THE REINSURANCE ARBITRATION PANEL:

SELECTION AND COMMUNICATION

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I. INTRODUCTION

The typical reinsurance arbitration panel is composed of two party-appointed arbitrators and an umpire. A complete understanding of the arbitration process and the respective roles of each panel member is essential for parties and counsel participating in reinsurance arbitration. The manner in which the parties select and interact with the panel members may directly impact the outcome of the proceeding. This paper reviews the process of selecting and interacting with reinsurance arbitrators before, during and after an arbitration proceeding.

II. SELECTING ARBITRATORS

Once the threshold decision to proceed with arbitration is made, the parties generally shift their focus to identifying the proper person or persons to serve as arbitrators. The selection of arbitrators is often considered one of the most important decisions parties make in the course of a reinsurance arbitration. Consequently, the parties that take the time to research the issues and the prospective arbitrator candidates will enjoy a distinct advantage over parties that treat the selection as a routine step in the process.

Notwithstanding the flood of commentary over the past five years suggesting that reinsurance arbitration has become as burdensome and expensive as litigation, there are many advantages to resolving disputes in arbitration. In the reinsurance context, one of the principal advantages is the parties' ability to select the arbitration panelists. In the court system, litigants are typically faced with the luck of the draw in terms of which judge will preside over a lawsuit. In arbitration, like many other forms of private alternative dispute resolution, the parties have direct input in selecting the person or persons that will "judge" their case. Of course, this luxury is not fortuitous, but rather a bargained for entitlement set forth in most reinsurance contracts. Similarly, it is the use of experienced industry executives as reinsurance arbitrators that enables the parties to obtain results that are more consistent with the business climate in which the dispute arose.

A. Method of Selecting Arbitrators

The method employed by the parties to appoint arbitrators is usually described in the arbitration clause of the reinsurance contract at issue. Here, the parties are free to identify a specific method for the selection of arbitrators in the event a dispute arises. The Federal Arbitration Act (FAA), 9 U.S.C. §5, provides for enforcement of the methods for selecting arbitrators set forth in the contract.

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Ibid. If the reinsurance agreement does not address the method of appointment or the number of arbitrators, or the contractual method fails, courts may appoint an arbitrator under that same statutory authority. *Creative Tile Marketing, Inc. v. Sicis Intern., S.r.L.*, 922 F. Supp. 1534 (S.D. Fla. 1996). Thus, for example, where the arbitration agreement provides for appointment of an arbitrator who is unable to serve as originally contemplated, the court may appoint the arbitrator to allow the arbitration to proceed. *Astro Footwear v. Harwyn*, 442 F. Supp. 907 (S.D.N.Y. 1978). However, where the contract identifies a particular person to arbitrate disputes as a condition of the agreement and that person is not available, the entire arbitration agreement may fail. *In Re Salomon Inc. Shareholders Derivative Lit.*, 68 F.3d 554 (2d Cir. 1995).

If an arbitrator or umpire dies or becomes otherwise unable to serve during the course of an arbitration, and the arbitration agreement is silent as to those circumstances, the general rule is that a replacement is appointed and the process starts over from the beginning. In *Trade & Transport v. Natural Petro. Charterers*, 931 F.2d 191 (2d Cir. 1991), the court confirmed the general rule that the arbitration must commence anew when an arbitrator dies after appointment, but ultimately held this rule did not apply because of special circumstances. Here, the parties had asked the original panel to issue a prompt decision on the limited issue of liability. After the panelists submitted a final decision on the liability issue only, one of the arbitrators died. Accordingly, the court refused to nullify the panel's decision regarding the liability issue. *Id.* at 194. The court reasoned that the decision was considered final and all three arbitrators participated in the process.

In *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992), one of three arbitrators died after the evidentiary hearing but prior to the rendering of a final decision. The court held that the arbitration must commence anew with a full panel. *Id.* at 68. The court distinquished the *Trade*

& Transport case on the grounds that the subject arbitration panel had not deliberated or rendered a final decision when the arbitrator died.

B. Timing of Arbitrator Selection

Although it may seem relatively unimportant, the deadlines for the selection of an arbitrator are often strictly enforced. Parties that ignore the timing requirements may waive their right to select an arbitrator and/or participate in the appointment of the umpire.

The typical reinsurance contract provides specific limitations regarding when the parties must appoint an arbitrator. Similarly, some arbitration clauses dictate that if a party fails to comply with the deadline for appointment, the opposing party is entitled to select the other arbitrator. While the ramifications of even minor delays can prejudice a parties' ability to select an arbitrator, the courts have generally enforced such rules as direct edicts of the contract language negotiated by the parties. For support, courts frequently refer to Section 5 of the FAA which states that the contractual method for appointing arbitrators shall be followed and there is no authority for ignoring or not enforcing these provisions. *Universal Reinsurance v. Allstate*, 16 F.3d 125 (7th Cir. 1994)(rejecting the argument that a panel composed of arbitrators appointed all by one party is inherently biased, even though arguably pre-disposed to their appointing party, ". . . each of the arbitrators is constrained by a duty of fairness," 16 F.3d at 129 fn. 2). In *Employers Insurance of Wausau v. Jackson*, 527 N.W.2d 681 (Wisc. 1995), the Supreme Court of Wisconsin held that the circuit court had authority to appoint an arbitrator where one of the parties to the agreement at issue failed to make timely appointment of an arbitrator as required by the agreement. *Id.* at 686. The court further confirmed that circuit court followed the appropriate course in giving deference to the arbitration agreement by naming an arbitrator selected by nondefaulting party under the parties' agreement whereby either party could appoint the other's arbitrator if the second party neglected to do so within the designated time frame. *Id.* at 688.

If the arbitration clause does not provide for a penalty for the failure to appoint an arbitrator or umpire within the specified time frame, a party is not permitted to delay or cancel the arbitration by simply neglecting or refusing to proceed with an appointment. If a party does not proceed, its adversary may apply to a court to either compel the party to proceed, or to allow the applicant to make the appointment. The court, however, may grant the application for appointment of an arbitrator, but reject the applicant's candidate and choose its own. See FAA §5; *Pacific Reinsurance Mgt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th 1987)(held that district court had authority under FAA to appoint umpire in dispute over reinsurance agreements and was not required to first order parties to comply with contractual selection method where only 7 of 12 contracts contained umpire selection procedure and parties had been deadlocked over selection for five months.)

C. Qualifications For Arbitrators

The qualification requirements for persons selected to serve on a reinsurance arbitration panel are typically set forth in the arbitration clause. Although such contractual qualifications may be waived or modified by agreement, there is a presumption that the parties intended the contract language to control. The typical reinsurance contract provides that arbitration panel members be present or former officers of a reinsurance or insurance company, or attorneys with experience in the field of reinsurance. Although such contract language provides some guidance, parties generally need to consider many additional factors in selecting an arbitrator.

In addition to meeting the criteria set out in the contract, the selection of a reinsurance arbitrator should also be based on a thorough understanding of the issues involved in the dispute and a complete investigation of prospective arbitrators. There are certain strategic issues to consider in selecting an arbitrator with a particular background or training. For example, if the underlying dispute arises out of an underwriting issue, the parties should consider an arbitrator with a strong insurance underwriting background. Similarly, if the dispute concerns claims handling or settlement allocation, the parties may prefer an arbitrator with a claims background.

Other relevant information regarding the prospective arbitrator's background includes experience in a particular line of insurance business. For example, if the underlying dispute arises from a professional liability policy, the parties may prefer an arbitrator with experience in that particular line of business. Such expertise will presumably assist the panel in interpreting and evaluating technical issues. This is also true with regard to whether the arbitrator is an attorney. The selection of an attorney as a panelist may be prudent if a party is asserting a particularly legal or technical argument to support its position. Although arbitrators are not bound by any particular rules of law, additional legal expertise on the panel may be useful in the panel deliberations or in addressing discovery issues in advance of the evidentiary hearing.

Once a party has identified the criteria it seeks for a party-appointed arbitrator, it is faced with the larger task of finding an individual that meets the criteria. Information regarding arbitrators can be compiled from many sources. The oldest resource, and probably the best, is word of mouth referrals from other parties or counsel based on past experiences. However, there are several industry and professional organizations that publish directories of reinsurance arbitrators. The Reinsurance Association of America located in Washington, D.C. publishes a bi-annual directory of arbitrators that describes each individual's industry background and arbitration experience. In addition, ARIAS*US (AIDA Reinsurance & Insurance Arbitration Society) based in Mt. Vernon, New York,

also publishes a directory of reinsurance arbitrators with certified credentials based on educational and experience requirements.

(1) Party-appointed Arbitrators

As set forth above, most reinsurance arbitration agreements provide for each party to select an arbitrator and then the two selected arbitrators chose a third person to serve as an umpire. Although different vernacular is used, the arbitrators appointed by the parties are generally referred to as the "party-appointed arbitrators." Notwithstanding this well established procedure, there are different views as to the role or disposition of the party-appointed arbitrator. Under the traditional or "old-fashioned" approach, all arbitrators are expected to be completely neutral and impartial. This issue was specifically addressed in *Barcon Associates, Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 430 A.2d 214 (Supr. Ct. of N.J. 1980), where the court adopted the traditional view that a party-appointed arbitrator should not be an advocate for the appointing party and must be completely disinterested.

In contrast, the more contemporary approach recognizes that party-appointed arbitrators are not entirely neutral. This "less than neutral" viewpoint is largely a recognition that the parties generally appoint arbitrators with a particular background or disposition which supports their position in the dispute. However, there are limitations of a party-appointed arbitrator's role. Even if the arbitrator is predisposed in favor of the appointing party, there is an obligation to make independent judgments and observe a duty of fairness. *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 129, fn. 2 (7th Cir. 1994). Thus, although the typical arbitration clause providing for a tripartite panel requires only that the umpire be mutual, and is silent as to the neutrality of the two-party arbitrators, they must still act together as a disinterested board of arbitrators. *Astoria Medical Group v. Health Insurance Plan*, 11 N.Y.2d 135, 227, N.Y.Supp.2d 401 (1962).

However, the "fairness" and "disinterest" requirements do not necessarily preclude advocacy. By the same token, advocacy should be distinquished from "evident partiality" that may result in a challenge to the arbitration award. An arbitrator may be predisposed to decide an issue based on his or her own personal views and experiences. Notwithstanding this "predisposition," the arbitrator could be "disinterested" if he has no personal or financial interest in the outcome of the dispute. Thus, a party can designate as its arbitrator a person with similar views in the expectation that an arbitrator will argue in favor of those views during the panel deliberations. For example, in a dispute concerning a ceding company that contends a reinsurer has improperly refused to follow a settlement, the ceding company may seek an arbitrator that is inclined to apply a broad application of the follow the settlements doctrine.

The debate over neutral and "less than neutral" predisposition often leads to the issue of whether a reinsurance arbitrator is an "advocate." For many, the party-appointed arbitrator is essentially a "hired gun" much like counsel retained to prepare the case for the arbitration. Consequently, it is fairly common for party-appointed arbitrators to become advocates of those parties that have appointed them. Even though party-appointed arbitrators are not expected to be completely neutral, "evident partiality" is a sufficient basis for challenging an appointment. The courts have not clearly defined "evident partiality" and most courts in the United States refuse to consider charges of bias against arbitrators or umpires prior to the conclusion of an arbitration. Consequently, parties face the possibility of completing the entire arbitration process, only to have the arbitration award set aside if the partiality of one of the panel members is successfully challenged.

Where the arbitration clause is silent as to whether a party-appointed arbitrator must be neutral, there is a debate as to whether that arbitrator can be an advocate for the appointing party throughout the proceeding, or whether he or she must listen and decide the dispute as a neutral adjudicator. See *Lanzone & Kaminsky*, The Rule of Party-Appointed Arbitrators in Reinsurance Disputes, FICC Quarterly, Spring 1993. Some federal and state courts have held that where the arbitration clause does not require party-appointed arbitrators to be neutral, neither their appointment nor resulting award can be challenged on the basis of partiality of such arbitrators, absent overt misconduct. Under the traditional view, each member of an arbitration panel was required to be completely neutral and impartial absent a contract provision that acknowledges that a party-appointed arbitrator cannot be completely "neutral" in the same sense as an umpire. Because all arbitrators, whether a party-appointed arbitrator or an umpire, have different experiences in the insurance industry, it is unrealistic to expect complete absence of any predisposition or prior contact with the parties.

The predisposition of an arbitrator to support a position of the appointing party is almost inevitable, as parties chose the individuals they know are, or would tend to be, sympathetic to their position. A reinsurer is free to select a representative from another reinsurer. Similarly, a ceding insurer may select a representative from a ceding company.

The FAA provides some statutory guidance regarding whether an arbitration award can be vacated for "evident partiality" of an arbitrator. 9 U.S.C. §10 (a)(2). In *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L.Ed.2d 301 (1968) the court concluded that evident partiality existed where it was undisclosed that a neutral arbitrator's regular customers in the past included the respondent in the arbitration.

(2) The Umpire

The umpire in a reinsurance arbitration is usually selected by the two party-appointed arbitrators. The umpire is expected to fulfill numerous responsibilities and remain completely neutral. First, the umpire generally fulfills an administrative role in overseeing the arbitration process and establishing a schedule for the completion of certain tasks. Second, the umpire also serves a judicial role to the extent a vote is needed to resolve discovery issues or the ultimate dispute.

The administrative role of the umpire may have significant impact on the overall expenses incurred by the parties in the course of the arbitration. Because reduced expenses are generally considered to be one of the advantages of the arbitration process, this is an important role. Here, the umpire may control the expenses incurred for discovery and the hearing before the panelists. With regard to discovery, the umpire is generally expected to keep the parties within reasonable limits in relation to the issues presented by the dispute. See *William J. Wall, The Role of the Umpire As Manager and Cost Cutter In Reinsurance Arbitration*, 1997 APR Andrews Int'L Reinsurance Disp. Rep. 3 (April 21, 1997).

While the method for selecting the party-appointed arbitrator is generally described in the arbitration clause of the contract, this is not the case for the method of selecting the umpire. The contract language specifies that the two party-appointed arbitrators will agree on an umpire. As a practical matter, the parties typically begin the process of selecting an umpire by trading lists of proposed arbitrators. On occasion, parties will agree that a number of the proposed arbitrators are qualified for the assignment, but not agree on which one of the proposed individuals should be retained. In this instance, the final selection is typically determined by drawing lots.

Since most agreements do not include an express limitation as to when the parties must complete the umpire selection process, lengthy delays are possible. Parties may seek court intervention to expedite the selection of the umpire pursuant to state or federal authority. *Pacific Reinsurance Mgt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th Cir. 1987).

D. Disclosure of Interests

It is standard practice for arbitrators to provide full disclosure of any significant affiliations, business or personal relationships they have had with the parties, counsel and/or the other panelists. Although this requirement is generally not found in the arbitration clauses, it is a common request from the parties. In addition, courts have enforced this requirement where the arbitration clause required completely impartial arbitrators. For example, in *Firemans Fund Ins.*

Co. v. Sorema North America Reinsurance Co., No. 94-3617 SC (N.D. Cal. 1995), the court rejected the argument that it did not have jurisdiction to rule on the disclosure issue. In concluding that the disclosure requirement was enforceable, the court held that since the agreement required impartiality by the arbitrators, Sorema's request for a completed disclosure statement from each appointed and nominated arbitrator was in accordance with the terms of the agreement and fully enforceable. Other federal courts have reached this same conclusion. *Metropolitan Property & Casualty Ins. Co. v. J.C. Penny Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991)

Because the disclosure requirement provides the parties with information regarding potential conflicts and/or bias, the courts assessing challenges to arbitrators are more likely to focus on undisclosed relationships, as opposed to disclosed relationships. Similarly, it questionable whether courts will permit parties that fail to object to disclosed relationships and then seek to overturn an unfavorable outcome based on bias. In other words, once a party is made aware of a basis to challenge an appointment for improper bias, it must assert an objection or risk waiving it. *Health Services Management Corp. v. Hughes*, 975 F. 2d 1253 (7th Cir. 1992).

For parties concerned about potential arbitrator bias, the disclosure statement is an invaluable tool. However, as noted above, parties should thoroughly research the background of all proposed arbitrators in advance of the organizational meeting and formal disclosures. By knowing the general background of the proposed arbitrator in advance of the formal disclosure, a party will be well prepared to make further inquiries regarding potential bias.

Once the disclosure statements are provided, parties should determine if the statement is generally consistent with the preliminary research regarding the arbitrator. Because the reinsurance community is relatively small, it is unlikely that experienced arbitrators will have no past experiences or relationships with other arbitrators, the parties, the insurance companies and/ or the counsel. In fact, if a proposed arbitrator had no such experiences, then it would be questionable whether the person had sufficient qualifications to serve on the panel.

While examining an arbitrator's disclosure statement, counsel should pay particular attention to the former and current business relationships of the arbitrator. For example, if a large part of the arbitrator's professional income is derived from serving on arbitration panels, counsel should inquire into the number of arbitrations where the individual served as a party arbitrator for the opposition. A similar inquiry should be made regarding the prospective arbitrators' experience with the attorney or law firm representing the opposition.

E. Challenging Arbitration Appointments

The most common basis asserted for challenging an arbitrator is bias. However, the court decisions regarding when a party may raise such a challenge are inconsistent. The FAA does not expressly authorize courts to disqualify an arbitrator for bias prior to the conclusion of an arbitration. Section 5 of the FAA authorizes the court to appoint an arbitrator in three limited circumstances: 1) when the arbitration agreement fails to provide a method for the appointment of an arbitrator; 2) when a party fails to follow the selection method set forth in the arbitration agreement; or 3) when there is some other "lapse" in the selection of an arbitrator. 9 U.S.C. §5.

In *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826 (S.D.N.Y. 1996), affirmed, 110 F. 3d 892 (2d Cir. 1997), Aviall sought to disqualify the accounting firm of KPMG Peat Marwick selected by Ryder, the former parent of Aviall, to arbitrate a dispute. Aviall argued that KPMG's relationship with Ryder as its regular accounting firm and KPMG's conduct regarding the dispute indicated partiality sufficient to disqualify KPMG from arbitrating the dispute. The Second Circuit Court of Appeal affirmed the district court's conclusion that the FAA did not authorize the court to hear a motion to disqualify an arbitrator until after the arbitration is completed. *Id.* at 896. See also *In the Matter of Arbitration Between Certain Underwriters at Lloyd's, London and Continental Casualty Company*, 1997 WL 461035, 3-4 (N.D. Ill. 1997)(held court not authorized to review alleged arbitrator bias under Section 10 of the FAA until after conclusion of proceeding.)

After a party objects to an arbitrator based on a perceived bias, the opposing party may agree that the subject arbitrator should be excused from the process. If the opposing party does not agree that the arbitrator should be excused, then the objecting party may be required to wait until there is a decision from the panel before it seeks a formal challenge based on bias. Because this approach periodically results in a waste of the resources expended to complete the arbitration, parties should consider including terms in their arbitration contracts that describe procedures for challenging arbitrator appointments.

III. Working With The Arbitrators

As set forth above, the role of the arbitrator is much more than simply providing a decision at the end of the proceeding. Accordingly, the parties should establish and maintain a good working relationship with the entire arbitration panel. The amount of contact with the arbitrators will vary depending on the rules established at the organizational meeting and the unique issues presented by the dispute.

A. The Organizational Meeting

It is standard practice for the parties and the selected arbitrators to participate in an organizational meeting to discuss the dispute and establish

guidelines for the proceeding. It is important for the parties to be well prepared to address all aspects of the arbitration proceeding. Similarly, the parties should anticipate potential disputes regarding discovery or other administrative matters and be prepared to offer reasonable compromises where possible.

To facilitate the organizational meeting, arbitrators often request the parties to submit a statement of the case. By having a summary of the issues in dispute, the panel may tailor the proceedings accordingly and in line with the parties' preferences. Here, parties should take particular care in framing the issues for the arbitrators since this may impact the arbitrators view of the matter and the rules established for conducting discovery. For example, where the issues are straightforward and uncomplicated, the panel may be inclined to authorize only limited discovery.

B. Ex Parte Communications

The parties are free to decide whether ex parte communications with the arbitrators will be permitted. Although ex parte communications with the umpire are almost never permitted, such communications with the party-appointed arbitrators are common practice. See *Employers Insurance of Wausau v. National Union*, 933 F. 2d 1481 (9th Cir. 1991)(held arbitrators had right to permit ex parte communications as part of rules of procedure.) There are different schools of thought on this subject. Those in favor of ex parte communications contend that the parties need to communicate with their appointed arbitrator as a resource for preparing their case. In contrast, the more conservative view is that arbitrators should be neutral and not subject to the influence of one parties' ex parte communications.

As a practical matter, a limited amount of ex parte communication with arbitrators is necessary in the beginning to explore whether the arbitrator is available and/or interested in serving on the panel. This initial contact with the arbitrator is important in that it is the best opportunity to determine if the individual has favorable views on the pending issues. In some respects, these early communications may also influence the arbitrator's views regarding the issues. Caution should be used, however, since extensive ex parte contact with an arbitrator prior to a proceeding may provide a basis for the opposition to challenge the appointment based on bias.

Since the arbitration clauses in most reinsurance contracts do not specifically address the issues of ex parte communications, the parties are generally free to communicate with a party-appointed arbitrator. It is common for the parties to mutually agree that ex parte communications will be permitted up until a certain date before the matter is submitted to the panel. Such agreements are typically negotiated at the initial organizational meeting of the parties and the arbitrators. It is often useful for parties to have input from their party-appointed arbitrator through the discovery portion of the proceeding.

However, it is generally agreed that ex parte communications should cease once the final briefs are submitted or the evidentiary hearing commences.

C. Pre-Hearing Communications

Depending on the nature of the dispute, the parties to a reinsurance arbitration will have varying degrees of contact with the arbitrators in advance of an evidentiary hearing. Prior to the submission of briefs and documentary evidence, issues related to administration of the proceedings, evidence or discovery may require communication with the arbitration panel. From the first telephone call related to the arbitration to the final decision, the arbitrators begin to formulate impressions and beliefs regarding the dispute. Accordingly, each communication with the panel members should be well organized and consistent with the parties theme for the proceeding. In each instance, the parties and their counsel should provide the panel with a clear and concise summary of the issue and possible solutions. Extensive briefing is generally unnecessary.

Most arbitration panels will expect highly professional and courteous conduct from the parties and counsel. Acrimonious or contentious conduct by a party may influence the panel's view of the issues and possibly the outcome of the dispute. Counsel should presume that all written communications with the opposition regarding discovery issues may ultimately be presented to the panel. Accordingly, counsel should avoid asserting unreasonable positions that taint the panel's view of the party.

D. Briefs and Documentary Evidence

The presentation of evidence at the evidentiary hearing phase of an arbitration should be thoroughly organized. The parties should strive to make their brief the roadmap for the panel to follow throughout the proceeding with cross-references to documentary evidence. All documentary evidence should be pre-marked and in bound volumes or binders with tabs for easy reference. Most arbitrators, like their judicial counterparts in the court system, will expect and appreciate the organized presentation of evidence. Parties should anticipate any unique evidentiary issues regarding oversized documents or exhibits.

E. The Evidentiary Hearing

The procedures followed in an evidentiary hearing are variable depending on the preferences of the parties and the panel members. In general, the umpire presides over the proceedings and speaks for the panel when necessary. Although all panelists are generally entitled to examine the witnesses, it is frequently the party-appointed arbitrators that make the most inquiries of the witnesses. For counsel, this can be a frustrating aspect of an arbitration hearing. Because the

proceedings are not governed by the legal rules of evidence, it is not uncommon for arbitrators to ask questions that would be improper or simply objectionable in a court proceeding. When this occurs, counsel must decide whether to raise an objection and risk of alienating the arbitrator making the inquiry or simply ignore the defects.

In accord with the general objectives of minimizing delay and expenses, parties should attempt to avoid an extensive presentation of evidence at the hearing. The presentation of live testimony, if any, should be from the critical witnesses and not duplicative. The use of deposition transcripts and/or videotaped deposition testimony is generally considered more efficient than the presentation of live testimony. However, the parties should consult the arbitration panelists to determine their preferences based on their understanding of the issues.

The use of live expert witnesses at an evidentiary hearing is generally considered unnecessary in a reinsurance arbitration. This is largely based on the expectation that a panel composed of current or former insurance or reinsurance officers will have a sufficient expertise in the issues presented. However, in certain instances where the case involves unique facts, experts may be necessary to fully educate the panelists.

A related issue is whether arbitrators should be allowed to testify as witnesses. Since arbitrators are typically experienced professionals with extensive experience in the insurance industry it is not uncommon for them to have first hand knowledge of the dispute in question or the type of business in dispute. Although there are no definitive court decisions on this issue in a reinsurance context, it appears the courts will apply the same evident partiality standard used in determining whether an arbitration award should be vacated due to testimony from an arbitrator. See Larry P. Schiffer, *Should Arbitrators Be Allowed To Be Witnesses?*, 3 No. 8 Andrews Int'L Reinsurance Disp. Rep. 3 (September 21, 1998).

The use of enlarged exhibits or automated visual aids may enhance the presentation of evidence to an arbitration panel. Many of the advances in technology in use with trial courts are equally useful in reinsurance arbitration hearings. Here, the parties should evaluate the use of technology in accord with the anticipated expense and the preferences of the panelists. Certain technological advancements, such as paperless document images and realtime transcription are particularly useful in complex, document intensive proceedings.

IV. CONCLUSION

The composition of a reinsurance arbitration panel and the manner in which the parties communicate with the panel may influence the outcome of the proceeding. Accordingly, parties should take particular care in selecting their party-appointed arbitrator by basing the selection on thorough research and a complete understanding of the issues. Finally, parties should consider each communication with the arbitration panel as critical to the outcome of the proceeding.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities