OUTSIDE REINSURANCE: PRAGMATIC TIPS TO MANAGING ARBITRATIONS WITHOUT ACKNOWLEDGED RULES

By: Susan E. Mack

Susan E. Mack, a certified ARIAS•U.S. umpire, arbitrator and qualified mediator, had the privilege of being one of the co-founders of the organization. A retired C-level executive, she has served as insurers' and reinsurers' General Counsel, Chief Claims Officer, Chief Compliance Officer and Chief Treaties Officer. Engaged in the private practice of law in Jacksonville, Florida with Adams and Reese LLP, she is frequently appointed as an umpire and arbitrator in both property/casualty and life/health proceedings. Her arbitration practice has included both reinsurance disputes and disputes between insurance companies and either service providers or large commercial policyholders.

I. The ARIAS•U.S. Model: Knowing What to Expect

Since the founding of ARIAS•U.S. in 1994, the ARIAS•U.S. conferences have maintained a laser focus on continuous improvement of the reinsurance arbitration process. In no small part due to these efforts, participants in the reinsurance arbitration process know what to expect. The reinsurance arbitration landscape is distinguished by:

- Knowledgeable counsel;
- Certified arbitrators and umpires with continuing substantive and ethical education requirements;
- Reinsurance contract arbitration clauses, with stated time constraints, arbitrator qualifications, procedures for resolving umpire selection deadlocks and specifications about what fees and costs can be awarded;
- Agreed parameters, typically understood as a tripartite panel with a neutral umpire and two party-appointed arbitrators who may enter the process with a predilection towards one side's case;
- The ARIAS•U.S. Practical Guide to Reinsurance Procedure; and
- The ARIAS•U.S. Code of Conduct.

Admittedly, the occasional proceeding is marred by unprofessional conduct in the form of lack of courtesy or delaying tactics on the part of counsel, parties or panel members. But, on the whole, due to the frequency with which reinsurance specialty counsel, industry participants and experienced arbitrators encounter each other in the context of reinsurance arbitrations, proceedings run without uncontained contentiousness and undue delay.

II. A Case Study: Efficient Models Break Apart

Outside reinsurance, dispute resolution can involve controversies among:

- Insurers and such service providers as managing general agents or third party administrators;
- Insurers and large commercial insureds;
- Consumers and Banks/Collection Agencies;
- Consumers and Service Providers and
- Investors vs. Investment Brokers (Financial Industry Regulatory Authority or FINRA).

Many of these proceedings are efficiently run, as they are subject to agreed rules and ethical guidelines. The FINRA proceedings are illustrative- arbitration participants are subject to specified Arbitration Rules and the American Arbitration Association/American Bar Association Code of Ethics for Arbitrators in Commercial Disputes.[1] Consumer arbitrations often are governed by the consumer's agreement to a contract containing an arbitration clause specifying the involvement of the American Arbitration Association ("AAA"). These proceedings are aided by the involvement of an AAA staff case manager, and arbitrators are guided by both the aforementioned Code of Ethics for Arbitrators in Commercial Disputes and the AAA Consumer Arbitration Rules.[2]

In my experience, the most significant problems with managing arbitration proceedings occur both when (a) disputes occur outside the reinsurance context and (b) unlike the FINRA and AAA instances, the related contracts fail to specify any applicable administrative rules or ethical codes. The problems are exacerbated by the likelihood that counsel involved in such proceedings outside reinsurance may be more accustomed to the norms of litigation rather than alternative dispute resolution.

Consider this case study: a property/casualty insurance dispute between an insurer and a managing agent is governed by a contract containing a manuscript arbitration clause. The arbitration clause specifies that a panel consisting of an umpire and two arbitrators will constitute the forum, but does not specify (a) time constraints for panel appointment and process completion, (b) the precise qualifications and industry experience of the panelists and. importantly (c) whether the two party-appointed arbitrators may initially advocate the positions of the appointing party or must be neutral. No reference is made in the arbitration clause to a governing set of procedural rules or ethical guidelines. The clause is narrowly drafted; meaning that only disputes "arising out of" the contract and pertaining to contract "interpretation, performance and breach" are subject to arbitration. The clause does specify, however, that deadlock in umpire selection shall result in a federal district court choosing the umpire.

[1] https:/www.finra.org/arbitration-and-mediiation

[2] https:/www.adr.org/aaa

A dispute arises between the insurer and the managing general agent with respect to whether the managing general agent breached the contract by failing to follow the insurer's stated underwriting guidelines.

Predictably, the litigation firm hired by the managing general agent appears to be more comfortable with federal and state court practice than in an arbitral setting with industry practitioners as the forum. The litigation firm attempts to end-run the arbitration proceedings by stating that the issues relates to the formation of the contract rather than a breach of the contract's terms. After eight months, the court rules that the dispute must be referred to arbitration. The managing general agent's lawyer selects an arbitrator whose only industry connection is a brief stint as a junior counsel at a life insurance company. The arbitrator is not a member of any arbitration society such as ARIAS•U.S. or the AAA.

The initial delay caused by the diversion to court is now dwarfed by delays caused by the arbitrator's conduct. He is perpetually unavailable to the insurer's appointed arbitrator, citing that he has business "out of the country" and that his practice is extraordinarily hectic. He does, however, find time to argue that the process should be presided over by three neutral arbitrators, in an apparent attempt to eliminate all ex parte contact and keep the insurer's appointed arbitrator from communicating with the insurer about the proceeding's status or to provide an insurance industry perspective.

When pressed to appoint umpire candidates, the arbitrator finally names candidates who, like himself, are not members of any arbitral society. He provides the candidates' resumes. While each candidate has worked for a period of less than five years in a property/casualty company, the resumes do not show whether each candidate has ever served as an arbitrator.

After a painful year and a half after the court's referral of the dispute to arbitration, the matter ends up again in court. Ultimately, the pace of the matter accelerates substantially when the court chooses a seasoned umpire to complete the panel.

III. Little Help Found: Application of Law and Arbitral Codes of Conduct

Unfortunately, there exists little in the way of applicable law or ethical disciplinary rules which could have assisted the insurer and insurer's appointed arbitrator in the described situation.

9 U.S.C.A. 10 authorizes vacatur of arbitration awards procured by evident partiality or corruption of the arbitrators (subsection (a)(2)) or where the arbitrators are guilty of "any other misbehavior by which the rights of any party have been prejudiced" (subsection (a)(3)), but authorizes nothing to ameliorate that pain of interim proceedings that ultimately resolve.

Each of ARIAS•U.S. and the AAA publish ethical rules, but they are self-monitoring. For example, Comment 3 of Canon VII of the ARIAS•U.S. Code of Conduct specifies that "arbitrators <u>should</u> make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process." Subpart F of Canon

I of the AAA's Code of Ethics states that "an arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants or other abuse or disruption of the arbitration process." Rule 18 of the AAA Rules for Commercial Arbitration Rules and Mediation Procedures provide something more – possible arbitrator disqualification where the arbitrator displays "inability or refusal to perform his or her duties with diligence or in good faith." But, admittedly, these rules do not strictly apply where the arbitrator in question is credentialed by neither ARIAS•U.S. nor the AAA.

IV. Pragmatic Tips to Dealing with Arbitrations Without Rules-or Arbitrations Where a Panel Member Eschews Rules

The arbitrator confronted with delaying or harassing tactics can present his or her concerns to the umpire, in the event that the tactics occur post-umpire appointment. My recommendation to the arbitrator faced with these difficulties prior to umpire appointment (as posed by the case study) is to resort to constructive self-help. Here are pragmatic tips to jump-start such arbitrations:

- **Don't lean into the described delays.** Ask, in writing, when an arbitrator will be available to speak substantively about the proceeding's issues. Assure the arbitrator that you can be available despite time zone differences. When the arbitrator responds, confirm the teleconference start time in writing and indicate how long a session is anticipated to wrap up issues.

- **Break what needs to be accomplished into deadlined steps with consequences for missing deadlines.** For such critical steps as putting forward umpire candidates, document a date and stick to it. Report any unfortunate misses in writing to both counsel, copied, of course to the arbitrator.

- **No matter what the provocation, do not descend to the depths.** When it is apparent that the other arbitrator is employing delaying tactics, perhaps intentionally, it is tempting to indicate that you have "caught on" to these tactics to that arbitrator. Just don't do it-the conversation will disintegrate quickly. Your worst case scenario is being quoted to counsel as the one whose speech or conduct is overly aggressive. Focus your comments on the process.

- **Avoid any attempts to bar communication with counsel.** Keeping appointing counsel in the loop as to the difficulties encountered with the process is key to appropriately enlisting counsel's help with the difficult circumstances.

- **If possible, employ any tools provided by the relevant contract's arbitration clause.** If time limitations exist in the clause, use them to the advantage of the proceeding.

- **Document, document, document.** Documenting deadlines and conduct via email may result in the other arbitrator disagreeing with your observations by email. It is still worthwhile to avoid the possibility that the other arbitrator's contentions will stand without contradiction.

- **Focus on running, not walking, to the next arbitration phase where an experienced umpire can be of great assistance.**