ARIAS•U.S. Practical Guide | Chapter I: 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 in **Chapter 2** and in the **ARIAS•U.S. Code of 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]udgement on the award may be entered in any court having jurisdiction." This provision paraphrases and 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 Panels' 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 and 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 arbitrator 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.