IMPROVING THE ARBITRATION PROCESS THROUGH BETTER CONTRACT WORDING

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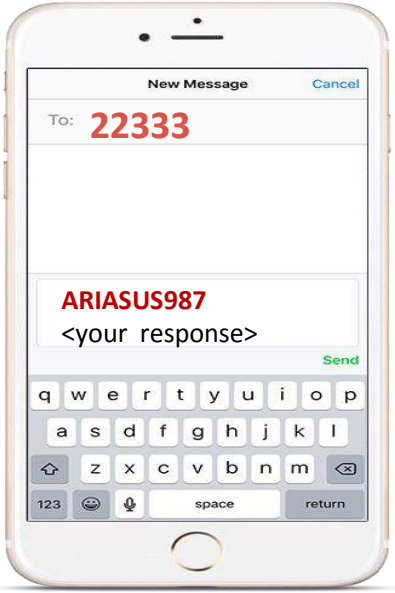
Julie Pollack · Sean Maloney · Marnie Hunt · Bryce L. Friedman

Polling Instructions

To participate via text:

1. you must first join the session. You do this be sending a message to the five digit number 22333.
2. In the body of the message, you'll type the keyword **ARIASUS987**
3. You will get a confirmation message that you are now part of the session.
4. When we ask a question, you will just reply to that message with your response (A,B,C)…"



Premise

- The choice whether to resolve disputes through arbitration is one that is made by participants in the reinsurance market with every new or renewed reinsurance contract.
- To the extent the perceived advantages of arbitration cease to outweigh the perceived disadvantages, arbitration will cease to be the preferred means of resolving reinsurance disputes.

Perceived (Historical) Advantages of Arbitration

- Party involvement in selection of decision maker
- Decision makers with industry experience
- Efficiency
- Cost
- Fairness
- Finality

Concerns About the State of Arbitration*

- Cost
  - Perception that it would be cheaper to litigate many cases
- Expansive Discovery
  - Perception that arbitrators are far more permissive than a court would be in ordering expansive discovery
- Efficiency
  - Excessive motion practice
  - Excessive length of briefs
  - Time to get to a hearing
- Fairness concerns
- Finality

** Anecdotal evidence based on discussions with industry participants.*

How can contract wording be used to improve the state of arbitration?

- Set appropriate time frames for proceedings
- Simplify and enhance confidence in Arbitrator selection
- Establish an efficient and fair discovery framework
- Structure submissions to the arbitration panel and the conduct of the arbitration hearing to promote efficiencies
- Clearly articulate the authority and the obligations of the arbitration panel

Time Frames

- 30 day time period
  - Meaning?
  - Followed?
- Motion practice
- ARIAS Streamlined Rules

Poll Question -- Framing the Issues

Each party shall submit its case to its arbitration panel within 30 days of the appointment of the third arbitrator

What does this mean? (choose one)

a) All evidence must be submitted to the panel

b) Initial position statements must be submitted to the panel

c) It does not matter – the provision is always waived or ignored

d) It is not clear

Poll Question

What time period between panel establishment and issuance of decision would suffice for at least 90% of arbitrations?

a) 6 months
b) 9 months
c) 1 year
d) 18 months

Arbitration Panel Selection

- Recent introduction of neutral panels
- How should the selection of the umpire be done in order to avoid gamesmanship and an appointment based on luck?

Poll Question

Which of the following contributes most to excessive complexity and/or cost in your arbitrations?

a) Discovery demands that are not targeted to articulated issues
b) Delays because a party is not prepared for foreseeable requests
c) Use of discovery for delay or other tactical advantage
d) Excessive cost/burden of document production (or privilege log)
e) None of the above

Common Arbitration Clauses Do Not Encourage Parties to Define the Issues Early

- Arbitration clauses rarely restrict late introduction of new issues or arguments
  - Uncertainty about the issues can lead to increased discovery costs and complexity
- ARIAS Rules encourage, but do not mandate, an early focus of the issues
  - *After the opening of the Organizational Meeting, the arbitration demand may be amended only by leave of the Panel…. [T]he Panel shall consider the effect of the amendment on the efficiency of the proceedings; the potential for prejudice to the opposing Party; and any other appropriate factor(s)*. Rule 5.1

Contract Wording Can Define the Issues and Focus Discovery

- Require parties to articulate specific issues and arguments by a date certain, i.e. the Organization Meeting
  - *Each party shall submit to the panel a Position Statement – specifying in reasonable detail in the issues it believe to be in dispute in the arbitration, and the party's position with respect to each such issue including a description of the particular evidence upon which the party expects to rely.*
- Limit the parties' ability to amend position statements
  - Require leave from Panel, and only for "new information" or similar "good cause"
  - No amendments later than 20 days after the close of discovery
  - Neither party may introduce in its direct case any evidence or argument outside the scope of its position statement

Common Arbitration Clauses Do Not Set Effective Discovery Parameters

- Arbitration clauses are commonly silent on the parameters of discovery
  - At most providing that *"[w]ithin thirty (30) days after notice of appointment of all arbitrators, the panel shall meet and determine timely periods for briefs, discovery procedures and schedules for hearings*."
  - *The Arbitration Panel shall have the power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which they may consider proper in the circumstances of the case*
- Challenges to effectively exercising this discretion
  - Potential due process objection
  - Differences in Arbitrator knowledge or experience with legal procedure

Contract Wording Can Establish Appropriate Discovery Parameters

- Affirmatively obligate both parties to be diligent in anticipating, preparing for and engaging in discovery
  - Automatic disclosure of affected Underwriting and Claim files by the Organizational Meeting
- The new FRCP Rule 26(b)(1) offers some guidance - Discovery must be both relevant to a claim or defense and proportional to the needs of the case.

Contract Wording Can Establish Appropriate Discovery Parameters

- Reasonable express boundaries around the scope of discovery
  - Information and documents directly related to timely articulated issues or based upon new information
  - Depositions limited to an appropriate number (i.e. 3-5) and duration (i.e. 7 hours)
- Additional documents or depositions only with prior approval of the Panel for new information or similar good cause
- Shift costs for particularly burdensome discovery requests to the requesting Party
- Expressly empower Panel to impose sanctions for discovery abuses

Motion Practice In Arbitration

- "Motion practice in arbitrations" may at first seem to be an oxymoron, it need not be
- Motions can be a tool to prepare the case for hearing and can shorten rather than lengthen the hearing and reduce the expenses involved both prehearing and at the hearing
- If properly managed, motions can increase the efficiency and effectiveness of arbitrations.
  - Discovery Motions
  - Designate one arbitrator as "discovery referee"
  - Expedited Procedures
  - Motions for "Summary Judgment" or to Dismiss Claims
  - Motions in Limine
  - Motions Relating to the Conduct of Hearing, Bifurcation, Phasing

Contract Wording Does Not Generally Limit "Unnecessary" Motion Practice

- Delay and cost of prehearing motions can undermine the efficiency essential to a workable arbitration process

- A mechanism should exist that allows parties to obtain prehearing relief regarding claims/defenses that are frivolous or clearly barred, but the arbitration process must also ensure that any final award be based on a factual and legal record appropriate to the circumstance given, among other things, the substantially unreviewable nature of arbitration awards

Can Contract Wording Limit "Unnecessary" Motion Practice?

- Tools
  - Strict time limits
  - Strict limits on submissions
  - Mandatory verification
  - Mandatory "fee shifting"

Contract Wording Does Not Generally Address Evidence Presentation

- Parties and arbitrators have wide discretion in how to present evidence
- ARIAS Rules permit written testimony and some rules make it presumption
- Written direct testimony as a civil trial convention also is gaining ground in U.S. courts

Potential Benefits Of Direct Written Testimony

- Cost-effective and time saving means of presenting evidence
- Facilitates hearing preparation by parties and arbitrators
- Fact finding tool where discovery is limited
- May facilitate resolution by narrowing or eliminating issues pre-hearing

Potential Downside Of Direct Written Testimony

- Lawyer drafted
- Limits time for credibility assessment
- Potential loss of impact of direct testimony

Direct Testimony In Writing Is Common In International Arbitrations

- A 2012 study of international arbitration reported that, over the prior five years, fact witness evidence was offered by exchange of written witness statements in a significant majority of arbitrations (87%), together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%).*

- Moreover, 59% of survey respondents believe that the use of written witness statements as a substitute for oral direct examination at the hearing is generally effective.*

**2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, White & Case LLP and the School of International Arbitration, Queen Mary University of London, at 24 (2012).

Poll Question

- Are your arbitrations in which direct testimony was submitted in writing more efficient for all participants?
  a) Yes
  b) No
  c) I have no relevant experience

Timing of the Decision

- What is an appropriate time within which the decision should be made?
- Should it depend on the amount of dollars in dispute?
- What happens if the time frame is not met? Can the panel extend its time, especially if the case is complex?

Poll Question

- Have reasoned awards been issued more than 50% of the time for the arbitrations in which you have been involved?
  a) Yes
  b) No

Reasoned Awards

- Does there need to be greater clarity around what is a reasoned award?
- Does a reasoned award reduce the ability to split the decision?
- Does a reasoned award increase the likelihood of the decision being overturned in court?

Punitive Damages

- Should they be awarded to the extent permitted by law?
- Does a panel feel empowered to award punitive damages if it is not stated as an affirmative right in the contract?
- Does the knowledge that punitive damages can be awarded deter egregious behavior?

Other Awards?

- Should the panel be able to decide who bears the costs of the arbitration panel, rather than the contract specifying that each party bears the cost of its arbiter and half the umpire cost?
- Should the contract state that interest will be awarded?
- Should there be clarity around whether attorneys' fees can be awarded if legally permissible?

Practical Approaches

- Remote organizational meetings
- Governing Law
- Which arbitration rules govern?
- Confidentiality?