

A Prototype for a Next-Generation Arbitration Clause

article

By Elaine A. Caprio

In recent years, ARIAS-U.S. promulgated state-of-the-art arbitration rules that govern the resolution of U.S. insurance and reinsurance disputes, as well as streamlined arbitration rules for small claim disputes.¹

In order to promote the use of these rules, and to further the objectives of ARIAS-U.S.,² this article provides suggested language³ for a prototype of a next-generation arbitration clause ("Prototype Arbitration Clause") for insurance and reinsurance contracts.⁴

Why Advance This Prototype?

In addition to incorporating ARIAS-U.S. Regular, Neutral and Streamlined Rules for the resolution of U.S. insurance and reinsurance disputes, this Prototype Arbitration Clause wording is designed to help streamline the arbitration process and efficiently resolve disputes by:

- Setting variable time limits from the organizational meeting to hearing, based on the amount of dollars in dispute;
- Applying parameters for E-Discovery between the parties;
- Utilizing mediation during the arbitration process; and
- Examining the potential application of the English Rule for panel and attorney fees, as well as costs.

A version of the Prototype Arbitration Clause can be incorporated into future insurance or reinsurance contracts, as well as existing or new Master Trading Agreements between reinsurers and ceding companies.⁵ Prior to an insurance or reinsurance dispute, the parties could contractually agree to utilize a version of the Prototype Arbitration Clause in lieu of the arbitration clause contained within the subject reinsurance contract(s).⁶

Prototype Arbitration Clause

The parties agree to the following regarding any and all disputes between the Company and the Reinsurer arising out of, relating to, or concerning this Contract, including its formation and validity, whether sounding in

contract or tort and whether arising during or after termination of this Contract.

A. Application of Streamlined Rules: For all disputes involving amounts at issue less than USD \$1,000,000, the arbitration shall be conducted in accordance with then applicable ARIAS-U.S. Streamlined Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (The Streamlined Rules).

B. Application of Neutral or Regular Rules: For all disputes involving amounts at issue of USD \$1,000,000 or greater, the arbitration shall be conducted in accordance with the then applicable [ARIAS-U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (The Neutral Rules)], OR [ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (The Rules)], subject to the following amendments:

1. **Honorable Engagement:** Section [13.3 of the Neutral Rules] OR [14.3 of the Rules] for the Resolution of U.S. Insurance and Reinsurance Disputes shall provide: The Panel shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general purpose of this Contract.

2. **Time Limits for Disputes Less Than a Certain Dollar Amount:** For disputes involving amounts at issue from USD \$1,000,000 to USD \$____,000,000, the date for the hearing shall be set no later than three hundred and sixty (360) days from the date of the Organizational Meeting.

3. **Consolidation:** If the Company and more than one Reinsurer are involved in the same dispute(s) or difference(s) arising out of this Contract, and the Company requests consolidated arbitration with those Reinsurers in an initial Notice of Arbitration or Response, then those Reinsurers shall constitute and act as one Party for

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purposes of the arbitration. For purposes of this paragraph, any instance in which two or more Reinsurers have not paid their proportional shares of the same balance claimed due by the Company shall be deemed to involve the "same dispute(s) or difference(s) arising out of this Contract." Communications shall be made by the Company to each of the Reinsurers constituting one Party. Nothing in this paragraph shall impair the rights of Reinsurers to assert several rather than joint defenses or claims, change their liability under this Contract from several to joint, or impair their rights to retain separate counsel in connection with the arbitration.

4. **E-Discovery:** Discovery of electronically stored information ("ESI") is limited to sources used in the ordinary course of business, and shall not extend to restoration of back-up tapes, erased data, or data deleted in the ordinary course of business. The panel has discretion to limit ESI discovery, as well as order reasonable costs be paid from the requesting party to the producing party if the burden and cost of producing ESI outweigh the likely importance of the discovery requested.

C. **Place of Arbitration:** Any arbitration conducted under Sections A or B of this Article shall take place in [insert City and State].

D. **Mediation During Arbitration:** [Section 12 of the Rules shall provide:] During the course of an arbitration conducted under Sections A or B of this Article, the parties agree to submit to a mediation session of at least eight (8) hours, to attempt to resolve certain or all of the disputes at issue in the arbitration. Mediation submissions are limited to ten (10) pages in length. Notwithstanding the foregoing, the Panel has the discretion to order the parties to submit to additional mediation at any time during the course of an arbitration conducted under Sections A or B of this Article.

E. **Jurisdiction:** Unless prohibited by law, the [Insert Court] shall have exclusive jurisdiction over any and all court proceedings that either party may initiate

in connection with this Article, including proceedings to compel, stay, or enjoin arbitration or to confirm, vacate, modify, or correct an Arbitration Award under Sections A or B. In addition, the Company and the Reinsurer shall have the right to seek and obtain in such court provisional relief prior to the Panel being fully formed pursuant to this Article, including prior to the commencement of the arbitration proceeding.

F. **Application of English Rule:** The Prevailing Party in a dispute resolved in accordance with sections A or B or this Article shall be entitled to recovery of costs as well as reasonable arbitrator and attorney fees (hereinafter collectively referred to as "Fees."). Fees awarded shall be the lesser of 1) actual Fees, or 2) thirty (30) percent of the difference between the final award and the non-prevailing party's last written offer of settlement. The "Prevailing Party" means the party identified by the arbitrator(s) in the award as the party to have most nearly prevailed in the dispute, even if such party did not prevail on all matters.

OR

F. **Application of American Rule:** Each party shall bear the costs of the arbitrator it selected and shall bear, equally and jointly with the other party, the costs of the third arbitrator. Each party shall also bear the costs and attorney fees of the attorneys it selected. Notwithstanding the foregoing, the panel may, at its discretion, award attorney fees, costs and the panel's fees and costs, as it considers appropriate.

G. **Resolution of Conflicts between Rules and this Article:** In the event of any conflict between the Streamlined Rules and this Article, or the [Neutral Rules] OR [Rules] and this Article, this Article will control.

H. **Survival:** The provisions of this Article shall survive the termination or expiration of this Contract.

Provided below is a summary of the progressive wording contained in the foregoing Prototype Arbitration Clause that could assist with streamlining the arbitration process.

Application of Streamlined, Neutral or Regular Rules

Unlike those arbitration clauses that contain a set of arbitration rules within the body of the clause, the Prototype Arbitration Clause applies the state-of-the-art ARIAS-U.S. Rules. For claims seeking monetary relief where the amount in dispute is less than USD \$1,000,000, the ARIAS-U.S. Streamlined Rules would apply.⁷ Such arbitration would be conducted by a single Umpire, with streamlined pre-hearing procedures and discovery.⁸ A hearing on the merits would be set no later than one hundred and eighty (180) days after the Organizational Meeting.⁹ For claims seeking monetary relief where the amount in dispute is USD \$1,000,000 or more, either the ARIAS-U.S. Neutral Panel or Regular Panel rules would apply.

Features of the ARIAS-U.S. Neutral Panel Rules include:

- The panel will consist of three ARIAS-U.S. Certified Arbitrators who qualify under the ARIAS-U.S. Neutral Arbitration Panel Criteria, or are ARIAS-U.S. Certified Neutral Arbitrators;
- Ex parte communications between a party or its representatives and any potential arbitrator are not permitted; and
- The arbitration panel shall issue a written reasoned decision.¹⁰

Features of the ARIAS-U.S. Regular Panel Rules include:

- One arbitrator is appointed by the Petitioner, and one by the Respondent. The third arbitrator shall serve as the umpire, who shall be neutral;
- Ex parte communications are permitted between the Party Appointed arbitrator and the party who appointed such arbitrator; and
- If both parties request a written rationale for the final award, the Panel shall provide one. If one party requests a written rationale but the other party objects, the decision whether to issue one is at the Panel's discretion.¹¹

Time Limits for Disputes Less Than A Certain Dollar Amount

In addition to the time limitation within the Streamlined Rules, the Prototype Arbitration Clause provides an additional time limitation, up to three hundred sixty (360) days from the Organizational Meeting to the Hearing, where the amount in dispute is between USD \$1,000,000 and USD \$1,000,000 (an amount agreed by the parties). Utilizing contractual time limitations can prevent runaway arbitrations from occurring and accentuate the parties' intention that time is of the essence during the arbitration process.

E-Discovery Parameters

In this section of the Prototype Arbitration Clause, limitations are placed upon the scope of electronically stored information ("ESI") discovery to be provided by the parties. The panel is granted discretion to deny requests or award reasonable costs to the producing party if the panel believes the burden and cost of producing the ESI outweigh the importance of the discovery requested.¹² Using a variation of this wording could assist with controlling electronic discovery costs in arbitrations.

Mediation During Arbitration Process

The Prototype Arbitration Clause mandates that the parties agree to submit to at least eight (8) hours of mediation at any time during the arbitration process. In addition, an arbitration panel is provided discretion to order the parties to submit to additional mediation. Including this language would, at key junctures during arbitration proceeding, provide the parties an opportunity to attempt to resolve all or a portion of the dispute through the mediation process, or to tailor the issues to be presented at the hearing. It would also

contractually provide an arbitration panel with the same powers that judges have in the court system to order parties to submit to mediation.

Application of the English Rule or the American Rule

Using the Prototype Arbitration Clause, the parties can consider whether to retain the American Rule, or adopt a form of the English Rule, which is not only in place in the United Kingdom, but across Western Europe as well as Canada and Australia.¹³ Adoption of such a rule could increase the viability of smaller, highly meritorious claims that are not being arbitrated in the current system.¹⁴ This rule could also lead to both parties re-examining which matters should end up in arbitration, and the amount of legal costs to be incurred.¹⁵ The suggested wording for the application of the English Rule encourages the parties to make settlement offers, and creates incentives for the parties to control litigation costs.¹⁶

The parties may choose to adopt all or a portion of the Prototype Arbitration Clause, and to modify the suggested language. ▼

ENDNOTES

1. See ARIAS-U.S. Rules for the Resolution of Insurance and Reinsurance Disputes; ARIAS-U.S. Neutral Panel Rules for the Resolution of Insurance and Reinsurance Disputes; ARIAS-U.S. Streamlined Rules for Small Claims Disputes.
2. See ARIAS-U.S. By-Laws, § 1 (e): The objectives of the Society shall be... to propose model arbitration clauses; "Objectives of ARIAS-U.S.," #5: To propose ...model arbitration clauses. "About ARIAS-U.S." under the header "Policy:" The

ARIAS-U.S. Board of Directors and members act as an insurance think-tank for procedural issues involving the insurance/reinsurance arbitration arena- developing alternative contract language designed to streamline the arbitration process.

3. This language is being proposed in lieu of, or in addition to the arbitration clause wording suggested in the ARIAS-U.S. Rules for the Resolution of Insurance and Reinsurance Disputes. ARIAS-U.S. Neutral Panel Rules for the Resolution of Insurance and Reinsurance Disputes, and/or ARIAS-U.S. Streamlined Rules for Small Claims Disputes.

4. The author does not make any representation as to whether such prototype wording complies with all applicable laws or regulations, or as to its legal sufficiency. While this language is being provided for practitioners to consider for use within insurance or reinsurance contracts, it does not represent an exhaustive survey of arbitration clauses or source material.

5. See BRMA Master Trading Agreement- A Practical Guide, 2011.

6. See Beneficial National Bank, U.S.A. v. Payton, 214 F. Supp. 679, 685 (S.D. Miss. 2001) ("If [an] arbitration clause contains retroactive time-specific language, e.g. a phrase reading 'this agreement applies to all transactions occurring before or after this agreement,' then [the court] may apply the arbitration provision to events relating to past events.>").

7. See ARIAS-U.S. Streamlined Rules for Small Claims Disputes.

8. *Id.*

9. *Id.*

10. See ARIAS-U.S. Neutral Panel Rules for the Resolution of Insurance and Reinsurance Disputes.

11. See ARIAS-U.S. Rules for the Resolution of Insurance and Reinsurance Disputes.

12. See Emilia A. Quesada, *E-Discovery In Arbitration Proceedings*, 2013, at 2 (available at http://www.americanbar.org/content/dam/aba/publications/litigation_committees/womanadvocate/aba-annual-2013-preventing-a-runaway.authcheckdam.pdf).

13. See Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System*, Civil Justice Report No. 11, December 2008 at Forward.

14. *Id.* at 8.

15. *Id.* at 8 and 11.

16. *Id.* at 20.

	Summary of Prototype Arbitration Clause
Composition of Panel	<ul style="list-style-type: none"> • ARIAS-U.S. Neutral Panel; or • ARIAS-U.S. Traditional Panel; or • ARIAS-U.S. Single Arbitrator Panel
Rules and Tools	<ul style="list-style-type: none"> • ARIAS-U.S. Regular, Neutral or Streamlined Rules • Time Limits for Disputes with Certain Dollar Amounts • E-Discovery parameters
Attorney's Fees	<ul style="list-style-type: none"> • English Rule; or • American Rule
Mediation	<ul style="list-style-type: none"> • Mandatory during arbitration process; further use at Panel's discretion