual bias on point.

III. Do Industry Executives Have the Necessary Technical Knowledge of Receiverships?

Reinsurance contracts generally call for arbitration of disputes which "arise out of the contract." Technical issues of receivership law or procedure often do not arise out of the contract. For instance, the receiver of an insolvent reinsurer may have to arbitrate a coverage dispute, but the outcome of that dispute has no impact on priority of distribution of assets.

In my twelve arbitrations involving insurers in receivership, only one included the material involvement of a technical receivership issue and in that case the issue (setoff and recoupment) was a blend of contract and statute. For the most part, my arbitrations involved common disputes of coverage, allocation, misrepresentation and failure

to properly administer the business. In these arbitrations, the fact that one party was in receivership was functionally irrelevant.

In any case, it is not unusual that arbitrators have to be educated on certain technical issues. Notwithstanding the concept of "expert arbitrators", it is impossible to be expert on all aspects of a sprawling industry. Wise counsel recognize the need to demonstrate how their positions on the issues of the day fall squarely within the broader principles of the insurance industry.

Finally, the IAIR list of arbitrators includes individuals who have both industry experience and technical knowledge of receiverships. Arbitration panels often lean members with particular and applicable technical expertise if provided in a balanced fashion.

VI. Arbitrations Are Too Slow and Expensive

This is sometimes a way of saying that the receiver is more comfortable in the friendly confines of the receivership court *i.e.* home court advantage. This is a tactical issue which is unrelated to the merits of arbitration itself.

More to the point, it is accurate to observe that many arbitrations have become too slow and expensive. However, this observation is not unique to receivership disputes - it is a general affliction. There are a number of reasons for this phenomenon. High on the list is the argument that counsel, and sometimes their clients, want them to be so. As the stakes increase and discontinued operations proliferate, there is greater incentive to win all costs, or at least very high cost.

It might be speculated that arbitrators are indifferent to or even welcome protracted proceedings for economic reasons. To the contrary, there is a great deal of eye rolling and grumbling from arbitrators when *yet another discovery dispute* which might delay the proceeding rears its head. A growing number of arbitrators charge a fee for the postponement of a hearing as a disincentive to protracted proceedings

Nonetheless, there is significant variation in the willingness of panels to focus and limit discovery to the issues of the day. Arbitrators, counsel and parties share the responsibility to return arbitration to the efficient dispute resolution mechanism it once was.

V. Conclusion

There is little evidence to conclude that reinsurance panels are inherently biased against receivers. Neither is it evident that lack of technical receivership knowledge on the part of the panel puts the receiver at a disadvantage. Technical receivership issues seldom play a material role in arbitrations and there are arbitrators available with such knowledge. While arbitrations have become slow and expensive, this is a general problem unconnected to receivership disputes.

ENDNOTES

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[i]. *See e,g, Recent Case Law Developments with Arbitration in Receiverships*, International Journal of Insurance Law, Part I at 5 (1998). This article is available on my website: robertmhall.com.

[ii]. One example is a receiver who took a very sophisticated issue of federal jurisdiction to the United States Supreme Court and lost 9 - 0. At oral argument he focused on unpaid creditors rather than the issue for which the Court had granted certiorari.