

If We Want Reliability, Should We All Just Get a Dog?

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Is Arbitration Reliable?

- Reliability matters
- Distinction between “fairness” and “reliability”
- Through the glass darkly
- Panelists as “demi-gods”
- Consequences of unpredictable results

Is the Arbitration Process Reliable?

- Has the arbitration process become less reliable over time, and, if so, what has caused this phenomenon?
- Should the industry aim for procedural or substantive reliability?
- Does the lack of precedential value to arbitration decisions diminish reliability?
- Does confidentiality diminish reliability?
- Is arbitration any more reliable than litigation?

Promoting Reliability

A Company Representative's View

- The importance of reliability in the arbitration process
- Detailed arbitration provisions in reinsurance contracts allows for the budgeting of internal and external costs and resources and may aid in providing some certainty as to the timing of a decision
- Arbitration proceedings governed by less detailed arbitration clauses may benefit from a comprehensive scheduling order modeled after the ARIAS form Scheduling Order

Promoting Reliability

A Company Representative's View (cont.)

- Utilizing the **ARIAS Scheduling Order**, parties may consider:
 - requiring more robust opening position statements to frame the issues in dispute and potentially limit the scope of written and oral discovery
 - limiting the number of hearing witnesses and, therefore, the potential number of depositions
 - specifying when an *ex parte* prohibition incepts and terminates
 - each party including its proposed award with its pre-hearing arbitration briefs and limiting the relief to be granted by the panel to the parties' proposed awards

Promoting Reliability

An Outside Counsel's View

- Form of proceeding
 - Consolidated proceeding or not and who decides
 - Reasoned awards and the form of the relief that may be granted
 - Confidentiality and its enforceability
- Identifying the decision makers
 - Contrast with random assignment of judges in litigated matters
 - Selecting party arbitrators: counsel's pre-screening of candidates
 - Selecting an umpire: party arbitrators' working relationship with candidates and how they are likely to approach issues in dispute

Promoting Reliability

An Outside Counsel's View (cont.)

- **Discovery**

- Fact Discovery: Panel's discretion to control scope of discovery vs. broad discovery in litigation
- Third-Party Discovery
- Expert Discovery: Are panel members the experts?

- **Evidence**

- "Honorable engagement" clause and the rules of evidence
- Panel's willingness to limit: leading questions on direct examination, evidence lacking proper foundation, parol evidence at variance with contract terms, evidence of "custom and practice", hearsay, etc.

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An Outside Counsel's View (cont.)

- Appeal
 - Does the lack of meaningful appellate review process make the process more or less reliable?
- *Res judicata*/collateral estoppel
 - What is the difference?
 - Is a court required to apply these doctrines to arbitration awards?
 - Do panels apply these doctrines?

Promoting Reliability

An Arbitration Panel Member's View

- “The business of the Business”
- Arbitrators need to plan and project, assess “conflicts,” and make disclosures in other proceedings. So, at its most basic, reliability means “being kept in the loop.” Examples are expressed in the following questions:
 - Was I appointed as arbitrator or umpire? Did the other side appoint?
 - What's the status of umpire selection?
 - Is the arbitration moving forward, “stalled, “on hold” or settled?
 - What is the status of audit(s), negotiations, mediation, document production, dispositive motions, etc.?
 - How is the agreed schedule holding up? Any potentially meaningful slippage? Should the Panel “hold” the hearing dates or look at other dates? Is there any slippage in the arbitrations schedule?

Promoting Reliability

An Arbitration Panel Member's View (cont.)

- Keeping the arbitration on track
 - Pursue “parallel tracks” of arbitration and settlement discussions
 - Working under the gun of scheduled hearing dates facilitates settlement (if there is to be one) by emphasizing to all players that the “endgame” is at hand in a way that continual adjournments of hearing dates may not.
- Paying panel members promptly
 - “Do you think we do this for our health (or as part of our commitment to pro bono work)?”
- The parties utilizing the process should tell us what they want!