Umpire Roundtable: Deliberation Logistics

Moderated by Catherine Isely

Isely: I've gathered four ARIAS•U.S. certified professionals to talk about the logistics of arbitration deliberation: Katherine Billingham, Ann Field, Andrew Maneval, and Dick White. In total, they've served as umpire in, at last count, 137 arbitrations, and as arbitrators in another 200. We'll learn how these experienced panelists approach the nuts and bolts of deliberating when they're sitting in the middle seat—in short, what happens once the parties rest and the panel takes up its work.

Katherine, do you have a regular approach in conducting deliberations when you sit as umpire, or do those deliberations unfold differently based on your fellow panel members and their style?

Billingham: My default approach is to start out by approaching it issue by issue. Depending on what issues are before the panel will dictate the priority of those issues. Generally speaking, I might tackle the easiest issues first and ask each of the party-appointed arbitrators to express his or her views on a given issue, and try to identify agreements or commonalities of insights and capitalize on them. I might then summarize where the differences are—and hopefully we have more consensus than difference on a point—before I explain my own opinions.

Field: My approach is very similar. By the time you're in a deliberation, there's a culture and you already know how the team works together. You can develop your strategy based upon how your party arbitrators work successfully together or on how you will all work best as a three-person team.

I don't know that I have any set approach. I do consider the dynamics of the team, lay out some principles and make sure that I'm hearing from both sides. I will set the guidelines and what the expectations are, and make sure I apply them. I'll check in with the team to make sure they're comfortable with that approach, and I'll ask if anybody has different thoughts for proceeding or am I missing anything that we should consider.

Once we have an agreement on how we're going to tackle the issues, then we move forward. I treat it really as I would treat most business meetings: being very organized, having an agenda, having the respect and the buy-in of the team. I think that's an important part of being an umpire—keeping it professional, keeping it moving forward in a professional, healthy way. So, the basic guidelines are respecting one another, coming prepared, respecting each other's time, respecting each other's thought processes, keeping your emotions in check. It's about being appropriate and being professional.

Maneval: I like what I've heard so far. There's also a question that exists about when the deliberations should be scheduled and undertaken. There's obviously the question of whether the deliberations best follow immediately on the conclusion of the evidentiary hearing, whether there should be some period for post-hearing briefing, and whether there should be some period of reflection. There are a lot of different views that different arbitrators take to those questions.

Obviously, you have a tension between the risk of forgetting evidence that might be most pertinent the longer you wait, versus the danger of not giving the matter sufficient reflection or consideration if you immediately plunge right into the deliberations. My own preference is to try and get right into deliberations, unless a

case is so complicated or there are extrinsic strands of evidence or argument that ought to be considered, whether a briefing would be requested or not, that might warrant putting deliberations off for a period of time. I think the best idea is that these questions will have been addressed before the hearing even starts, or certainly before it concludes, so that the panel understands how it's approaching the way in which deliberations will be handled.

Isely: Section 5.3 of the ARIAS Practical Guide says, in many instances, it's best for the panel to commence and, if possible, conclude deliberations immediately after the parties have presented the case at the hearing. I hear you saying that in many instances that's your preference, but I think you make a solid argument, too, for a period of reflection, particularly when the case is more complicated. Dick, how do you like to start deliberations, and when do you like to start?

White: I normally like to start with a statement from me. Remember, we're doing this right after counsel has concluded with closing arguments, so I would have the benefit of that, and I would summarize what the dispute is and the various issues in the dispute. Oftentimes, in these closing arguments and even the final days of the hearing, some disputes kind of go away. Even though counsel may not remove them, as a practical matter, they've been essentially resolved. So I'll summarize that to get a sense of my co-panelists' views on the matters still remaining so we can dispense with them easily. That tends to bring in the party arbitrators to clarify my lack of clarity. They get to participate, and we get the discussion going just as a result of that process.

As to Andrew's point, I am a strong advocate for deliberations directly after the hearing, such that when we're planning during the hearing, counsel has to adjust as the week goes on. But if anybody has scheduling problems, I encourage everyone to give a lot of notice early so we don't run out of time for deliberations. Not that they have to be the final deliberations, but at least one pass through everything so we kind of understand where people are. I really abhor running out of the room to trains or planes without having some kind of discussion among the panel.

Field: Personally, I agree with Dick and Andrew, in that I still prefer to have as much of the deliberations at the conclusion of the hearing. I do think it's important while it's fresh. But if you need to postpone part of it or have deliberations at a later date, my preference is still to pick up the phone and have that dialogue. I think there are some arbitrators that prefer to send things in writing. It's my preference to do it orally. The parties have presented quite a bit in writing. Our job is to really be discussing that and vetting that together as a team.

Billingham: I also prefer to follow up by phone. I think it's just more efficient, and also you can get a better feel for where other people are coming from and better appreciate their viewpoints when you can hear it and there's more immediate give-and-take.

Isely: You've discussed how an umpire can encourage fruitful discussions in deliberations and set the stage for those being professional and civil. But sometimes, I imagine, deliberations can become more heated. How do you decide when and how to bring those deliberations to a close?

Maneval: Like everything, the question about deliberations continuing or how they would continue is contextual; it's very different depending on the circumstances. Again, I think to some extent it might relate to the complexity of the case. I've found, in any number of cases, that there was value in the panel members going off thinking about things a little more, and even potentially submitting some written thoughts to give some concrete expression to the points that have come in.

One thing that I think of as a fixed principle is that a panel wants time right after the hearing to get together, even if it's just to schedule what happens next. We've all said, ideally, there's deliberation that starts off right away. But you always want to make sure that the panel has gotten together to address what the process will be.

The question, then, is how does one draw deliberations to a conclusion, how does one end it, and so forth. That is, of course, also pertinent to the particular case and the degree of complexity and the feelings of the party-appointed arbitrators. I never like to cut off the party-appointed arbitrators' input until I think it is either purely repetitive—just covering ground that's been gone over before—or, in rare cases (and, in my case, totally absent), harassing or uncivil. But what panels want to do is give as much opportunity for input from both panel members as possible, because that's what the parties were bargaining for when they went with our system of arbitration.

Field: I agree with Andrew, but also I will recap my understanding of each side's position and give them the confidence that I understand the issues, I understand the arguments, I understand their positions, their views on the issues. This also allows me to make sure that I close that repetitive loop as well, where I feel I do have enough information to make that final decision. My colleagues will have that confidence

from my recap.

White: It may be somewhat controversial, but when you get to this point where it's kind of like loggerheads, I would normally raise the suggestion that, say, the minority, be that me or someone else, seriously consider a dissent here so that it's clear what this dispute is. I find that this tends to focus the majority's judgment, as well as the minority's, because now everybody has to document in writing why they think this is the way to run the railroad, as it were. Sometimes when you have to do that, it kind of clarifies things for the panel, and maybe there isn't an insuperable problem.

Where strong disagreement persists, I prefer the dissenting party to write why. When the hearing ends, the parties want to hear from their arbitrators—"how did I do, did I present our case effectively," and all that—and the panel has this kind of unwritten rule that one can say certain things and can't say others. And that's an almost impossible stance to maintain, because these discussions include voice inflection and often body language and so on. This way, if the dissenting arbitrator writes why they disagree, there is no worry about conversation. You've laid out exactly what the problem was. I do think the process is better off when the parties can see as much as possible, consistent with the ARIAS Code of Conduct, what went on in deliberations.

Field: On your idea of inviting folks to do a dissent, I once had an interesting situation where I felt the dissent was inappropriate and I had to provide a lot of guidance as the umpire. I think you're certainly entitled to do a dissent, but when it's including things that shouldn't necessarily be in a dissent, you can have another unique situation transpire.

Maneval: I was in a case as a party-appointed arbitrator where the other party-appointed arbitrator filed a dissent that disclosed deliberations, and intended to do so. That case ended up going to the U.S. Circuit Court eventually. The award was upheld, but there can be the danger of mischief in dissents.

Having said that, in my view, anytime there's a reasoned award I can't imagine being a dissenter and not writing a reasoned dissent. I know you don't have to as a dissenter; you can just say, "I dissent." But I would want to provide a dissenting, reasoned opinion, which was mentioned before, if it would help the process and the parties' understanding of what happened, and so forth, and provide context for what was important to the panel and why. So I would always expect a dissent that's reasoned when we have a reasoned majority opinion.

I also think it's important for the panel to understand that all matters are non-final until whatever drafts are contemplated have been completed. Recently, I was an umpire in a case that I thought was a very close case; it was an all-or-nothing kind of case. In my mind, it was sort of a 55-45 case, and then I saw the dissent and it made it a lot harder for me. It turned it into a 51-49 case. There were issues for me as an umpire to think about more fully. So, you don't want to miss the opportunity to see things expressed perhaps more clearly and forcefully in a dissent.

Isely: Comments to Canon 6 of the ARIAS Code of Conduct speak to these types of issues, including what can and can't be included. Now we want you to dish. Tell us your pet peeves and tell us particular qualities that you appreciate as deliberations are going on.

Billingham: I will say that I really appreciate when counsel is efficient and gets to the point, with not a lot of extraneous information or evidence that the panel has to consider. Certainly we want to give each party the full opportunity to present all evidence, but efficiency is one of the key things that helps the entire panel in processing the information, prioritizing it, and coming to an efficient and fair decision. The flip side of that is grandstanding; an arbitration process is probably not best suited for that sort of thing. But efficiency is certainly at the top of my list.

Isely: Dick, is there a practice that, during deliberations, you find frustrating or inefficient?

White: It's going to be surprising: My answer is no. Some of the people on this call have heard me say this before, but for the arbitrations I've been in, I've never served with a "brother-in-law." I use that as a term for someone who's hostage, who's in the tank for one party or the other. So the umpires and the party arbitrators with whom I've served, though often very aggressive and so on, that's what I expect. I don't find it offensive at all. In my own experience, I've not come across any behavior that I thought was untoward.

The one thing I value the most—which is not necessarily the fault of the arbitrator if they don't have it, but if they do it's extremely helpful to me, especially if I'm the umpire—is knowledge of the business at the time these contracts were entered into or these claims were settled, to know what's happening on the ground firsthand. That's very helpful. As the others here know, many of these disputes are in the nature of "custom and usage" and so on, and the issue(s) are not always clear. Lawyers will argue—Catherine, apologies to you—lawyers will argue, oh, it's

absolutely clear that's what the contract provides, but we know it's not that clear. So other arbitrators that have a sense of what's happening in the market at that time, I find helpful.

Maneval: The thing maybe I like best is when the party-appointed arbitrators are able, thoughtfully, to tie the factual evidence—whether it be testimonial or documentary—to the issues and the possible outcomes, to really have clarity about the record and the significance of evidence that had been developed in the record to what we're trying to decide.

That's complementary to Dick's point because, necessarily, the idea of bringing a general knowledge of the industry, especially when it's potentially decades old, is outside the record, or it can be. We've debated these kinds of things at ARIAS conferences, but I think everyone generally agrees that it's good to have the benefit that Dick referred to. That's part of the reason for picking arbitration. Yet, lawyers and people who are resolving disputes like to look at the record and say definitively what was proven and what wasn't. So, I think the idea of being able to combine both a careful understanding and appreciation of what's in the record with the business knowledge to know what might not have been said but infused everything that was said, is a quality that party-appointed arbitrators can bring in, and the umpire, too.

In terms of things that I don't like—maybe to some extent because of my experience as a litigating attorney a long, long time ago, like Dick, I don't mind the rough-and-tumble—people are going to feel strongly about these issues. But what I don't like is, if there's sort of an emerging clarity in the majority viewpoint in deliberations, a lot of times the party-appointed arbitrator whose viewpoint is faring less well will start to retreat and set up new efforts to pursue some type of unwarranted compromise. I think that, while the reinsurance arbitration process is way better than it used to be in this respect, compromises are fine where they are appropriate, but they're bad when they're not principle-based. I never like it when the side that's not doing well decides to take aim at achieving some lesser and, ultimately, inappropriate outcome.

Field: I would say that the qualities that I do appreciate in my fellow panel members during deliberations help the process go more smoothly—things like collaboration. Being prepared is a big one for me. I look to everybody on the panel to be prepared and be thoughtful and respectful. If you have those key elements, you can have very successful deliberations. Having industry experience in the room, it's what makes a panel really tick well. Whether it's the unconscious experience or conscious experience, it does help the discussions, and I don't see it as being an issue necessarily having anything that's outside of the record, but we do bring our experience to that room.

I would say it's nice to hear my colleagues generally have had positive experiences in their arbitration panels to date. I'd say, overall, I have as well. I'm sure people are going to be more persuasive than others or more aggressive than others, and you deal with that and you deal with it professionally. My hope is that every umpire is doing that. I would say, for me, the behavior that I find disappointing is when I see a panel member who just pushes every issue and does not really listen or try to build some consensus somewhere. There has to be some point or issue that they can agree on, or you start losing credibility for that particular arbitrator. For me, that's a bit of a pet peeve. It doesn't always bene-

"... [C]ompromises are fine where they are appropriate, but they're bad when they're not principle-based. I never like it when the side that's not doing well decides to take aim at achieving some lesser and, ultimately, inappropriate outcome."
—Andrew Maneval

fit that arbitrator, and they need to think about that and how they are approaching every situation, because you tend to lose credibility.

Billingham: Andrew had said, and I agree, that parties have strong feelings about their case. By "grandstanding," I'm not referring to the impassioned arguments of counsel—I think that's great and can even be useful. What I'm referring to is undignified conduct, or casting aspersions on the other side. I haven't seen that very often, but it has happened.

I would dovetail on my colleagues' comments about having experienced people on the panel and, when it adds value to the case, having experts give testimony. But particularly having an experienced panel that understands the history of the issues, the history of the treaties, and has a broader appreciation for the context in which the issues might have arisen.

This roundtable discussion was reported by Aline Akelis, Winter Reporting, and later edited for clarity and length.

Katherine Billingham has 35 years of reinsurance and insurance experience as an attorney, arbitrator and mediator. She currently serves as vice president and general counsel for Scottish Re, a life reinsurance company. She is an ARIAS-Certified Arbitrator and Mediator and a certified neutral with the American Arbitration Association.

Ann L. Field is a senior vice president and the executive director of client services in North America with Willis Re, Inc. She is an ARIAS-Certified Arbitrator and a licensed attorney with more than 23 years of significant experience in reinsurance and insurance coverage issues, arbitration, and litigation. She has served as an arbitrator or umpire on more than 35 insurance and reinsurance **arbitrations.**

Andrew Maneval is president of Chesham Consulting, LLC, providing arbitration and mediation services. He is an ARIAS-Certified Arbitrator and Umpire, an AIRROC- and FINRA-certified arbitrator, and a New Hampshire court mediator. He previously served as president, COO, and board chair of First State Insurance Company and New England Reinsurance Corp. and was responsible for run-off operations at the Hartford Financial Services Group.

Dick White is the deputy liquidator of Integrity Insurance Company in Paramus, New Jersey, and has an extensive background in the financial and insurance communities. During his professional career, his responsibilities have included finance, accounting, insurance, reinsurance billing and collection, arbitrations, and forensic accounting. He is a certified public accountant and has been an adjunct faculty member at several universities.

Catherine Isely is a partner at Butler Rubin Saltarelli & Boyd LLP, where she litigates complex commercial disputes on behalf of local, national, and global businesses and represents clients in complex mediations and high-stakes commercial arbitrations. Much of her work involves mass torts, product or premises liability actions, workers' compensation claims, or environmental property damage disputes.