# ARIAS•U.S. Practical Guide | Chapter IV: Interim Awards, Discovery and Briefing

## *4.1 DISCOVERY SCHEDULE:*

The Panel should issue an order establishing a comprehensive schedule with deadlines for as many activities as possible through the beginning of the hearing. This order is usually entered at or just after the Organizational Meeting. To the extent possible, the parties should confer in advance of the Organizational Meeting and attempt to agree on scheduling deadlines; the Panel's order should reflect the parties' agreement on scheduling items to the extent appropriate.

***COMMENT A:***

A sample scheduling order is available in the ARIAS•U.S. **Sample Form 4.1**. on the Forms page of the website. The sample scheduling order is intended as a checklist. Each item probably will not apply to every case, and additional items may be appropriate in others. Careful consideration should be given to specific terms of the scheduling order, because all concerned are expected to honor the established timetable.

***COMMENT B:***

The sample scheduling order in the ARIAS•U.S. **Sample Form 4.1**.on the Forms page of the website contemplates that the Panel may be substantially involved in the discovery process, but this may not be necessary or appropriate in all cases. The parties and the Panel may consider permitting the parties' counsel to work out discovery and scheduling details, and only involving the Panel if the parties reach impasse, after certain targeted completion dates for each stage are established. The parties should immediately notify the Panel in writing if they agree to modify the scheduling order in a way that affects briefing deadlines and/or the hearing date.

***COMMENT C:***

The Panel's scheduling order should ordinarily establish deadlines to identify the fact and expert witnesses that each party intends to call at the hearing. Identification of witnesses may be staggered, with initial lists due on one date and supplemental lists of rebuttal witnesses due shortly thereafter.

***COMMENT D:***

ARIAS•U.S. **Sample Form 4.1**. on the Forms page of the website. anticipates that the parties will want, and the Panel will permit, depositions of persons whom the parties identify as their fact witnesses at the hearing. However, the parties and the Panel should not presume that depositions

are necessary or appropriate in all instances or that each side needs the same number of depositions as the other side to fairly prepare its case.

***COMMENT E:***

The Panel has considerable discretion to limit the amount and type of discovery available to the parties in the arbitration. The Panel's objective should be to give each party a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay on the other party(ies). No particular pattern suits all reinsurance arbitrations. In resolving disputes, the Panel should exercise its discretion and strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process.

***COMMENT F:***

Discovery disputes can arise even when both parties act in good faith. Under unusual circumstances, the umpire alone may initially hear and decide some discovery disputes. As a general practice, however, the entire Panel should hear and decide discovery disputes. If the Panel determines that written submissions are appropriate, it should set briefing schedules to give each party a fair opportunity to present its position, keeping in mind the dual goals of reaching a proper final decision on the merits and implementing overall efficient case management.

***COMMENT G:***

In particular cases, discovery disputes may require the Panel to use innovative procedural approaches. Possible approaches suggested by some practitioners include: 1) have only the two arbitrators review arguably privileged or confidential material in camera, with the umpire only participating in the process if the arbitrators cannot reach agreement; and 2) use a special master to help resolve privilege and confidentiality disputes. Each approach raises its own concerns: the first risks having some, but not all, Panel members review materials that might ultimately be determined to be not be discoverable, while the second involves increased costs and an additional layer of bureaucracy on what is intended to be a streamlined process. The Panel should adopt a procedure to resolve discovery disputes that takes into account the parties' interests in fairly resolving the disputes and their interest in maintaining the streamlined, cost-effective nature of the arbitration process.

***COMMENT H:***

Some cases may involve substantive issues of contract interpretation or application, but little or no disputed issues of underlying facts. In those cases, the Panel and parties may want to consider limiting the amount of discovery and/or using a streamlined hearing procedure, such as that outlined in **Chapter 6.**

## *4.2 USE OF EXPERT WITNESSES:*

At the Organizational Meeting, the Panel may ask the parties whether they foresee a need to offer expert testimony at the hearing. The Panel may deem it appropriate to discuss with the parties whether, given the Panel's professional experience with the subject matter of the dispute or lack of such experience, there are areas in which expert witnesses may or may not be helpful.

***COMMENT A:***

Parties must give adequate and complete notice of the intent to retain an expert in sufficient time to allow the opposing party(ies) time to identify and appoint their responding expert(s), if they choose to retain one.

***COMMENT B:***

In cases where expert witness testimony is contemplated, the scheduling order should establish deadlines (a) to identify expert witnesses and disclose anticipated expert testimony, (b) to identify rebuttal expert witnesses and anticipated rebuttal expert testimony (if appropriate), and (c) to complete any expert witness depositions.

***COMMENT C:***

While the facts define the bounds of fact testimony, no such definition applies to expert testimony. For this reason, the pre-hearing disclosure of anticipated expert testimony is extremely important. The Panel should set the form and method of that disclosure, recognizing the parties' interests and the particular circumstances of the case. For example, an initial disclosure of the expert's opinions in the form of an expert report, followed by a deposition of the expert witness, may be an appropriate way to help the parties understand the scope and basis for the expert•s anticipated hearing testimony. As to the form and content of the expert report, the standards under Rule 26(a)(2) of the Federal Rules of Civil Procedure are a good guide. In other cases, however, the amount at issue or the self-evident nature of the expert's anticipated testimony may justify a less formal disclosure process, such as a letter from the party offering the expert testimony that outlines the topics and substance of the anticipated testimony, followed (or not) by a deposition of the expert witness.

## *4.3 PRE-HEARING BRIEFS:*

The Panel's scheduling order, with the parties' input, should establish a pre-hearing briefing schedule, including:

a) the due dates for the initial and reply briefs, if any;
b) whether the briefs are to be submitted sequentially or simultaneously; and
c) whether the briefs have a specified page limit.

***COMMENT:***

ARIAS•U.S. **Sample Form 4.1**. on the Forms page of the website provides for exchange of pre-hearing briefs and reply briefs without specifying precise content. The briefs should include any exhibits identified in the text. At one end of the spectrum, the briefs could set forth conclusions which the parties ask the Panel to apply to facts presented at the hearing. At the other end of the spectrum, the briefs could be case statements by each party dealing with both points of law and key facts, with supporting exhibits. Panels and parties are urged to agree upon and adopt a briefing format that fits the needs of the case.

## *4.4 INTERIM AWARDS:*

The Panel has the authority to enter interim awards in appropriate cases.

***COMMENT A:***

Under broad forms of arbitration clauses, most courts have upheld the Panel's authority to enter interim awards. A proposed form of order awarding the provisional remedy of pre-hearing security is available in the ARIAS•U.S. **Sample Form 4.2**. on the Forms page of the website. In appropriate cases the parties may ask the Panel to consider other types of interim awards, including injunctive relief or attachment.

***COMMENT B:***

If a party seeks an interim award, the Panel should determine whether written submissions from both parties and/or oral argument would assist the Panel in determining whether to afford the requested relief, keeping in mind the often-competing goals of affording each party a fair opportunity to present its position, reaching a meaningful proper decision on the requested relief, and implementing overall efficient case management.

***COMMENT C:***

ARIAS•U.S. **Sample Form 4.2** on the Forms page of the website addresses only the reinsured's need for security. If the reinsurer seeks affirmative relief (*e.g.*, security for return of losses paid), this form may be adapted to require security from the cedent.

***COMMENT D:***

Pre-hearing security may be in the form of a letter of credit, a bond, cash in an escrow account, or otherwise, as may be fair and appropriate in the circumstances. The party requesting pre-hearing security should specify the form of security desired.