ARIAS•U.S. Practical Guide | Chapter III: The Organizational Meeting

Though not specifically provided for in most arbitration clauses, it is appropriate and customary to begin arbitrations (once a Panel has been selected) with an Organizational Meeting. The meeting usually marks the first time the parties and the Panel meet. At the Organizational Meeting, Panel members disclose prior relationships with the parties, their counsel, other Panel members, and any potential witnesses brought to the Panel's attention. After such disclosures and any resulting discussion, parties are typically asked to, and in most instances do, accept the Panel as duly constituted. The Organizational Meeting also gives parties an opportunity to execute agreements, including "hold harmless" and confidentiality agreements, and gives the Panel an opportunity to establish an arbitration schedule, usually with the assistance of the parties and their counsel.

The Organizational Meeting can be fairly expensive if parties, their counsel and the arbitrators must gather from distant locations to meet face to face. A face-to-face meeting may also take considerable time to arrange, as travel time may limit the participants' ability to identify a mutually acceptable date. While the amount at stake in many arbitrations may justify this time and expense, ARIAS•U.S. also proposes procedures for streamlined arbitrations (discussed in **Chapter 6**). Alternatively, if the parties and Panel agree, the Organizational Meeting may be held telephonically, potentially reducing the expense and time required for a face-to-face meeting.

3.1 PRE-MEETING CONFERENCE CALL:

Before the Organizational Meeting, the umpire should communicate (by teleconference or correspondence) first with the arbitrators and then the parties and/or their counsel to discuss agenda items, logistics, pre-meeting submissions, and other topics.

COMMENT A:

A proposed Agenda for the Organizational Meeting is available here in **ARIAS•U.S. Sample Form 3.1** on the Forms page of the website. A discussion of the agenda items appears in the text below.

COMMENT B:

Before the pre-meeting conference call, the Panel should request a copy of and review the arbitration clause or clauses in the contract(s) to determine any applicable procedures or other guidelines. The Panel should be aware of any contractual time restrictions that may be subject to waiver. If the relevant arbitration clause specifies particular procedural rules, the Panel should obtain those rules from the parties and review them before the Organizational Meeting.

COMMENT C:

Arbitration is a matter of contract. If both parties have explicitly agreed to a matter and wish to enforce that agreement, the Panel must follow. An arbitrator who cannot abide by the parties' agreements should resign.

3.2 SITE OF THE ORGANIZATIONAL MEETING:

Absent the parties' agreement, the Organizational Meeting should be held in the most convenient location for all attendees.

COMMENT:

If the arbitration clause does not designate a location for the Organizational Meeting and the parties do not agree on a location, the Panel should choose the location. In making this decision, the Panel should consider which location minimizes the cost to all parties to the arbitration.

3.3 STATEMENT SUBMITTED TO THE PANEL BEFORE THE ORGANIZATIONAL MEETING:

Before the Organizational Meeting, each party should submit a short Position Statement that apprises the Panel of the facts, issues, and demands between the parties, as well as either a joint proposal, or the parties' individual proposals, for a pre-hearing schedule and a hearing date.

COMMENT A:

The Position Statement is principally designed to give the Panel a general case background to provide a frame of reference for any procedural decisions the Panel makes at the Organizational Meeting. For example, a Panel may be unable to assess a party's stated need for extensive discovery without some knowledge of the dispute's factual background.

COMMENT B:

If the Panel wants to set a page limit on submissions before the Organizational Meeting, it should give due consideration to the complexity of the issues and to whether a page limit restriction (standard letter size) would be unfair to one or more parties. ARIAS•U.S. recommends that the Panel not impose a strict page limit, but instead suggest a recommended length.

COMMENT C:

To facilitate the scheduling process, the parties should work together prior to the Organizational Meeting to agree on a pre-hearing schedule. If the parties cannot agree on one or more elements of the schedule prior to the Organizational Meeting, the parties' Position Statements should present sufficient information for the Panel to consider and resolve the scheduling issues, including the party's positions on the merits of the dispute, the issues to be decided, the types and amounts of relief sought, and the discovery each party may need to develop or prove its position. To help identify necessary discovery and resolve discovery disputes, it may be appropriate for the Position

Statements to include initial document production requests and/or identification of fact witnesses each party anticipates it may need to develop or prove its position. If appropriate, the parties' Position Statements should also advise the Panel whether they foresee a need for expert witness testimony at the hearing.

3.4 IDENTIFICATION OF THE ISSUES TO BE ARBITRATED:

As part of the Position Statement or at the Organizational Meeting, the Panel should ask the parties to identify precisely the issues and defenses that will be subjects of the arbitration.

COMMENT A:

Parties should be required, as early in the arbitration process as possible, to identify all claims and defenses they will present at the hearing. This avoids the injustice of a lastminute claim or defense and gives parties fair notice of each other's claims and contentions, which usually influences the scope of discovery.

COMMENT B:

Knowledge of the claims, defenses and issues at the Organizational Meeting allows the Panel to rule intelligently on the scope of appropriate discovery and to impose reasonable limitations.

COMMENT C:

Identifying the issues to be arbitrated also provides a reference point for the Panel should a party later request an extended discovery period to respond to a "newly raised" issue. The Panel can consult the statements of claims and defenses before or at the Organizational Meeting to determine whether the issue is in fact "newly raised."

COMMENT D:

Early issue identification should not always limit the parties to pre-discovery claims or defenses. The Panel should normally give the parties latitude to amend their claims and defenses up to a reasonable period before the hearing, with due notice to and after comment by all involved parties.

COMMENT E:

In appropriate cases, the Panel should consider, with the parties' input, whether bifurcation of the arbitration into phases (for instance, one phase on liability and a second on damages) would promote an efficient resolution of the dispute. In most instances one final hearing, rather than two, will be most efficient.

3.5 ORGANIZATIONAL MEETING ATTENDANCE:

Except in cases in which the amount claimed or the disputed issue do not warrant it, both company official(s) and outside counsel should represent the parties at the Organizational Meeting.

COMMENT:

Party representatives' direct involvement at all stages of the arbitration process increases the potential for businessperson-to-businessperson dealings and reduces the risk of the arbitration process becoming unduly lawyer-driven. Party representative attendance at the Organizational Meeting in particular also ensures that the parties are fully aware of discovery and pre-hearing obligations and the timetables for meeting those obligations.

3.6 PANEL DISCLOSURES:

At the Organizational Meeting, all members of the Panel should reveal on the record their past, present, and any known future business and personal relationships with the parties, the parties' counsel, other Panel members, and any potential witnesses who are identified in documents provided to the Panel members.

COMMENT A:

Disclosures should include business, professional, and personal contacts, including contacts in other reinsurance arbitrations. Business and professional contacts should include, when applicable, both individuals and their organizations. Disclosures should include whether Panel members have served as expert witnesses for any party and/or their respective counsel. Panel members should also disclose if they were involved with the particular reinsurance contracts at issue.

COMMENT B:

Panel members may consider it advisable to prepare a written list of all relationships with the parties, their counsel and other Panel members for distribution at or before the Organizational Meeting, and to supplement that list orally, if needed, on the record at the meeting. If the Organizational Meeting proceedings are not transcribed, a written list with any written supplementation is especially important.

COMMENT C:

Given the myriad relationships a Panel member may have had over the years with participants in the given arbitration, even the best-intentioned Panel member may forget to disclose a contact of which one party's representative or counsel is aware. To avoid later disputes over whether the non-disclosure was intentional and/or whether the undisclosed contact warrants disqualifying the Panel member or overturning an arbitration award, at the Organizational Meeting party representatives and counsel should supplement the Panel•s disclosures with any undisclosed contacts of which they are aware between Panel members and the party or counsel.

3.7 FORMAL ACCEPTANCE OF PANEL:

Once Panel members have made all disclosures, the parties are traditionally asked to accept the Panel as duly constituted.

COMMENT A:

ARIAS•U.S. **Sample Form 3.2** on the Forms page of the website is a proposed Hold Harmless Agreement, in which the parties formally accept the Panel and agree to hold the Panel members harmless against any claims related to their service in the arbitration.

COMMENT B:

A party may effectively have no remedy, other than proceeding to arbitration with all rights reserved, if it challenges one or more Panel members. A party in this circumstance should consider appropriate amendments to the proposed Hold Harmless Agreement, ARIAS•U.S. **Sample Form 3.2.** on the Forms page of the website. Many courts have refused to entertain pre-hearing petitions to disqualify arbitrators on the ground of bias, absent special circumstances (e.g., a request to enforce a contractual requirement for "impartial" arbitrators). Such challenges, some courts have held, should be brought after the arbitration on a motion to vacate the award.

COMMENT C:

Panel members have no intrinsic right to be "held harmless" by all parties to the arbitration. Panel members presumably have arbitral immunity (akin to judicial immunity) that protects them from liability for their service as arbitrators, although the extent of this immunity is not precisely defined in all jurisdictions. Clearly, a Panel has the power (but is not obliged) to proceed without a hold harmless agreement. It is the position of ARIAS•U.S. that absent extraordinary circumstances, parties should hold Panels harmless. Panel members generally are retired individuals or current executives acting in a personal capacity. To encourage their continued participation, these individuals should in most circumstances receive assurance that their personal assets are not at risk.

3.8 CONFIDENTIALITY:

The confidentiality of arbitration proceedings should be memorialized in either an agreement by the parties and the Panel, or an order entered by the Panel, setting forth the terms and scope of the confidentiality.

COMMENT A:

Most parties to arbitration prefer that the proceedings remain confidential. One advantage of the arbitration process is that confidentiality is much easier to maintain in arbitrations than in litigation.

COMMENT B:

A confidentiality agreement is usually entered by agreement of the parties and the Panel.

COMMENT C:

It is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties' complete agreement. Cases may arise, however, in which either partial or no confidentiality may be appropriate (*e.g.*, if the cedent wants to disclose arbitration results to a related reinsurer, or if the current proceedings may be relevant to another pending or future proceeding between the same parties). If one party opposes total confidentiality of the arbitration, the Panel should consider the parties• arguments on the issue and use its discretion in ordering whether and to what extent the arbitration should be confidential. If the parties agree to a certain level of confidentiality, the Panel should enter an order or sign a confidentiality agreement reflecting the parties' agreement.

COMMENT D:

ARIAS•U.S. Sample Form 3.3 on the Forms page of the website is a sample Confidentiality Agreement form. This form can be converted to an Order, rather than an Agreement, if necessary.

3.9 EX PARTE COMMUNICATIONS:

At the Organizational Meeting, the Panel should establish a date for the cut-off of all ex parte communications between parties and the Panel members.

COMMENT A:

Possible dates for the cut-off of ex parte communications include (a) the Organizational Meeting; (b) the end of discovery; (c) the filing of pre-hearing briefs; or (d) commencement of the hearing.

COMMENT B:

There is a wide range of views about the most appropriate cut-off date for ex parte contact. Some believe that all ex parte communications between the parties and the Panel must cease immediately after the Organizational Meeting to ensure the fair-minded administration of the arbitration. Others believe that procedural issues can be resolved more efficiently, and settlement prospects can occasionally be advanced, if ex parte contact is permitted up until the hearing. No ex parte communication should be permitted during the final hearing because the risk of disclosing confidential Panel deliberations involving the resolution of the dispute is too great. Since each Panel member has a duty to hear the evidence and decide the case impartially, there should be no reason for any ex parte contact with the parties during the hearing.

COMMENT C:

If the Panel permits ex parte contact to continue beyond the Organizational Meeting, certain confidentiality issues arise. Normally, ex parte communications are confidential. Participants in the arbitration expect that discussions between a party and the arbitrator it appointed will not be shared with other Panel members. In addition, arbitrators must remember that Panel deliberations are and

should remain confidential. Because the Panel is a quasi-judicial body, some privilege may attach to their discussions, and Panel members may be able to invoke that privilege if one or both parties approach them about their discussions or deliberations. Unless the Panel specifically decides otherwise, Panel members should not disclose Panel discussions to the parties.

3.10 SCHEDULING:

At the Organizational Meeting, the Panel should establish, with the parties' input, a hearing date and estimated hearing length, including additional time for Panel deliberations after the parties have presented the case. As discussed in greater detail in **Chapter 4**, the Panel should also work with the parties to establish a workable schedule for discovery, briefing, and other pre-hearing events at or shortly after the Organizational Meeting.

COMMENT A:

The hearing should be held at a neutral site, unless the parties agree otherwise. The Panel should ask one of the parties to make the necessary accommodations, *i.e.*, rental of hearing room and proposed overnight accommodations, if necessary. Both parties should equally share the cost of the hearing room, court reporter and other hearing costs.

COMMENT B:

In establishing this schedule, the parties and Panel should ensure that the final exchange of hearing exhibits occurs sufficiently before the beginning of the hearing to preclude unfair surprise.

3.11 PARTY STIPULATIONS:

The Panel should generally accept the parties' stipulations (if any) concerning discovery, scheduling, cut-off of ex parte communication with Panel members, and order and timing of briefs.

3.12 INTERIM DISPUTES:

The parties and Panel should establish a protocol to handle disputes (e.g., concerning discovery) that may arise in the time between the Organizational Meeting and the hearing. For example, they might agree that communications will be by e-mail; and that (absent Panel request for oral argument) a disputed matter will be ripe for decision after a submission, an answer, and a reply by the moving party. The parties and Panel should also discuss whether disputes must always be resolved by the entire Panel, or whether under certain circumstances disputes may be resolved (a) by the umpire alone, or (b) jointly by the two arbitrators.

3.13 MISCELLANEOUS ISSUES:

The Panel should afford the parties and their counsel the opportunity to raise any other matters at the Organizational Meeting, though the Panel should encourage the parties and their counsel to agree on as many procedural issues as possible before the Organizational Meeting.

COMMENT A:

Special arrangements, e.g., creation of an escrow account, are sometimes made for the payment of the umpire's fees.

COMMENT B:

A party's request for pre-hearing security is typically addressed at the Organizational Meeting, but full briefing normally should occur in advance of the meeting. Pre-hearing security is discussed in greater detail in **Chapter 4**, which sets forth a proposed form of order.

COMMENT C:

Normally, a court reporter should transcribe the Organizational Meeting proceedings.

COMMENT D:

The Panel should consider whether the relevant arbitration clause designates specified procedural rules (e.g., the American Arbitration Association Commercial Arbitration Rules, or the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes), whether particular rules apply to an international arbitration, and/or whether the parties have agreed to any other set of procedural rules.