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# Direct Insurance Coverage Disputes -

## Can ARIAS Develop an Attractive Arbitration Product?

Mitchell Dolin, Covington & Burling  
Deirdre Johnson, Crowell & Moring  
Peter Rosen, Latham & Watkins  
Paul Zevnik, Morgan Lewis & Bockius

# The Expansion Proposition

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# A Policyholder Perspective on Arbitration as the Dispute Resolution Mechanism of Choice

# Organizations that Purport to be Equipped to Handle Direct Insurance Disputes

## Potential Focus Areas for Direct Insurance Arbitrations

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### 1. Coverage In Place Agreements.

#### EXAMPLE #1:

#### Dispute Resolution

If any dispute between the Parties concerning the meaning or operation of this Agreement shall arise, the Parties shall use their best efforts to resolve any such dispute through good faith negotiations. If any Party contends that another Party has breached the terms of the Agreement, such Party, within a reasonable time under the circumstances, will provide to the other Party notice of this contention via e-mail or overnight delivery service. The Party that contends that the Agreement has been breached shall give the allegedly breaching Party thirty (30) calendar days from the date of receipt of the notice to cure the alleged breach before taking any further action. If any such dispute or alleged breach of the Agreement cannot be resolved through good faith negotiations, the Parties will submit such dispute for binding arbitration to proceed in a mutually agreed location (city and state) under the Commercial Arbitration Rules of the American Arbitration Association.

## Potential Focus Areas for Direct Insurance Arbitrations (cont'd)

### 1. Coverage In Place Agreements (cont'd.).

#### EXAMPLE #2:

The Parties agree that they will attempt to resolve any dispute arising from this Settlement Agreement through good faith negotiations for a period of thirty (30) days after written notification regarding such dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to mediation. The Parties will conduct the mediation in such a manner that it shall be completed within ninety (90) days after good faith negotiations have failed to resolve the dispute. Thereafter, if the dispute remains unresolved, the Parties agree to submit the dispute to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect as of the Effective Date. Unless the Parties agree otherwise, mediation and/or arbitration shall take place in New York, New York.

## Potential Focus Areas for Direct Insurance Arbitrations (cont'd)

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### 1. Coverage In Place Agreements (cont'd.).

#### EXAMPLE #3:

11.2. In the event the mediation fails to resolve such dispute within ninety (90) days of any Party's written request to mediate pursuant to Section 11.1, said dispute shall be submitted to and resolved by arbitration held through JAMS in New York, New York.

11.3. The dispute resolution procedures set forth in this Section 11 shall govern all disputes relating to, arising out or involving the construction or application of this Agreement, as well as any contention that a Party has failed to live up to its obligations under this Agreement.



## Potential Focus Areas for Direct Insurance Arbitrations (cont'd.)

### 1. Coverage In Place Agreements (cont'd.).

#### EXAMPLE #4:

Binding Arbitration: If a mediated resolution to the dispute is not achieved within ninety (90) days of the selection of a mediator (or such additional time as the relevant Parties may agree in writing), any party may serve a written demand for arbitration of the unresolved dispute.

The unresolved dispute shall be submitted to binding arbitration. . . before a single arbitrator selected by the relevant Parties with substantial background in risk management or insurance coverage law. If the relevant Parties cannot agree on the arbitrator within (30) days of a written demand for arbitration, then a panel of three arbitrators shall be selected by the relevant Parties pursuant to the Center for Public Resources' Rules for Non-Administered Arbitration, subject to the relevant Parties' agreement that all three arbitrators shall have a substantial background in risk management or insurance coverage law. The costs of the arbitration shall be shared equally... Each party to the arbitration shall bear its own costs and fees including attorneys' fees, association with the arbitration.

## Potential Focus Areas for Direct Insurance Arbitrations (cont'd)

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- Multi-phase, dispute resolution process: meeting, mediation, binding arbitration
- Qualifications: “substantial background in risk management or insurance coverage law”
- Express choice of law clause
- Time-bar: Disputes barred unless arbitration commenced within three years of notice of the dispute

## 2. Captive Insurance/Reinsurance Agreements

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### XIX. GOVERNING LAW AND DISPUTE RESOLUTION

Any dispute or claim arising out of or relating to this Agreement, including its formation and validity, shall be referred to arbitration. The arbitration shall be conducted in accordance with the ARIAS U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.

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 parties agree to submit to binding arbitration. The arbitration proceedings shall take place before a single arbitrator appointed pursuant to the ARIAS US Umpire Selection Procedure. Such arbitrator shall be either a present or former executive officer of insurance or reinsurance companies in the United States of America and shall be certified by ARIAS U.S. The arbitrator shall be disinterested, shall not be under the control of either party, and shall have no financial interest in the outcome of the arbitration.

## 2. Captive Insurance/Reinsurance Agreements (cont'd)

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- Express reference to ARIAS rules and umpire selection process
- Qualifications tied to US insurers and reinsurers
- Single arbitrator
- Honorable engagement language
- Expedited process – Submission of briefs within thirty (30) days after arbitrator appointment

### 3. Specialty Insurance Policies: Transactional/M&A- Related, Professional Liability, Financial Lines Policies

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#### EXAMPLE #1 (D&O Policy):

##### E7 Jurisdiction and Governing Law / Arbitration

This policy shall be governed by a construed in accordance with the laws of England and Wales. All matters in difference between the parties arising under, out of or in connection with this policy, including formation and validity, and whether arising during or after the period of this policy, shall be referred to an arbitration tribunal. The seat and place of arbitration shall be in London.

The arbitration shall be conducted in accordance with the latest UK ARIAS Rules published at the time that the arbitration is commenced by the claimant (the party requesting arbitration), unless the rules conflict with this clause, in which case this clause will prevail...

### **3. Specialty Insurance Policies: Transactional/M&A- Related, Professional Liability, Financial Lines Policies**

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- England/Wales Choice of Law
- ARIAS UK Rules
- Chairman of ARIAS UK as the default appointer
- Qualification requirements: “not less than ten years experience of insurance or reinsurance as persons engaged in the industry itself or as lawyers or professional advisers”

### 3. Specialty Insurance Policies: Transactional/M&A- Related, Professional Liability, Financial Lines Policies (cont'd)

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#### EXAMPLE #2:

#### **XVIII. SEVERABILITY**

Each provision of this Agreement is severable. In the event that any provision of this Agreement is found or declared to be void, illegal, or unenforceable by a court having proper jurisdiction, the remaining provisions of this Agreement shall retain their full force and effect.

#### **XIX. GOVERNING LAW AND DISPUTE RESOLUTION**

Any dispute or claim arising out of or relating to this Agreement, including its formation and validity, shall be referred to arbitration. The arbitration shall be conducted in accordance with the ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes.

### 3. Specialty Insurance Policies: Transactional/M&A- Related, Professional Liability, Financial Lines Policies (cont'd)

#### EXAMPLE #3 (Surety Bond):

The arbitrator will interpret this Agreement as an honorable engagement and will not be obligated to follow the strict rules of law or evidence. In making the award, the arbitrator shall apply the custom and practice of the property and casualty insurance and reinsurance industry in the United States of American with a view to affecting the general purpose of the Agreement. To the extent that the arbitrator looks to any state or federal law, the arbitration tribunal will apply the laws of State of Delaware.

The arbitrator will have the power to fix all procedural rules for the holding of the arbitration including discretionary power to make orders as to any matters which it may consider proper in the circumstances of the case with regard to pleadings, discovery, inspection of documents, examination of witnesses and any other matter whatsoever relating to the conduct of the arbitration. The arbitrator may receive and act upon such evidence whether oral or written, strictly admissible or not, as in his/her discretion will think fit, subject to the following guidelines:



### 3. Specialty Insurance Policies: Transactional/M&A- Related, Professional Liability, Financial Lines Policies (cont'd)

1. Within thirty (30) days after the arbitrator has been impaneled, the parties will submit briefs on the matters at issue. All other papers and documents submitted in connection with the hearing will be provided in sufficient quantities for distribution to the adverse party and to the arbitrator.
2. All correspondence between the parties and the arbitration tribunal will be certified mail, return receipt requested.
3. With or without the briefs, at the expiration of the thirty (30) day period the arbitrator will provide the parties with a minimum of two (2) weeks notice of the hearing, which will be set as soon as possible after the expiration of the time for filing briefs.
4. The arbitrator will make his/her decision within thirty (30) days following the final hearing.

## 4. Property Insurance Appraisals

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N.Y. Ins. Law § 3404 (McKinney 2000) states in part:

- (a) The printed form of a policy of fire insurance, as set forth in subsection (e) hereof, shall be known and designated at the "standard fire insurance policy of the state of New York."
- (b)(1) No policy of contract of fire insurance shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform as to all provisions, stipulations, agreements and conditions with such form of policy....

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- (e) The form of the standard fire insurance policy of the state of New York ... shall be as follows:

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Appraisal In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

## 5. Disputes Between Insurers

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## The Way Forward

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- Addressing Policyholder Views that ARIAS is an Insurance Industry Group
- Identification/Selection of Arbitrators that Both Insurers and Policyholders Would Embrace
- Development of Arbitration Clauses and Arbitrator Qualification Requirements
- Revised Certification Process

# Questions