ARIAS•U.S. Practical Guide | Chapter II: Panel Selection

Reinsurance agreements often require parties to resolve disputes by a Panel of two arbitrators and a third "umpire" appointed with both arbitrators' input. The establishment of a knowledgeable and experienced Panel is the single most important factor in ensuring the smooth, fair, and efficient resolution of privately arbitrated disputes. This chapter provides an overview of contract terms concerning Panel selection and discusses recommended best practices for Panel selection. In addition, parties are advised to be sensitive to the umpire selection and arbitrator qualification rules in certain jurisdictions, as those rules may apply if the arbitration clause and the Federal Arbitration Act are silent on a given point. *See, e.g.,C.G.S.A. §§ 50-a-101 et seq.* (Connecticut's version of UNCITRAL, establishing guidelines for umpire selection absent party agreement on a procedure, and providing that a party may challenge an arbitrator for lack of "partiality and independence"); Cal. Code of Civil Procedure § 1297.111 *et seq.* (setting forth umpire selection procedures if the parties have not agreed on a procedure).

2.1 SAMPLE ARBITRATION CLAUSE LANGUAGE FOR PANEL FORMATION:

Each party shall appoint one arbitrator, and the two arbitrators so appointed shall then appoint a neutral Umpire before proceeding. If either party fails to appoint an arbitrator within thirty (30) days after it receives a written request by the other party to do so, the other party may appoint an arbitrator for it. Should the two arbitrators fail to choose an Umpire within thirty (30) days of the appointment of the second arbitrator, each arbitrator shall propose three names, of whom the other shall strike two, and the decision shall be made from the remaining two by drawing lots. The arbitrators and Umpire shall be either present or former executives or officers of insurance or reinsurance companies, or arbitrators certified by ARIAS•U.S. The arbitrators and the Umpire shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.

COMMENT A:

The sample clause incorporates a common procedure to appoint the Panel: each party selects an arbitrator, and the two arbitrators then select an umpire. Key provisions are the time limits to select the arbitrators and umpire, and the procedure to resolve deadlocks between umpire candidates. Some clauses do not expressly provide for a method to appoint an umpire if the arbitrators do not agree on an umpire. In those instances, the default mechanism would be to petition a court of competent jurisdiction to appoint the umpire.

COMMENT B:

Since the umpire may decide the arbitration, the deadlock resolution mechanism is critical. The sample incorporates the common "lot selection" method, which has the advantage of simplicity but the disadvantage that parties may propose a slate of prospective umpires with a known or highly predictable predisposition. If this occurs, the court system may be the parties' only recourse, although as a practical matter, most courts have difficulty evaluating claims of "predisposition." Absent tangible evidence of bias, which is rare, a court is likely to remit the parties to their contractual "lot selection" remedy. For these reasons, many practitioners dislike the lot selection method; some suggested alternatives appear in paragraph 2.2, below.

COMMENT C:

When parties or their counsel communicate with prospective arbitrators, they should disclose the fact (but not the content) of such communications to the other party(ies) and the other Panel members once the Panel is constituted. Parties should not ask candidates how they will rule on the specific issue(s) before the Panel. Parties also should not provide arbitrator candidates with any documents that the parties do not intend (e.g., for reasons of privilege) to produce in discovery or enter into evidence in the arbitration. ***Refer to the*** **ARIAS•U.S. Code of Conduct, Canon V, Comment 2.**

COMMENT D:

To the extent practical or feasible, any communications with prospective umpire candidates (*e.g.,* to determine their availability to serve as umpire) should be made either jointly by counsel for both parties or jointly by both arbitrators.

2.2 ALTERNATIVES FOR UMPIRE SELECTION:

Means of resolving a deadlock in umpire selection, other than "lot selection," are as follows:
1. Use of the ARIAS•U.S. Umpire Appointment Procedure. Briefly, this Procedure, primarily administered by the parties, has two parts: (a) an initial random selection from either the ARIAS•U.S. Umpire List or the ARIAS•U.S. Certified Arbitrator List, (b) followed by questionnaire responses and a selection and ranking procedure conducted by the parties.
2. Use of the umpire selection method set forth in Section 6 of the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999). Briefly, if the arbitrators fail to agree upon an umpire, the parties conduct a selection and ranking procedure which uses a list of arbitrators (e.g., AAA or ARIAS•U.S.) designated in the arbitration clause.
3. Application to an identified "appointer" or "appointing authority," such as the Superintendent of Insurance in the state in which the arbitration is to be held, the CPR Institute for Dispute Resolution, the American Arbitration Association, or the International Commerce Commission (Paris);
4. Application to another official designated by the arbitrators; or
5. Application to a specified court.

COMMENT A:

While no default mechanism for umpire selection is perfect for all occasions, ARIAS•U.S. believes that its Umpire Appointment Procedure has certain attributes that parties should consider in crafting their arbitration clause: (1) both the ARIAS•U.S. Umpire List and Certified Arbitrator List contain a core group of highly qualified arbitrators; (2) those arbitrators are listed because they meet published, objective criteria (not because of a private, subjective selection process); (3) the Umpire Appointment Procedure combines initial random selection (which prevents skewing) with party-controlled ranking; and (4) many practitioners believe that this type of default mechanism increases the parties' willingness to mutually agree on an umpire without using the default mechanism itself.

COMMENT B:

If the contract designates an appointer, he/she/it may decline to appoint an umpire, or the office may no longer exist. In such situations, contracts should propose an alternative means of selection. Absent an agreed alternative selection method, the parties must resort to a court of competent jurisdiction.

2.3 "DISINTERESTED" ARBITRATORS:

The parties and Panel should interpret arbitration clauses requiring "disinterested" arbitrators to mean that arbitrators may have no financial interest in the arbitration outcome and are not under any party's control.

COMMENT A:

When the arbitration clause requires that all arbitrators be "disinterested," there is a lack of consensus over whether or to what extent party-appointed arbitrators can be partisan. Some believe the "disinterested arbitrator" requirement give parties a contractual right to a partisan arbitrator. Others believe such arbitrators should be non-partisan in the decision-making process. Absent specific contractual language to the contrary, it is generally understood in the industry that party-appointed arbitrators can be initially predisposed but must remain open-minded and render decisions fairly. Regardless of specific contract language, however, it is accepted practice that all arbitrators should be financially disinterested and not under any party's control, and that the umpire should be neutral. Examples of a "financial interest" include contingent fee arrangements, bonuses tied to a result, employment by another reinsurer or cedent on the same risk at issue, or a financial investment in a company that may be materially affected by the outcome of the proceedings. An arbitrator is "under the control" of a party when he or she is an employee, officer or director of that party or receives a consulting fee or other remuneration or compensation from that party other than as an arbitrator or umpire. ARIAS•U.S. believes that all Panel members must decide the issues before them on the merits of the case presented without regard to the party who appointed them. Panel members should avoid reaching a final judgment until both parties have had a full and fair opportunity to present their respective cases and the Panel has fully deliberated on the issues.

COMMENT B:

Unless the arbitration clause specifically provides otherwise (e.g., by requiring that all Panel members be "neutral"), it is accepted practice for a party to speak with a prospective arbitrator before appointment to discuss the case as long as that conversation complies with the ARIAS•U.S. Guidelines for Arbitrator Conduct. ***Refer to the* ARIAS•U.S. Code of Conduct, Canons II, V.**

COMMENT C:

It is accepted practice that the parties will not meet with, or discuss anticipated issues with, umpire candidates prior to nomination or appointment. If the parties desire to determine whether umpire nominees have potential conflicts before selecting an umpire, the parties should consider circulating a questionnaire such as Sample Form 2.1., the ARIAS•U.S. **Umpire Questionnaire.**

2.4 DISCLOSURE STATEMENTS:

The foundation for broad industry support of arbitration is confidence in the arbitrators' competence and fairness. Panel members owe a duty to the parties, the industry, and themselves. ***Refer to the* ARIAS•U.S. Code of Conduct , Canon I.** Panel members and candidates should fully disclose all conflicts of interest, real, potential, or apparent. Panel members and candidates should disclose any interest or relationship likely to affect their judgment, including any facts that might appear to give them a financial interest in the arbitration's outcome. Any doubt should be resolved in favor of disclosure. *See id.*, Canon IV. The obligation to disclose all past and present interests or relationships continues throughout the proceeding. If any previously undisclosed interests or relationships arise or are recalled during the arbitration, they should be disclosed promptly to all parties and the other Panel members. *Id.*

COMMENT A:

It is common practice for nominated Panel members to disclose their contacts with the parties (and their counsel and any known witnesses) in the business world and in prior arbitrations, and with the particular contracts involved in the dispute. A proposed disclosure form is Sample Form 2.1., the ARIAS•U.S. **Arbitrator and Umpire Disclosure Questionnaire** on the Forms page of the website. The proposed form includes a variety of questions that may or may not serve as a basis to disqualify a Panel member. ARIAS•U.S. believes it is appropriate for parties to seek general background information in addition to information that may serve as a basis for disqualification. ARIAS•U.S. does not recommend that parties be allowed to question proposed umpires about how they will rule in the particular case, though questioning candidates about pre-existing positions, for example concerning repetitive issues, may be warranted in some instances. See Sample Form 2.1., the ARIAS•U.S. **Arbitrator and Umpire Disclosure Questionnaire**, Questions 6.D and 8. Sample Form 2.1., the ARIAS•U.S. **Arbitrator and Umpire Disclosure Questionnaire** was originally designed for umpire candidates, but now has been tailored to apply to arbitrators, as well.

COMMENT B:

Disclosures allow parties to pursue or preserve their challenges to the Panel under applicable law. In limited instances, that information may enable a party to bring a successful pre-hearing challenge to a Panel member's qualifications. Courts applying the Federal Arbitration Act usually defer challenges for arbitrator bias until after the Panel issues its award.

COMMENT C:

Early and full disclosure raises confidence in the Panel's fair-mindedness and makes the arbitration process more efficient. Although ARIAS•U.S. does not propose the use of a form in every case, arbitrators should make such disclosures before the parties accept the Panel as duly constituted. It is routine and appropriate for such disclosures to be made at or prior to the Organizational Meeting. See paragraph ***3.6, infra.***