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3 Ways To Make Reinsurance Arbitrations Faster And Cheaper

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Reinsurance arbitrations are supposed to be fast, inexpensive and flexible, as compared to traditional judicial methods of dispute resolution. However, reinsurers and cedents (and their counsel) often find themselves involved in protracted and costly arbitrations.

Although there is no single, perfect solution for reducing the length and expense of arbitral proceedings, there are a number of ways that parties to an arbitration could save both time and money, while still achieving a thoughtful resolution to their dispute. While these three options are not appropriate in every case, they warrant consideration by party representatives, counsel and panel members, depending on the circumstances presented.

1. No Discovery At All

Discovery is perhaps the most time-consuming and costly part of many reinsurance arbitrations. Typically, parties spend months drafting and responding to discovery requests and in the review and production of documents. The costs associated with discovery — and in particular document production — can be significant.

However, absent reinsurance contractual language or a state statute expressly permitting discovery, there is no "right" to discovery in a reinsurance arbitration. In certain cases, the cost and distraction of any discovery may outweigh its usefulness, especially when the parties already possess documents to support their coverage arguments. Cedents and reinsurers frequently engage in substantial discussions and written correspondence regarding disputed claims prior to an arbitration demand. For example, reinsurers often request documents and information from cedents following the submission of reinsurance billings. This is relatively unsurprising given that cedents are more often the party in possession of the vast majority of documents and information regarding the billing and underlying losses. Many reinsurers also conduct audits to gain further information and documentation regarding ceded losses. By the time a cedent or reinsurer demands arbitration, it is not uncommon that the parties will have already exchanged significant information and documents.

In reinsurance disputes that are not fact-sensitive — such as certain disputes centering on the proper interpretation of a reinsurance contract — discovery may be unnecessary, because the parties may have already exchanged sufficient documentation and information prior to arbitration. For example, a common dispute among reinsurers and cedents is whether claims were aggregated in accordance with

the relevant reinsurance contract language. Although a cedent and reinsurer may have differing views of the occurrence and cause/event language in a reinsurance contract, discovery may not provide a material benefit to the panel's ultimate determination. If everyone agrees on the underlying facts, and the parties are just debating the meaning and application of the reinsurance contract's aggregation provision, discovery may be a waste of time in certain cases.

Proportionality is also important. In a reinsurance dispute for tens of millions of dollars, eliminating discovery is less realistic. However, if the amount in dispute between a cedent and reinsurer is relatively small, eliminating or significantly narrowing discovery should be a realistic option.

Discovery in reinsurance arbitrations is largely a construct created by the parties and panel. Unlike the right of a reinsurer to access the books and records of a cedent, which is often expressly provided in reinsurance contracts, arbitration provisions in reinsurance contracts often do not address discovery.

2. Limit Discovery Testimony

If the arbitration panel does permit discovery, parties may consider reducing time and expense by limiting discovery testimony to one Rule 30(b)(6)-style deposition per side.

This approach is especially appropriate when reinsurance disputes center around a single or limited number of discrete issues about which there are no or limited fact issues for development. Instead of a parade of witnesses who say the same thing, it may be sufficient in many cases for each side to put forward one witness to articulate its position and the supporting facts.

The adoption of a 30(b)(6)-style deposition per side approach could be agreed to by the parties, or ordered by the panel at the organizational meeting over one party's objection. Panel members may also see this approach as an attractive "compromise" result between a cedent's argument for no depositions and a reinsurer's argument for extensive depositions.

3. Summary Adjudication by Agreement

Parties can also reduce time and expense by agreeing to resolve their dispute by way of summary adjudication. Preparing for a hearing entails drafting opening and closing statements, preparing witnesses, identifying and organizing exhibits, and countless other tasks. Hearings can span a few days to several weeks. The costs associated with a hearing can be significant.

In certain cases, however, it is not important or helpful for the arbitration panel to hear live witnesses at a hearing. For example, in reinsurance coverage disputes regarding aggregation and allocation, the testimony of live witnesses may not be necessary where the panel is composed of insurance and reinsurance officers and individuals with industry experience that are well-versed on those issues. Likewise, reinsurance disputes that require application of an objective standard — such as the objective reasonableness of a cedent's post-settlement reinsurance allocation — may not need the testimony of live witnesses at a hearing to discuss their intent.

Traditionally, reinsurance arbitration panels have been reluctant to grant summary adjudication, even when parties file cross motions. Instead, it has been easier for a panel to order the matter to an evidentiary hearing. Panel members may perceive that an evidentiary hearing is a right to which the parties bargained in arbitration.

In appropriate cases, however, parties can prevent this result by agreeing between themselves to direct the panel to resolve the matter by written submissions and oral argument of counsel. To the extent that the principal issues in dispute are well defined early in the proceedings, the parties could agree in advance of the organizational meeting to resolve the matter without a full evidentiary hearing. Alternatively, after discovery has concluded and when it is more likely the parties will have narrowed the issues in dispute, the parties could agree to forego a hearing and instead rely on written submissions and oral argument of counsel.

Reinsurance disputes have been resolved primarily by arbitration for many decades, but somewhere along the way many of these arbitrations have morphed from fast, inexpensive and flexible to slow, costly and rigid. Isn't it time to bring back the long-acknowledged benefits of arbitration?

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