feature

Let's Break the Mold...or at Least Reshape It a Bit

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Let's face it: companies, counsel, and even some arbitrators want the system to change in a big way. If you didn't think so before the November 2011 meeting, you should now be a believer. Criticism of the process on the street has grown exponentially. Just ask any lawyer or company involved in the process and you'll get an earful: unpredictability, damaging non-disclosures, unfair collaboration among certain panel members, outright monetary greed... and the list goes on and on.

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Of late, even traditionally deferential courts have placed arbitrators and lawyers under the microscope. Recently, decisions criticizing and reversing previously sacrosanct awards, and chastising and sanctioning lawyers and arbitrators, have multiplied like vengeful rabbits. Why is this happening? Was this conduct previously under the radar? Is it new? To current naysayers of arbitration, the answers are irrelevant. The resulting cause and effect, however, are patent: lawyers are recommending that clients omit arbitration clauses from new reinsurance agreements, and adversaries opt out of arbitration despite clauses in existing agreements, preferring the more predictable, rule-friendly and appealable (in a legal way) court system.

To its credit, ARIAS•U.S. seized the opportunity and market momentum to fashion a very topical and necessary agenda for this past November's meeting. The wrap-up of topics discussed during breakout sessions was illuminating, including many suggestions for improving the process: more on-the-papers decisions, more panel questioning, development of best practices, more active use of discovery limits, justification requirements for experts and depositions, use of active company-umpires who never act as arbitrators, use of a non-judicial body to select the umpire if the parties can't agree, earlier cutoff of ex parte communications, and published feedback on panel/panelists' performance (to name a few).

Mediation garnered serious attention. In general, introduction of mediation into the process was broadly accepted. The issue was timing: should it be before discovery, after discovery, just before the hearing? Though mediation is often misjudged as solely a tactical weapon, breakout attendees recognized its many benefits, including evaluation of the strengths/weaknesses of your case, your opponent's case, and even of the parties' respective lawyers and witnesses. And while ARIAS arbitrators may serve as mediators, the groups felt that some would need "re-engineering" and specialized training in mediation techniques. Many felt the broker community should do more to open the dialogue and ultimately introduce refurbished arbitration/mediation clauses into new treaties.

All fine ideas; all useful suggestions. But can we do more? Should we do more to face the "hue and cry"?

What follows are suggestions - some aggressive and unique; some vaguely familiar - designed to generate more dialogue and suggestions for improving the process.

Lest there be any misunderstanding, this is not "arbitration bashing." I am and will continue to be an ARIAS member, an avid supporter of arbitration, and ready, willing, and able panelist. Like my colleagues, I believe in the process ***and*** the positive power of change.

Umpire/Mediator Pre-Dispute Selection

Instead of trudging through the often frustrating, quixotic attempt to agree on an umpire mid-dispute, the parties should mutually agree upon an umpire and one alternate in advance, even when the treaty is executed, to expedite the panel appointment

process later. Similarly, to resolve issues quickly and less expensively, the parties could also designate a standing and alternate mediator, available quickly to help the parties resolve smaller disputes without the need for arbitration.

At what point are the parties most agreeable? Most of the time, it's when they successfully negotiate the terms and execute the signature page of an agreement. Why not seize the moment and have the parties discuss and agree upon a person whom they trust to act as a fair and impartial umpire (plus at least one alternate of similar reputation)?

This serves several purposes: first, it eliminates the typical, multi-month wrangling and gnashing of teeth to arrive at what many feel is the lopsided selection of one party's candidate for umpire. Once the parties select their arbitrators, the panel can immediately proceed with a qualified, acceptable umpire. Second, it avoids potential "jury rigging" of the umpire selection process. And finally, the selected umpire and alternate must disclose any subsequently accepted, potential conflicts to the contracting parties, keeping them up to date on their candidates' qualifications to serve in any future dispute.

If, after disclosure of additional appointments, a standing umpire crosses the parties' comfort line, they may move the alternate up and choose another alternate. Even if the parties must obtain a replacement standing umpire, the very act of recognizing the conflict and agreeing upon a replacement, keeps the parties in discussion mode, not aggression mode. In fact, the parties may trust their nominee enough to have him or her serve solo in any subsequent dispute, especially if the amount at issue is small.

The parties could also designate a standing (and alternate) mediator. This serves many important goals: first, once again, the mediator is easily selected at the beginning of the business relationship when all is sweet. Second, he or she is quickly available by email or phone to help the parties address any issue, large or small, before it festers and boils over into full-blown, "in-the-trenches" warfare. Third, the mediator's role is designed to maintain the standing umpire's strict neutrality, shielding him/her from the candid, sometimes damaging, disclosures parties make in private caucuses. And, last but certainly not least, the mediator can prevent the unnecessary time and expense of arbitrations that should never have been filed.

Pre-Organizational Meeting Disclosures, Panel Approval, and Hold Harmless.

Panelists should make their disclosures, and parties should accept and hold the panel harmless, immediately after the umpire is selected and before the organizational meeting.

The weeks and months between umpire selection and organizational meeting are the "no man's land" of the arbitration process. Little if anything is accomplished, other than the parties' submissions of position statements, and discussion and occasional approval of a case schedule. The as yet unapproved and unprotected panel logically leaves the drab and difficult issues for the organizational meeting, typically conducted in person regardless of the amount in dispute, often at significant time and expense for parties, counsel, and arbitrators.

With the help of a standing, qualified panel, the parties can agree upon and eliminate much of the organizational meeting agenda in advance, making telephonic meetings (or even no meeting) the rule, not the exception. The fully functioning, indemnified panel can be available by phone to conduct status conferences and even entertain on the spot oral arguments to resolve logjams in the parties' search for a mutually acceptable schedule. And if early motion practice is necessary (e.g., motion for pre-hearing security), a fully functioning panel can help the parties set a pre-OM briefing schedule. If an in-person organizational meeting is unnecessary, the panel can rule on the papers; if needed, they are ready to hear oral argument and rule on the spot or soon thereafter, saving the usual post-OM time to brief and entertain the motion, accelerating the schedule even more.

Make the Schedule Fit the Dispute

Panels must affirmatively and proportionately streamline the length and scope of the proceedings to the amounts in dispute.

Starting with communications with counsel before the OM, the panel should affirmatively announce that the parties, armed with as comprehensive an evaluation of their case as possible, must develop a schedule that fits the amount in dispute. Does a $250,000 case require eight depositions? Must the hearing in this case be two years away? Like the rule about running water following the course and filling the space available, the more time it takes to get to hearings, the more that can be plugged into the schedule, resulting in less focused, more costly, discovery.

The parties and their lawyers are smart, analytical problem solvers — if the panel says "absent (really) good cause shown, you're doing this in twelve months with three deps," they will figure out how to do it. If discovery reveals evidence that breaks the small case open, the panel can address any necessary schedule adjustments at the time. And a reduction in depositions (which are not, by the way, as of right) can still be accommodated: for example, the direct testimony of less important witnesses can be submitted in written form, subject to cross-examination at the hearing, eliminating any "trial by ambush" arguments and allowing opposing counsel to "pick their spots" and decide whether and to what extent they wish to cross the witness at all.

From the beginning, ask the parties to ultimately prepare and agree upon stipulations of fact. This avoids the mindless repetition of duplicate information in future filings and makes the parties focus and agree on certain items in the record, further streamlining future discovery and arguments to a more limited set of factual issues. If the parties can agree to the authenticity of

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documents one of them produced, depositions solely to authenticate such documents become unnecessary.

Separate Discovery Master Arbitrator

Either the panel or the parties can appoint one Discovery Master Arbitrator to decide all non-dispositive, discovery motions.

- A perennial harangue is that discovery in arbitration is out of control. How many times in how many conferences have we discussed this topic?
- But wherever your case falls on the "out-of-control" meter, simple non-dispositive discovery motions often cause complex problems:
- Even though submissions must follow approved motion protocols, some counsel fall prey to the addictive "last word" email syndrome, continuing to sur-surreply to the last surreply to the original reply — despite the fact that such exchanges require panel approval;
- If oral argument is required and the potential evidence is critical and time sensitive, you now must undo the Gordian knot of coordinating the schedules of three panelists, two lawyers, and possibly two (or more) client representatives;
- A complex motion (e.g., over e-discovery) can redirect the panel and parties' attention for weeks away from other items on the often tight discovery calendar;
- Deliberations on motions involving arguably privileged and confidential, sometimes prejudicial, documents could poison the umpire and/or arbitrators' view of the case, even if the documents are ultimately excluded.

An independent Discovery Master Arbiter can:

- reduce the schedule coordination problem by two arbitrators. In fact, if the parties agree, the one Discovery Master Arbiter can be freely and informally available for on the spot conference calls to resolve minor discovery-related issues;
- shield the entire panel from the potential prejudice of reviewing disputed privileged documents;
- free up the panel and counsel to handle other, non-discovery matters, especially if counsel can delegate non-dispositive discovery work to other lawyers in their firms;
- come down harder than the panel on "last-word-email syndrome" abusers, giving them a second chance to mend their ways without aggravating the panel;
- report to the panel, as necessary, on the progress and resolution of discovery issues and coordination of the remaining discovery schedule.

Simultaneous Depositions and Questioning of Experts

Truncate and expedite the deposition schedule by simultaneously deposing competing experts.

In addition to the occasional questionable need for them, expert witnesses seriously complicate and extend the discovery schedule, which must accommodate the identification of affirmative experts, filing of their initial reports, depositions, identification of rebuttal experts, filing of their rebuttal reports, depositions, and testimony. Counsel must prepare for, take, and defend separate depositions for each of them — if you have more than one affirmative/rebuttal expert in the case, good luck! At the hearing, the availability of experts often complicates the hearing schedule. Who goes on when, who has to wait until tomorrow, who has been hanging around all day in the hall, etc. Also, given the length of an expert's direct and cross-examination and the occasional need to take them out of order, the panel may hear petitioner's expert on Monday and respondent's on Thursday, making it harder to compare the substance and credibility of their respective testimony.

One answer: allow the two opposing experts to testify at the same time, whether in depositions or at the hearing. With counsels' input, the panel can develop a protocol for this procedure in advance. The process is simple: place opposing experts on the stand simultaneously, ask them the same questions and have them respond to each other's answers (subject to either a determined limit or the umpire's discretion), followed up by panel questions similarly handled.

If this is properly controlled, you now have a

reasoned debate (monitored by the panel if done at the hearing stage) and a record of the experts' competing arguments in one section of the transcript. One major benefit is that the panel can explore critical issues without waiting days between opposing expert's testimonies. The consolidated record reduces the time and cost of finding and comparing the experts' opinions. Simultaneous direct and cross of the experts avoids any actual or perceived unfairness to the party whose expert testifies first. Since the parties had the benefit of analyzing and reacting to their opponents' experts' reports in advance, they don't need it again at the hearing. And finally, though experienced counsel generally conduct effective cross-examinations, this procedure affords the parties' experts — the true specialists — the opportunity to ask the questions most important to them and the opinion they seek to defend.

Permit the Panel to Suggest Mediation

Since panels are dispute resolution experts with a seasoned sense for the good and bad case, allow either the umpire or the entire panel to suggest mediation to the parties at any point in the case.

First and foremost, panelists are dispute resolution experts. In some cases, they have collectively participated in hundreds of arbitrations, seen the rise and fall of parties' cases, and judged the probative/putative value of evidence and solid/sinking credibility of dozens of witnesses. They have a "gut" sense for where a case may be heading. In fact, more and more arbiters are also trained, experienced mediators who can see the right vs. wrong case for mediation a mile away, regardless of any prediction of an ultimate winner or loser at trial.

Why isn't it in the parties' best interests to allow the very panel that may decide their fate to open the discussion and even recommend mediation? Judges do it all the time. True, the settlement judge is usually not the trial judge, but not always. And what is better for the parties — knowing or not knowing before hearings that the three people to whom you will hand over your case recommend mediation? Isn't the answer obvious?

Protections can be built into the process to avoid unfairness. For example:

- parties can agree in advance to allow discussion of the "M" word ***only if all panelists agree***. A unanimous recommendation is a pretty strong, very valuable hint to the parties (not necessarily both of them) that a mediated settlement offers better options for proper relief than an arbitrated award;
- following the panel's recommendation, the case can be referred to a third party mediator selected either by the parties or the panel ***in advance***. This allows the parties to be more candid to the mediator and shields the panel from confidential disclosures made at the mediation, especially if it proves unsuccessful and the disputants return.
- ***in advance of the organizational meeting***, parties and the panel can insert dates into the schedule to discuss mediation, avoiding inferences or fears of panel prejudgment when the topic is raised later in the case;
- draft the mediation process into the arbitration clause for new contracts or amend the clause to include it in existing contracts;

Conclusion

ARIAS's November 2011 meetings have set an excellent tone for improvements in the arbitration process. Collectively, arbitrators, counsel, and parties have the opportunity to work together to address the rising tide of complaints — some unique, some long-standing — with all phases of the process. The trick is not to hold on to the past for the past's sake, but to keep what works and fix what's broken for the future.

This article hopes to open a dialogue with suggested changes to certain elements of the process — but there are more ideas and better suggestions out there. Advance selection of umpires, mediators, and the panel, making the case schedule fit the amount in dispute, using independent discovery arbiters, conducting simultaneous expert testimony, and using mediation where appropriate — all of these have the capacity to make arbitration more efficient; it still is, and always will be, arbitration.▼

DID YOU KNOW...?

...THAT SENDING A CHANGE OF ADDRESS TO ARIAS•U.S. FOR THE MEMBER DATABASE AND QUARTERLY DOES NOT CHANGE AN ARBITRATOR'S PROFILE? THE YELLOW BUTTON ON THE HOME PAGE LABELED "LOG IN TO ARBITRATOR PROFILE DATA ENTRY SYSTEM" ALLOWS ARBITRATORS TO MAKE CHANGES TO ALL DATA IN THE PROFILE, INCLUDING CONTACT INFORMATION. THE ARIAS WEBSITE IS AT WWW.ARIAS-US.ORG.