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Umpire Challenges under the New ARIAS-US Panel Rules for the Resolution of Insurance and Contract Disputes

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Writing in 2015 about the need to study the intersection between insurance and dispute resolution, Professor Robert H. Jerry II concluded as follows:

> "The business of insurance is first and foremost the business of providing financial security against the risk of loss, but when loss occurs, the business of insurance becomes the business of resolving claims. The core of the bargain in an insurance contract is security, but without efficient and effective dispute resolution processes, security is lost and the important functions of insurance fail. Many issues of law and jurisprudence deserve our serious study and attention, but there can be no doubt that the points at which insurance and dispute resolution coverage are among them".

The AIDA Reinsurance Insurance Arbitration Society ("ARIAS-US") is a nonprofit corporation, per its website, "dedicated to improving the insurance and reinsurance arbitration process for the international and domestic markets". ARIAS-US provides initial training and continuing education for arbitrators, and certifies a pool of qualified arbitrators. In addition, ARIAS has promulgated procedural rules for use in insurance and reinsurance arbitrations.

On September 16, 2019, the new ARIAS-US Panel Rules for the Resolution of Insurance and Contract Disputes went into effect (the "Insurance Rules") (*See* P. Halprin, *Introducing the ARIAS-US Panel Rules for the Resolution of Insurance and Contract Disputes* (Oct. 4, 2019).) The impetus behind the Insurance Rules was to create arbitration rules for use in non-reinsurance disputes including direct insurance disputes and those involving captives.

The Insurance Rules contain a protocol, unique amongst ARIAS rules, to manage umpire challenges. This article highlights three key aspects of the challenge protocol – the timing of challenges, grounds for challenges, and the potential results of challenges.

Umpires as Neutrals

The starting point for the Insurance Rules is the ARIAS-US Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Neutral Rules").

Under Article 6.1, the Neutral Rules require that the arbitration panel consist of three neutral arbitrators who qualify under the ARIAS-US Neutral Arbitration Panel Criteria (the "Neutral Criteria"). The Neutral Criteria, per Article 6.3, cover: (a) prior service as party-appointed arbitrator; (b) prior service as an umpire or neutral arbitrator; (c) prior expert or consultant service, and; (d) prior service as counsel for or employment by one of the parties. If, in the five years prior to the date of nomination, an arbitrator candidate has served in excess of the enumerated threshold amount associated with any area of conflict, the arbitrator shall fail to meet the Neutral Criteria.

Under Rule 6.1 of the Insurance Rules, only the umpire is required meet the Neutral Criteria. As such, the challenge procedure that is discussed below is focused on umpires and not party-appointed arbitrators. This approach was intentionally designed to limit challenges to those involving the umpire rather than to waste the parties' time and resources as to whether the party-appointed arbitrators have a truly neutral background.

The Timing of Challenges

Under Rule 16.9(a) of the Insurance Rules, challenges must take place within the following parameters:

> "A Party that intends to challenge the umpire shall send notice of its challenge within fifteen (15) days after it has been notified of the appointment of the umpire, or within fifteen (15) days after the grounds upon which it intends to challenge have become known to that Party, but no later than 90 days after the Organizational Meeting;"

Modeled on Article 13(1) of the UNCITRAL Arbitration Rules, Rule 16.9(a) modifies Article 13(1) by barring challenges lodged more than ninety (90) days after the Organizational Meeting. The intent of this modification was to put the onus on parties to promptly investigate the grounds for challenge and to expeditiously lodge complaints. This prevents gamesmanship, for example, on the eve of a hearing.

The Grounds for Challenge

The grounds for challenge are enumerated in Rule 16.9(d) as follows:

> "If, within fifteen (15) days from the date of the notice of challenge, all Parties do not agree to the challenge or the challenged umpire does not withdraw, the Party making the challenge may elect to pursue it if the challenge is based on: (1) the failure of the umpire to meet the requirements for umpire set forth in the relevant contract(s); (2) the failure of the umpire to meet the Neutral Criteria listed in 6.3(a) – 6.3(d) above; (3) a violation of the standards set forth in Comment 3 to Canon 1 of the ARIAS•U.S. Code of Conduct; or (4) the alleged failure to make adequate disclosures as required by Canon IV of the ARIAS•U.S. Code of Conduct. In that case, within fifteen (15) days of the notice of challenge, the Party making the

> challenge shall seek a decision on the challenge from a neutral three-member sub-committee made up exclusively of members of the ARIAS Ethics Committee and the Board of Directors (the "Sub-Committee"). The Party seeking such a decision shall do so by notifying the Executive Director, in writing, of its intention to seek a decision on the challenge from the Sub-Committee".

Under Article 12 of the UNCITRAL Arbitration Rules, "any arbitrator may be challenged if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence". Here, the grounds for challenging an umpire through the protocol are limited to those enumerated in Rule 16.9(d).

The first two grounds involve failure of the umpire to meet the requirements set forth in the relevant contract or under the Neutral Criteria.

The third ground requires reference to Comment 3 to Canon 1 of the ARIAS-US Code of Conduct. As set forth in Comment 3, "The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve…". An example of such a circumstance, per Comment 3(a), is "where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings".

The fourth ground is the failure to make adequate disclosures as required by Canon IV of the ARIAS-US Code of Conduct. Per Canon IV, "Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure". Per Comment 2 to Canon IV, required disclosures include but are not limited to relevant positions taken in published works or in expert testimony, the extent of previous appointments as an arbitrator by either party, and any past or present involvement with the contracts or claims at issue.

The Potential Results of a Challenge

There are three likely outcomes that will result from a challenge – (1) the challenging party will prevail resulting in the replacement of the umpire; (2) the challenging party's challenge will not be accepted, or; (3) the umpire will withdraw.

In terms of the mechanics of the challenge, Rule 16.9(e) of the Insurance Rules provides that a three-person Sub-Committee will be chosen at random by the Executive Director exclusively from the members of the ARIAS Ethics Committee and Board of Directors.

For a hearing on the papers, the associated fee is $5,000. If an in-person hearing is determined to be required, the associated fee is a daily rate of $2,400 plus reasonable costs and expenses. The Sub-Committee has discretion in how it decides the challenge. But it is charged with rendering a decision on the challenge within thirty (30) days of receiving the papers or completing a hearing on the merits.

Rules 16.9(i) and 16.9(j) of the Insurance Rules suggest that the three scenarios set forth above will

be resolved as follows:

1. Where the challenger prevails, the challenging party shall be awarded its fees and costs, and the second-highest ranked umpire candidate will serve as the replacement umpire;
2. Where the challenger fails, the party opposing the challenge shall be awarded its fees and costs, and the umpire will remain in place; and
3. Where the umpire withdraws, the second-highest ranked umpire candidate will serve as the replacement arbitrator.[1)]

The Challenge of Challenges

The drafting of the challenge provision was an attempt to provide parties acting in good faith with a fair and efficient challenge process while at the same time deterring mischievous parties from using frivolous challenges as a tool for obstruction and delay. While actual challenges under the Insurance Rules will no doubt test the procedure, its mere presence advances the Insurance Rules as a valuable tool for the resolution of with direct insurance and insurance-related contract disputes.

References

?1 Although the answer likely depends upon the timing of the withdrawal, it seems unlikely that related fees and costs incurred may be awarded to the challenger in the event of a withdrawal as the pertinent portion of the Insurance Rules refers to a “decision” of the Sub-Committee. Absent a “decision”, it is unclear how such fees and costs could be awarded under the procedure.

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