

Strike and Rank – An Alternative to the Strike and Flip Umpire Selection Process

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Umpire selection is one of the most important aspects of a reinsurance (or any other) arbitration because it can have a significant impact on the outcome of your case. Traditionally, parties have utilized the "strike and flip" method of umpire selection where the parties nominate a specified number of candidates, strike all but one of the other side's candidates and then select the umpire using a "coin flip" – which can also be based on the closing number of the Dow Jones Industrial Average – between the remaining two. While the simplicity of the strike and flip method makes it easy to use, some industry professionals have been critical of the fact that something as important as umpire selection effectively comes down to the "flip of a coin." For those critics, an umpire selection process utilizing a ranking system offers an alternative.

With a ranking system, the parties (or a neutral third party) come up with a certain number of candidates (usually totaling between 8 and 12). An umpire questionnaire may then be sent to each of the candidates so the parties can be better informed prior to the striking process. The parties may then strike one or more candidates to come up with the final list. From there, the parties agree on a date and time to "rank" the remaining candidates (from 1 to the number of umpire candidates). The candidate with the lowest combined total is selected as the umpire.

To some, the "strike and rank" system is advantageous as the "strike" allows each party to remove the candidates they view as the least desirable, while the "rank" provides some level of control over who will be selected as umpire (*i.e.*, each party can maximize the likelihood of its preferred candidates being selected by assigning them a lower number). However, in order to make the most of the strike and rank system, there are a few issues the parties need to keep in mind.

Be Specific

Most importantly, the parties need to make the umpire selection agreement specific. First, the parties need to agree whether the umpire candidates will be chosen by the parties or by a neutral organization (*e.g.*, ARIAS, AAA etc.). Second, the parties need to agree on whether the candidates will be asked to fill out an umpire questionnaire and, if so, the form of the questionnaire. And last, but perhaps most important, the parties need to agree on the specific parameters for the selection of an umpire. It is not enough, for example, to just agree that the candidate with the lowest total will be selected as umpire. Rather, the agreement should set forth specific procedures for replacing a candidate if one drops out or is not qualified, or if there is a tie between candidates. And these issues all need to be worked out before the umpire candidates are selected.

A clear and specific agreement on tiebreakers is particularly important because the ranking system can often lead to a tie between two or more candidates and it is difficult to just "rank the candidates again" because the parties will already have had previewed the parties' preferences as to each remaining candidate. To alleviate this issue, it is best to agree on tiebreakers that cover a variety of outcomes. While there are a number of potential tiebreakers, one simple way is to eliminate the candidate(s) with the highest single number ranking by either party. For example, assume there are a total of 8 candidates, and there is a three-way tie among the candidates with the lowest total combined score of 6. Under this example, candidates ranked 1 and 5 (5 being the highest) and 2 and 4 (4 being the second highest) would be eliminated, and the candidate ranked 3 and 3 would be selected as umpire. Another variation of this tiebreaker would be to only eliminate the candidate with the highest single number (in the above example the candidate ranked 1 and

5) and then do a "flip" (typically based on the close of the Dow Jones Industrial Average on an agreed date) between the remaining two candidates. As one would expect, the ways in which the parties can agree to break ties are virtually limitless but the important thing to keep in mind is not necessarily "how" ties will be broken, but rather that a tiebreaker process is put in place before the ranking process goes forward.

Ranking Strategy

Unlike selecting an umpire via a "strike and flip" (where you just strike the least preferred candidates), the ranking process entails a great deal more strategy. While it may at first seem intuitive to simply rank your top candidates with the lowest numbers (and your favorite candidate with the number 1), that may not always be the best option. At times it may be in your best interest to rank a less favored candidate in the top half of the rankings (*i.e.*, above one of your favored candidates). If, for example, there is a candidate who is generally acceptable but not in your top half of preferred candidates, you could rank that individual lower to maximize the likelihood of the selection of an umpire who is acceptable. Not surprisingly, there are an almost infinite number of ranking strategies and determining which to use is very fact dependent.

THE BOTTOM LINE

Unlike the traditional strike and flip process whereby a coin flip selects the umpire, the ranking process can provide the parties with potential strategies for maximizing the likelihood that a preferred candidate is selected and minimizing the likelihood that a less preferred candidate is selected. And while the ranking process can be an effective one, parties should avoid potential issues by: (1) agreeing to specific procedures for the selection of the umpire (including what to do in the case of ties and replacement candidates) upfront; and (2) utilizing an informed ranking strategy that takes into account all the facts of the specific situation.

If you have questions or would like additional information, please contact Justin K. Fortescue (fortescuej@whiteandwilliams.com; 215.864.6823) or another member of our Reinsurance Group.

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