

Points of Departure: Procedural Differences between International Arbitration and U.S. Reinsurance Arbitration

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I. Introduction

This paper reviews the main differences between domestic reinsurance arbitrations and “international arbitration.” The latter has gained an increasingly important role in resolving cross-border commercial disputes, prominently including certain classes of direct insurance coverage disputes. Some of these differences flow from the procedural rules imposed under the various international arbitration institutions (*e.g.*, the International Chamber of Commerce (“ICC”), the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”), the London Court of International Arbitration (“LCIA”)). Others, however, reflect differences in culture.

While it is true that reinsurance arbitration is less formal than litigation, most practitioners in this field also work or have worked as trial lawyers. Therefore, their frame of reference is U.S. litigation and the substantially parallel federal and state civil procedure rules. True, these rules do not govern reinsurance arbitrations, but their underlying principles, such as those regarding the scope and form of discovery, have substantial influence. In contrast, the international arbitration community is decidedly not U.S.-centric. Many international arbitrations, especially in the reinsurance and insurance area, more closely follow the English law model, with formal statements of claim, detailed written witness statements and no depositions or direct witness testimony. In other types of cases, the counter-party and potentially the tribunal chair may be from a civil law background, and the contract itself may prescribe the law of a civil law jurisdiction.

As a framework for our panel discussion, we review some of the main points of difference a practitioner should understand when preparing to move from ARIAS reinsurance arbitration into the cross-border world.

II. Main Points of Comparison

A. Panel Composition and Neutrality

- Panel Composition:

- o *Domestic Reinsurance Arbitration:* In most reinsurance arbitrations, the parties’ arbitration agreement will require that the Panel consist of industry experts. ARIAS currently recommends the following clause:

Arbitration shall be conducted before a three-person Arbitration Panel appointed as follows. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall then appoint a neutral Umpire before proceeding. If either party fails to appoint an arbitrator within thirty (30) days after it receives a written request by the other party to

do so, the requesting party may appoint both arbitrators. Should the two arbitrators fail to choose an Umpire within thirty (30) days of the appointment of the second arbitrator, the parties shall appoint the Umpire pursuant to the ARIAS•U.S. Umpire Selection Procedure. The arbitrators and Umpire shall be either present or former executive officers of insurance or reinsurance companies, or arbitrators certified by ARIAS•U.S. The arbitrators and Umpire shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.²

Note that this modern ARIAS clause recognizes ARIAS certification as an alternative to industry experience. Most older clauses do not allow that flexibility.

- o *International Arbitration*: Under most international arbitration regimes, any neutral person may be selected as an arbitrator.³ Although not common, some national laws do impose qualifications on who may sit as arbitrator.⁴ However, as with domestic reinsurance arbitration, the parties' contract may impose specific qualifications going to professional or industry qualifications or language skills.⁵ Leading commentators recommend against extensive contractual qualification restrictions in international arbitration.⁶ This allows the parties to focus on the specific traits required when a dispute materializes.

- Panel Neutrality:

- o *Domestic Reinsurance Arbitration*: In domestic reinsurance arbitration, we usually have non-neutral, party-appointed arbitrators and a neutral "umpire." While there have been some momentary wobbles in recent lower court decisions, the law remains clear that the requirement that all arbitrators be "disinterested" means they that cannot have a direct personal pecuniary stake in the outcome or

² ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, Chpt. 1, Illust. 1.1, *available at* <http://www.arias-us.org/index.cfm?a=38> (last visited Oct. 5, 2014.)

³ Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 258 (5th ed. 2009) [hereinafter *Redfern & Hunter*].

⁴ *Id.* at 258-59. Limitations that national law may impose include requirements on nationality, legal qualifications, capacity, and restrictions on appointments of sitting judges or those convicted of serious crimes or in bankruptcy. *See* Gary B. Born, *International Commercial Arbitration* 1739, 1743-46 (2d ed. 2014) [hereinafter *Born*] (discussing restrictions on the appointment of arbitrators).

⁵ *Redfern & Hunter* at 258-63.

⁶ *See, e.g., id.* at 259.

be under party control.⁷ Subject to the agreement of the parties at the organizational meeting, *ex parte* communications between party-appointed arbitrators and their respective parties can remain open for much of the proceeding.⁸ *Ex parte* communication between a party and the umpire is not permitted other than for limited, logistical matters. The use of non-neutral, party-appointed arbitrators is rare outside of U.S. reinsurance arbitration.⁹ Even in the United States, although it is not common, the parties may provide for arbitration of insurance and reinsurance disputes under the auspices and rules of the American Arbitration Association (“AAA”), which contemplate panel neutrality.¹⁰

- o *International Arbitration*: International arbitration laws and arbitral rules universally require that each member of the tribunal be and remain both independent and *impartial*.¹¹ This not only bars all *ex parte* communications with any member after the tribunal is formed, but it also bars substantive discussion of the merits of the dispute with potential arbitrators prior to their appointment.¹²

B. Prehearing Procedures

- Before the Panel/Tribunal is Established:

⁷ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 2.3 (Rev. Ed. 2004). (“The parties and Panel should interpret arbitration clauses requiring “disinterested” arbitrators to mean that arbitrators may have no financial interest in the arbitration outcome and are not under any party’s control.”); ARIAS•U.S. Code of Conduct, Canon 1(3) (Mar. 24, 2014) (providing a list of disqualifying conflicts of interest) *available at* <http://www.arias-us.org/index.cfm?a=27> (last visited Oct. 5, 2014.)

⁸ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 3.9.

⁹ Steven C. Schwartz, Reinsurance Law: *An Analytic Approach* §13.03[2] (2009) (“Partisan arbitrators are unusual outside the United States.”).

¹⁰ AAA Commercial Arbitration Rules and Mediation Procedures R-18(a) (2013) (“Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for: **i.** partiality or lack of independence, **ii.** inability or refusal to perform his or her duties with diligence and in good faith, and **iii.** any grounds for disqualification provided by applicable law.”).

I. ¹¹ See Julian D. M. Lew et al., *Comparative International Commercial Arbitration* 255 (2003) [hereinafter *Lew*] (“It is a fundamental and universally accepted principle of international arbitration that arbitrators have to be **impartial** and independent of the parties and must remain so during the proceedings.”). The IBA has published Guidelines on Conflicts of Interest in International Arbitration to assist parties, institutions, and courts in assessing an arbitrator’s independence and impartiality. IBA Guidelines on Conflicts of Interest in International Arbitration (2004), *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#.

¹² See *Born* at 1697 (“no *ex parte* contacts between the arbitrators and parties about the dispute may take place”).

- o *Domestic Reinsurance Arbitration*: A reinsurance arbitration is generally commenced when one party serves a demand for arbitration. By providing the recipient with notice of the proceeding and the nature of the claims, the demand is analogous to the summons and complaint in civil litigation. A demand, however, will usually take the form of a letter, and generally will not include detailed factual allegations commonly found in a complaint. A demand should identify the contract at issue, the nature of the dispute, and the deadlines in the arbitration clause regarding matters such as the due date for any response and the appointment of an arbitrator.¹³
- o *International Arbitration*: International arbitrations frequently proceed under formal rules. Such institutional rules include those promulgated by the ICC, ICDR, or the LCIA or, in *ad hoc* arbitrations, the rules promulgated by the U.N. Committee on International Trade (“UNCITRAL”). These rules provide a framework for the arbitration and contain detailed provisions on the initial phases of the arbitration, particularly before a tribunal has been established. These rules typically contain provisions on how to file or serve a request for arbitration¹⁴ and how to answer a request for arbitration.¹⁵ These rules also typically provide default provisions for how to appoint arbitrators,¹⁶ determine the language,¹⁷ and set the place – or seat – of the arbitration,¹⁸ if the parties have not already agreed to these issues.

During this initial phase, if the parties have agreed to institutional rules, such as those of the ICC, ICDR, or LCIA, the institution will assist in administering the arbitration and, if the parties are not able to agree, can appoint arbitrators or select the language or seat. If the parties have agreed to *ad hoc* proceedings, the parties

¹³ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 1.2 (“An arbitration should be initiated by a written demand that precisely identifies the subject contract(s) and the specific nature of the claims and/or issues. The demand should also identify the arbitration clause’s requisite deadlines, e.g., due dates for the respondent’s answer, appointment of an arbitrator, etc.”).

¹⁴ See, e.g., ICC Arbitration Rules Art. 4 (2012); ICDR Arbitration Rules Art. 2 (2014); LCIA Arbitration Rules Art. 1 (2014); UNCITRAL Arbitration Rules Art. 3 (2010).

¹⁵ See, e.g., ICC Arbitration Rules Art. 5; ICDR Arbitration Rules Art. 3; LCIA Arbitration Rules Art. 2; UNCITRAL Arbitration Rules Art. 4.

¹⁶ See, e.g., ICC Arbitration Rules Arts. 12-13; ICDR Arbitration Rules Arts. 11-12; LCIA Arbitration Rules Art. 4; UNCITRAL Arbitration Rules Arts. 7-10

¹⁷ See, e.g., ICC Arbitration Rules Art. 27; ICDR Arbitration Rules Art. 18; LCIA Arbitration Rules Art. 17; UNCITRAL Arbitration Rules Art. 19.

¹⁸ See, e.g., ICC Arbitration Rules Art. 18; ICDR Arbitration Rules Art. 17; LCIA Arbitration Rules Art. 16; UNCITRAL Arbitration Rules Art. 18.

will need to rely on the courts at the seat of the arbitration for assistance in the initial phases of the arbitration.

- Preliminary Meetings and Orders:

- o *Domestic Reinsurance Arbitration:* Shortly after its appointment, the panel will customarily hold an organizational meeting. At the organizational meeting, the panel will make all requisite disclosures regarding its relationships with the parties, their respective counsel, and the other panel members. If these disclosures do not reveal any disqualifying conflicts of interest, the panel will be formally accepted by the parties. Other matters typically addressed at the organizational meeting include scheduling, protocols for motions and *ex parte* communications, and confidentiality.¹⁹
- o *International Arbitration:* Here, international practice is similar in that the tribunal will typically hold a preliminary meeting to establish the framework for the arbitration.²⁰ Among the issues that may be discussed at this initial meeting are the schedule and the procedures for the presentation of written and oral arguments and the exchange of documentary, witness, and expert evidence. However, in contrast to most U.S. reinsurance cases, the typical international arbitration tribunal will then issue a detailed procedural order, which establishes the procedure that will be followed for the arbitration. This order, often called Procedural Order No. 1, contains the scheduling and procedural issues discussed during the preliminary meeting and may also contain basic information, such as the parties' and arbitrators' contact information and the language and seat of the arbitration.²¹ This is one of several respects in which the more active role of the tribunal departs from common law practice and is closer to the inquisitorial model of civil law courts.

- Written Submissions

- o *Domestic Reinsurance Arbitration:* The panel will typically request that the parties submit "position statements" in advance of the organizational meeting. These submissions ordinarily consist of a short statement of a party's substantive position and procedural issues that a party wishes to raise at the organizational meeting, such as scheduling or the scope of discovery. The position statement is

¹⁹ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure Chpt. III.

²⁰ In fact, some arbitration rules require a tribunal to hold such a meeting. *See, e.g.,* ICC Arbitration Rules Art. 24.

²¹ *See Redfern & Hunter* at 374 (explaining that Procedural Order No. 1 is "designed to establish an overall procedural scheme for the arbitration" but that the form of the order will depend on the practices of the particular arbitrators).

the first opportunity the parties will have to present their respective cases to the panel, and therefore they are usually organized and presented in the form of short legal briefs.²² Between the completion of discovery and the final hearing, the parties typically submit pre-hearing briefs and reply briefs (when permitted). These briefs contain vastly greater detail than the position statements, typically consisting of a full statement of facts supported by citations to evidentiary exhibits, legal arguments and supporting authority, and a prayer for relief. It is customary for the parties to submit their respective pre-hearing briefs and reply briefs simultaneously.

- o *International Arbitration*: Written submissions are given considerable weight by international arbitration tribunals and will likely have a greater impact on the tribunal's ultimate ruling than the written submissions to a domestic reinsurance panel.²³ International arbitrations commence with an initial exchange of written submissions that lay out each parties' basic legal claims and defenses.²⁴ These submissions typically include a request for arbitration (or notice of arbitration), an answer (and any counterclaims), and any defense to counterclaims.²⁵ Once the tribunal is constituted, parties are typically given the opportunity to elaborate on these initial claims and defenses in further formal written submissions, usually denominated as the "statement of claim" and the "statement of defense."²⁶ Although the form of these documents will depend on the complexity of the arbitration, it is not uncommon for these submissions to take months to prepare and to ultimately consist of hundreds of pages.²⁷ The submissions generally contain a party's recitation of the facts, legal arguments, and requests for relief and attach the written witness statements, documentary evidence, and legal authorities relied on in the statement of claim or defense.

²² Schwartz, *Reinsurance Law: An Analytic Approach* §13.05[3].

²³ See D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 409 (2d ed. 2013) ("Written pleadings are often given primary emphasis throughout the proceedings, with a short oral hearing or no hearing at all.").

²⁴ *Born* at 2249.

²⁵ See, e.g., ICC Arbitration Rules Arts. 4-5; ICDR Arbitration Rules Arts. 2-3; LCIA Arbitration Rules Arts. 1-2; UNCITRAL Arbitration Rules Arts. 3-4.

²⁶ See *Born* at 2250 (explaining that some national arbitration laws and rules, in fact, require that parties have the opportunity to present these further submissions).

²⁷ See *id.* at 2251-52 ("In some arbitrations (particularly smaller ones), written submissions will be brief, relatively informal documents submitted shortly before the evidentiary hearing; most of the parties' submissions will be oral, made at the hearing itself. In other arbitrations (typically larger disputes), written submissions will require several months to prepare, will be hundreds of pages long (not including exhibits, witness statements and expert reports, which will entail thousands of additional pages or more) and will be very comprehensive, detailed documents.").

- Procedural Rules/Discovery:

- o *Domestic Reinsurance Arbitration:* Although ARIAS has promulgated rules of procedure, parties have not generally incorporated those rules, or any other set of procedural rules, in their arbitration clauses. Therefore, the current practice is for the parties and the panel to agree on basic ground rules at the organizational meeting. For example, it is customary for there to be full document disclosure and depositions, at least of witnesses expected to testify at the hearing.²⁸ The scope of such discovery will depend upon considerations such as the amount in dispute, complexity of the issues, and availability of evidence.²⁹ In all cases, unless the arbitration agreement provides otherwise, the scope of discovery is left to the panel's discretion.³⁰
- o *International Arbitration:* Notwithstanding the formal rules that often apply, those rules do not typically contain detailed requirements for the specific procedures for

²⁸ Schwartz, *Reinsurance Law: An Analytic Approach* §13.05[6] (“Although discovery in reinsurance arbitrations may once have been rare, today it is common. Parties exchange documents and take depositions in much the way they would in court, and, just as in court, the extent of discovery that is appropriate varies with every case.”)

²⁹ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 4.1, Comment E (“No particular pattern fits all reinsurance arbitrations. In resolving disputes, the Panel should exercise its discretion and strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process.”)

³⁰ *E.S. Originals, Inc. v. Totes Isotoner Corp.*, 08 CIV. 01945 LAP, 2011 WL 4527417 (S.D.N.Y. Sept. 30, 2011) (finding that disputes concerning “discovery requests are properly decided by the appointed arbitrator, not the Court” and “any requests to limit the scope of discovery are denied without prejudice to renewal before the arbitrator”).

taking and presenting evidence in the arbitration.³¹ Instead, the procedures may be agreed by the parties or adopted by the tribunal.³² Where the tribunal must exercise its discretion to establish the procedure of the arbitration, the tribunal generally strives to create a procedure that balances a respect for the parties' due process rights (so as to not jeopardize the enforceability of any awards) and procedural efficiency to keep the proceeding moving forward.³³

³¹ See William W. Park, "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion (The 2002 Freshfields Lecture)," 19 Arb. Int'l 279, 282 (2003) *reprinted in* 19 Int'l Arb. Rep. 30 (May 2004) ("For better or for worse, rules in the first sense (prefabricated provisions) contain few rules in the second sense (canons for conduct of the proceedings), but leave the latter questions to the arbitrators.").

For example, Article 22 of the ICC Arbitration Rules provides general principles for the arbitration procedure but does not mandate specific procedures to be followed:

- 1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
- 2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.
- 3) Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- 5) The parties undertake to comply with any order made by the arbitral tribunal.

Article 19 of the LCIA Arbitration Rules and Article 20 of the ICDR Arbitration Rules similarly provide guiding principles for the conduct of the arbitration proceeding but do not mandate specific procedures to be followed.

³² Most arbitration laws affirm that parties are free to agree to the procedure of the arbitration and that, absent such agreement, arbitrators have broad discretion to establish the procedure. See, e.g., UNCITRAL Model Law on International Commercial Arbitration Art. 19 (1985 with 2006 amendments) ("(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.").

³³ William W. Park, "The Procedural Soft Law of International Arbitration," *Pervasive Problems in International Arbitration* 143-44 (2006) ("In managing cases, arbitrators face a delicate counterpoise between efficiency and fairness. They must keep the process moving, while allowing claims to be presented and defended fully enough that the parties feel they have been treated in a just fashion. Efficiency involves making the process shorter and cheaper. Fairness, however, can implicate the additional time and cost sometimes needed to provide a meaningful right to be heard.").

Depositions are rarely permitted. However, while no one is rushing to copy most aspects of American discovery practice, document disclosure has become much more common and more comprehensive in international arbitration. Still, American participants should keep in mind that many foreign parties and their counsel – especially those from civil law jurisdictions – do not share our familiarity with the disclosure process and may not share our assumptions about the need for full, voluntary disclosure of both the “good” and “bad” materials from their files.

If no other set of rules applies under the parties’ arbitration agreement, international arbitrators might refer to the IBA Rules on the Taking of Evidence in International Arbitration to prescribe the procedure for exchanging and presenting documents, factual witness testimony, and expert evidence.³⁴ These rules attempt to combine civil and common law elements.³⁵ For example, these rules provide for document disclosure. However, to ensure that the discovery requested is reasonably necessary, they require that the requesting party: (1) provide a description of the document or “narrow and specific” category of documents requested, (2) explain how the document(s) is “relevant to the case and material to its outcome,” and (3) explain why it does not have and cannot obtain the document(s) and why it believes another party has the requested document.³⁶

The IBA rules also contain provisions on the presentation of witness statements,³⁷ presentation of expert evidence,³⁸ examination of factual and expert witnesses by the parties and the tribunal,³⁹ and the tribunal’s *sua sponte* authority to order the production of documents or appearance of witnesses.⁴⁰

C. Hearing: Form/Presentation of Arguments and Evidence

³⁴ IBA Rules on the Taking of Evidence in International Arbitration (2010) *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

³⁵ 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, “Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration” 3, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (“The IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves.”) [hereinafter *Commentary on the IBA Rules*].

³⁶ IBA Rules on the Taking of Evidence in International Arbitration Art. 3(3).

³⁷ IBA Rules on the Taking of Evidence in International Arbitration Art. 4.

³⁸ IBA Rules on the Taking of Evidence in International Arbitration Art. 5.

³⁹ IBA Rules on the Taking of Evidence in International Arbitration Art. 8.

⁴⁰ *See, e.g.*, IBA Rules on the Taking of Evidence in International Arbitration Arts. 3(10), 4(10), 6.

- Hearing Procedures:

- o *Domestic Reinsurance Arbitration:* In U.S. reinsurance arbitration, the panel has the discretion to dictate the form of any interim or final hearing, including whether the presentation will involve a full blown evidentiary hearing or whether the matter requires only briefing and an oral argument (such as where the case involves a pure question of contract interpretation.) The only constraint is how much process is necessary under the circumstances to ensure that the parties have been afforded due process. Thus, it is the amount in controversy and the complexity of the issues that usually dictate the scope of the procedures.
- o *International Arbitration:* The tribunal in an international arbitration also has broad discretion to regulate the taking of evidence and presentation of arguments, either as written submissions or at an evidentiary hearing.⁴¹ Most arbitral rules require, however, that the tribunal hold a hearing if requested by the parties.⁴² It is therefore common that a tribunal will hold at least one hearing in which a party may submit its factual and legal evidence. As with reinsurance arbitrations, the nature and complexity of the issues will often dictate the form of hearing.

- The Hearing Presentation:

- o *Domestic Reinsurance Arbitration:* Evidentiary hearings in reinsurance arbitrations generally follow the pattern of U.S. litigation, with each party making an opening presentation followed by live witness testimony and cross-examination from each side. The most pronounced difference from proceedings in court is the relaxed approach to the admission of evidence. While counsel may object to hearsay and other forms of evidence that would not be admissible in court, panels rarely sustain those objections and instead trust in their ability to give appropriate weight to the proof on offer. Reinsurance panels almost always hear closing arguments, most commonly on the final day of the hearing or very soon thereafter. Post-hearing briefs and deferred closing argument may be permitted, but this is not common.

⁴¹ See Lew at 553 (explaining that arbitrators have wide discretion in taking evidence in international arbitration).

⁴² See, e.g., ICC Arbitration Rules Art. 25(6) (“The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.”); SCC Arbitration Rules Art. 27(1) (2010) (“A hearing shall be held if requested by a party, or if deemed appropriate by the Arbitral Tribunal.”); UNCITRAL Arbitrations Rules Art. 17(3) (“If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral arguments.”)

- o *International Arbitration*: As noted above, international arbitration tribunals usually receive highly detailed pre-hearing submissions, including both itemized statements of claim, defense and reply, as well as comprehensive witness statements. For that reason, they often will not permit full-blown opening statements. Rather, the parties are allowed only a limited time to present a concise summary of their arguments.⁴³ For the same reason, tribunals rarely permit substantive direct examination. Normally, before offering a witness for cross-examination, counsel will be permitted to ask the witness only whether he or she stands by the written testimony that has been submitted and to add only such additional points as may reasonably be needed to respond to subsequent submissions. Finally, international arbitration tribunals frequently ask for post-hearing briefing and often also schedule post-briefing closing argument.

As in U.S. reinsurance arbitration, strict rules of evidence usually do not apply. However, because it is more common for the tribunal chair and sometimes also the other arbitrators to be practicing or retired trial lawyers (*e.g.*, an English or Commonwealth QC), there may be greater scope for evidentiary objections based on the practical, truth-seeking principles that underlie all evidence codes.⁴⁴

- Questions from the Panel or Tribunal:

- o Questions from the panel/tribunal may be expected in both types of arbitration. The scope and timing of such questioning probably depends more on the individual arbitrators and the dynamics of the individual proceeding than anything else. The main difference is that neutral arbitrators will not typically engage in the type of adversarial questioning that is common in U.S. reinsurance arbitration. In international proceedings, arbitrator questioning usually goes to points of clarification or to extract more information on a point the arbitrator deems important.⁴⁵

- Language:

- o *Domestic Reinsurance Arbitration*: In domestic disputes, the proceedings will always take place in English.

⁴³ See *Redfern & Hunter* at 419 (explaining that, given the strict time limits allocated in a hearing, counsel typically assume that the arbitrators “have a full knowledge of the documents that have been submitted,” making only a brief opening statement necessary).

⁴⁴ See *Lew* at 553 (explaining that the procedure arbitrators set for taking evidence will often depend on the arbitrators’ nationalities, training, legal backgrounds, and experiences).

⁴⁵ See *Redfern & Hunter* at 420 (explaining that witness examination is “dictated mainly by the arbitral tribunal itself” but that the questioning is typically restricted to questions to clarify or to expand on information).

- o *International Arbitration*: In cross-border disputes, the parties may operate in different native languages. Often times, parties choose English as a neutral language. But regardless of the language of the proceeding, there will frequently be documents in a different language and witnesses who require translation. In these situations, country of origin and language capabilities may be an important consideration in arbitrator selection. It is also essential to invest in a first-rate translation service. Simultaneous translation costs more but brings huge benefits in efficiency and the flow of testimony.

D. Role of Statutory and Case Authority

- o *Domestic Reinsurance Arbitration*: It is common for reinsurance clauses to include an “honorary engagement clause,” which will typically provide:

The arbitrators and Umpire shall interpret this Agreement as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their award, they shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general purpose of the Agreement.⁴⁶

Both the direction given by that clause and the composition of most U.S. reinsurance panels counsel in favor of argument based on commercial practicality and fairness rather than technical legal rules. However, while panels need not, and often do not, follow legal precedent as such, they may well be persuaded by citation to cases that reflect industry practice and by cases that are themselves grounded in practical considerations or that can be shown to have reached a fair result on similar facts.

- o *International Arbitration*: “Honorable engagement” clauses are not common in international arbitrations, and most arbitration agreements direct the tribunal to apply the law of a specified jurisdiction. In common law proceedings, case law may be very important to the tribunal’s analysis. In civil law proceedings, expert testimony from legal scholars and scholarly commentaries will have a greater role.

E. Confidentiality

- o *Domestic Reinsurance Arbitration*: Reinsurance arbitrations are almost always confidential. The confidentiality of the proceedings is typically memorialized in an agreement executed by the panel members and the parties at the organizational meeting requiring that, with limited exceptions, such as when required by court order, or in connection with enforcement proceedings, the panel members and the

⁴⁶ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure Illustration 1.1.

parties refrain from disclosing information obtained during the course of the proceeding or the contents of any award issued by the panel.⁴⁷

- o *International Arbitration*: While arbitrators and arbitration institutions are typically required to maintain the confidentiality of an international arbitration,⁴⁸ parties are not typically bound to the same confidentiality requirements, absent an express agreement.⁴⁹ Indeed, neither the majority of national laws nor the majority of arbitration rules require parties to maintain the confidentiality of an arbitration. Consequently, a party that wishes to maintain the confidentiality of an international arbitration should seek to include a confidentiality provision into the arbitration agreement or to execute a confidentiality agreement with the other party once the dispute has arisen. As with U.S. reinsurance arbitration, even where such an agreement exists, parties are still typically allowed to disclose arbitration awards as necessary to request or resist enforcement.

F. Form of Award

- o *Domestic Reinsurance Arbitration*. Although a subject of perennial discussion, the “unreasoned” award is still most common in U.S. reinsurance arbitration. The conventional wisdom has been that a substantive, reasoned opinion is more likely to provide a broader target for challenge in court. Some surprising recent decisions have challenged that assumption,⁵⁰ and there may also be a growing feeling that parties prefer to know the panel’s reasoning. As few contracts address this issue, the choice of whether to require a reasoned award will be an agenda item for the organizational meeting. If the question has not already been decided, parties often urge one approach or the other in closing argument.

⁴⁷ ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure § 3.8 (providing a link to the ARIAS•U.S. sample confidentiality agreement).

⁴⁸ See, e.g., French Code of Civil Procedure, Art. 1479 (requiring arbitrators’ deliberations to be confidential); ICDR Arbitration Rules Art. 37(1) (“Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator.”); LCIA Arbitration Rules Art. 30.2 (“The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator’s refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal.”).

⁴⁹ See *Born* at 2783-84 (“most national courts and other authorities have held that parties are in principle free to agree to either confidential or non-confidential arbitrations and that their agreements will generally be given effect as an element of the parties’ general procedural autonomy.”). But see LCIA Arbitration Rules Art. 30.2 (“The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration . . .”)

⁵⁰ See, e.g., *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631, 633 (E.D. Pa. 2009) aff’d, 400 F. App’x 654 (3d Cir. 2010).

- *International Arbitration.* The reasoned decision is the norm in international arbitration. In fact, most arbitral rules require this,⁵¹ and it is not uncommon for tribunals to issue findings of fact and conclusions of law that run for tens and even hundreds of pages. The utility of these lengthy rulings, and the time required to negotiate and draft them, may not be self-evident to those used to the American reinsurance approach. But, knowing that the tribunal will be framing that kind of award, the parties should make every effort to provide clear, logical, and credible statements of their proposed findings and legal conclusions. The easier it is for the tribunal to adapt your submission into a convincing final award, the more inclined they will likely be to your view of the case.

III. Conclusion

As an introductory comparison, this paper has necessarily focused on differences in rules and procedures. In actual practice, this is only a starting point. Lawyers and arbitrators who have the opportunity to move from domestic to international cases must of course learn these procedural differences and to appreciate the cultural differences we have discussed. But they will also need to adjust their strategic thinking. For example, many American lawyers have never conducted a hearing cross-examination without having previously deposed the witness. How does one compensate for the lack of depositions and generally narrower disclosure? What happens if the other side opts not to cross-examination one of your fact or expert witnesses? That will likely mean the tribunal will never see that witness in the flesh. How will that affect your case? Should you be thinking of omitting cross-examination of opposing witnesses?

For arbitrators, of course, there will be not only the transition to neutrality, but also new responsibility for negotiating and drafting detailed procedural orders and potentially lengthy, reasoned awards. Hopefully, the overview provided here of how international cases are conducted will help both lawyers and arbitrators making this transition to anticipate the new demands they will face.

⁵¹ See, e.g., ICC Rules Art. 31(2); ICDR Arbitration Rules Art. 30(1); LCIA Arbitration Rules Art. 26.2; SCC Arbitration Rules Art. 36(1); UNCITRAL Arbitration Rules Art. 34(3).