



ARIAS•U.S.

**Practical Guide to
Reinsurance
Arbitration
Procedure
2004**



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Reinsurance

Arbitration

Procedure

2004

REVISED EDITION



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INTRODUCTION

ARIAS•U.S., a not-for-profit corporation existing principally as an educational society, is dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS•U.S. trains knowledgeable and reputable professionals to serve as Panel members in industry arbitrations. The ARIAS•U.S. Board of Directors certifies as arbitrators individual members who satisfy established qualification standards.

For arbitration to remain effective to resolve industry disputes, parties, their counsel, and Panel members must be familiar with arbitration procedure.

ARIAS•U.S. has created this **Practical Guide to Reinsurance Arbitration Procedure (2004 Revised Edition)**, an update of its 1998 Guide, as a reference for arbitrators, insurance and reinsurance professionals, and attorneys involved in reinsurance arbitrations. The Guide draws principally from the experience and expertise of the ARIAS•U.S. membership and offers sample forms and practices for use in reinsurance arbitrations. The purpose of this Guide is to promote fairness, effectiveness, and efficiency in reinsurance arbitrations, *i.e.* the integrity of the process.

The practices in this Guide are not intended to supersede any express contractual agreements between the parties. To resolve questions about arbitration practice or procedure, one must always consult the arbitration clause in the parties' agreement first. This Guide is intended to provide a reference when (a) as often occurs, the arbitration clause provides little or no express or specific guidance to the arbitration's governing procedures, or (b) the parties wish to enhance or improve those procedures by mutual agreement. Of course, all arbitration practices and procedures are subject to and must be considered in light of any applicable law.

Extensive information about ARIAS•U.S., including this Practical Guide and its sample forms, is available online at www.arias-us.org.

CHAPTER 1: ARBITRATION INITIATION

Before initiating arbitration, parties and their counsel should analyze the arbitration clause in the relevant contract(s). Clauses range from a short paragraph to several pages. No matter how detailed, no clause can possibly anticipate every procedural contingency that may arise in an arbitrated dispute.

The following arbitration clause (which contains many typical and some atypical provisions) is offered not as a “model clause,” but as a framework for discussion and illustration of important issues that commonly arise in arbitration.

1.1 ILLUSTRATIVE ARBITRATION CLAUSE:

Any dispute or claim arising out of or relating to this Agreement, including its formation and validity, shall be referred to arbitration. Arbitration shall be initiated by the delivery, by mail, facsimile, or other reliable means, of a written demand for arbitration by one party to the other. The arbitration shall be held in _____ or such other place as the parties may mutually agree.

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.

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.

The decision of a majority of the Arbitration Panel shall be final and binding, except to the extent otherwise provided in the Federal Arbitration Act. The Arbitration Panel shall render its award in writing. Judgment upon the award may be entered in any court having jurisdiction, pursuant to the Federal Arbitration Act. Unless the Arbitration Panel orders otherwise, each party shall pay: (1) the fees and expenses of its own arbitrator; and (2) an equal share of the fees and expenses of the Umpire and of the other expenses of the arbitration.

COMMENT A:

Scope of Arbitrable Matters. The illustrative arbitration clause defines arbitrable matters as “any dispute or claim arising out of or relating to this Agreement, including its formation or validity.” This language, based on the American Arbitration Association’s suggested model, is intended to grant arbitrators the broadest authority to hear disputes that could arise under or with respect to the contract, including disputes relating to the formation and validity of the arbitration clause.

COMMENT B:

Applicable Arbitration Law. The illustrative clause above expressly invokes the FAA to govern matters relating to either the enforcement of the arbitration agreement (e.g., proceedings to compel arbitration), or the arbitration award (e.g., proceedings to confirm or vacate the award). Some arbitration clauses invoke a certain state’s arbitration law, rather than the FAA. Many arbitration clauses, however, do not contain any such choice of arbitration law provision, meaning that the applicable arbitration law would be based on the facts of the case. When the reinsurance contract involves a maritime transaction or an interstate commercial transaction, the FAA typically would apply. If the parties are located in different countries, the FAA’s international counterparts (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) or the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”)) may apply. If the reinsurance contract involves wholly intrastate transactions, or if the applicable state law addresses an issue in a way that does not conflict with the FAA, state law may apply. In addition, in some circumstances, state law may preempt and apply in lieu of the FAA. Parties and Panels should be aware of the potentially applicable arbitration law as they proceed through the arbitration.

COMMENT C:

Location of the Arbitration. Many arbitration clauses set the hearing site at a specific location (usually the ceding company’s domicile). The designated location, however, may not be the most convenient. The sample clause expressly permits the parties to agree upon a different location, which is often how venue issues are resolved in practice. If the contract is silent and the parties cannot agree on a venue, the Panel should designate the site, based on the circumstances of the arbitration. Parties and Panel members should be aware, however, that the arbitration location may affect the Panel’s jurisdiction and/or the applicability of default statutory provisions regarding Panel member neutrality or umpire appointment procedures. See, e.g., C.G.S.A. §§ 50-a-101 *et seq.* (Connecticut’s version of the UNCITRAL rules, which permit an arbitrator challenge for “justifiable doubts as to his partiality and independence,” apply if the hearing is to be held in Connecticut); Cal. Code of Civil Procedure § 1297.111 *et seq.* (setting forth umpire selection procedures applicable absent the parties’ agreement on a procedure).

COMMENT D:

Subpoena Power. Under the FAA, the Panel can subpoena a witness to attend the hearing, but the subpoena's reach only equals the reach of a federal court in the same jurisdiction (Panels may have broader subpoena power to compel discovery). Therefore, before designating a hearing location, the parties and the Panel should consider whether any witnesses and/or other evidence must be subpoenaed for the hearing. If so, a Panel may also consider whether it is appropriate to hear evidence in a jurisdiction in which a particular witness can be subpoenaed.

COMMENT E:

Panel Member Neutrality. Many arbitration clauses expressly require the umpire to be neutral, but are silent on whether the arbitrators must also be neutral. The impact of such textual distinctions, and generally-accepted and best practices with respect to Panel member neutrality, are discussed below in Chapter 2 and in the ARIAS•U.S. Guidelines for Arbitrator Conduct.

COMMENT F:

Provision for Umpire Appointment. The sample clause provides that if the arbitrators fail to agree promptly upon an umpire, the ARIAS•U.S. Umpire Selection Procedure is the default umpire selection mechanism. Various alternative default mechanisms are discussed below in Chapter 2. Many practitioners recommend that the arbitration clause include a default mechanism designed to produce a truly neutral umpire. Once a dispute arises, it may be too late to agree upon such a default mechanism; and if the contract provides such a mechanism, there is less incentive (than under a "lot selection" clause, for example) for the parties to nominate umpires with known or presumed predispositions.

COMMENT G:

Consolidation of Arbitrations. Some arbitration clauses expressly permit parties to consolidate related issues between the parties into one arbitration, and/or consolidate several parties in the one arbitration. For example:

If more than one Reinsurer is involved in the same dispute, all such Reinsurers shall constitute and act as one party for purposes of the arbitration, and communications as provided herein shall be made by the Company to each of the Reinsurers constituting the one party; provided, however, that nothing herein shall impair the rights of such Reinsurers to assert several, rather than joint, defenses or claims, nor be construed to change the liability of the Reinsurers under the terms of this Agreement from several to joint.

If the arbitration clause lacks specific consolidation guidelines, the parties may be unable to resolve consolidation issues. For example, three or more parties may wish to arbitrate related issues in a single arbitration, but the relevant arbitration clauses may provide for a three-member Panel chosen by only two parties.

COMMENT H:

Form and Enforcement of Decision. The illustrative arbitration clause above provides that “[j]udgment on the award may be entered in any court having jurisdiction.” This provision paraphrases the language of the FAA, 9 U.S.C. § 9, which authorizes certain courts to confirm an award when “the parties in their agreement have agreed that a judgment of the court shall be entered upon the award.”

COMMENT I:

ARIAS•U.S. Certification. The ARIAS•U.S. Board of Directors certifies as arbitrators certain individual ARIAS•U.S. members who qualify under criteria and procedures established by the ARIAS•U.S. membership.

COMMENT J:

Authority to Resolve Discovery Disputes. As in the illustrative clause above, arbitration clauses often do not expressly address the Panel’s authority to resolve discovery disputes. It is commonly recognized, however, that arbitration Panels have the authority to resolve procedural disputes, including the scope and nature of permissible discovery. See § 3.12 *infra* (which discusses procedures to resolve discovery disputes in a pending arbitration).

COMMENT K:

Specific Procedures. If the parties intend the arbitration clause to include procedures governing the arbitration, they should consider specifically incorporating the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999). These Procedures, the product of a broadly representative Task Force, provide specific rules to govern an arbitration.

1.2 ARBITRATION DEMAND:

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.

COMMENT A:

Time Limits. Many arbitration clauses require the recipient of an arbitration demand to appoint an arbitrator within a specified time limit (usually 30, 60 or 90 days). Some courts have construed such time limits strictly. Closely examine the arbitration clause’s time deadlines to determine whether the time period starts to run upon “receipt” or “sending” of the notice in question. Absent specific contractual guidance, the respondent should consider clarifying the deadline with the claimant.

COMMENT B:

Naming an Arbitrator in the Arbitration Demand. Many arbitration clauses require the claimant to identify its arbitrator in the demand, or within a specified time after the respondent asks it to do so. Some arbitration clauses, however, do not specify when the claimant must name an arbitrator. To avoid ambiguity, the claimant should either name an arbitrator in its demand, or agree with the respondent that each party will name an arbitrator within a specified period after the notice of arbitration is sent. It is also good practice to enclose a copy of the arbitrator's curriculum vitae with the notice of appointment and to request one for the other arbitrator.

COMMENT C:

Service of the Demand. It is good practice for the claimant to serve the demand by first-class mail and by other reliable means, such as facsimile or overnight mail. Contractual requirements for service of the demand, if any, should be strictly followed. For example, if the contract requires that formal communications be through a broker, that requirement should be observed in serving arbitration demands. Alternative means (such as a courtesy copy to the respondent's counsel, if known) should be considered as well.

COMMENT D:

Identification of the Issues. The demand should identify the issues to be arbitrated with sufficient detail to enable the respondent to defend against them. If the claimant seeks monetary relief, its demand should specify the exact amount sought, to the extent that amount is known at the time the demand is issued.

COMMENT E:

Deadlines. The arbitration clause may set other deadlines, including when the case must be submitted to the Panel or when the Panel must issue its decision. One common clause requires the parties to submit their briefs to the Panel within 60 days of the umpire's appointment. Parties commonly waive this requirement in practice. Recognizing that strict deadlines may not suit all disputes under a reinsurance agreement, the parties may choose to vest the Panel with discretion over all procedural matters, including deadlines.

COMMENT F:

Expedited Arbitrations. Arbitration offers parties the opportunity for a faster, cheaper alternative to litigation. Some disputes, however, may not justify the usual arbitration costs. If the parties decide that the issues and amount in controversy warrant an expedited approach, they should consider agreeing to use a single jointly-appointed arbitrator to decide the dispute and/or to ask a fully-constituted Panel to adopt expedited procedures. Chapter 6 of this Practical Guide outlines Streamlined Arbitration Procedures.

1.3 RESPONSE TO THE ARBITRATION DEMAND:

The respondent should submit a formal written answer to the demand within the appropriate time period by (1) designating an arbitrator and enclosing a copy of the arbitrator's curriculum vitae; and (2) specifically identifying any counterclaims.

COMMENT A:

Strict Deadlines. Parties who violate express deadlines in the arbitration clause risk losing their right to appoint an arbitrator. See, e.g., *Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1993) (party waived its right to appoint an arbitrator when it missed the contractual 30-day deadline due to clerical error).

COMMENT B:

The specificity of the response depends in part on the specificity of the demand. If the issues to be arbitrated are not well defined in either the demand and response letter or the pre-Organizational Meeting Position Statements, this problem should be addressed at the Organizational Meeting.

CHAPTER 2: PANEL SELECTION

Reinsurance agreements often require parties to resolve disputes by a Panel of two arbitrators and a third “umpire” appointed with both arbitrators’ input. The establishment of a knowledgeable and experienced Panel is the single most important factor in ensuring the smooth, fair, and efficient resolution of privately arbitrated disputes. This chapter provides an overview of contract terms concerning Panel selection and discusses recommended best practices for Panel selection. In addition, parties are advised to be sensitive to the umpire selection and arbitrator qualification rules in certain jurisdictions, as those rules may apply if the arbitration clause and the Federal Arbitration Act are silent on a given point. See, e.g., C.G.S.A. §§ 50-a-101 *et seq.* (Connecticut’s version of UNCITRAL, establishing guidelines for umpire selection absent party agreement on a procedure, and providing that a party may challenge an arbitrator for lack of “partiality and independence”); Cal. Code of Civil Procedure § 1297.111 *et seq.* (setting forth umpire selection procedures if the parties have not agreed on a procedure).

2.1 SAMPLE ARBITRATION CLAUSE LANGUAGE FOR PANEL FORMATION:

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 other party may appoint an arbitrator for it. Should the two arbitrators fail to choose an Umpire within thirty (30) days of the appointment of the second arbitrator, each arbitrator shall propose three names, of whom the other shall strike two, and the decision shall be made from the remaining two by drawing lots. The arbitrators and Umpire shall be either present or former executives or officers of insurance or reinsurance companies, or arbitrators certified by ARIAS•U.S. The arbitrators and the Umpire shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.

COMMENT A:

The sample clause incorporates a common procedure to appoint the Panel: each party selects an arbitrator, and the two arbitrators then select an umpire. Key provisions are the time limits to select the arbitrators and umpire, and the procedure to resolve deadlocks between umpire candidates. Some clauses do not expressly provide for a method to appoint an umpire if the arbitrators do not agree on an umpire. In those instances, the default mechanism would be to petition a court of competent jurisdiction to appoint the umpire.

COMMENT B:

Since the umpire may decide the arbitration, the deadlock resolution mechanism is critical. The sample incorporates the common “lot selection” method, which has the advantage of simplicity but the disadvantage that parties may propose a slate of prospective umpires with a known or highly predictable predisposition. If this occurs, the court system may be the parties’ only recourse, although as a practical matter, most courts have difficulty evaluating claims of “predisposition.” Absent tangible evidence of bias, which is rare, a court is likely to remit the parties to their contractual “lot selection” remedy. For these reasons, many practitioners dislike the lot selection method; some suggested alternatives appear in paragraph 2.2, below.

COMMENT C:

When parties or their counsel communicate with prospective arbitrators, they should disclose the fact (but not the content) of such communications to the other party(ies) and the other Panel members once the Panel is constituted. Parties should not ask candidates how they will rule on the specific issue(s) before the Panel. Parties also should not provide arbitrator candidates with any documents that the parties do not intend (e.g., for reasons of privilege) to produce in discovery or enter into evidence in the arbitration. See ARIAS•U.S. Guidelines for Arbitrator Conduct, Canon V, Comment 2.

COMMENT D:

To the extent practical or feasible, any communications with prospective umpire candidates (e.g., to determine their availability to serve as umpire) should be made either jointly by counsel for both parties or jointly by both arbitrators.

2.2 ALTERNATIVES FOR UMPIRE SELECTION:

Means of resolving a deadlock in umpire selection, other than “lot selection,” are as follows:

1. Use of the ARIAS•U.S. Umpire Appointment Procedure. This is set forth at www.arias-us.org. Briefly, this Procedure, primarily administered by the parties, has two steps: (a) an initial random selection from either the ARIAS•U.S. Umpire List or the ARIAS•U.S. Certified Arbitrator List, (b) followed by questionnaire responses and a selection and ranking procedure conducted by the parties.
2. Use of the umpire selection method set forth in Section 6 of the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 1999). Briefly, if the arbitrators fail to agree upon an umpire, the parties conduct a selection and ranking procedure which uses a list of arbitrators (e.g., AAA or ARIAS•U.S.) designated in the arbitration clause.

3. Application to an identified “appointer” or “appointing authority,” such as the Superintendent of Insurance in the state in which the arbitration is to be held, the CPR Institute for Dispute Resolution, the American Arbitration Association, or the International Commerce Commission (Paris);
4. Application to another official designated by the arbitrators; or
5. Application to a specified court.

COMMENT A:

While no default mechanism for umpire selection is perfect for all occasions, ARIAS•U.S. believes that its Umpire Appointment Procedure has certain attributes that parties should consider in crafting their arbitration clause: (1) both the ARIAS•U.S. Umpire List and Certified Arbitrator List contain a core group of highly qualified arbitrators; (2) those arbitrators are listed because they meet published, objective criteria (not because of a private, subjective selection process); (3) the Umpire Appointment Procedure combines initial random selection (which prevents skewing) with party-controlled ranking; and (4) many practitioners believe that this type of default mechanism increases the parties’ willingness to mutually agree on an umpire without using the default mechanism itself.

COMMENT B:

If the contract designates an appointer, he/she/it may decline to appoint an umpire, or the office may no longer exist. In such situations, contracts should propose an alternative means of selection. Absent an agreed alternative selection method, the parties must resort to a court of competent jurisdiction.

2.3 “DISINTERESTED” ARBITRATORS:

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.

COMMENT A:

When the arbitration clause requires that all arbitrators be “disinterested,” there is a lack of consensus over whether or to what extent party-appointed arbitrators can be partisan. Some believe the “disinterested arbitrator” requirement give parties a contractual right to a partisan arbitrator. Others believe such arbitrators should be non-partisan in the decision-making process. Absent specific contractual language to the contrary, it is generally understood in the industry that party-appointed arbitrators can be initially predisposed but must remain open-minded and render decisions fairly. Regardless of specific contract language, however, it is accepted practice that all arbitrators should be financially disinterested and not under any party’s control, and that the umpire should be neutral. Examples of a “financial interest” include contingent fee arrangements, bonuses tied to a result, employment by another reinsurer or cedent on the same risk at issue, or a financial investment in a company that may be materially affected by the

outcome of the proceedings. An arbitrator is “under the control” of a party when he or she is an employee, officer or director of that party or receives a consulting fee or other remuneration or compensation from that party other than as an arbitrator or umpire. ARIAS•U.S. believes that all Panel members must decide the issues before them on the merits of the case presented without regard to the party who appointed them. Panel members should avoid reaching a final judgment until both parties have had a full and fair opportunity to present their respective cases and the Panel has fully deliberated on the issues.

COMMENT B:

Unless the arbitration clause specifically provides otherwise (e.g., by requiring that all Panel members be “neutral”), it is accepted practice for a party to speak with a prospective arbitrator before appointment to discuss the case as long as that conversation complies with the ARIAS•U.S. Guidelines for Arbitrator Conduct. See ARIAS•U.S. Guidelines for Arbitrator Conduct, Canons II, V.

COMMENT C:

It is accepted practice that the parties will not meet with, or discuss anticipated issues with, umpire candidates prior to nomination or appointment. If the parties desire to determine whether umpire nominees have potential conflicts before selecting an umpire, the parties should consider circulating an umpire questionnaire such as ARIAS•U.S. Sample Form 2.1.

2.4 DISCLOSURE STATEMENTS:

The foundation for broad industry support of arbitration is confidence in the arbitrators’ competence and fairness. Panel members owe a duty to the parties, the industry, and themselves. See ARIAS•U.S. Guidelines for Arbitrator Conduct, Canon I. Panel members and candidates should fully disclose all conflicts of interest, real, potential, or apparent. Panel members and candidates should disclose any interest or relationship likely to affect their judgment, including any facts that might appear to give them a financial interest in the arbitration’s outcome. Any doubt should be resolved in favor of disclosure. See *id.*, Canon IV. The obligation to disclose all past and present interests or relationships continues throughout the proceeding. If any previously undisclosed interests or relationships arise or are recalled during the arbitration, they should be disclosed promptly to all parties and the other Panel members. *Id.*

COMMENT A:

It is common practice for nominated Panel members to disclose their contacts with the parties (and their counsel and any known witnesses) in the business world and in prior arbitrations, and with the particular contracts involved in the dispute. A proposed disclosure form is ARIAS•U.S. Sample Form 2.1 at the end of this chapter. The proposed form includes a variety of questions that may or may not serve as a basis to disqualify a Panel member. ARIAS•U.S. believes it is appropriate for parties to seek general background information in addition to information that may serve as a basis for disqualification. ARIAS•U.S. does not recommend that parties be allowed to question proposed umpires about how they will rule in the particular case, though questioning candidates about pre-existing positions, for example concerning repetitive issues, may be warranted in some instances. See ARIAS•U.S. Sample Form 2.1, Questions 6.D and 8. ARIAS•U.S. Sample Form 2.1 is designed for umpire candidates, but it could easily be tailored for arbitrators if the parties so desire.

COMMENT B:

Disclosures allow parties to pursue or preserve their challenges to the Panel under applicable law. In limited instances, that information may enable a party to bring a successful pre-hearing challenge to a Panel member's qualifications. Courts applying the Federal Arbitration Act usually defer challenges for arbitrator bias until after the Panel issues its award.

COMMENT C:

Early and full disclosure raises confidence in the Panel's fair-mindedness and makes the arbitration process more efficient. Although ARIAS•U.S. does not propose the use of a form in every case, arbitrators should make such disclosures before the parties accept the Panel as duly constituted. It is routine and appropriate for such disclosures to be made at or prior to the Organizational Meeting. See paragraph 3.6, *infra*.

ARIAS•U.S. SAMPLE FORM 2.1: UMPIRE QUESTIONNAIRE

In the Matter of the Arbitration Between

Petitioner
- and -

Respondent.

UMPIRE QUESTIONNAIRE

To help the parties evaluate the qualifications of umpire nominees in the above-captioned arbitration, and to identify any potential conflict of interest, please supply the following information:

1. Name: _____
Company: _____
Address: _____
Telephone: _____
Fax: _____
Cell Phone: _____
Email: _____
Home Address: _____
Telephone: _____
2. EMPLOYMENT HISTORY (please attach a current résumé or CV).
 - A. Current Employment (if not apparent from the attached résumé or CV)

Position Title: _____
Length of Employment: _____
Principal Duties: _____
 - B. PAST QUALIFYING EMPLOYMENT (if not currently an officer of an insurance or reinsurance company [or an Underwriter at Lloyd's of London] and if not apparent from the attached résumé or CV).

3. Please provide a copy of your current fee schedule, including any refundable or non-refundable retainer.

4. INSURANCE ARBITRATION EXPERIENCE

Have you previously participated as an arbitrator or umpire in connection with insurance disputes?

Yes No

If yes, please set forth:

Number of appearances as an umpire:

Number of appearances as an arbitrator:

5. REINSURANCE ARBITRATION EXPERIENCE

Have you previously participated as an arbitrator or umpire in connection with reinsurance disputes?

Yes No

If yes, please set forth:

Number of appearances as an umpire:

Number of appearances as an arbitrator:

6. POTENTIAL CONFLICTS

A. Are you presently or have you ever been an employee, officer, director, shareholder, agent or consultant of any of the parties listed below, or of the parties' subsidiaries, affiliates or parent companies?

[List of all applicable parties, subsidiaries, affiliates, and parent companies]

Yes No

If yes, please explain.

B. Have you ever served as an arbitrator, umpire, attorney, or expert witness in a matter involving any of the parties listed above or any subsidiaries, affiliates or parent companies of such parties?

Yes No

If yes, please explain.

C. Have you ever had any involvement in an insurance or reinsurance transaction or dispute involving any of the parties, or involving such parties' subsidiaries, affiliates or parent companies?

Yes No

If your answer is yes, briefly describe the details and nature of the transaction or dispute.

D. Have you ever had any involvement in an insurance or reinsurance transaction or dispute involving any of the specific claims, policies and/or treaties at issue in this matter as described in Question 8 below?

Yes No

If yes, please explain.

E. To your knowledge, do any companies with which you are presently affiliated or in which you presently have a financial interest have an ongoing business relationship with any of the parties and/or affiliates listed above?

Yes No

If yes, please explain.

7. EXPERIENCE WITH OTHER PANEL MEMBERS AND PARTIES' COUNSEL

A. Have you ever served on an arbitration panel with _____?

Name of Arbitrator

Yes No

If yes, for each such arbitration, state the approximate date of commencement and termination (or whether still pending) and the respective capacities in which you and _____ acted, i.e., as arbitrator or umpire.

B. Have you ever served on an arbitration panel with _____?

Name of Arbitrator

Yes No

If yes, for each such arbitration, state the approximate date of commencement and termination (or whether still pending) and the respective capacities in which you and _____ acted, i.e., as arbitrator or umpire.

C. Have you ever served as an arbitrator, umpire, expert witness or consultant in an arbitration or litigation at the request of any counsel involved in this arbitration?

[List counsel for all parties]

Yes No

If yes, identify counsel and disclose type of service and approximate date so engaged.

D. Have you ever served as an arbitrator, umpire, expert witness or consultant in an arbitration or litigation in which any of the above-listed counsel represented a party?

Yes No

If yes, identify counsel and disclose type of service and approximate date so engaged.

8. SUBJECT MATTER OF THE ARBITRATION

This arbitration involves [insert a neutral description of the dispute between the parties]

Might these facts or circumstances prevent you from rendering an unbiased decision in this arbitration?

Yes No

If yes, please explain.

9. OTHER CONSIDERATIONS

Are you aware of any facts or circumstances which (1) might impair your ability to serve (including schedule availability) or (2) might create an appearance of partiality on your part in the above-captioned arbitration?

Yes No

If yes, please explain.

Signature: _____ Date: _____

CHAPTER 3: THE ORGANIZATIONAL MEETING

Though not specifically provided for in most arbitration clauses, it is appropriate and customary to begin arbitrations (once a Panel has been selected) with an Organizational Meeting. The meeting usually marks the first time the parties and the Panel meet. At the Organizational Meeting, Panel members disclose prior relationships with the parties, their counsel, other Panel members, and any potential witnesses brought to the Panel's attention. After such disclosures and any resulting discussion, parties are typically asked to, and in most instances do, accept the Panel as duly constituted. The Organizational Meeting also gives parties an opportunity to execute agreements, including "hold harmless" and confidentiality agreements, and gives the Panel an opportunity to establish an arbitration schedule, usually with the assistance of the parties and their counsel.

The Organizational Meeting can be fairly expensive if parties, their counsel and the arbitrators must gather from distant locations to meet face to face. A face-to-face meeting may also take considerable time to arrange, as travel time may limit the participants' ability to identify a mutually acceptable date. While the amount at stake in many arbitrations may justify this time and expense, ARIAS•U.S. also proposes procedures for streamlined arbitrations (discussed below in Chapter 6). Alternatively, if the parties and Panel agree, the Organizational Meeting may be held telephonically, potentially reducing the expense and time required for a face-to-face meeting.

3.1 PRE-MEETING CONFERENCE CALL:

Before the Organizational Meeting, the umpire should communicate (by teleconference or correspondence) first with the arbitrators and then the parties and/or their counsel to discuss agenda items, logistics, pre-meeting submissions, and other topics.

COMMENT A:

A proposed Agenda for the Organizational Meeting appears at the end of the chapter as ARIAS•U.S. Sample Form 3.1. A discussion of the agenda items appears in the text below.

COMMENT B:

Before the pre-meeting conference call, the Panel should request a copy of and review the arbitration clause or clauses in the contract(s) to determine any applicable procedures or other guidelines. The Panel should be aware of any contractual time restrictions that may be subject to waiver. If the relevant arbitration clause specifies particular procedural rules, the Panel should obtain those rules from the parties and review them before the Organizational Meeting.

COMMENT C:

Arbitration is a matter of contract. If both parties have explicitly agreed to a matter and wish to enforce that agreement, the Panel must follow. An arbitrator who cannot abide by the parties' agreements should resign.

3.2 SITE OF THE ORGANIZATIONAL MEETING:

Absent the parties' agreement, the Organizational Meeting should be held in the most convenient location for all attendees.

COMMENT:

If the arbitration clause does not designate a location for the Organizational Meeting and the parties do not agree on a location, the Panel should choose the location. In making this decision, the Panel should consider which location minimizes the cost to all parties to the arbitration.

3.3 STATEMENT SUBMITTED TO THE PANEL BEFORE THE ORGANIZATIONAL MEETING:

Before the Organizational Meeting, each party should submit a short Position Statement that apprises the Panel of the facts, issues, and demands between the parties, as well as either a joint proposal, or the parties' individual proposals, for a pre-hearing schedule and a hearing date.

COMMENT A:

The Position Statement is principally designed to give the Panel a general case background to provide a frame of reference for any procedural decisions the Panel makes at the Organizational Meeting. For example, a Panel may be unable to assess a party's stated need for extensive discovery without some knowledge of the dispute's factual background.

COMMENT B:

If the Panel wants to set a page limit on submissions before the Organizational Meeting, it should give due consideration to the complexity of the issues and to whether a page-limit restriction (standard letter size) would be unfair to one or more parties. ARIAS•U.S. recommends that the Panel not impose a strict page limit, but instead suggest a recommended length.

COMMENT C:

To facilitate the scheduling process, the parties should work together prior to the Organizational Meeting to agree on a pre-hearing schedule. If the parties cannot agree on one or more elements of the schedule prior to the Organizational Meeting, the parties' Position Statements should present sufficient information for the Panel to consider and resolve the scheduling issues, including the party's positions on the merits of the dispute, the issues to be decided, the types and amounts of relief sought, and the discovery each party may need to develop or prove its position. To help identify necessary discovery and resolve discovery disputes, it may be appropriate for the Position Statements to include initial document production requests and/or identification of fact witnesses each party anticipates it may need to develop or prove its position. If appropriate, the parties' Position Statements should also advise the Panel whether they foresee a need for expert witness testimony at the hearing.

3.4 IDENTIFICATION OF THE ISSUES TO BE ARBITRATED:

As part of the Position Statement or at the Organizational Meeting, the Panel should ask the parties to identify precisely the issues and defenses that will be subjects of the arbitration.

COMMENT A:

Parties should be required, as early in the arbitration process as possible, to identify all claims and defenses they will present at the hearing. This avoids the injustice of a last-minute claim or defense and gives parties fair notice of each other's claims and contentions, which usually influences the scope of discovery.

COMMENT B:

Knowledge of the claims, defenses and issues at the Organizational Meeting allows the Panel to rule intelligently on the scope of appropriate discovery and to impose reasonable limitations.

COMMENT C:

Identifying the issues to be arbitrated also provides a reference point for the Panel should a party later request an extended discovery period to respond to a "newly-raised" issue. The Panel can consult the statements of claims and defenses before or at the Organizational Meeting to determine whether the issue is in fact "newly raised."

COMMENT D:

Early issue identification should not always limit the parties to pre-discovery claims or defenses. The Panel should normally give the parties latitude to amend their claims and defenses up to a reasonable period before the hearing, with due notice to and after comment by all involved parties.

COMMENT E:

In appropriate cases, the Panel should consider, with the parties' input, whether bifurcation of the arbitration into phases (for instance, one phase on liability and a second on damages) would promote an efficient resolution of the dispute. In most instances one final hearing, rather than two, will be most efficient.

3.5 ORGANIZATIONAL MEETING ATTENDANCE:

Except in cases in which the amount claimed or the disputed issue do not warrant it, both company official(s) and outside counsel should represent the parties at the Organizational Meeting.

COMMENT:

Party representatives' direct involvement at all stages of the arbitration process increases the potential for businessperson-to-businessperson dealings and reduces the risk of the arbitration process becoming unduly lawyer-driven. Party representative attendance at the Organizational Meeting in particular also ensures that the parties are fully aware of discovery and pre-hearing obligations and the timetables for meeting those obligations.

3.6 PANEL DISCLOSURES:

At the Organizational Meeting, all members of the Panel should reveal on the record their past, present, and any known future business and personal relationships with the parties, the parties' counsel, other Panel members, and any potential witnesses who are identified in documents provided to the Panel members.

COMMENT A:

Disclosures should include business, professional, and personal contacts, including contacts in other reinsurance arbitrations. Business and professional contacts should include, when applicable, both individuals and their organizations. Disclosures should include whether Panel members have served as expert witnesses for any party and/or their respective counsel. Panel members should also disclose if they were involved with the particular reinsurance contracts at issue.

COMMENT B:

Panel members may consider it advisable to prepare a written list of all relationships with the parties, their counsel and other Panel members for distribution at or before the Organizational Meeting, and to supplement that list orally, if needed, on the record at the meeting. If the Organizational Meeting proceedings are not transcribed, a written list with any written supplementation is especially important.

COMMENT C:

Given the myriad relationships a Panel member may have had over the years with participants in the given arbitration, even the best-intentioned Panel member may forget to disclose a contact of which one party's representative or counsel is aware. To avoid later disputes over whether the non-disclosure was intentional and/or whether the undisclosed contact warrants disqualifying the Panel member or overturning an arbitration award, at the Organizational Meeting party representatives and counsel should supplement the Panel's disclosures with any undisclosed contacts of which they are aware between Panel members and the party or counsel.

3.7 FORMAL ACCEPTANCE OF PANEL:

Once Panel members have made all disclosures, the parties are traditionally asked to accept the Panel as duly constituted.

COMMENT A:

ARIAS•U.S. Sample Form 3.2 at the end of this chapter is a proposed Hold Harmless Agreement, in which the parties formally accept the Panel and agree to hold the Panel members harmless against any claims related to their service in the arbitration.

COMMENT B:

A party may effectively have no remedy, other than proceeding to arbitration with all rights reserved, if it challenges one or more Panel members. A party in this circumstance should consider appropriate amendments to the proposed Hold Harmless Agreement, ARIAS•U.S. Sample Form 3.2. Many courts have refused to entertain pre-hearing petitions to disqualify arbitrators on the ground of bias, absent special circumstances (e.g., a request to enforce a contractual requirement for “impartial” arbitrators). Such challenges, some courts have held, should be brought after the arbitration on a motion to vacate the award.

COMMENT C:

Panel members have no intrinsic right to be “held harmless” by all parties to the arbitration. Panel members presumably have arbitral immunity (akin to judicial immunity) that protects them from liability for their service as arbitrators, although the extent of this immunity is not precisely defined in all jurisdictions. Clearly, a Panel has the power (but is not obliged) to proceed without a hold harmless agreement. It is the position of ARIAS•U.S. that absent extraordinary circumstances, parties should hold Panels harmless. Panel members generally are retired individuals or current executives acting in a personal capacity. To encourage their continued participation, these individuals should in most circumstances receive assurance that their personal assets are not at risk.

3.8 CONFIDENTIALITY:

The confidentiality of arbitration proceedings should be memorialized in either an agreement by the parties and the Panel, or an order entered by the Panel, setting forth the terms and scope of the confidentiality.

COMMENT A:

Most parties to arbitration prefer that the proceedings remain confidential. One advantage of the arbitration process is that confidentiality is much easier to maintain in arbitrations than in litigation.

COMMENT B:

A confidentiality agreement is usually entered by agreement of the parties and the Panel.

COMMENT C:

It is generally agreed throughout the industry that reinsurance arbitrations are and should be confidential in most circumstances, even absent the parties' complete agreement. Cases may arise, however, in which either partial or no confidentiality may be appropriate (e.g., if the cedent wants to disclose arbitration results to a related reinsurer, or if the current proceedings may be relevant to another pending or future proceeding between the same parties). If one party opposes total confidentiality of the arbitration, the Panel should consider the parties' arguments on the issue and use its discretion in ordering whether and to what extent the arbitration should be confidential. If the parties agree to a certain level of confidentiality, the Panel should enter an order or sign a confidentiality agreement reflecting the parties' agreement.

COMMENT D:

A sample Confidentiality Agreement form appears at the end of this chapter as ARIAS•U.S. Sample Form 3.3. This form can be converted to an Order, rather than an Agreement, if necessary.

3.9 EX PARTE COMMUNICATIONS:

At the Organizational Meeting, the Panel should establish a date for the cut-off of all *ex parte* communications between parties and the Panel members.

COMMENT A:

Possible dates for the cut-off of *ex parte* communications include (a) the Organizational Meeting; (b) the end of discovery; (c) the filing of pre-hearing briefs; or (d) commencement of the hearing.

COMMENT B:

There is a wide range of views about the most appropriate cut-off date for *ex parte* contact. Some believe that all *ex parte* communications between the parties and the Panel must cease immediately after the Organizational Meeting to ensure the fair-minded administration of the arbitration. Others believe that procedural issues can be resolved more efficiently, and settlement prospects can occasionally be advanced, if *ex parte* contact is permitted up until the hearing. No *ex parte* communication should be permitted during the final hearing because the risk of disclosing confidential Panel deliberations involving the resolution of the dispute is too great. Since each Panel member has a duty to hear the evidence and decide the case impartially, there should be no reason for any *ex parte* contact with the parties during the hearing.

COMMENT C:

If the Panel permits *ex parte* contact to continue beyond the Organizational Meeting, certain confidentiality issues arise. Normally, *ex parte* communications are confidential. Participants in the arbitration expect that discussions between a party and the arbitrator it appointed will not be shared with other Panel members. In addition, arbitrators must remember that Panel deliberations are and should remain confidential. Because the Panel is a quasi-judicial body, some privilege may attach to their discussions, and Panel members may be able to invoke that privilege if one or both parties approach them about their discussions or deliberations. Unless the Panel specifically decides otherwise, Panel members should not disclose Panel discussions to the parties.

3.10 SCHEDULING:

At the Organizational Meeting, the Panel should establish, with the parties' input, a hearing date and estimated hearing length, including additional time for Panel deliberations after the parties have presented the case. As discussed in greater detail in Chapter 4, the Panel should also work with the parties to establish a workable schedule for discovery, briefing, and other pre-hearing events at or shortly after the Organizational Meeting.

COMMENT A:

The hearing should be held at a neutral site, unless the parties agree otherwise. The Panel should ask one of the parties to make the necessary accommodations, *i.e.*, rental of hearing room and proposed overnight accommodations, if necessary. Both parties should equally share the cost of the hearing room, court reporter and other hearing costs.

COMMENT B:

In establishing this schedule, the parties and Panel should ensure that the final exchange of hearing exhibits occurs sufficiently before the beginning of the hearing to preclude unfair surprise.

3.11 PARTY STIPULATIONS:

The Panel should generally accept the parties' stipulations (if any) concerning discovery, scheduling, cut-off of *ex parte* communication with Panel members, and order and timing of briefs.

3.12 INTERIM DISPUTES:

The parties and Panel should establish a protocol to handle disputes (*e.g.*, concerning discovery) that may arise in the time between the Organizational Meeting and the hearing. For example, they might agree that communications will be by e-mail; and that (absent Panel request for oral argument) a disputed matter will be ripe for decision after a submission, an answer, and a reply by the moving party. The parties and Panel should also discuss whether disputes must always be resolved by the entire Panel, or whether under certain circumstances disputes may be resolved (a) by the umpire alone, or (b) jointly by the two arbitrators.

3.13 MISCELLANEOUS ISSUES:

The Panel should afford the parties and their counsel the opportunity to raise any other matters at the Organizational Meeting, though the Panel should encourage the parties and their counsel to agree on as many procedural issues as possible before the Organizational Meeting.

COMMENT A:

Special arrangements, *e.g.*, creation of an escrow account, are sometimes made for the payment of the umpire's fees.

COMMENT B:

A party's request for pre-hearing security is typically addressed at the Organizational Meeting, but full briefing normally should occur in advance of the meeting. Pre-hearing security is discussed in greater detail in Chapter 4, which sets forth a proposed form of order.

COMMENT C:

Normally, a court reporter should transcribe the Organizational Meeting proceedings.

COMMENT D:

The Panel should consider whether the relevant arbitration clause designates specified procedural rules (*e.g.*, the American Arbitration Association Commercial Arbitration Rules, or the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes), whether particular rules apply to an international arbitration, and/or whether the parties have agreed to any other set of procedural rules.

ARIAS•U.S. SAMPLE FORM 3.1: AGENDA FOR THE ORGANIZATIONAL MEETING**AGENDA FOR THE ORGANIZATIONAL MEETING**

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

Disclosures, which should be made by Panel members, counsel, and parties, should include contacts of 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 (See ARIAS•U.S. Sample Form 3.2 and any appropriate modifications).
4. Special arrangements, if necessary or appropriate, for payment of the umpire's fees, e.g., escrow account.
5. Confidentiality (See ARIAS•U.S. Sample Form 3.3 and any appropriate modifications).
6. *Ex parte* communications with Panel members. Possible cutoffs: immediate, at the end of discovery, upon the filing of pre-hearing briefs, 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.
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: See ARIAS•U.S. Sample Form 4.1

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
11. Collateral estoppel/*res judicata* issues (if appropriate)
12. Other preliminary issues (if appropriate)
13. Pre-hearing security (if appropriate): See ARIAS•U.S. Sample Form 4.2
14. Pre-hearing briefs
 1. sequential or simultaneous
 2. page limit, if any
 3. schedule
15. Hearing dates, location, and length
16. The form of the final award: written, reasoned(?)

ARIAS•U.S. SAMPLE FORM 3.2: HOLD HARMLESS AGREEMENT

In the Matter of the Arbitration Between

Petitioner
- and -

Respondent.

STIPULATION

WHEREAS, (names of Panel members) _____ have been appointed to serve as members of the Arbitration Panel ("Panel") in the above-captioned arbitration; and

WHEREAS, an organizational meeting was held on _____ (date) _____, in _____ (location) _____ at which counsel for both parties and all members of the Panel were present; and

WHEREAS, the Panel members have in good faith and to the best of their recollection disclosed any interest in the outcome of these proceedings, and any business and social relationships which they have or have had among themselves and/or with parties, counsel, and as applicable, others; and

WHEREAS, based on those disclosures, the parties have unanimously found that no Panel member has any conflict of interest that would make him or her unfit to serve in this Arbitration; and

WHEREAS, based on those disclosures, the parties accept this Panel as being without conflicts of interest and duly constituted to hear the matter(s) under dispute in this Arbitration.

NOW, THEREFORE, the parties agree as follows:

- (1) Each party agrees that it shall not assert any claim, file any suit, or initiate any action against the Panel or any member thereof in connection with their rendering of services as arbitrator and/or umpire in this Arbitration proceeding (including, but not limited to, any claim, suit or action relating to any alleged conflict, bias or lack of disinterestedness); and
- (2) Both parties further agree jointly and severally, to protect, defend, indemnify and hold harmless any and all members of the Panel against any and all expenses, costs and fees of any kind incurred by the members of the Panel, and the payment of their reasonable hourly fees, in connection with any claim, action or lawsuit arising or resulting from or out of this Arbitration.

Nothing in this Stipulation, however, shall abridge any rights the Petitioner and Respondent may have with respect to each other to seek to vacate or modify any Order, Ruling or Award which the Panel may render except in regard to any conflicts of interest which have been fully disclosed to the parties. This Stipulation is non-cancelable and of unlimited duration.

MEMBERS OF THE PANEL:

Arbitrator: _____

Arbitrator: _____

Umpire: _____

AGREED:

_____ for _____ Petitioner

_____ for _____ Respondent

Dated: _____

ARIAS•U.S. SAMPLE FORM 3.3: CONFIDENTIALITY AGREEMENT

In the Matter of the Arbitration Between

Petitioner

- and -

Respondent.

CONFIDENTIALITY AGREEMENT

1. The parties intending to be bound by this agreement are:
 - a. The _____ and its parent corporation, subsidiaries, affiliates, agents, employees, officers and directors.
 - b. The _____ and its parent corporation, subsidiaries, affiliates, agents, employees, officers and directors.
2. Except as provided in Paragraph 3 below, and absent written agreement between the parties to the contrary, _____ and _____ agree that all briefs, depositions and hearing transcripts generated in the course of this arbitration, documents created for the arbitration or produced in the proceedings by the opposing party or third parties, the final award or order and any interim decisions, correspondence, oral discussions and information exchanged in connection with the proceedings (hereinafter collectively referred to as "Arbitration Information") will be kept confidential. This Confidentiality Agreement will remain in effect even after conclusion of the arbitration proceedings.
3. Disclosure of Arbitration Information may be made: (a) to the extent necessary to obtain compliance with any interim decisions or the final award herein, or to secure payment from retrocessionaires; (b) in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify or vacate an arbitration award; (c) as is necessary in communications with auditors retained by any party, or federal or state regulators; (d) as is necessary to comply with subpoenas, discovery requests or orders of any court; and (e) to the extent Arbitration Information is already lawfully in the public domain. Any disclosures pursuant to subparagraphs (a) or (c) shall be accompanied by a copy of this Confidentiality Agreement and an instruction to any recipient to maintain the confidentiality of all Arbitration Information. In connection with any disclosures pursuant to subparagraph (b), the parties agree, subject to court approval, that all submissions of Arbitration Information to a court shall be sealed. If any party is requested or required under subparagraph (d) to disclose Arbitration Information, subject to any applicable legal restrictions, that party will give written notice to the other(s) as soon as possible after the subpoena, discovery request or court order is received. In all contexts, all parties will make good-faith efforts to limit the extent of the disclosures, if any, to be made, and will cooperate with each other in resisting or limiting disclosure of Arbitration Information.
4. For the purpose of conducting this arbitration, Arbitration Information may be disclosed as needed or appropriate to the following persons only:
 - a. the arbitration panel, who evidence by their execution hereof their undertaking to maintain Arbitration Information in confidence as set forth herein;
 - b. counsel for a party or employees of counsel's law firm who are assisting counsel;
 - c. employees and agents of the parties for purposes consistent with this agreement;
 - d. any party's deposition or trial witness;
 - e. any person retained by counsel for a party to assist in this arbitration; provided, however, that such person shall agree to be bound by the terms of this Confidentiality Agreement as if that person were a party, and shall so acknowledge by executing, prior to receipt of or access to Arbitration Information, an affidavit in the form attached hereto as Exhibit A; or

- f. any non-party deposition or trial witness; provided, however, that such person shall agree to be bound by the terms of this Confidentiality Agreement as if that person were a party, and shall so acknowledge by executing, prior to receipt of or access to Arbitration Information, an affidavit in the form attached hereto as Exhibit A.
- 5. If a party is requested or required to disclose Arbitration Information, subject to applicable legal restrictions, that Party will: 1) notify the other party(ies) in writing as soon as possible after the subpoena, request or court order is received, to permit the other party(ies) to seek legal protection against any such disclosure; and 2) tender the defense of that demand to the party that produced the Arbitration Information, or permit that party to associate in the defense of that demand. Unless the demand has been timely limited, quashed or extended, the obligated party will thereafter be entitled to comply with such demand, request or court order to the extent required by law. If requested by any other party(ies), the obligated party will cooperate (at the expense of the requesting other party(ies)) in the defense of a demand.
- 6. The parties recognize that serious injury could result to any party and its business if the other party breaches its obligations under this Agreement. Therefore, each party agrees that all parties will be entitled to seek a restraining order, injunction or other equitable relief if another party breaches its obligations under this Agreement, in addition to any other remedies and damages that would be available at law or equity.

MEMBERS OF THE PANEL:

Arbitrator: _____

Arbitrator: _____

Umpire: _____

AGREED:

_____ for _____ Petitioner

_____ for _____ Respondent

Dated: _____

EXHIBIT A

In the Matter of the Arbitration Between

Petitioner

- and -

Respondent.

AFFIDAVIT

_____, being duly sworn, deposes and says:

1. I live at _____

2. I am employed as (position) by (name and address of employer), _____

3. I am aware that the parties to In the Matter of the Arbitration Between _____
and _____

have entered into a Confidentiality Agreement dated _____.

I have received and read a copy of that Confidentiality Agreement.

4. I agree to review or otherwise use the material produced in the instant arbitration by _____

only under supervision of a party's counsel and only in connection with this particular arbitration.

5. I agree that I am bound by the terms of the Confidentiality Agreement as though I were a party to the
arbitration, and I will not disclose or discuss material produced by _____

or _____

to or with any person other than those permitted access to such material under the Confidentiality
Agreement.

(Signature) _____

Sworn to before me this ____ day of _____, 20__.

Notary Public
(SEAL)

CHAPTER 4: INTERIM AWARDS, DISCOVERY AND BRIEFING

4.1 DISCOVERY SCHEDULE:

The Panel should issue an order establishing a comprehensive schedule with deadlines for as many activities as possible through the beginning of the hearing. This order is usually entered at or just after the Organizational Meeting. To the extent possible, the parties should confer in advance of the Organizational Meeting and attempt to agree on scheduling deadlines; the Panel's order should reflect the parties' agreement on scheduling items to the extent appropriate.

COMMENT A:

A sample scheduling order appears at the end of this chapter as ARIAS•U.S. Sample Form 4.1. The sample scheduling order is intended as a checklist. Each item probably will not apply to every case, and additional items may be appropriate in others. Careful consideration should be given to specific terms of the scheduling order, because all concerned are expected to honor the established timetable.

COMMENT B:

The sample scheduling order at Form 4.1 contemplates that the Panel may be substantially involved in the discovery process, but this may not be necessary or appropriate in all cases. The parties and the Panel may consider permitting the parties' counsel to work out discovery and scheduling details, and only involving the Panel if the parties reach impasse, after certain targeted completion dates for each stage are established. The parties should immediately notify the Panel in writing if they agree to modify the scheduling order in a way that affects briefing deadlines and/or the hearing date.

COMMENT C:

The Panel's scheduling order should ordinarily establish deadlines to identify the fact and expert witnesses that each party intends to call at the hearing. Identification of witnesses may be staggered, with initial lists due on one date and supplemental lists of rebuttal witnesses due shortly thereafter.

COMMENT D:

ARIAS•U.S. Sample Form 4.1 anticipates that the parties will want, and the Panel will permit, depositions of persons whom the parties identify as their fact witnesses at the hearing. However, the parties and the Panel should not presume that depositions are necessary or appropriate in all instances or that each side needs the same number of depositions as the other side to fairly prepare its case.

COMMENT E:

The Panel has considerable discretion to limit the amount and type of discovery available to the parties in the arbitration. The Panel's objective should be to give each party a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay on the other party(ies). No particular pattern suits 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.

COMMENT F:

Discovery disputes can arise even when both parties act in good faith. Under unusual circumstances, the umpire alone may initially hear and decide some discovery disputes. As a general practice, however, the entire Panel should hear and decide discovery disputes. If the Panel determines that written submissions are appropriate, it should set briefing schedules to give each party a fair opportunity to present its position, keeping in mind the dual goals of reaching a proper final decision on the merits and implementing overall efficient case management.

COMMENT G:

In particular cases, discovery disputes may require the Panel to use innovative procedural approaches. Possible approaches suggested by some practitioners include: 1) have only the two arbitrators review arguably privileged or confidential material *in camera*, with the umpire only participating in the process if the arbitrators cannot reach agreement; and 2) use a special master to help resolve privilege and confidentiality disputes. Each approach raises its own concerns: the first risks having some, but not all, Panel members review materials that might ultimately be determined to be not be discoverable, while the second involves increased costs and an additional layer of bureaucracy on what is intended to be a streamlined process. The Panel should adopt a procedure to resolve discovery disputes that takes into account the parties' interests in fairly resolving the disputes and their interest in maintaining the streamlined, cost-effective nature of the arbitration process.

COMMENT H:

Some cases may involve substantive issues of contract interpretation or application, but little or no disputed issues of underlying facts. In those cases, the Panel and parties may want to consider limiting the amount of discovery and/or using a streamlined hearing procedure, such as that outlined below in Chapter 6.

4.2 USE OF EXPERT WITNESSES:

At the Organizational Meeting, the Panel may ask the parties whether they foresee a need to offer expert testimony at the hearing. The Panel may deem it appropriate to discuss with the parties whether, given the Panel's professional experience with the subject matter of the dispute or lack of such experience, there are areas in which expert witnesses may or may not be helpful.

COMMENT A:

Parties must give adequate and complete notice of the intent to retain an expert in sufficient time to allow the opposing party(ies) time to identify and appoint their responding expert(s), if they choose to retain one.

COMMENT B:

In cases where expert witness testimony is contemplated, the scheduling order should establish deadlines (a) to identify expert witnesses and disclose anticipated expert testimony, (b) to identify rebuttal expert witnesses and anticipated rebuttal expert testimony (if appropriate), and (c) to complete any expert witness depositions.

COMMENT C:

While the facts define the bounds of fact testimony, no such definition applies to expert testimony. For this reason, the pre-hearing disclosure of anticipated expert testimony is extremely important. The Panel should set the form and method of that disclosure, recognizing the parties' interests and the particular circumstances of the case. For example, an initial disclosure of the expert's opinions in the form of an expert report, followed by a deposition of the expert witness, may be an appropriate way to help the parties understand the scope and basis for the expert's anticipated hearing testimony. As to the form and content of the expert report, the standards under Rule 26(a)(2) of the Federal Rules of Civil Procedure are a good guide. In other cases, however, the amount at issue or the self-evident nature of the expert's anticipated testimony may justify a less formal disclosure process, such as a letter from the party offering the expert testimony that outlines the topics and substance of the anticipated testimony, followed (or not) by a deposition of the expert witness.

4.3 PRE-HEARING BRIEFS:

The Panel's scheduling order, with the parties' input, should establish a pre-hearing briefing schedule, including:

- a) the due dates for the initial and reply briefs, if any;
- b) whether the briefs are to be submitted sequentially or simultaneously; and
- c) whether the briefs have a specified page limit.

COMMENT:

ARIAS•U.S. Sample Form 4.1 provides for exchange of pre-hearing briefs and reply briefs without specifying precise content. The briefs should include any exhibits identified in the text. At one end of the spectrum, the briefs could set forth conclusions which the parties ask the Panel to apply to facts presented at the hearing. At the other end of the spectrum, the briefs could be case statements by each party dealing with both points of law and key facts, with supporting exhibits. Panels and parties are urged to agree upon and adopt a briefing format that fits the needs of the case.

4.4 INTERIM AWARDS:

The Panel has the authority to enter interim awards in appropriate cases.

COMMENT A:

Under broad forms of arbitration clauses, most courts have upheld the Panel's authority to enter interim awards. A proposed form of order awarding the provisional remedy of pre-hearing security appears at the end of this chapter as ARIAS•U.S. Sample Form 4.2. In appropriate cases the parties may ask the Panel to consider other types of interim awards, including injunctive relief or attachment.

COMMENT B:

If a party seeks an interim award, the Panel should determine whether written submissions from both parties and/or oral argument would assist the Panel in determining whether to afford the requested relief, keeping in mind the often-competing goals of affording each party a fair opportunity to present its position, reaching a meaningful proper decision on the requested relief, and implementing overall efficient case management.

COMMENT C:

ARIAS•U.S. Sample Form 4.2 addresses only the reinsured's need for security. If the reinsurer seeks affirmative relief (e.g., security for return of losses paid), this form may be adapted to require security from the cedent.

COMMENT D:

Pre-hearing security may be in the form of a letter of credit, a bond, cash in an escrow account, or otherwise, as may be fair and appropriate in the circumstances. The party requesting pre-hearing security should specify the form of security desired.

ARIAS•U.S. SAMPLE FORM 4.1: SCHEDULING ORDER

In the Matter of the Arbitration Between

 Petitioner
 - and -

 Respondent.

COMPREHENSIVE ARBITRATION SCHEDULING ORDER

Having first considered the parties’ initial written submissions and their comments and arguments at the Organizational Meeting, the Panel adopts the following schedule for the captioned arbitration:

- Date I The parties will exchange with each other [and send to the Panel] any [supplemental] requests for relevant documents.
- Date II The parties will exchange with each other [and send to the Panel] objections, and the bases therefor, to the other party’s document requests.
- Date II Each party will make available for inspection and copying all documents responsive to the other party’s request to which no objection or privilege claim has been made.
- Date IIa Any party that withholds responsive documents on claims of a privilege, protection of work product materials or other basis of confidentiality, shall by this date provide the other party(ies) with a Privilege Log describing the following for each withheld document:
 - 1. production number (if any);
 - 2. document type;
 - 3. date[s];
 - 4. author(s);
 - 5. recipient(s) (including carbon copies and blind copies, if any);
 - 6. general subject matter of document[s]; and
 - 7. basis for withholding document[s].

If a party produces a redacted document, the redaction must be clearly labeled, and a description of that redaction should be included in the Privilege Log.
- Date III Each party will advise the Panel of any unresolved disputes regarding the other party’s document production. The Panel shall set a schedule to resolve the dispute. The parties, however, should make every effort to resolve any discovery disputes without Panel intervention.
- Date IV The parties will exchange with each other [and send to the Panel] a preliminary list of fact witnesses each party anticipates calling at the Hearing.
- Date V The parties will exchange with each other [and send to the Panel] a list of any expert witness(es) each party anticipates calling at the Hearing and [provide an expert report meeting the requirements of Federal Rule of Civil Procedure 26(a)(2)] [disclose the anticipated expert testimony with a written summary of its substance].
- Date VI Each party will identify individuals it wants to depose. A party may depose any witness on the other party’s(ies’) witness list(s) and only such other persons as the parties may agree or the Panel may order upon a showing of good cause. A party representative may attend any deposition.

- Date VII The parties will exchange with each other [and send to the Panel] a final list of potential Hearing witnesses, including disclosures of rebuttal expert witnesses, if any. Individuals not identified by this date shall not testify at the Hearing, except as the Panel may order upon a showing of good cause.
- Date VIII Fact witness depositions will be completed, and discovery will be closed, except for expert witness discovery.
- Date IX Expert witness depositions will be completed.
- Date X The parties will exchange with each other [and send to the Panel] a list of Hearing witnesses. This list is a culled version of the witness list provided prior to the deposition period, and is not intended to permit the addition of a previously un-listed witness.
- Date XI This will be the last day for each party to have *ex parte* contact with Panel members.
- Date XII The parties will submit Initial Pre-Hearing Briefs to the Panel and each other. The Panel recommends that each party's Initial Pre-Hearing Brief should not exceed ____ pages (without exhibits). Each party will provide to the Panel and each other copies of exhibits cited in its Brief numbered as they will be at the Hearing.
- Date XIII The parties will submit Reply Pre-Hearing Briefs to the Panel and each other. The Panel recommends that each party's Reply Pre-Hearing Brief should not exceed ____ pages (without exhibits). Each party will provide to the Panel and each other copies of exhibits cited in its Reply Brief numbered as they will be at the Hearing.
- Date XIV A party wishing to present at the Hearing the deposition testimony, rather than live testimony, of a witness for its case-in-chief must provide the other party(ies) and the Panel with the transcript page and line numbers of such deposition testimony. Only the transcript page and line numbers identified by a party on this date will be permitted in that party's case-in-chief at the Hearing.
- Date XV The parties will exchange with each other [and send to the Panel] copies of all exhibits to be offered into evidence at the Hearing that have not been previously exchanged.
- Date XVI The Hearing will be held in _____ (City, State) _____, which shall be deemed the place of the arbitration unless otherwise specified by further order of this Panel. The Hearing will commence and should last no longer than ____ days. [Unless they are party representatives or expert witnesses, persons who will testify at the Hearing may not attend the Hearing until the time for their testimony.]

As to dates above which provide for service of written materials, the parties shall serve letters and briefs (without exhibits or appendices) electronically on the specified date, with hard copies sent out on that date by overnight mail to be accompanied by exhibits and appendices.

MEMBERS OF THE PANEL:

Arbitrator: _____

Arbitrator: _____

Umpire: _____

Dated: _____

ARIAS•U.S. SAMPLE FORM 4.2: PRE-HEARING SECURITY ORDER

In the Matter of the Arbitration Between

Before an arbitration Panel
consisting of

Petitioner

- and -

Respondent.

PRE-HEARING SECURITY ORDER

[Petitioner] has asked this Panel to issue a Final Award requiring [Respondent] to pay \$_____ which [Petitioner] alleges is presently due. [Petitioner] has also asked this Panel to issue an Interim Award requiring [Respondent] to post security in the amount of \$ _____ to remain in place during the pendency of this arbitration.

The parties have presented the Panel with their positions on this request for an interim award [in written statements] setting forth their claims, defenses, and the reasons that [Respondent] should or should not be required to post security, the form of that security and the amount thereof.

A hearing on this request was held on [date], at which time the parties were given a full opportunity to state their reasons that this Panel should or should not require [Respondent] to post security;

IT IS HEREBY ORDERED, that within thirty (30) days of the last date below, [Respondent] shall file with the Panel evidence to be approved by the Panel of a cash deposit or securities in an escrow account, or a letter of credit, or a bond with good and sufficient securities, in the amount of \$_____, with such escrow account, letter of credit or bond to remain in place subject to the control and further order of this Panel or agreement of the parties.

MEMBERS OF THE PANEL:

Arbitrator: _____

Arbitrator: _____

Umpire: _____

Dated: _____

CHAPTER 5: HEARING AND AWARD

5.1 PRE-HEARING CONFERENCE CALL:

The Panel should usually schedule a pre-hearing telephonic conference with the parties' counsel in the month before the scheduled hearing to discuss and make arrangements for any remaining hearing preparations, including but not limited to, the following:

- (a) order of proof;
- (b) presentation of witnesses, with estimated time;
- (c) presentation and numbering of exhibits;
- (d) preparation of documents necessary to the Panel's decision, including proposed forms of order;
- (e) personnel in attendance at the hearing;
- (f) concerns of the parties;
- (g) administrative details (location of the hearing, accommodations).

COMMENT:

The Panel should carefully consider any request to postpone a hearing, including whether a delay could unfairly disadvantage one party. The Panel and the parties should also endeavor to complete the testimony and argument within the allotted time. Requests to reconvene to hear additional testimony in the event the allotted time is not sufficient to complete the hearing should be granted selectively. The Panel, however, should afford the parties ample time to present their case and should allow continuances in appropriate cases.

5.2 PROPOSED FORM OF ORDER:

Either prior to or during the hearing, the Panel may consider requiring each party to circulate to all involved a proposed form of order that precisely identifies the nature of the relief sought.

COMMENT A:

Distribution of a proposed order may help the Panel determine precisely what relief the parties seek and whether that relief should be in the form of a contractual interpretation, a dollar amount, and/or some other form.

COMMENT B:

If a party seeks an award of interest, the amount and calculation of that interest should be submitted to the Panel and the other party(ies).

5.3 THE FINAL AWARD:

In many instances, it is best for the Panel to commence (and, if possible, conclude) deliberations immediately after the parties have presented the case at the hearing. The Panel should exercise care to ensure that the parties have had due opportunity to address important issues with the Panel. The Panel should issue a written award after its deliberations and within a reasonable time after the hearing.

COMMENT A:

In some instances, the Panel may consider distributing a proposed award (to be effective at a specified date), inviting written comments to the Panel and the opposing party(ies) if the proposed order does not address all issues in arbitration or is otherwise deficient in form or computation.

COMMENT B:

If the Panel performs mathematical calculations (or the like), the Panel should consider giving the parties an opportunity for input if such input might help prevent error.

COMMENT C:

If the award requires payment by one or more parties, the Panel may specify a payment date and a rate of interest if payment is not made by the specified date. A Panel's authority, however, may end once it resolves the dispute. One court has held that matters concerning execution of the award and post-judgment interest should be addressed by a court on post-hearing motion or petition.

5.4 A "REASONED" AWARD:

If all parties request the Panel to explain the reasons for its award, the Panel should normally do so (and may be legally required to do so), despite any personal reluctance or reservations individual Panel members may have about written explanations of the award.

COMMENT A:

Unlike arbitration in the United Kingdom and certain other countries, the United States custom and practice is that arbitration Panels, unless requested otherwise, do not issue written explanations of the basis of their award. Arbitration clauses almost never require the Panel to explain the basis of its decision, although the parties are free to request the Panel to do so.

COMMENT B:

If all parties desire a "reasoned" award, Panel members should consider, in appropriate cases, asking the parties to submit sample questions, similar to "jury interrogatories," to highlight particular questions to be answered. If possible, these questions should be submitted jointly and be approved by all parties. Panel members should be guided by these questions in issuing their opinion, but should not be bound to answer them. The form of a "reasoned" award need not be elaborate.

COMMENT C:

Common arguments against “reasoned” awards are (a) they could discourage compromise awards when otherwise appropriate; (b) arbitration awards accompanied by written decisions may be challenged more frequently by petition to a court; (c) experience shows that “reasoned” decisions are often tailored predominantly to avoid reversal or criticism; and (d) requirements for “reasoned” decisions will ultimately favor appointing lawyers as arbitrators, whereas the essence of arbitration frequently is to obtain a business, rather than legalistic, resolution.

COMMENT D:

A common argument for a “reasoned” award is that it requires the Panel to articulate the basis of its award in writing, which should improve the quality of the award. It also gives the parties a better idea of how they fared and increases their confidence in the process because it demonstrates, in a way that a one-line written award does not, what arguments the Panel considered persuasive. Supporters of “reasoned” awards also disagree that written decisions make awards more vulnerable to post-hearing challenge, because many arbitration clauses specifically relieve arbitrators of the need to follow strict rules of law, instead providing that awards should be issued in accordance with the custom and practice of the insurance and reinsurance industry.

5.5 POST-HEARING CONTACT WITH THE ARBITRATION PANEL:

The Panel should consider whether it is appropriate for the arbitrators each individually, the umpire individually, or the entire Panel, to speak to the parties (and/or counsel) informally to explain the basis for the award.

COMMENT A:

If the parties are highly adversarial and the arbitration process has been difficult, the Panel members should agree not to have any post-hearing discussions with the parties concerning the arbitration. On the other hand, circumstances may exist when there would be no harm, and the parties would potentially benefit, from an informal explanation of the award. The Panel should discuss and agree on these countervailing considerations before the Panel dissolves.

COMMENT B:

Given the confidential nature of deliberations and the arbitration, and the fact that such informal contact may provide grounds to challenge the award, the parties should both agree that such explanation is off the record and cannot be the basis for an appeal.

CHAPTER 6: STREAMLINED ARBITRATION PROCEDURES

If conducted in the usual fashion, arbitration may not be cost-effective when small amounts are in dispute and the parties do not otherwise have a substantial stake in the issues to be arbitrated. In appropriate cases, the Panel should consider streamlined alternatives to traditional arbitration. The following alternatives are suggestions to consider in arriving at a more efficient resolution of the issues before the Panel so that the cost of the arbitration is commensurate with the amount in controversy.

6.1 ORGANIZATIONAL MEETING BY TELEPHONE:

The Panel should consider holding the Organizational Meeting by telephone, and completing the necessary paperwork by mail, fax, and/or e-mail.

COMMENT A:

Parties that agree to a streamlined approach will also usually agree to an early telephonic Organizational Meeting, particularly if the parties are familiar with all the Panel members. At the meeting, the umpire should take detailed notes and circulate a draft summary of the meeting and any schedules or other items agreed upon to all involved for comments before finalizing them.

COMMENT B:

If the parties do not agree to a telephonic Organizational Meeting, the Panel should consider holding the Organizational Meeting at a later, rather than sooner, date so that parties can resolve certain issues, such as discovery, before the Organizational Meeting and present them to the Panel if the parties cannot resolve them on their own.

6.2 STREAMLINED DISCOVERY:

The Panel could direct the parties to serve and respond to discovery requests (if the parties anticipate needing them) before the Organizational Meeting, so that the Panel can address any discovery issues at the Organizational Meeting.

COMMENT:

If the parties agree to a streamlined discovery procedure, the Panel should consider, for example, an exchange of claims files within a week of the Organizational Meeting, with follow-up discovery requests to be authorized by the Panel only. The Panel should also consider whether to permit depositions, and whether to limit the number and/or duration of any depositions to be taken.

6.3 STREAMLINED HEARING:

The Panel should consider whether a streamlined hearing procedure would serve the parties' best interests: for example, submission of the dispute to the Panel on the briefs alone or with briefs and oral argument, but no live testimony. It may be feasible in some instances to hold a telephonic Organizational Meeting, followed by the exchange of relevant files, followed by a hearing (attended by counsel and the lead representative of each party) at which the Panel attempts to resolve the matter; and if it cannot, the process so narrows the issues for discovery and briefing that no further evidentiary hearing is required.



Practical Guide to Reinsurance Arbitration Procedure
2004 REVISED EDITION