



ARIAS•U.S. Practical Guide | Chapter V: Hearing and Award

5.1 PRE-HEARING CONFERENCE CALL:

The Panel should usually schedule a pre-hearing telephonic conference with the parties' counsel in the month before the scheduled hearing to discuss and make arrangements for any remaining hearing preparations, including but not limited to, the following:

- (a) order of proof;
- (b) presentation of witnesses, with estimated time;
- (c) presentation and numbering of exhibits;
- (d) preparation of documents necessary to the Panel's decision, including proposed forms of order;
- (e) personnel in attendance at the hearing;
- (f) concerns of the parties;
- (g) administrative details (location of the hearing, accommodations).

COMMENT:

The Panel should carefully consider any request to postpone a hearing, including whether a delay could unfairly disadvantage one party. The Panel and the parties should also endeavor to complete the testimony and argument within the allotted time. Requests to reconvene to hear additional testimony in the event the allotted time is not sufficient to complete the hearing should be granted selectively. The Panel, however, should afford the parties ample time to present their case and should allow continuances in appropriate cases.

5.2 PROPOSED FORM OF ORDER:

Either prior to or during the hearing, the Panel may consider requiring each party to circulate to all involved a proposed form of order that precisely identifies the nature of the relief sought.

COMMENT A:

Distribution of a proposed order may help the Panel determine precisely what relief the parties seek and whether that relief should be in the form of a contractual interpretation, a dollar amount, and/or some other form.

COMMENT B:

If a party seeks an award of interest, the amount and calculation of that interest should be submitted to the Panel and the other party(ies).

5.3 THE FINAL AWARD:

In many instances, it is best for the Panel to commence (and, if possible, conclude) deliberations immediately after the parties have presented the case at the hearing. The Panel should exercise care to ensure that the parties have had due opportunity to address important issues with the Panel. The Panel should issue a written award after its deliberations and within a reasonable time after the hearing.

COMMENT A:

In some instances, the Panel may consider distributing a proposed award (to be effective at a specified date), inviting written comments to the Panel and the opposing party(ies) if the proposed order does not address all issues in arbitration or is otherwise deficient in form or computation.

COMMENT B:

If the Panel performs mathematical calculations (or the like), the Panel should consider giving the parties an opportunity for input if such input might help prevent error.

COMMENT C:

If the award requires payment by one or more parties, the Panel may specify a payment date and a rate of interest if payment is not made by the specified date. A Panel's authority, however, may end once it resolves the dispute. One court has held that matters concerning execution of the award and post-judgment interest should be addressed by a court on post-hearing motion or petition.

5.4 A "REASONED" AWARD:

If all parties request the Panel to explain the reasons for its award, the Panel should normally do so (and may be legally required to do so), despite any personal reluctance or reservations individual Panel members may have about written explanations of the award.

COMMENT A:

Unlike arbitration in the United Kingdom and certain other countries, the United States custom and practice is that arbitration Panels, unless requested otherwise, do not issue written explanations of the basis of their award. Arbitration clauses almost never require the Panel to explain the basis of its decision, although the parties are free to request the Panel to do so.

COMMENT B:

If all parties desire a "reasoned" award, Panel members should consider, in appropriate cases, asking the parties to submit sample questions, similar to "jury interrogatories," to highlight particular questions to be answered. If possible, these questions should be submitted jointly and be approved by all parties. Panel members should be guided by these questions in issuing their opinion, but should not be bound to answer them. The form of a "reasoned" award need not be elaborate.

COMMENT C:

Common arguments against "reasoned" awards are (a) they could discourage compromise awards when otherwise appropriate; (b) arbitration awards accompanied by written decisions may be challenged more frequently by petition to a court; (c) experience shows that "reasoned" decisions are often tailored predominantly to avoid reversal or criticism; and (d) requirements for "reasoned" decisions will ultimately favor appointing lawyers as arbitrators, whereas the essence of arbitration frequently is to obtain a business, rather than legalistic, resolution.

COMMENT D:

A common argument for a "reasoned" award is that it requires the Panel to articulate the basis of its award in writing, which should improve the quality of the award. It also gives the parties a better idea of how they fared and increases their confidence in the process because it demonstrates, in a way that a one-line written award does not, what arguments the Panel considered persuasive. Supporters of "reasoned" awards also disagree that written decisions make awards more vulnerable to post-hearing challenge, because many arbitration clauses specifically relieve arbitrators of the need to follow strict rules of law, instead providing that awards should be issued in accordance with the custom and practice of the insurance and reinsurance industry.

5.5 POST-HEARING CONTACT WITH THE ARBITRATION PANEL:

The Panel should consider whether it is appropriate for the arbitrators each individually, the umpire individually, or the entire Panel, to speak to the parties (and/or counsel) informally to explain the basis for the award.

COMMENT A:

If the parties are highly adversarial and the arbitration process has been difficult, the Panel members should agree not to have any post-hearing discussions with the parties concerning the arbitration. On the other hand, circumstances may exist when there would be no harm, and the parties would potentially benefit, from an informal explanation of the award. The Panel should discuss and agree on these countervailing considerations before the Panel dissolves.

COMMENT B:

Given the confidential nature of deliberations and the arbitration, and the fact that such informal contact may provide grounds to challenge the award, the parties should both agree that such explanation is off the record and cannot be the basis for an appeal.