

Yes, You Are Qualified to Arbitrate Direct Insurance Disputes

But You Need to Understand The Difference

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Ellen Kennedy – United Educators Insurance

Paul Dassenko – AzuRe Advisors, Inc.

Michael Carolan – Troutman Pepper



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Direct Insurance Arbitrations Are Becoming More Common

Types of Insurance Agreements That May Have Arbitration Provisions:

- High-Level Excess Liability
- First-Party Property
- MGA/MGU/TPA/Broker Agreements
- Captive Insurance Policies/Programs
- D&O / E&O / EPLI / Workers Comp
- Healthcare Insurance
- Cyber Insurance
- Coverage-in-Place Agreements

Question #1 – Have You Participated In A Direct Insurance Arbitration?

- Arbitrators
 - 1 – Yes
 - 2 – No
- Company Representatives
 - 1 – Yes
 - 2 – No
- Outside Counsel
 - 1 – Yes
 - 2 – No

Differences Between Direct and Reinsurance Arbitrations

The Parties

Direct Insurance Arbitrations Involve More Parties, Sometimes With Less Experience:

- Risk Managers
- Policyholder Business Executives and Employees
- Captive Business Owners
- MGU/MGA/Brokers
- Multiple Carriers

Differences Between Direct and Reinsurance Arbitrations

The Nature of the Dispute

Direct Insurance Arbitrations Can Involve A Broad Array Of Disputes:

- Claims Disputes
 - Choice of Law
 - Scope of the Arbitration / Arbitrability
 - Defense / Reasonableness of Legal Fees
 - Indemnity / Claim Value
- Contractual Disputes (MGA/MGU/Broker)
- Disputes Involving Prior Settlements

Question #2 – If You Have Participated In A Direct Insurance Arbitration, Did The Entire Panel Have Insurance Company Experience?

1 – Yes

2 – No

Qualifications for Direct Insurance Arbitrations

ARIAS Arbitrators Generally Will Qualify

- Insurance policy arbitration clauses may or may not require insurance related experience for all members of the panel.
- But most insurance agreement arbitration provisions will contain qualification provisions that are broad enough to include ARIAS arbitrators
- Potential exceptions:
 - Clauses that require specific certification (e.g., AAA, JAMS, etc.)
 - Clauses that require specific industry experience (e.g., healthcare)
 - Clauses that require qualification by locality

Qualifications for Direct Insurance Arbitrations

Sample Insurance Policy Arbitration Clauses

Example #1

[T]he parties agree to submit their dispute to a confidential, binding arbitration held according to the JAMS Comprehensive Arbitration Rules & Procedures in effect as of June 1, 2021 (the “Rules”) ...Unless the parties consent in writing to a lesser number, the arbitration panel shall consist of three (3) arbitrators, the first to be appointed by the Educational Organization on behalf of the Insureds, the second to be appointed by us, and the third (the “Chairperson”) to be appointed by the two (2) arbitrators so appointed. **The Chairperson shall either (1) have a minimum of 10 years’ experience working in the insurance industry or (2) have handled a minimum of 5 insurance-related arbitrations or trials.**

...

Source: United Educators Insurance ELL Policy Form

Example #2

All disputes and differences between the insured and the insurer which arise under or in connection with this policy will be referred to arbitration under ARIAS Arbitration Rules (U.K.). The arbitration tribunal will consist of three arbitrators, one to be appointed by the insured, one to be appointed by the insurer and the third to be appointed by the two arbitrators. ... The arbitrators will be persons (including those who have retired) with **not less than ten years’ experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.**

...

Source: Beazley Employment Practices Liability Module

Question #3 – If You Have Participated In Direct Insurance Arbitrations Who Have You Most Commonly Seen As Umpire?

- 1 – Judge / Former Judge
- 2 – Risk Manager
- 3 – Current or Former Insurance Professional
- 4 – Non-Insurance Industry Professional
- 5 – QC / Foreign Arbitrator
- 6 – Other

Differences Between Direct and Reinsurance Arbitrations

The Arbitrators

Direct Insurance Arbitration Panels Involve A Wider Array Of Arbitrators, Including:

- Judges/Former Judges
- Mediators / Non-Insurance Arbitrators
- Risk Managers
- Policyholder Counsel
- Industry (but Non-Insurance) Professionals
- QCs / Foreign Arbitrator
- Arbitrators With Connections to the Insured

Differences Between Direct and Reinsurance Arbitrations

Arbitrator Selection

- AAA
 - If the arbitration clause specifies a selection method, it “shall be followed.” See AAA R-13(a).
 - Selection from AAA list based on “National Roster” may be necessary. See AAA R-13(a).
 - AAA may appoint arbitrator if selection not made within required period. See AAA R-13(b).
 - If the arbitration clause does not specify the number of arbitrators, the default is a single arbitrator. See AAA R-16(a).
 - A party may request a tripartite panel and AAA exercises discretion. See AAA R-16(a).
- ARIAS
 - Default is three arbitrators, one appointed by each party and the third appointed by the two party-appointed arbitrators. See ARIAS Rule 6.1.
- JAMS
 - Default is single arbitrator, unless all parties agree otherwise. See JAMS Rule 7(a).
 - Where parties agree to tripartite arbitration, the parties shall agree on the Chairperson but in the absence of agreement, JAMS will designate. See JAMS Rule 7(b).

Question #4 – If You Have Participated In Direct Insurance Arbitrations Was The Arbitrator or Entire Panel Neutral?

- 1 – YES, ALWAYS
- 2 - SOMETIMES
- 3 – NEVER

Differences Between Direct and Reinsurance Arbitrations

Neutrality Is The Default In Direct Insurance Arbitrations

- AAA
 - Arbitrators shall be “impartial and independent, unless parties agree in writing that party-appointed arbitrators may be non-neutral. AAA R-18(a)-(b).
 - Unless otherwise agreed in writing, no *ex parte* communications with arbitrator or candidate other than pre-proceeding discussion of “general nature” of dispute and qualifications or potential umpire candidates, with AAA explicitly preferring this approach. AAA R-19.
 - AAA decides disqualification challenges. AAA R-18(c).
- ARIAS
 - Default is “Disinterested” but not “Neutral” party arbitrators. Umpire is “Neutral.” ARIAS Rule 6.1.
 - *Ex parte* contact with party arbitrators permitted per agreed protocol. ARIAS Rule 10.7.
- JAMS
 - Default is single neutral and independent arbitrator, unless all parties agree otherwise. See JAMS Rule 7(a).
 - No *ex parte* contact with neutral or non-neutral except to secure services, unless, for non-neutrals only, otherwise agreed. JAMS Rule 14.

Question #5 – If You Have Participated In A Direct Insurance Arbitration Was It More Or Less Efficient Than A Reinsurance Arbitration?

- 1 – DEFINITELY MORE EFFICIENT
- 2 – SOMEWHAT MORE EFFICIENT
- 3 – ABOUT THE SAME
- 4 – SOMEWHAT LESS EFFICIENT
- 5 – DEFINITELY LESS EFFICIENT

Differences Between Direct and Reinsurance Arbitrations

Discovery Generally Is More Limited

Document Discovery In Direct Insurance Arbitrations

- Not always a right to discovery
- General practice is for limited document discovery depending on size and complexity of dispute
- Written discovery is exchanged and motions to compel do happen

Depositions Are Less Numerous

- Depending on size of dispute, parties often agree on a limited number of depositions with hours limits

- AAA
 - Depositions are for “exceptional cases” “upon good cause shown” AAA L-3(f).
- ARIAS
 - Panel may authorize discovery and depositions “as is reasonably necessary” ARIAS Rule 11.3.
- JAMS
 - Default is one deposition, unless size of dispute permits three. JAMS Rule 17(b) & Protocols.
 - Additional depositions are at arbitrator discretion. JAMS Rule 17(b).

Differences Between Direct and Reinsurance Arbitrations

Direct Insurance Arbitrations Typically Focus on the Contract and the Law

No Honorable Engagement Language

- Arbitration clauses in direct insurance policies generally will not contain honorable engagement language
Often they require an “even handed” interpretation of the contract, without bias in either party’s favor

No Duty of Utmost Good Faith

- There is no duty of utmost good faith, nor can it be implied
- Fairness is not a focus of the arbitration panel

Relationship vs. Contract

- In reinsurance arbitrations, the relationship between the parties and their historical dealings can be as important as the words of the contract
- In direct insurance arbitrations, the contract controls

Differences Between Direct and Reinsurance Arbitrations

Direct Insurance Arbitrations Typically Focus on the Contract and the Law

Reinsurance Arbitrations

- Contracts are individually negotiated
- No pre-existing body of law that governs interpretation of contract terms
- Honorable engagement relieves the panel from strictly applying the law
- Panel focuses on business implications of reinsurance transaction

Direct Insurance Arbitrations

- Policies generally based on a form
- Contracts contain a choice of law clause
- Substantial body of case law and precedent regarding interpretation and application of contractual terms
- Panel is obligated to follow the contract and law

Question #6 – If You Have Participated In A Direct Insurance Arbitration Was Summary Disposition Granted?

- 1 – ALL CLAIMS RESOLVED ON SD MOTION
- 2 – CERTAIN CLAIMS/ISSUES RESOLVED ON SD MOTION
- 3 – NOTHING RESOLVED ON SD MOTION
- 4 – SD MOTION WAS NOT FILED

Differences Between Direct and Reinsurance Arbitrations

Summary Disposition Is More Accepted in Direct Insurance Arbitrations

- ARIAS
 - Rules reference dispositive motions as a scheduling issue. ARIAS Rule 10.7.
 - Summary disposition is seen as occurring rarely in reinsurance arbitrations
- AAA
 - “The arbitrator may allow the filing and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” AAA R-33.
- JAMS
 - Arbitrator may permit a motion for summary disposition “of a particular claim or issue” by agreement or upon request if the requesting party “has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case.” JAMS Rule 18.
 - Dispositive motions can “enhance the efficiency of the arbitration process if directed to discrete legal issues such as statute of limitations or defenses based on clear contractual provisions.” JAMS Arbitration Discovery Protocols.

Differences Between Direct and Reinsurance Arbitrations

Summary Disposition Is More Accepted in Direct Insurance Arbitrations

Reasons for Greater Use of Summary Disposition

- Direct insurance disputes generally turn on discrete legal issues like the interpretation of a contractual term
- The pre-existing, public body of insurance law means that parties have forewarning about court interpretation and application of common provisions
- In the context of third-party insurance, the parties may have a record from the underlying lawsuit, reducing any factual dispute
- Arbitrator or panel selection and neutrality also may have impact

Question #7 – If You Have Participated In Direct Insurance Arbitrations Was The Presentation of Direct Witness Testimony Live Or Through Witness Statements?

- 1 – ALWAYS LIVE
- 2 - MIXED
- 3 – ALWAYS WITNESS STATEMENTS

Differences Between Direct and Reinsurance Arbitrations

Streamlined Presentation of Evidence Is Common

Testimonial Evidence

- For efficiency, it is common for direct witness evidence to be presented through witness statements instead of testimony
- AAA
 - The arbitrator shall take steps to “avoid delay” and “achieve a fair, speedy, and cost-effective resolution” AAA L-3(a).

Cross-Examination

- Cross-examination, including panel/arbitrator questions, is conducted live
- ARIAS
 - The parties and panel to determine appropriate discovery and hearing protocols, which would permit direct testimony via witness statements, but it is not common.

Court Reporter Must Be Agreed

- Default is not to have a court reporter

Differences Between Direct and Reinsurance Arbitrations

It's Not All Different!

As With Reinsurance Arbitrations, Confidentiality Is The Default

Discovery Can Be Extensive

- For large dollar or complex disputes, the discovery issues can be even more extensive than the typical reinsurance arbitration

Insurance Experience Is Important

- As in reinsurance arbitrations, industry experience is important
 - Important in arbitrators
 - Important in experts
 - Important in counsel

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Any Questions?

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