

**ARIAS PRESENTATION – NOVEMBER 2016**  
**ULTIMATE DODGEBALL: HOW TO AVOID DELAYING TACTICS**  
**BY ARBITRATION PARTICIPANTS:**

**Outside Reinsurance: Managing Other Categories of Disputes**  
***By: Susan E. Mack***

**I. When Can a “Deadball” Occur Outside Reinsurance?**

- Insurer vs. Managing General Agent
- Insurer vs. Commercial Insured
- Consumers v. Banks/Collection Agencies
- Consumers vs. Service Purveyors
- Investors vs. Brokers (FINRA)

**II. “The Honor System Officiating” – Does It Matter if the Cause of Delay is Benign or Malignant?**

- And how does another arbitration participant tell?

**A. Applicable Rules**

- ARIAS Canon I – General Duty to Act with Diligence
- ARIAS Canon VII – Advancing the Arbitral Process: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications

Comment 2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct arbitration process promptly.

Comment 3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

- ARIAS Canon VIII – Arbitrators should make decisions justly, exercising independent judgment and should not permit outside pressure to affect decisions.

**B. Self-Monitoring Ethical Guidelines as opposed to an Umpire / Panel's Disciplinary Exertions**

1. Pre-panel formation
2. Post-panel formation

**III. Causes of Delay – Manuscript Arbitration Clauses**

**A. What Set of Rules Govern?**

1. Obvious Conflict
  - ARIAS–US Traditional Model
    - Two Party-Appointed Arbitrators Plus One Neutral
  - vs.
  - AAA Traditional Model: The Code of Ethics for Arbitration in Commercial Disputes (Canon IX)
    - All Three Arbitrators Presumed to be Neutral

**B. What Qualifications Shall the Arbitrators / Umpire Have?**

- Sourced from particular organization or society?
- Contacts with firm or parties permissible?

**C. What Time Frames – if any – Apply?**

**D. Have the Preliminary Requirements Been Met?**

- Negotiation by corporate executives?

**E. The Ultimate “Out of Bounds” Play – Is Litigation an Initial or Ongoing Recourse?**

1. Is there a subset of issues that is not:
  - ✓ implicated by the arbitration demand?
  - ✓ covered by a “narrow” arbitration clause?
  - ✓ ripe for any form of adjudication?

**IV. Causes of Delay: The Intransigent Arbitrator**

**A. Various Excuses Leading to Impermissible “Holding”**

1. “Out of the country”
2. Hectic schedule
3. Counsel unavailability
4. Counsel’s difficulty in contacting party
5. “Let’s wait until settlement talks concluded”

**V. Causes of Delay: Umpire Appointment**

**A. Questionnaire**

**B. Breaking an Umpire Selection Deadlock**

**VI. Causes of Delay: Demand and Answer**

**A. Initial Pleading Unclear or Does Not Follow Arbitration Clause Rules**

**B. Subsequent Pleading Results in Joining New Issues**

**VII. Causes of Delay: Discovery and Hearing**

**A. Moving the Hearing Date / Rescheduling**

## **VIII. Pragmatic Tips for Avoiding “Deadballs”**

### **A. Prior to Umpire Selection**

1. Establish firm deadlines with agreed consequences up front
2. Document all agreements as to deadlines and consequences
3. Enlist counsel's involvement
4. Employ tools provided by arbitration clause, if any
5. Run to the next phase as fast as you can

### **B. Concurrent with Umpire Selection**

1. Employ standard forms
2. Employ tools provided by arbitration clause, if any

### **C. During the Discovery and Hearing Process**

1. Bring evidence of “Malignant Delay” to Entire Panel with request for sanctions
2. Bring evidence of “Benign Delay” to Entire Panel, urging immediate action