

COMPARATIVE ETHICS: LESSONS TO BE LEARNED FROM OTHER ARBITRATION REGIMES

Moderator:

Cecilia F. Moss, Chaffetz Lindsey LLP

Panelists:

Mark Kantor, Independent Arbitrator

Larry P. Schiffer, Squire Patton Boggs (US) LLP

Kelly Turner, American Arbitration Association



Fact Pattern: Background

- Insure Em All (“Insure”) issued two excess policies to Asbestos Is Us (“Asbestos”), a \$100 million xs \$10 million and a \$100 million xs \$110 million layer.
- The Primary policy (which Insure did not write) was \$8 million policy, which sat on top of a \$2 million Self Insured Retention.
- Asbestos was sued by hundreds of thousands of asbestos plaintiffs.
- Asbestos estimated that its total liability exceeded \$200 million.



Fact Pattern: Background

- Asbestos commenced DJ action against Insure seeking coverage under the two excess policies.
- If the court were to find multiple occurrences, Insure would have no coverage obligation, but if it found one occurrence, its coverage would be exhausted.
- Insure's advisors concluded that it had a 50/50 chance of success on a multiple occurrence defense.
- Based on that advice, Insure offered to settle with Asbestos for a 50% discount; Asbestos accepted.
- Insure allocated the \$100 million settlement payment to its policies using the "rising bathtub" method, thereby allocating the full \$100 million payment to the first layer.



Fact Pattern: Background

- No Pay Reinsurance (“No Pay”) facultatively reinsured Insure’s first layer.
- Based on Insure’s rising bathtub allocation, the policy No Pay reinsured was exhausted.
- Insure billed No Pay for the full limit of its facultative certificate.
- No pay did not pay; Insure demanded arbitration.

Appointment of No Pay's Arbitrator

- No Pay's in-house and outside counsel called ARIAS certified arbitrator, Hired Gun, to discuss his potential appointment.
- No Pay's counsel described the facts and explained their belief that No Pay should benefit from the same discount that Insure secured through its settlement with Asbestos.
- No Pay's counsel asked Hired: "Will you rule in our favor?" Hired responded, "based on what you have told me, I will certainly rule in your favor."



Appointment of Insure's Arbitrator

- Following initial interview with its arbitrator, Joe Paladin, Insure sent certain documents to Paladin, including a Settlement Memo which explained that Insure's settlement was based on the legal advice it received that Insure had a 50% chance of success on its number of occurrences defense.
- The memo also advised management, "as always, we will allocate the loss using the rising bathtub method."
- In discovery, Insure withheld the document as privileged.
- At the hearing, Insure's arbitrator, Paladin, references the Settlement Memo and suggests that there is no basis for No Pay's bad faith argument because Insure always uses the rising bathtub method.



Appointment of Umpire: Candidate #1

- Umpire candidate #1 has been ARIAS certified for 2 years.
- During those two years, she has been appointed as an arbitrator 5 times.
- Although she has never been appointed by either party, she has been appointed by Insure's law firm 3 times.



Appointment of Umpire: Candidate #2

- Candidate #2 has worked in the industry for 40 years, both in-house and for law firms.
- He has never worked for either party.
- He is currently a salaried Of Counsel in a law firm that regularly represents insurers and reinsurers.
- One of the firm's partners currently represents No Pay. Candidate #2 works in a different office from that partner, has never worked on No Pay cases, and has no knowledge of them. However, there is no formal ethical wall in place.
- Candidate #2 is selected based on the coin toss. Insure objects because some of Candidate #2's salary is necessarily derived from the firm's work for No Pay and because there is no ethical wall in place.



Org. Meeting/Motion to Compel

- Ex Parte communications are cut off as to any interim issue when the issue is submitted to the Panel. Final cut off for ex parte communications will occur following submission of pre-hearing briefs.
- No Pay seeks vast discovery into Insure's files regarding the underlying litigation. Insure objects to production.
- No Pay moves to compel. Both parties speak with their party-appointeds prior to submitting their briefs to the Panel.
- Following the Panel's ruling, Insure also reaches out to its party appointed to understand the Panel's rationale and how it impacts their thinking on the merits.

Pre-Hearing Briefs

- Insure's attorney sends Paladin a draft of its pre-hearing brief and asks for comments.
- Paladin sends back a heavily red-lined mark-up of the brief and also adds a new argument that was not in the original draft.



Hearing/Cross Exam by Party Appointed

- At the hearing, most witnesses are presented on direct and are cross-examined by opposing counsel.
- Each are also asked a few questions by the Panel members.
- However, Hired Gun (No Pay's arbitrator) interrupts the questioning of the Insure witness who was responsible for billing the reinsurers. He proceeds with an aggressive cross examination which lasts 20 minutes.

Hearing/Final Award

- Following the hearing, the umpire reviews the pre-hearing briefs, but assigns an associate to read and summarize the cases for him and to prepare a draft award based on the associate's evaluation of which party should win.
- The umpire never reads the cases himself and he relies entirely on his associate's summary of them.
- At the conclusion of the Panel deliberations, the umpire removes the word "draft" from the award drafted by his associate and publishes it as the final award.

Panel Deliberations

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