

July 18, 2017

## ***ARIAS•U.S. Code of Conduct***

***This version of the Code of Conduct was revised and became effective as of January 1, 2014, for conduct taking place after that date. It is an integration, with significant updates and amendments, of the original Guidelines and the Additional Ethics Guidelines adopted by ARIAS in 2010. The date on the PDF version of the Code reflects subsequent amendments to the Code as approved by the Board.***

### **INTRODUCTION**

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational society 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 for service as panel members in industry arbitrations. The ARIAS•U.S. Board of Directors certifies as arbitrators individual members who are qualified in accordance with criteria and procedures established by the Board.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

### **PURPOSE**

*The purpose of the Code of Conduct is to provide guidance to arbitrators in the conduct of insurance and reinsurance arbitrations in the United States, whether conducted by a single arbitrator or a panel of arbitrators, whether or not certified by ARIAS•U.S. and regardless of how appointed. Comments accompanying the Canons explain and illustrate the meaning and purpose of each Canon. These Canons are, however, not intended to override the agreement between the parties in respect to arbitration and do not displace applicable laws or arbitration procedures. Though these Canons set forth considerations and behavioral standards only for arbitrators, **the parties and their counsel are expected to conform their own behavior to the Canons and avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.** Parties and counsel should provide prospective arbitrators and umpires with sufficient information concerning the dispute and all of its potential participants so that they may fairly consider whether to serve.*

### **DEFINITIONS**

1. Affiliate: an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;
2. Arbitrator: a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;
3. Party: the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;

4. Umpire: a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

## **CANON I**

**INTEGRITY:** Arbitrators should uphold the integrity of the arbitration process and conduct the proceedings diligently.

### **COMMENTS:**

1. The foundation for broad industry support of arbitration is confidence in the fairness and competence of the arbitrators.
2. Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.
3. The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve:
  - a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;
  - b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel;
  - c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the candidate may not serve as an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);
  - d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;
  - e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire; or
  - f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator or expert in a new matter involving a new matter by a party to the matter where the candidate sits as an umpire.

4. Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline the appointment:

- a) whether the candidate has a financial interest in a party;
- b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;
- c) whether the candidate has previously served as a consultant (which term includes service on a mock or shadow panel) or expert for or against one of the parties;
- d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness;
- e) whether the candidate has previously served as a lawyer for either party;
- f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;
- g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;
- h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;
- i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party involved in the proposed matter;
- j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

**5. *Relationship between comments 3 and 4.*** Comment 3 sets forth circumstances in which an arbitrator must refuse to serve. If none of those circumstances applies, comment 4 sets forth circumstances an arbitrator should nevertheless consider in deciding whether to serve. In some cases, comment 3 will "almost" apply – usually because the arbitrator has a relationship described in comment 3 with an entity that is related to a party to the current arbitration, but that is not strictly within the definition of "party." Thus, one of the circumstances set forth in comment 3 may apply

- (i) to an entity that is an affiliate of a party to the current arbitration, but that is not within the definition of "party," or

(ii) to an entity having the same third-party administrator or manager as a party to the current arbitration.

In such a case, the arbitrator should refuse to serve, in line with the general principle that in upholding the integrity of the arbitration process an arbitrator should not get too close to the edge on issues of ethics or process fairness. If, however, it is clear that the relationship between the entity with the “comment 3” relationship to the arbitrator and the party to the current arbitration is attenuated, and that, by reason of the attenuation, the reasons for the mandatory “do not serve” rules in comment 3 are not implicated, then the arbitrator may (but need not) choose to serve.

6. The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 5. The umpire or candidate shall be informed of such agreement.

7. Consistent with the arbitrator’s obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new matter by a party to the arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

## **CANON II**

**FAIRNESS:** Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

### **COMMENTS:**

1. Before accepting an appointment, a person contacted to serve as an arbitrator should consider whether the identity of the parties and their counsel, or factual issues anticipated to be implicated in the matter (as well as related issues that might be relevant such as the identity of affiliates of the parties, third-party managers, intermediaries, witnesses, etc.), would impact the arbitrator’s ability to render a just decision in a fair manner.

2. Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues. Arbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly.

3. Party-appointed arbitrators should not offer a commitment to dissent, or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested.

4. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, that would likely affect their ability to render a just decision.

### **CANON III**

**COMPETENCE:** Candidates for appointment as arbitrators should accurately represent their qualifications to serve.

#### **COMMENTS:**

1. Candidates should provide up-to-date information regarding their relevant training, education and experience to the appointing party (or parties if nominated or selected to serve as the umpire) to ensure that their qualifications satisfy the reasonable expectations of the party or parties.

2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

### **CANON IV**

**DISCLOSURE:** Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

#### **COMMENTS:**

1. Before accepting an arbitration appointment, candidates for appointment as arbitrators should make a diligent effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be arbitrators or potential witnesses. Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

2. A candidate for appointment as arbitrator shall also disclose:

- a) relevant positions taken in published works or in expert testimony;
- b) the extent of previous appointments as an arbitrator by either party, either party's counsel or either party's third party administrator or manager; while it may be true in some circumstances that only the party technically appoints the arbitrator, the purpose of this rule is to require disclosure of the relationships between the candidate and the parties as well as the candidate and either parties' counsel or third party administrator or manager; such relationships that must be disclosed include appointments as an arbitrator where the party's counsel and/or the party's third party administrator or manager acted as counsel or third party administrator or manager for a party making the appointment; and
- c) any past or present involvement with the contracts or claims at issue.

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

5. After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, such as serious personal or family health issues. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.

- a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;
- b) if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or
- c) if required by the contract or law.

6. The duty to disclose all interests and relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in -paragraphs 1 and 2 above are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators together with an explanation of why such disclosure was not made earlier.

## **CANON V**

**COMMUNICATION WITH THE PARTIES:** Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.

### **COMMENTS:**

1. If an agreement between the parties or applicable arbitration rules establish the manner or content of communications among arbitrators and the parties, those procedures should be followed.

2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract are required to be “neutral” or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications.

3. A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition. A party-appointed arbitrator should, once all members of the Panel are selected, disclose to the other members of the Panel and the parties all documents that they have examined relating to the proceeding. Party-appointed arbitrators may consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the umpire.

4. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered.

5. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted, they are not required to send copies of any such written communication to any other party or arbitrator.

6. Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and

(c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

7. Whenever the umpire communicates in writing with one party on subjects relating to the conduct of the arbitration or orders, the umpire should at the same time send a copy of the communication to each other arbitrator and party. Whenever the umpire receives any written communication concerning the case from one party on subjects relating to the conduct of the arbitration that has not already been sent to every other party, the umpire should promptly forward the written communication to the other arbitrators and party.

8. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, the umpire should not discuss a case with a single arbitrator, party or counsel in the absence of the other arbitrator, party or counsel, except in one of the following circumstances:

a) Discussions may be had with a single arbitrator, party or counsel concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the umpire should promptly inform the other arbitrator, party or counsel of the discussion and should not make any final determination concerning the matter discussed before giving each arbitrator, party or counsel an opportunity to express its views.

b) If all parties request or consent to it, such discussion may take place.

c) If a party fails to be present at a hearing after having been given due notice, the panel may discuss the case with any party or its counsel who is present and the arbitration may proceed.

## **CANON VI**

**CONFIDENTIALITY:** Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

### **COMMENTS:**

1. Arbitrators are in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required or allowed by applicable rules or law, arbitrators should keep confidential all matters relating to the arbitration proceedings and decision.

3. Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings,

except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators. Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return or retain notes taken during the arbitration. Notes, records and recollections of arbitrators are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the panel agree to such disclosure, or (2) a disclosure is required by law.

## **CANON VII**

**ADVANCING THE ARBITRAL PROCESS:** Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

### **COMMENTS:**

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrators to comply with such procedures or rules unless the parties agree otherwise.
2. Individuals should only accept arbitration appointments if they are prepared to commit the time necessary to conduct the arbitration process promptly.
3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.
5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

## **CANON VIII**

**JUST DECISIONS:** Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.

COMMENTS:

1. When an arbitrator's authority is derived from an agreement between the parties, arbitrators should neither exceed that authority nor do less than is required to exercise that authority completely.
2. Arbitrators should, after careful review, analysis and deliberation with the other members of the panel, fairly and justly decide all issues submitted for determination. Arbitrators should decide no other issues.
3. Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.
4. In the event that all parties agree upon a settlement of issues in dispute and request arbitrators to embody that agreement in an award, they may do so, but are not required to do so, unless satisfied with the propriety of the terms of settlement. Whenever arbitrators embody a settlement by the parties in an award, they should state in the award that it is based on an agreement of the parties.

## **CANON IX**

**ADVERTISING:** Arbitrators shall be truthful in advertising their services and availability to accept arbitration appointments.

COMMENTS:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.
2. Arbitrators shall make only accurate and truthful statements about their skills or qualifications. A prospective arbitrator shall not promise results.
3. In an advertisement or other communication to the public, an individual who is an ARIAS U.S. certified arbitrator or umpire may use the phrase "ARIAS U.S. Certified Arbitrator (or Umpire as the case may be)" or "certified by ARIAS U.S. as an arbitrator (or umpire as the case may be)" or similar phraseology.

## **CANON X**

**FEES:** Prospective arbitrators shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or to both parties if chosen to serve as the umpire.

**COMMENTS:**

1. Information about fees should be addressed when an appointment is being considered. The better practice is to confirm the fee arrangement in writing at the time an arbitration appointment is accepted.

2. Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. Arbitrators shall not give or receive any commission, rebate or similar remuneration for referring a person for alternative dispute resolution services.