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TWO NATIONS SEPARATED BY A COMMON LANGUAGE ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE

Panel

Moderator : Susie Wakefield (Shoosmiths, London)

Christine Russell (Chubb) of the US cedent, PAYCO, instructing US and UK lawyers

Jonathan Sacher (BCLP, London) – the UK solicitor appointed by PAYCO

Deirdre Johnson (Mintz, US), US attorney appointed by PAYCO

Howard Denbin – the US arbitration appointee

Mark Chudleigh (Kennedys, Bermuda) – the UK arbitration appointee



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Facts

US cedent (PAYCO) is seeking to make a recovery for its US Covid losses on two Excess of Loss Reinsurance treaties. The recoveries are due from its US reinsurer (PAYLESSCO) and London company (LONPAYLESSCO) and Lloyd's Syndicate reinsurers. There are two separate treaties with different arbitration clauses, one applying ARIAS (US) rules and the other applying ARIAS (UK) rules. The UK version of the clause applies English substantive law.



TWO NATIONS SEPARATED BY A COMMON LANGUAGE ARBITRATION IS NO EXCEPTION: A COMPARISON BETWEEN US AND UK PROCEDURE (CONT'D)

Issues for discussion by the Panel

Appointment of the arbitrator

Appointment of the Third Arbitrator/Umpire

Organisational meeting/UK timetable

Witnesses/discovery



ARIAS (UK) ARBITRATION CLAUSE

All disputes and differences arising under or in connection with this contract shall be referred to arbitration under ARIAS (UK) Arbitration Rules.

...

The Arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

...

The proper law of this contract shall be the law of England and Wales



SAMPLE “US” ARBITRATION CLAUSE WITH HONORABLE ENGAGEMENT LANGUAGE

...

All arbitrators must be disinterested active or former officials of insurance or reinsurance companies or Syndicates at Lloyd’s having at least ten (10) years of insurance or reinsurance experience and not under the present or former control or management of either party to this Agreement ...

...

Within 30 calendar days after the appointment of all arbitrators, the panel must meet with the parties. Prior to such meeting, the panel may require the parties to, respectively, submit a writing detailing the nature of the dispute, the issues, and the resolution sought. At the meeting, the panel shall determine, among other items, the scope of and time frame for submitting briefs, beginning and ending dates for discovery (including the scope of discovery), schedule for hearings, use of confidentiality agreements, and the cut-off date for ex-parte communications between the parties and their party-appointed arbitrator...

...

The panel will be relieved of all judicial formality and will not be bound by rules of procedure and evidence.



ARIAS (UK) DIRECTIONS ORDER

1. The Respondent is to serve its Defence before [date]
2. The Claimant is to serve its Reply and Defence to Counterclaim by [date]
3. Requests for disclosure are to be made by [date]
4. Any submissions in response to requests for disclosure are to be served by [date]
5. By no later than [date] the parties are to inform the Tribunal of any objections to any of the requests for disclosure in each case with a brief statement of the reasons for the objection
6. The Tribunal will endeavour to rule on any matters in dispute under paragraph 5 above by [date]



ARIAS (UK) DIRECTIONS ORDER (CONT'D)

7. Documents agreed or ordered to be disclosed are to be produced by [date]
8. The parties have liberty to call expert evidence (if so advised) as follows:
 - (a) One claims expert to address
 - (b) One underwriting expert to address
9. Signed statements of witnesses of fact are to be exchanged by [date]
10. Signed reply statements of fact are to be exchanged by [date]
11. Signed Experts reports are to be exchanged by [date]



ARIAS (UK) DIRECTIONS ORDER (CONT'D)

12. Expert meetings are to take place by [date]
13. Supplementary expert reports are to be exchanged by no later than [date]
14. Joint memoranda of experts are to be signed by no later than [date]
15. A pre trial procedural hearing be fixed by agreement with the Tribunal
16. The parties are to seek to agree a List of Issues by [date]
17. In the event of failure to agree the List of Issues the parties may apply to the Tribunal
18. Skeleton arguments and agreed hearing bundles are to be served by no later than [date]
19. The hearing is listed for 5 days commencing [date] and will take place at the International Dispute Resolution Centre at 1 Paternoster Square, St Paul's Churchyard, London



AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US))

1. Disclosures: Panel members should disclose contacts/connections with--
 - a. each other;
 - b. parties;
 - c. counsel; and
 - d. potential witnesses, if known.

Disclosures, which should be made by panel members, counsel, and parties, should include contacts of a business, professional, and personal nature. Business and professional contacts should include, when applicable, both individuals and their organizations. Discussion of continuing disclosure requirement.

2. Formal acceptance of panel or challenges.
3. Hold Harmless Agreement



AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

4. Special arrangements, if necessary or appropriate, for payment of the umpire's fees, e.g., escrow account.
5. Confidentiality
6. Ex parte communications with panel members. Possible cutoffs: (1) immediately, (2) at the end of discovery, (3) upon the filing of pre-hearing briefs, and (4) at commencement of hearing.
7. Brief position statements by counsel, if necessary. Generally, they will not be necessary if the usual pre-meeting position papers have already been filed. Their purpose is to give the panel a general understanding of substantive issues in the case to enable the panel to rule on procedural items.
8. Witnesses: anticipated number of both deposition and hearing witnesses. Need for/anticipated use of expert witnesses (if appropriate). Date for exchange of witness lists.



AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

9. Discovery

A. Types

1. Document production
2. Interrogatories, bills of particulars, or the like
3. Audit
4. Depositions
 - a. fact witnesses
 - b. experts

B. Privilege issues

1. Privilege logs
2. In-camera review

C. Schedule

10. Procedures for dealing with discovery disputes

A. Correspondence

1. between counsel
2. to panel

B. Conference calls/meetings

C. Requirements for decision

1. entire panel
2. umpire alone
3. umpire (after consultation with arbitrators)



AGENDA FOR THE ORGANIZATIONAL MEETING (ARIAS (US)) (CONT'D)

11. Collateral estoppel/res judicata issues (if appropriate)
12. Other preliminary issues (if appropriate)
13. Pre-hearing security (if appropriate)
14. Pre-hearing briefs: (1) sequential or simultaneous; (2) page limit, if any; and (3) schedule
15. Hearing dates, location, and length
16. The form of the final award: written, reasoned



DISCLOSURE SCHEDULE (ARIAS (UK))

IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF THE ARBITRATION ACT 1996

BETWEEN:

PAYCO

Claimants

-v-

LONPAYLESSCO AND LLOYD'S REINSURERS

Respondents



DI SCLOSURE SCHEDULE (ARIAS (UK)) (CONT'D)

No.	DOCUMENTS OR CATEGORY OF DOCUMENTS REQUESTED	RELEVANCE AND MATERIALITY	OBJECTIONS TO DOCUMENT REQUEST	REPLY TO OBJECTIONS TO DOCUMENT REQUEST	RESPONSE TO REPLY TO DOCUMENT REQUEST	TRIBUNAL'S RULINGS
1.	All documents generated between 1 January 2020 and January 2021 showing why there are variations between the Event Definition clause (2001) and the Event Definition clause appearing in Reinsurance Agreement ("the Reinsurance Agreement")	<p>The Respondent has pleaded that the Event Definition clause in the Reinsurance Agreement is not identical to the 2001 clause. It is relevant and material to the plea of "background matrix of facts" to determine why there are variations in the terms of the Event Definition clause appearing in the Reinsurance Agreement.</p> <p>See paragraphs 7 and 8, Points of Claim ("PoC") and paragraphs 18 and 19 Points of Defence ("PoD").</p>	<p>To the extent that these documents do not appear on the Placing Files that have been disclosed, they are unlikely to exist.</p> <p>Furthermore, the requested documents are irrelevant to the issues that the Tribunal has to determine. Evidence of the parties' pre-contractual negotiations is inadmissible as an aid to construction. The Tribunal will not be assisted by a review of these documents (even if they do exist).</p>	This request is not pursued. No ruling from the Tribunal is required.	It is noted that the request is not pursued.	



