FOX ROTHSCHILD LLP

CORPORATE INSURANCE AND REINSURANCE PRACTICE GROUP

INTERNATIONAL PRACTICE GROUP

***ALTERNATIVE DISPUTE RESOLUTION*©**

PRESENTATION MATERIALS

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Topics:

I. Selection of Arbitrators

- Nuts and Bolts of Selection
- Ethics Issues
- Discussion
- Interview of Arbitrator

II. Preparing the Client for ADR

- Do's and Don'ts of Preparing the Client for Arbitration

Presumed language in an agreement between two entities incorporates Alternative Dispute Resolution (ADR) within the agreement. The agreement goes beyond that to compel mandatory arbitration by using a mandatory arbitration clause, which is a surviving provision in most contracts. Next, hypothetically, we assume a disagreement between the parties and one of the parties demands arbitration.

The party demanding arbitration now asks counsel to explain the structure, methodology and procedure of prosecuting an arbitration and inquires about the following:

- Process for the arbitration;
- Process for the arbitration;
- Selection of the arbitrator;
- Is there a necessity that the arbitrator have experience and skill in the subject matter pertaining to the nature of the business of the parties?;
- Goals with respect to experts and discovery;
- Cost effectiveness;
- Stenographic record;
- Reasoned award or standard opinion/order.

A. Contract to Arbitrate

Typically, once an irreconcilable dispute is recognized by the parties to the agreement, the terms and provisions of the contract will give direction and guidance specific to dispute resolution. A fairly common arbitration provision will read as follows:

Arbitration

1. Should an irreconcilable difference of opinion arise between the Company and any Reinsurer subscribing to this Contract as to the interpretation of this Contract, it is hereby

mutually agreed that, as a condition precedent to any right of action hereunder, such difference, upon the written request of either party, shall be submitted to arbitration, one arbiter to be chosen by the Company, one by such Reinsurer, and an umpire to be chosen by the two arbiters before they enter upon arbitration.

2. In the event that either party should fail to choose an arbiter within sixty days following a written request by the other party to enter upon arbitration, the requesting party may choose two arbiters who shall in turn choose an umpire before entering upon arbitration. If the arbiters have not chosen an umpire at the end of ten days following the last day of the selection of the two arbiters, each of the arbiters shall name three, of whom the other declines two, and the decision shall be made of the remaining two by drawing lots. The arbiters and the umpire shall be active or retired disinterested officers of insurance or reinsurance companies or Underwriters at Lloyd's, London, not under the control of either party to this Contract. Each party shall present its case to the arbiters within sixty days following the date of their appointment.

3. The decision, in writing, of the arbiters shall be final and binding upon both parties, but failing to agree, they shall call in the umpire and the decision of the majority shall be final and binding upon both parties. Judgment upon the award rendered may be entered in any court having jurisdiction. Each party shall bear the expense of its own arbiter and shall jointly and equally bear with the other the expense of the umpire and of the arbitration. In the event that the two arbiters are chosen by one party, as above provided, the expense of the arbiters, the umpire, and the arbitration shall be equally divided between the two parties.

4. Any such arbitration shall take place at _____, unless some other location is mutually agreed upon by the two parties in interest.

Now that the ground rules for arbitration have been established, counsel for the parties gives advice with respect to selection of the arbitrators. This is the point at which consideration is given to the skill sets, assets and uniqueness of the arbitrator, particularly if it is important if the arbitrator be someone having an unbiased basis of knowledge and familiarity with the subject. Naturally, the selection process gives rise to issues involving ethics, conflicts, and disclosures.

The discussion with the potential arbitrator at a minimum must include the following:

1. Qualifications of the arbitrator nominee.
2. Employment history, useful to include a current resume or C.V. The employment history should include all positions, titles, length of employment and principal duties. Past qualifying employment is also useful.
3. Arbitration experience, specifically whether or not the nominee has participated as an arbitrator in connection with similar disputes. If so, the number of appearances as a party appointed arbitrator and disclosure of the number of appearances as the neutral umpire.
4. Potential conflicts. It is compulsory to determine whether or not the arbitrator at any time has ever been an employee, officer, director, shareholder, agent or consultant to any of the parties to the arbitration. This includes any of the parties' subsidiaries, affiliates, or parent companies. It is critical for the arbitrator nominee to disclose whether he or she has ever served as an arbitrator, umpire, attorney, consultant, or expert witness in any prior matter involving the parties to the arbitration, including subsidiaries, affiliates, or parent companies of the parties. The arbitrator should also disclose whether or not there has been any prior involvement with respect to this particular transaction or dispute.

5. Has any of the arbitrators past or present employment, including the entity with whom employed, have any financial interest or have any ongoing business relationship with any of the parties to the arbitration?
6. The arbitrators should be questioned as to whether or not they know or have any experience with any other party who may also serve as an arbitrator in the matter. If the answer is yes, there should be a disclosure for each individual known, the capacity in which they are known, and the dates of any other proceedings. The arbitrator nominee should also disclose any knowledge or affiliation they may have with counsel representing any party.
7. The arbitrator should be provided with a very short fact specific explanation of the subject matter of the arbitration to determine whether or not any of these facts or circumstances may prevent the arbitrator from rendering an unbiased decision.
8. Lastly, a catch-all consideration as to whether or not the arbitrator is aware of any facts or circumstances that impair his ability to serve or create the appearance of impartiality which can potentially lead to an unbiased award.

B. Rules of Professional Conduct

If the arbitrator is an attorney, there is great utility in refreshing the arbitrator or nominees recollection of the following contained in the Rules of Professional Conduct. **The purpose for inserting the Rules of Professional Conduct whether applicable to attorney arbitrators or non-attorney arbitrators is to help facilitate the "role-playing" between lawyers and the mock arbitrator. These will serve as questions and answers.**

Rule 1.6 Confidentiality of Information

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest

Rule 1.10 Imputation of Conflicts of Interest.

Sometimes, it is prudent also to familiarize the arbitrator with the ABA (American Bar Association) Model Rules of Professional Conduct.

If the arbitrator is a non-attorney, then the Rules of Professional Conduct and Model Rules can serve as guidelines during the interview process.

C. Hold Harmless

The nuts and bolts of the selection should also include a discussion of the necessity for a stipulation serving as a hold harmless agreement. The stipulation should include language that they will act in good faith, have made complete disclosures, and are without conflicts. Moreover, the hold harmless stipulation should be executed by the parties as well as the arbitrator and should contain language that the parties agree not to assert any claim, file any suit, or initiate any action against the arbitrator in connection with the rendering of services as an arbitrator, including but not limited to any claims, suit or action relating to any allege, conflict, bias or lack of disinterestedness. Furthermore, the parties should agree jointly and severally, to protect, defend, indemnify and hold harmless the arbitrator against any and all expenses, costs and fees of any kind incurred by the arbitrator, and paying their reasonable hourly fees, in connection with any claim, action or law suit arising or resulting from or out of the arbitration. Lastly, the stipulation should include language that nothing in the stipulation shall abridge any rights of the petitioner or a respondent (the parties) as they may have with respect to each other to seek to vacate or modify any order, ruling or award which the arbitrator may render except in regard to any conflicts of interest which have been fully disclosed to the parties. The stipulation should be non-cancellable and of unlimited duration. An example of a typical stipulation for hold harmless is attached to the materials.

D. Expectations of Arbitrator

By use of an agenda, the arbitrator should set forth what is expected of the parties. At a minimum the following are compulsory.

- Petitioner's Statement of Position
- Respondent's Statement of Position
- Confidentiality Agreement (Exhibit attached)
- Hold Harmless Stipulation (Exhibit attached)
- Agreement on Ex-Parte Communications
- Stenographic Requirements
- Arbitration Schedule
- Discovery Among Parties and Non-Party Subpoenas
- Expectation of a reasoned Award with language explaining enforcement of the Award

E. Preparing the Client for ADR

- Documentary evidence
- Retention
- Confidential and Proprietary
- Trade Secrets
- Witnesses
- Experts
- Budget