Arbitration – Stage Three

Case Development and Hearing Preparation

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The Third Stage

- Phase of arbitration where discovery is well underway or concluded
- Parties developing their cases for presentation to the panel
- Panel not heavily involved unless certain issues arise

Case Development Issues

- Requests for Pre-Hearing Security
- Requests for Stays/Continuances
- Arbitrator Withdrawals
- Changes in Scope of Proceeding
- Requests for Consolidation
- Choice of Law Determinations

Hearing Preparation Issues

- Dispositive Motions
- Pre-Hearing Briefing
- Panel Preparation for Hearing

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Changes in Scope of Arbitration

- "Amended" claims or defenses; ARIAS Practical Guide to Reinsurance Arbitration Procedure, § 3.4, "Identification of the Issues to be Arbitrated"
  - Parties should be required to identify all claims/defenses in Position Statement or at Organizational Meeting
  - Provides fair notice to other party(s) and enables panel to rule appropriately on discovery scope and case schedule
  - However, parties should not necessarily be limited to pre-discovery claims/defenses. Panel should normally give parties latitude to amend claims/defenses up to a reasonable period before hearing, subject to notice and comment by other parties.

Changes in Scope--Consolidation

- When does issue arise?
  - ✓ Multiple reinsurers on same contract
  - ✓ Same reinsurer on different layers of same contract
  - ✓ Same reinsurer on renewals of single program
  - ✓ Same reinsurer on different/unrelated contracts with same cedant

Consolidation (cont.)

- Some (relatively) recent reinsurance contracts may have language specifically addressing the consolidation of disputes with multiple reinsurers on the same contract, such as:

  At the Company's option, if more than one Reinsurer is involved in arbitration relating to this Contract, where there are common issues of law or fact and a possibility of conflicting awards or inconsistent results, all such Reinsurers shall constitute and act as one Party for the purposes of this Arbitration Article….

- Reinsurance contract language specifically addressing consolidation of disputes involving multiple contracts is comparatively rare

Consolidation (cont.)

- The parties may always consent to consolidation
- When parties do not consent, who decides whether proceedings should be consolidated, the arbitrators or the courts?
- Prior to 2002, courts generally decided this issue, with the weight of authority holding that under the FAA, courts could not order consolidation, absent express consolidation language in the contract
- In 2002 and 2003, the Supreme Court issued two decisions strongly suggesting that consolidation was a "procedural" question, to be decided by the arbitrators, not the courts. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)
- It appears, however, from the Supreme Court's more recent decision in Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp, 130 S. Ct. 1758 (2010), that the issue of "who gets to decide" on consolidation—arbitrators or the courts—has not been conclusively resolved.
- The majority view among the lower courts appears to be that with respect to proceedings between the same parties, consolidation is for the arbitrators to decide.

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Consolidation (cont.)

- In Stolt-Nielson, the Supreme court held that although some procedural matters are implicitly for arbitrators to decide, class action arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration."

- These changes include:
  - Arbitrator no longer resolves single dispute between parties to single agreement, but many disputes between hundreds or thousands of parties
  - Arbitrator's award no longer purports to bind parties to single agreement, but adjudicates the rights of absent parties
  - Commercial stakes of class action arbitration are comparable to class action litigation even though scope of judicial review is more limited
  - Presumption of privacy and confidentiality does not apply to class action arbitrations, potentially frustrating intentions of the parties when they agreed to arbitrate

Consolidation (cont.)

- The reinsurance contract(s) at issue will always be the starting point in determining the panel's authority to consolidate
- Factors to consider:
  - Number of parties/contracts involved
  - Amount at stake
  - Whether there are common issues of law or fact
  - Likelihood of conflicting results
  - Procedural differences between contracts
  - Differences in arbitrator qualifications, selection method
  - Choice of law

Arbitrator Withdrawal

- Canon II – Fairness
  - Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw

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- Canon II, Comment 5

After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so.

Decision to Withdraw

- Canon II, Comment 5

In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.

a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;

b) if the arbitrator, after carefully considering the matter,- determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or

c) if required by the contract or law.

Consequences of Death of an Arbitrator/Umpire

- Where the arbitration clause provides a procedure that should be followed.

- Where (as is common) there is no specified procedure.
  - Courts are split on whether the arbitration continues with a new arbitrator or must begin anew

If You Must Withdraw

- Withdraw as soon as possible recognizing the impact to the arbitration if you delay a decision

Dispositive Motions

- Request for an award in advance of hearing
- Typical reliance upon summary judgment standard applicable in court:
  - "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" (F.R.C.P. Rule 56)

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Establishing Material Facts

- Stipulations
- Admissions
- Affidavits
- Documents
- Deposition Testimony
- “Judicial Notice”

Establishing a Dispute as to the Facts

- Counter-citation to sources advanced by movant
- Citation to additional sources
- Establish that a material fact was not addressed by the movant
- Question "admissibility" of evidence
- (More than just asserting a fact is in dispute)

Judgment as a Matter of Law

- Upon the undisputed facts, the law may be applied to reach a particular result. Much as the panel might do after hearing live evidence
- Not necessarily the standard for arbitration. Some contracts relieve the panel of a duty to follow the law.
- Absent application of the law, the process mimics the decision process of the panel after hearing – but based only on the undisputed material facts