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...March 1-4, 2009, Four Seasons, Las Vegas, NV

A Global Gathering for Senior Life Insurance and Reinsurance Executives

ReFocus 2009

March 1-4, 2009

Las Vegas, NV

**C4 – Preparing Executives for a
Reinsurance Dispute**

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Moderator**



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Preparing executives for a reinsurance arbitration

A view from the company

Paige S. Freeman

Vice President and General Counsel
Munich American Reassurance Company



Initial Considerations

- Involve In-House Counsel At The First Opportunity
 - Protect the company's position whether or not a formal dispute arises
 - Preserve privilege/work product
 - Remember electronic documents last forever!
 - Manage the process of achieving a business solution or, if necessary, handling a formal dispute

Initial Considerations

- Evaluate Your Case Thoroughly
 - Identify the strengths and weaknesses of your position – be realistic!
 - Understand key documents and key witnesses -- do not rely solely on summaries
 - Consider the position of the other party – you need an unbiased view
 - Identify any third party involvement (individuals or companies that may be asked to provide documents and/or testimony) and evaluate the impact on business relationships

Initial Considerations

- Perform A Cost/Benefit Analysis – Not Just \$!
 - Likelihood of potential outcomes
 - Time commitment
 - Impact on business relationships
- Engage a Third Party Consultant?
 - Unbiased viewpoint
 - Arbitration experience
 - Use as expert witness?

Initial Considerations

- Is a Business Solution Possible?
 - Be realistic
 - Be prepared to give something up
 - Be creative
- Consider Mediation/"Honest Broker"
- Consider Alternatives To Full-Blown Arbitration
 - Use a specialized process
 - Limit the issues, witnesses & depositions
 - Submit the case on briefs

Preparing for Arbitration

- Select Experienced Counsel
 - Experience with business
 - Experience with the process
- Choose Your Arbitrator and Umpire Candidates Wisely
 - Experience with business
 - Experience with the process

Preparing for Arbitration

- Advise Everyone Involved With The Counterparty
 - No documents related to the dispute (whether paper or electronic) should be destroyed
 - Do not “clean up” files
 - The dispute should not be discussed outside the company
 - Be careful about what is put into writing
- Give Your Team Confidence -- This Is Not A Time For “Finger Pointing”

Preparing for Arbitration

- Document Production
 - Designate one contact person in each relevant department (pricing, claims, admin, etc.) to serve as point person
 - The designated contacts should be familiar with the location of documents, applicable computer systems, and the background and history of the relationship with the counterparty
 - The contact people must be given the time and resources to work on the project

Managing Expectations

- Expect some minor defeats along the way
- It's business, not personal
 - Don't let your dislike of the opposing party, their counsel and/or their party-appointed arbitrator get in the way of making an honest assessment of your case
 - Stay focused on the issues in dispute
- Pick your battles -- contesting every issue will increase costs and may alienate the panel
- Don't automatically defer to counsel on strategic decisions



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A view from a lawyer

Gail M. Goering
Partner
Lovells LLP



Laying the groundwork

- Analyze disputes early
 - Review key documents and understand the role of key witnesses
 - Understand your opponent's position
 - Understand the financial implications
 - Identify what is a "win" and what is the most likely outcome (not necessarily the same thing)
 - Budget accordingly
 - Take care with internal communications and reporting



Laying the groundwork

- Use experienced counsel
 - Ensure your counsel understands the business and the issues
 - Use a small legal team
 - Ensure there is significant involvement of experienced lawyers

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Understanding the process

- Reinsurance disputes generally are arbitrated, not litigated, but in broad terms the process is the same
 - Opening papers
 - Document discovery
 - Depositions
 - Experts, if necessary
 - Pre-hearing/trial papers
 - Hearing/trial

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Understanding the process

- Arbitration is not necessarily faster or less expensive than litigation (although it can be)
 - Principal advantages = knowledgeable tribunal, confidentiality, procedural shortcuts, more limited discovery (usually); finality (usually)
 - Principal disadvantages = potential arbitrariness of umpire selection, limitations on third-party discovery, lack of precedential effect

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Managing the process

- Ensure that, from the outset, the case is prepared as if it is going to hearing
 - Do not wait until the last minute!
 - Ensure a focus on what is essential to the case
 - Identify the factual and business equities
 - Ensure that weak points are conceded strategically
 - If the case cannot be simplified and presented in a short period of time, perhaps it is not as strong as you think

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Managing the process

- Understand the impact on involved employees and facilitate their involvement
 - Information gathering and preparation for testimony take time and resource – be prepared
 - Electronic information presents special challenges!

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Managing the process

- Confer regularly about developments and their impact on case strategy, the budget and what constitutes a “win”
- Require candid assessments of the strengths and weaknesses of the case and the witnesses, and consider ways to mitigate weak points

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Managing the process

- Be circumspect in internal communications and reporting
- Seek opportunities for settlement
 - Post-document discovery
 - Post-fact witness depositions
 - Post-expert discovery
 - Pre-hearing

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Managing the process

- Take care in choosing party-arbitrator and umpire candidates
 - Case specifics should guide candidate selection
 - Key points to consider include:
 - Familiarity with the underlying business and issues, and any potential predisposition for/against
 - Facility with relevant financial and actuarial concepts
 - Familiarity with the arbitration process
 - Reputation for fairness
 - Reputation for decisiveness and control of the process
 - Ability to communicate effectively
 - Attention to detail
 - Availability
 - Candidly discuss the case with your proposed party-arbitrator prior to appointment and, if allowed, throughout the process

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Participating in the process – organizational meeting

- Once a panel is appointed, it usually will convene a meeting of the parties and counsel to set the procedures and schedule for the arbitration
- Your counsel may ask you to attend this organizational meeting to begin fostering a relationship with the persons who will be deciding the dispute

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Participating in the process – fact investigation

- If you have factual involvement with the dispute, understand that counsel will need to interview you as part of their initial investigation in order to understand the nature and extent of your involvement
 - More than one interview may be necessary as new information comes to light
- Your first substantive factual discussions with counsel should not be in preparation for your deposition!

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Participating in the process – depositions

- A deposition is a question and answer session under oath
 - It is NOT a conversation – it is an artificial "dialogue" between the opponent's lawyer and you
 - It usually is NOT your time to "tell your story" – your job is to answer the questions posed in a truthful and concise manner
 - No one "wins" a deposition – it is principally a fact-finding tool, BUT:
 - Good answers are helpful in proving the case
 - Imprecise answers can create difficulties in proving the case

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Participating in the process – depositions

- Because deposition answers do "matter," preparation is key
 - Review documents as instructed by counsel
 - Don't investigate on your own or discuss with persons other than counsel
 - If you feel you need to see other documents or talk with other people to prepare more fully, say so
 - Understand both sides' theories of the case, the anticipated subject matter of questions and the purpose of your testimony

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Participating in the process – depositions

– Deposition preparation, cont'd

- Become familiar with the Q&A format
 - Listen
 - Think
 - Understand the question
 - Be conscious of objections
 - Review exhibits as needed
 - Formulate a response
 - Answer
- Above all, devote the necessary time to prepare!

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Participating in the process – depositions

- At the deposition

- Make sure you understand the question and the scope of your response
- Answer the question truthfully and concisely
- "Go slow to go fast"
- If you need to read a document in its entirety or see another document in order to answer a question, say so

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Participating in the process – depositions

- At the deposition, cont'd:
 - Be polite and professional - do not argue
 - Resist frustration and the urge to explain in detail
 - What may feel like "the easy way out" seldom is
 - If you believe you need to change an answer, tell your lawyer
 - A deposition may take all day (or even more than one day), so take frequent breaks – it is difficult truly to concentrate for more than an hour at a time
- After the deposition, review your transcript and advise counsel of any changes, no matter how insignificant they might seem

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Participating in the process – the hearing

- At the hearing, both parties will present evidence to the arbitrators, usually via documents and "live" witness testimony
- The panel will evaluate the facts, consider the law and evaluate the credibility of the witnesses
- Based on the evidence, the panel will issue an award
 - Panels generally have very broad powers to fashion relief
 - The relief awarded usually is intended to be consistent with the panel's understanding of the parties' intent and/or industry custom and practice

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Participating in the process – the hearing

- Unlike at your deposition, you will have an opportunity to "tell your story" at the hearing
 - Your counsel will ask you open-ended questions designed to facilitate the telling of your story
 - The opponent's counsel will cross-examine you – questions ordinarily will be "leading" and focused on a limited number of significant topics
 - The panel usually will question you, too

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Participating in the process – the hearing

- Your hearing testimony is a "live performance" -- thorough preparation is essential
 - In some ways, your preparation will be similar to that for depositions
 - Review documents as instructed by counsel
 - Understand both sides' current theories of the case, their respective strengths and weaknesses, and the purpose of your testimony in advancing your side's theory

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Participating in the process – the hearing

- Hearing preparation, cont'd:
 - Become comfortable with how to tell your story (including strategic concession of weak points if necessary)
 - Understand the questions that your lawyer will ask you to bring out your story
 - Become familiar with the leading question format
 - Understand the areas of anticipated cross-examination and consider potential responses
 - Above all, devote the necessary time to prepare!

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Participating in the process – the hearing

- At the hearing:
 - Talk to the arbitrators, not to the lawyers
 - Tell your story in response to your counsel's questions
 - Don't try to memorize a script
 - If you omit a significant fact your counsel will ask you questions to elicit that information

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Participating in the process – the hearing

- At the hearing, cont'd:
 - On cross-examination:
 - Listen, think, then answer the question truthfully and concisely
 - Just because a question is leading, you do not necessarily have to answer "yes" or "no," but do not be evasive
 - Be polite and professional - do not argue
 - Do not "take the easy way out"
 - If the record is unclear following cross-examination, your counsel will ask you follow-up questions

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Participating in the process – the hearing

- At the hearing, cont'd:
 - Make sure you answer the arbitrators' questions plainly and directly – they are the ones deciding the case!

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Preparing Executives for a Reinsurance Dispute: A View from the Panel

Denis W. Loring, Senior Vice President – RGA Financial Markets
January 2009



Accept Your Anxiety

- **You're in unfamiliar territory.**
- **You're not in control!!**
- **Yes, you can be– almost.**

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Dissect the Dispute

- Understand the evidence: documents, depositions, fact witnesses, experts.
- What is a win for you?
- What can you live with?
- Become your opponent. How does it look from his side?
- Now what can you live with?

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Read the Rulebook

- Honorable engagement
- Customs and practices
- Relief from the law

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Choose Your Champion

- Avoid the hired gun.
- Target useful skill sets.
- Seek the communicator.
- Your arbitrator is part of the team.
Use him!

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Ponder the Principles

- Utmost good faith
- Follow the fortunes

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Select Your Strategy

- Most arbitrations are decided on the facts, not the law.
- Rescissions are difficult.
- Breach and damages are easier.

What really happened?
What's the right remedy?

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Temper Your Tactics

- Strings of cites aren't useful.
- Four corners arguments are rarely effective.
- Don't nitpick on cross.
- This isn't a courtroom.

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Win the War

- Arbitrators are experienced.
Trust us.
- Tell us a story, and lead us
to the ending.
- Always be a professional.

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and never forget...

**You, the business person,
must control the process...**



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...not the lawyers!



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