THE ISSUE OF "RELIABILITY" IN REINSURANCE ARBITRATIONS

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INTRODUCTION

Parties who opt to include an arbitration clause in their reinsurance contracts typically give up the safeguards provided by the well-established procedural and evidentiary rules used in courtrooms, as well as the binding effect of precedent concerning the substantive legal points that may be pertinent to disputes that could eventually arise between the parties. Similarly, if an arbitration clause governs dispute-resolution between two parties: 1) there is no opportunity to have factual differences resolved by as many as twelve disinterested people; and 2) there is very little chance for the losing party to obtain any sort of appellate relief.

Since an entity agreeing to arbitrate is evidently relinquishing some very valuable rights, it would be reasonable to wonder why a sophisticated commercial entity would agree to have its disputes resolved by merely 1-3 people who are given vast leeway in how they perform their functions; and are given the power to make important decisions in private amongst themselves; and who further enjoy the absence of any significant concern that their decisions will be overturned. The generally accepted answer to that question is that arbitration allows commercial disputants to resolve their differences in a non-public forum using experienced industry professionals who understand the subject matter and can appreciate and apply "industry custom and practice" to reach a fair resolution. Using a small number of knowledgeable people as the decision-maker(s) should also theoretically lead to a quicker and less-expensive disposition of the parties' disagreement.

Since many reinsurance contracts (both historically and currently) include arbitration clauses, it seems apparent that most participants in the reinsurance industry remain generally willing to cede broad dispute-resolution authority to arbitration panels - notwithstanding the reality that important safeguards may be lost. Yet, it is probably fair to say that the system remains imperfect and some of the participants are less than fully satisfied. In fact, one reason for the existence of ARIAS•U.S. is to continually work toward establishing a consensus on how best to make improvements.

One of the oft-repeated areas of concern relates to a perception that reinsurance arbitrations are not sufficiently "reliable". The procedures used by panels can vary widely, and the substantive results are far less predictable than they would be in a courtroom litigation. Consequently, the issue of "reliability" may be a fertile ground for ongoing inquiry and improvement by the participants in ARIAS-U.S.

Positive Steps By ARIAS•U.S.

It should be noted, of course, that ARIAS•U.S. over the years has developed a number of initiatives that may tend to increase reliability. For example:

Code of Conduct

ARIAS•U.S. published on its website a revised Code of Conduct that became effective on November 13, 2015. The purpose is to provide guidance to arbitrators and to encourage high standards of ethical conduct amongst panel members.

Practical Guide

In 2004 ARIAS•U.S. made available on its website a revised Practical Guide to Reinsurance Arbitration Procedure. This is a useful tool that encourages some consensus regarding the general way in which reinsurance arbitrations should normally be conducted.

Umpire Questionnaires

The method in which parties select the umpire in an arbitration is usually considered to be extremely important. In an attempt to facilitate full disclosure and fairness in the selection process, ARIAS•U.S. publishes on its website a model form - and the form is periodically revised in order to accommodate improvements sought by the members.

ARIAS•U.S. Rules

Within the past couple of years ARIAS•U.S. also developed a set of Rules for the Resolution of U.S. Insurance and Reinsurance Disputes. It is noteworthy that these were proposed as rules rather than mere guidelines, but they are not binding and enforceable unless the parties engaged in the dispute have either placed them into their arbitration clause or have otherwise agreed to jointly abide by them.

Neutral Panel Rules

In an attempt to deal with the "reliability" problems related to the use of party-appointed arbitrators, and the perception that sometimes arbitrations in the U.S. may be too partisan, ARIAS•U.S. offers on its website a set of procedural rules for parties who may wish to have an all-neutral panel preside over the parties' dispute.

The Issue

Ultimately, arbitration is a private contractual undertaking between two parties. Rules, guidelines, and forms can be suggested by ARIAS•U.S. but they are technically unenforceable unless the parties have adopted them in their contract or have subsequently agreed to be bound. This sometimes leads to inconsistencies, and situations in which a participant (a company, an outside counsel, or even a panel member) is left with a feeling that the arbitration process is insufficiently reliable.

A COMPANY REPRESENTATIVE'S VIEW

When agreeing to arbitrate disputes, the reinsurance industry likely envisioned a confidential, cost effective and efficient adjudicatory proceeding before experienced industry representatives well able to assess contracting parties' intent based, in part, on the industry's custom and practice. Unfortunately, reality does not always meet vision; this is true for the reinsurance arbitration process where, increasingly, companies are finding the process' costs savings and efficiencies to be overstated.

The confidential nature of most reinsurance arbitrations prohibits an empirical analysis of how often the arbitration process "breaks down" thus requiring parties to seek judicial intervention. As detailed below, however, a Lexis search of reported federal and state reinsurance cases[1] indicates an increase in the number of cases involving reinsurance arbitrations.

1995-1999	2000-2004	2005-2009	2010-2014	2015-2016
133	259	299	324	118

Arbitration Provisions in Newly-Placed Contracts

Despite its drawbacks, a company's desire to protect proprietary and confidential information, modeling data, and claims analyses may argue in favor of utilizing the reinsurance arbitration process. As such, arbitration provisions in newly-placed contracts should be drafted with an aim toward improving the procedural reliability of the arbitration process. This can be accomplished by including provisions:

- allowing potential consolidation of an arbitration across contracts in the same program and with reinsurers on these contracts as long as the arbitration involves the same dispute

- clarifying that the panel must follow the provisions of any confidentiality requirements, as well as award late payments penalties if such an article is invoked

- allowing a cedent to forego arbitration and instead bring an action in court against a "Runoff Subscribing Reinsurer" (as defined is appended Exhibit A)

ARIAS Scheduling Order

Absent its counterparty's consent to adjudicate a matter in court, a company with legacy business must utilize the reinsurance arbitration process. Arbitration proceedings governed by sparse arbitration provisions often found in legacy reinsurance contracts may benefit from a more comprehensive scheduling order based on the ARIAS recommended scheduling order. Scheduling orders can address the following potential issues, which may aid in the procedural reliability of the process:

[1] Using the term "reinsurance" within the same sentence as the search term "arbitrat!"

- require parties to submit more detailed Preliminary Statements in order to frame and define the dispute and provide some guidance as to needed discovery

- limit the number of depositions and hearing witnesses

- specify when an *ex parte* prohibition incepts and terminates

- require the parties to include their proposed awards with pre-hearing arbitration briefs, and limit the relief to be granted by the panel to that which is requested in the parties' proposed awards

- if the contract is silent, specify whether state or federal arbitration statutes govern the proceeding and whether rules of evidence govern the proceeding

Why Reliability in the Reinsurance Arbitration Process Matters

The inability to predict the procedural aspects of the arbitration process hinders a company's ability to budget external and internal resources. Adherence by the parties to agreed-upon arbitration procedures – including confidentiality – assists in managing and budgeting costs and resources by obviating the need for panel and/or judicial intervention with its attendant and unexpected costs. As the costs of arbitration proceedings increase and become more difficult to predict, a company may find the judicial process, with its rules of procedure, rules of evidence, and an appellate review process, more predictive and thus, preferable. Further, as courts increasingly adjudicate reinsurance contract disputes, a company may become more accustomed to the litigation process.

The lack of any precedential value to arbitration decisions results in a company's counsel often predicting outcomes based on a paucity of legal cases decided by strangers to the insurance and reinsurance industry. Further, it is difficult to analogize case law decisions, which are often dependent on contract wording, with an arbitration panel's potential award, which is more likely dependent on the custom and practice of the reinsurance industry. This inability hinders a company's ability to estimate the probable loss for certain reinsured claims.

The confidential nature of arbitration proceedings means a party is aware of its own "wins and losses" and, for the most part, not those of its colleagues with similar claims, wording, and disputes. This lack of data limits a predictive analysis of the chances of succeeding in an arbitration proceeding. As the business community increasingly depends on the collection, organization, and analysis of large sets of data to predict outcomes, it may find that confidentiality agreements, depending on their scope, hinder "big data" analytics.

Finally, increased participation by alternative market mechanisms in the reinsurance industry means a cedent's reinsurance partner may be a capital provider as opposed to a reinsurance underwriter. Capital providers likely have little, if any, experience in reinsurance arbitrations and may prefer to have their disputes decided by a court as opposed to reinsurance industry experts. The increasing costs and putative lack

of procedural reliability attendant with the reinsurance arbitration process may therefore cause these capital providers to insist on court adjudication of contractual disputes.

AN OUTSIDE COUNSEL'S VIEW

Outside counsel routinely advise their clients that they "don't guarantee outcomes" in dispute resolution proceedings, a piece of advice that automatically imparts a sense of unreliability. It is advice that applies as much in the context of litigation as it does to arbitration proceedings. Counsel, however, are quite familiar with their clients' need for estimates of the likelihood of success in the cases assigned to them, whether they be litigations or arbitrations. Such estimates are based, first and foremost, upon counsel's evaluation of the intrinsic strengths and weaknesses of their cases based upon the facts of the cases as counsel understand them. Nevertheless, when counsel thinks of "reliability" in the context of arbitration proceedings they are not thinking as much about handicapping the chances of achieving successful outcomes as they are about the procedural aspects of the process. From counsel's perspective, the concept of "reliability" in arbitration relates more to the procedures that will be used to reach the result than to a prediction of the eventual outcome. What are some of the procedural elements of typical ARIAS-style reinsurance arbitrations that differentiate them from what counsel encounter in the litigation process, and which contribute to a greater or lesser degree of "reliability"? The following are examples of procedural aspects of the process that both supporters and critics have identified as contributing to or detracting from reliability.

I. Form of the proceeding

A) Consolidated proceedings – who decides?

In litigated matters, both state and Federal rules of civil procedure govern the joinder of multiple parties and claims in a single proceeding. See, e.g., N.Y.CPLR-Article 10; 735 ILCS 5/2-404-407, 614; F.R.C.P. 10, 18-21. There are well-established principles of law governing the disposition of motions addressed to the pleadings in litigation, including motions relating to improper joinder of parties and claims under the applicable procedural rules. The rules also typically allow for severance of claims or counterclaims for trial, in instances where it would be inconvenient for the court to try all of the claims, counterclaims or cross-claims in a single proceeding. See, e.g., F.R.C.P. 42.

Since reinsurance arbitrations are creatures of contract, rules regarding consolidated arbitration proceedings involving multiple parties, claims and counterclaims do not exist, except to the extent provided in the contracts themselves. With respect to the parties, except in unusual circumstances, only those who have agreed to submit their contract disputes to arbitration may be joined as parties to the proceeding. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79,83, 123 S. Ct. 588,154 L. Ed. 2d 491 (2002) . However, issues regarding consolidation of disputes involving multiple parties, claims, counterclaims or cross-claims in a single arbitration proceeding often arise in cases where

one party seeks consolidation in the absence of an express agreement to do so.

Consolidation issues were traditionally decided by the courts, but the trend in more recent cases has been to hold that such issues should instead be decided by the arbitrators. See, e.g., *Munich Reinsurance America Inc. v. National Casualty Co*., 2011 WL 1561067 S.D.N Y. April 26, 2011); *Employees Insurance Co. of Wausau v. Century Indemnity Co*., 443 F. 3d 573 (7th Cir. 2006). Saying that consolidation issues are for arbitrators rather than courts to decide adds an element of unpredictability into the process. Without legal experience or precedent to guide them, arbitration panels may be faced with a number of difficult decisions regarding which arbitrators are authorized to decide complex questions of consolidation involving multiple parties or multiple panels. Courts have differed in their approaches to these issues. Compare, *Markel International Ins. Co. v. Westchester Fire Ins. Co*., 442 F. Supp. 2d 200 (D.N.J. 2006) with *Employees Ins. Co. of Wausau v. Century Indemnity Co.*, 2005 WL 2100977 (W.D. Wis. July 19, 2005) *aff'd* 443 F. 3d 573 (7th Cir. 2006).

B) Reasoned awards and the form of relief that may be granted.

In those litigations where the issues will be decided by a judge rather than a jury, the court will typically author either an opinion, or findings of fact and conclusions of law, that will provide the parties with an explanation of the court's reasoning for the result it reached. This practice promotes reliability to the extent it provides a check against an arbitrary or capricious result, or one based upon mistakes in the law or misunderstanding of the facts.

In reinsurance arbitrations, reasoned awards in which the arbitration panel provides the parties with the rationale for its decision are the exception rather than the rule, at least in cases where the contracts are silent on the issue and one party or the other objects to such an award.

With respect to the nature of the relief that may be ordered by an arbitration panel, there are very little checks on the panel's authority to devise a form of award that may involve declaratory relief rather than or in addition to the typical monetary award, and that might or might not have been requested by one of the parties at the outset of the proceeding or at any time prior to the entry of the final award. See, e.g., *Star Ins. Co. v. National Union Fire Ins. Co.*, No. 15-1403, 2016 BL 267734 (6th Cir. Aug. 16, 2016) (vacating arbitration panel's final award and noting that panel majority had awarded a form of relief that resulted in losing party being liable "for millions more than it had anticipated when the arbitration commenced"). The inability to define or predict the limits of the relief that may be granted by an arbitration panel, as distinguished from the forms of relief that are available to a court in a litigated matter, may add a significant element of unpredictability to the dispute resolution process in certain cases.

II. Identifying the decision makers

Judges in state and federal courts across the United States differ dramatically in their familiarity with the business of reinsurance, their understanding of the terminology

and contractual forms employed in the industry, and their experience in the resolution of reinsurance disputes. For example, while justices of the commercial division of the New York Supreme Court in Manhattan certainly have experience with reinsurance cases, as do some Federal courts in major commercial centers, most state courts have little experience in such matters, even those sitting in some of the major commercial jurisdictions. Looking at it in one way, there is a certain unpredictability that flows from a process in which the decision makers are unfamiliar with the business, terminology, contracts, customs and practices of the reinsurance industry, and have little or no experience or track record in resolving disputes in the industry. Obviously, the parties have little or no control over the identity of the judge who will decide their dispute if the matter is in litigation. Viewed another way, however, judges have been trained to apply rules of law and contract construction to the resolution of contractual disputes, regardless of the industry in which they arise, and predictability might be said to result simply from the application of those well-established rules.

In the case of reinsurance arbitrations, the contracts typically specify how many arbitrators will decide the case, what their qualifications will be, and the manner by which they will be appointed. The contracts often specify that arbitrators must be current or retired officers or directors of insurance or reinsurance companies. Other contracts may require that arbitrators have certain credentials, such as having been certified by ARIAS•U.S. These contractual provisions lend predictability to the process by specifying the universe of individuals eligible to serve, and establishing the process by which the arbitrators will be selected, as opposed to the relative randomness of the assignment of judges in U.S. courts.

It is beyond the scope of this paper to recite the pros and cons of a procedure which employs party-appointed advocate arbitrators, as opposed to one which employs all neutral arbitrators. For this purpose, it may be said that either system can be supportive of the goal of reliability simply because the process by which the decision makers are chosen is expressly set forth in the reinsurance contract.

Where randomness and unreliability enter more often is in the selection of the neutral third arbitrator or umpire by two party-appointed arbitrators. Typically, reinsurance agreements provide that if the party-appointed arbitrators cannot agree on the appointment of an umpire, which in practice they usually do not, then some form of random procedure is employed to select the umpire. The process of random selection often involves the two sides proposing separate slates of candidates, followed by a procedure by which each side strikes candidates from the other side's slate and then draws lots. Another somewhat less random process involves each side ranking the candidates on both slates, with the candidate achieving the highest total rank being selected automatically to serve as the umpire. It is often said that using a random process of umpire selection may determine the ultimate outcome of the arbitration, because the candidates slated by the opposing parties are often believed to have certain predispositions by reason of their backgrounds or their reputations in prior cases.

While the fairness of such a process has been questioned, "reliability" should not be doubted. Experienced counsel and their clients will reliably vet and select those party-appointed arbitrators best-suited to the needs of their cases. Experienced arbitrators will

reliably recommend umpire candidates with whom they have had good working relationships, and who they believe are likely to be sympathetic to their party's cases.

III. Confidentiality

It was once thought that confidentiality was one reliable advantage of arbitration over litigation. It is certainly accurate to state that arbitration is inherently *more* confidential than litigation, because public access to arbitration proceedings is not allowed, and no public record of the proceedings is made. Moreover, most parties to arbitration proceedings enter into confidentiality agreements in order to limit public disclosures. Such agreements, however, do not always assure that information about the arbitration actually remains confidential. Post-arbitration judicial proceedings may be filed to confirm or vacate an arbitration award, requiring that, at a minimum, some form of public record be made of the existence of the arbitration and the fact that an award has been entered. Even if the actual award is filed under seal, courts do not always agree to keep the parties' arbitration information confidential. Courts have sometimes held that the constitutional right of public access to court proceedings trumps the parties' confidentiality agreement. See, e.g. *Amerisure Mutual Ins. Co. v. Everest Reinsurance Co*., 2014 WL 5481107 (E. D. Mich. Oct 29, 2014); *Eagle Star Ins. Co. v. Provincial Indemnity Co*., 2013 WL 5322573 (S.D.N.Y) Sept. 23, 2013); *Aioi Nissay Dowa Ins. Co., v. Prosight Specialty Management Co., Inc*. 2012 WL 3583176 (S.D.N.Y. Aug. 21, 2012). Parties therefore cannot rely on their "dirty laundry" not being exposed to public scrutiny.

IV. Discovery

A) Fact

Fact discovery in modern reinsurance arbitration is common. Parties typically exchange documents and take depositions of fact witnesses in much the same way as they would in litigation. Most arbitration agreements, however, are silent on discovery, and the Federal Arbitration Act ("FAA") does not expressly address discovery.[2] Accordingly, arbitration panels, who have wide latitude to control the procedural aspects of the case, have broad discretion to regulate discovery to meet the needs of the individual proceeding. This discretion means that the scope of discovery that will be allowed in any given case might not be as reliable as it is in litigation, where rules governing permissible discovery are intentionally broad. See e.g., F.R.C.P. 26(b)(1); N.Y. CPLR § 3101; Ill. Sup. Ct. Rule 201 (b)(1).

Perhaps the area of fact discovery in arbitration which involves the greatest unreliability is third-party discovery. Third-parties obviously are not signatories to the arbitration agreement and therefore have not consented to the jurisdiction of the arbitration panel. The FAA does not expressly authorize third-party discovery, but does

[2] The reader should note that the Uniform Arbitration Act, adopted in some form by many states, expressly addresses both the production of documents as well as depositions for discovery purposes.

grant authority to the arbitrators to "summon in writing any person to attend before them," and this authority applies to both witnesses and documents. 9 U.S.C § 7. There is a split of authority as to whether the applicable provisions of the FAA allow only trial subpoenas, or permit discovery subpoenas as well. The Second, Third and Fourth Circuit Courts of Appeal have held that Section 7 does not confer authority on arbitrators to issue discovery subpoenas. The Eight and Sixth Circuits, however, have taken a broader view of Section 7, holding that the authority to issue discovery subpoenas may be inferred from the authority to issue trial subpoenas. To avoid this problem, some panels have convened "mini-hearings" before one or more of the arbitrators in order to allow parties to obtain discovery from third parties. Such proceedings can be cumbersome, and are fraught with their own issues of reliability.

B) Expert

Another area where discovery in arbitration can differ from litigation involves expert testimony. In litigation, parties are generally free to designate expert witnesses, subject to subsequent motion practice which may restrict a party's use of the experts' testimony at trial. It is not uncommon in arbitration proceedings for one party or another to argue that expert testimony is neither appropriate nor required. Typically a party asking an arbitration panel to resolve the dispute by applying the strict wording of the contract may argue that expert testimony is inappropriate. Moreover, parties seeking to limit evidence of custom and practice with respect to particular types of transactions or lines of business may argue that "the arbitrators are the experts" and that, as such, additional expert testimony would be cumulative and unnecessary. Panels often restrict and at times may refuse expert witness designation and discovery based on these arguments. Parties who had anticipated constructing their cases around relevant expert testimony may find they are foreclosed from doing so by pre-discovery rulings of the panel. This may add considerable unreliability and uncertainty to the arbitration process, especially compared to litigation where parties are typically allowed to designate and take discovery of expert witnesses, subject to a *subsequent* motion to limit the use of such testimony at trial.

V. Evidence

Reinsurance contracts typically contain an "honorable engagement" clause, an example of which is found in the ARIAS•U.S. guide to arbitration procedure:

> The arbitrators and the 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.

In litigation, reliability is promoted by the rules of evidence that govern the way in which evidence is offered and received by a judge or jury. Arbitration panels, on the other hand, are free to accept or reject the rules of evidence, or to apply them selectively. This means that panel members have discretion to ignore counsel's objections to the introduction of evidence based upon the following:

- Relevancy;
- Prejudice or confusion;
- Character and reputation evidence;
- Compromise and offers of compromise;
- Existence of retrocessional reinsurance for losses;
- Lack of personal knowledge;
- Writings used to refresh recollection;
- Opinion testimony by lay witnesses;
- Qualification of experts and bases of expert opinions;
- Hearsay and exceptions to hearsay;
- Authentication of original documents and duplicates;
- Admissions; and
- Leading questions on direct examination.

VI. Appeal

Arbitration agreements in reinsurance contracts typically provide that an award of the arbitration panel will be "final and binding" on the parties. This expresses the parties' contractual intent that a decision by an arbitration panel will not be appealable either to the panel itself or to a court. Section 9 of the FAA provides for judicial confirmation of final arbitral awards, and limits appeals in arbitration cases to the question of whether there are statutory grounds for vacating or modifying the award. The statutory grounds are exceedingly narrow, and thus appellate review of arbitration awards is far more limited than appellate review of judicial decisions. 9 U.S.C. 10 and 11. Viewed in one way, the absence of appellate review of arbitral awards adds an element of procedural reliability to the process because the parties know in advance that the decision of the panel will likely be final and non-appealable. On the other hand, however, critics argue that the absence of meaningful appellate review actually adds considerable unreliability to the arbitration process insofar as there is no mechanism in the process to correct errors made by arbitration panels.

VII. Res judicata/collateral estoppel

When a litigation is ended, a judgment is typically entered by the court which will likely have precedential or preclusive effect in subsequent cases. *Stare decisis* is the legal doctrine upon which the English and American systems of common law are built. The *stare decisis* doctrine provides that when principles of law are decided and applied to a certain set of facts, those principles will be applied in the same way to substantially the same facts in future cases. There is no such doctrine applicable to arbitration awards. Arbitration agreements in reinsurance contracts typically provide that the arbitrators are not bound by strict rules of law in making their decisions, and thus principles decided by an arbitration panel in one case need not be followed by subsequent panels in future cases. This cannot help but diminish the reliability of arbitration awards compared to judgments in litigation.

The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) bar the re-litigation of the same claims and issues in subsequent court cases. Do arbitral awards have the same preclusive effects? Some courts have answered this question in the affirmative, finding that arbitration awards may be given preclusive effect in subsequent litigation. See, e.g., *Lobaito v. Chase Bank*, 529 Fed. Appx. 100 (2d Cir. 2013); *Witkowski v. Welch*, 173 F. 3d 192 (3d Cir. 1999); *Universal American Barge Corp v. J-Chem, Inc.* 946 F. 2d 1131 (5th Cir. 1991). However, even those courts that recognize the preclusive effect of arbitration awards in subsequent litigation might find it difficult to do in a given case for the simple reason that arbitrators are not typically required to explain the reasons for their awards. *Postlewaite v. McGraw-Hill, Inc*., 333 F. 3d 42, 48-49 (2d Cir. 2003).

When the proceeding in which a prior arbitral award may be given preclusive effect is another arbitration rather than a litigation, courts have held that whether the prior award will be given such effect is for the subsequent arbitration panel rather than a court to decide. See e.g., *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F. 3d 126 (2d Cir. 2015); *Consolidation Coal Co v. United Mine Workers of America*, 213 F. 3d 404 (7th Cir. 2000). As such, arbitration panels are free to ignore the doctrines of *res judicata* and collateral estoppel. In theory, two panels in separate cases between the same parties, considering the same issues under identical or substantially the same contract wording, are free to decide the cases in opposite ways. This is another example of the relative unreliability of arbitration procedures as distinguished from those applicable in a litigation context.

AN ARBITRATION PANEL MEMBER'S VIEW

To the extent "reliability" of the arbitration process is considered, it is typically from the perspective of the parties. After all, they are the stakeholders that drive the "process"; with the endgame being the Panel's decision (hopefully in their favor). Panel Members on the other hand, whether serving as a party-appointed arbitrator or "neutral" umpire, recognize that they are in service of the process and the needs of the parties. Yet, Panel Members undoubtedly understand the perspective of the parties and share many of

the same concerns. However, for Panel Members (and for counsel as well) there is an additional element of "reliability" that has to do with the "the business of the business". So, what does "reliability" look like from the Panel Members perspective: what should they be able to rely upon from the parties and counsel in moving through the process?

At its most basic, "reliability" means knowing what's going on, or in other words, being kept "in the loop". Panel Members should be able to assess their inventory of arbitrations and where they stand. They need to know which arbitrations are "real" and which are not, i.e., which arbitrations are moving forward (and when), which arbitrations are "stalled" and which arbitrations are likely to go away. As all participants in the process understand, Panel Members need to know the status of their arbitrations for disclosures in other matters, both as a potential umpire making disclosures in an umpire questionnaire, or as a party-appointed arbitrator initially advising of potential "conflicts" and later making detailed disclosures in conjunction with an Organizational Meeting. Panel Members – like anyone else – need to be able to plan or project their schedules moving forward, as well as monitor the state of their business.

The first point of engagement with the process for a Panel Member often has to do with the appointment itself. "Reliability" in the appointment phase simply means letting the Panel member know whether or not they got the appointment. For a prospective umpire that means being updated on the status of umpire selection (which can extend over the course of a year or more), and ultimately being timely advised if the process resulted in another candidate being selected as umpire. For a prospective or actual arbitrator that similarly means being advised if another candidate got the appointment or if there are any delays in either making the appointment or moving forward with the arbitration itself.

Other examples of being kept "in the loop" can be expressed with the following questions:

> Is the arbitration moving forward, or is it "stalled" or "on hold" for umpire selection, audits, mediation, negotiations, consolidation matters, etc.? I would imagine that every arbitrator has amongst their inventory of arbitrations, some or many that are technically "open" (or presumed closed through passage of time), though they either never moved forward following appointment or at some later phase. I also suspect that many arbitrators have first heard from opposing arbitrators or umpires that an arbitration which was lying dormant for ages is suddenly moving forward.
>
> Did the other side appoint?
>
> Has a slate of potential umpires been vetted? Has a protocol for selection of the umpire been agreed? Has the umpire questionnaire been agreed or sent out? Has an umpire been appointed?
>
> What's going on with the audit(s), negotiations, mediation, document production, third-party discovery, dispositive motions?

How is the agreed schedule holding up? Any potentially meaningful slippage? Should the Panel "hold" the scheduled Hearing date(s), or look for other dates at an early opportunity?

Has the case settled? (I would imagine many Panels or Panelists have sought to find out what happened to the overdue pre-hearing briefs only to find out that the arbitration has already settled.)

Another issue of "reliability" from the Panel Member's perspective is keeping the arbitration on track. Continual adjournments of Hearing dates while settlement negotiations are ongoing do not support "reliability". On the other hand, holding to the scheduled hearing date and pursuing "parallel tracks" can focus the parties' attention and both facilitate settlement if there is going to be one and enhance "reliability" with all participants knowing the endgame (and the timing).

For any Panel Member, reliability" means being paid promptly for their services. After all, this is a business, like any other. Most Panel Members are not doing this simply for their health - the wonders of The Breakers notwithstanding. Similarly, most Panel Members are not doing this as an extension of their *pro bono* commitment as lawyers. With some notable and highly public exceptions, most business people believe that they should pay their service providers promptly and in full. In the arbitration business, however, that doesn't always translate into actual practice.

Finally, why don't you just tell us what you want as an industry? We certainly recognize that "Reliability" may not necessarily be advantageous to all in a particular arbitration. And as Panel Members, it's all good! (We're here to serve…if not protect) We're happy to remain entirely flexible, but that does not make the process "reliable" or predictable and can be dis-economic. And, these aspects of "process" impact the reliability of results as well. For example, do you want broad discovery akin to the federal rules, or narrow discovery limited to core documents? At this point, you can have polar extremes regarding document discovery and depositions, with everything in between, from proceeding to proceeding…either as a function of the Panel Members' backgrounds (lawyers and non-lawyers) and beliefs and/or the parties' or counsel's strategy. Another example, is the use of experts on "reinsurance" issues as opposed to scientific or technical issues. The point is, if it is reliability you want, this is something to consider from the Panel Member's perspective.

CONCLUSION

It seems apparent that significant concerns about "reliability" continue to exist in various segments of the ARIAS-US community. It is remarkable, though, that the grounds for concern are markedly different depending on whether the person is a company representative, outside counsel, or arbitrator.

EXHIBIT A

A “Run-off Subscribing Reinsurer” is defined as:

1. A State Insurance Department or other legal authority has ordered the Subscribing Reinsurer to cease writing business; or

2. The Subscribing Reinsurer has become insolvent or has been placed into liquidation, receivership, supervision or administration (whether voluntary or involuntary), or proceedings have been instituted against the Subscribing Reinsurer for the appointment of a receiver, liquidator, rehabilitator, supervisor, administrator, conservator or trustee in bankruptcy, or other agent known by whatever name, to take possession of its assets or control of its operations; or

3. The Subscribing Reinsurer has become involved in a scheme of arrangement or similar proceeding (whether voluntary or involuntary) which enables the Subscribing Reinsurer to settle its claims liabilities, including but not limited to any estimated or undetermined claims liabilities under this Contract, on an accelerated basis; or

4. The Subscribing Reinsurer has reinsured its entire liability under this Contract with an unaffiliated entity or entities without the Company's prior written consent; or

5. The Subscribing Reinsurer has ceased assuming new or renewal property or casualty treaty reinsurance business; or

6. The Subscribing Reinsurer has transferred or delegated its claims-paying authority, as respects business subject to this Contract, to an unaffiliated entity