EXPANDING ARIAS-US TO POLICYHOLDER AND DIRECT INSURANCE DISPUTES

DELIVERING THE BEST ARBITRATORS AND MEDIATORS FOR *ALL* INSURANCE DISPUTES

Panel:

David W. Ichel, Moderator
Steven Gilford
Peter A. Halprin
Kim D. Hogrefe
Deirdre Johnson
Lawrence W. Pollack
Carlos A. Romero
Peter K. Rosen

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1. Peter K. Rosen, *Does ARIAS Have a Role To Play In Direct Insurance Arbitrations*, ARIAS-U.S. Quarterly (2d Q 2018)

2. Mark Miller, Blog, *Why Insurance Carriers Prefer Insurance Coverage Arbitration Over Litigation*, Aug. 2, 2018, http://millerfriel.com/blog/insurance-carriers-love-insurance-coverage-arbitration/.

3. Excerpt from policyholder brief in opposition to a motion to appoint an ARIAS umpire in *In Re Nat. Union Fire Ins. Co. v. Beelman Truck Co.*, 17-cv-02946-VEC (S.D.N.Y. June 16, 2017).

4. David W. Ichel and Carlos A. Romero, *Comparing Policyholder Arbitrations to Reinsurance Arbitrations*, ARIAS U.S. Quarterly (d Q 2018).

Why Insurance Carriers Prefer Insurance Coverage Arbitration Over Litigation

Posted By Mark Miller on August 2, 2018 | permalink | trackbacks(2725)
http://millerfriel.com/blog/insurance-carriers-love-insurance-coverage-arbitration/

A question that corporate policyholders should ask before entering insurance coverage arbitration is whether arbitration is a viable way to resolve a complex corporate insurance dispute. In the not so recent past, arbitration provisions in insurance policies were rare. Now, they are common. And, language contained in many standard-form arbitration clauses has become even more onerous over time. The reason for this is that Insurance Carriers prefer Insurance Coverage Arbitration over litigation.

Are Insurance Coverage Arbitrations a Good Option for Corporate Policyholders?

We address here some of the issues that corporate policyholders should note when faced with an insurance coverage arbitration. We also draw some basic conclusions about insurance coverage arbitration based on our extensive experience in this area of insurance recovery law.

First, lets look at some of the reasons why insurers feel so strongly about arbitration.

1) Arbitrators May Not Follow Policyholder-Friendly Law

To prevail on claims, policyholders rely on powerful policyholder-friendly rules of construction. For example, there is a duty to defend whenever there is any potential of coverage. Courts and arbitrators should not look to the ultimate outcome of whether the claim is covered. Rather, if a claim has any possibility of being covered, a defense must be provided. Similarly, policy exclusions are construed against insurers and in favor of policyholders, and for an exclusion to apply, there must be no other reasonable interpretation of coverage other than the one offered by the insurer.

It goes without saying that both arbitrators and Courts should follow the law. If these and other common insurance rules of construction are applied, policyholders have a distinct advantage.

As a general rule, courts follow the law, and if the law is followed, policyholders are typically entitled to coverage. In litigation, if a Court does not follow the law correctly, an appeal may be taken.

Arbitration is a different animal. Review of arbitration awards is limited, and arbitrators are generally afforded more flexibility than courts in fashioning their rulings. In insurance coverage arbitration, arbitrators may be permitted to evaluate factors that have nothing to do with coverage. Arbitrators have been known to look at what a policyholder paid for coverage in relation to the value of the claim to determine what the insurer intended as far as coverage. They may also be improperly swayed by insurance industry custom and practice regarding what insurance companies think critical language means, rather than following the legal standard of interpreting insurance policy language. These factors that arbitrators may be interested in considering cannot be considered in court, as they are legally and factually irrelevant to coverage.

Finally, some arbitrators are reluctant to apply standard rules of construction because these rules of law are designed to render black and white coverage determinations in favor of coverage. Applying these rules to most contested corporate insurance claims can lead to a ruling that the claim is covered.

To cloud the issue, insurance carriers typically raise as many possible defenses to coverage as possible, and push for devaluation of a claim, irrespective of the validity of their so-called defenses. Hence, even if the applicable legal rules mandate coverage, arbitrators can, either intentionally or unintentionally, open the door to legally invalid insurer defenses. Although this does not necessarily lead to an incorrect decision, it unnecessarily complicates the process.

2) Arbitrators May Ignore Insurance Carrier Bad Faith

Another problem with arbitration is that some arbitrators have been conditioned to give insurance carriers a pass on bad faith conduct, whereas courts and juries may be conditioned in the opposite direction. Insurance carriers have a fiduciary duty not to place their interests above those of their corporate policyholders. This is an exceptionally hard standard for insurance companies to meet. Pursuant to their responsibilities to shareholders. Insurance companies are also obligated to maximize shareholder value. One way for insurance companies to increase net income is to limit expenses, which includes limiting payments on claims. These two competing burdens, one to shareholders, and another to policyholders, puts insurance companies in a uniquely difficult place. All too often, it is just too enticing to deny claims for financial

reasons, which results in a breach of their duty of good faith and fair dealing to corporate policyholders. In the corporate insurance context, these damages can be immense.

Insurance carriers commit bad faith because it is difficult for them to reconcile pursuit of their interests with the idea that they are not permitted to place their interests ahead of corporate policyholders.

One reason why arbitrators in an insurance coverage arbitration may not be inclined to award bad faith damages may be purely economic. If such a ruling is issued, and the insurers are upset by that ruling, the arbitrator will not be proposed by the insurers to handle future insurance coverage arbitrations.

3) Some Arbitrators May Find it Difficult to Side With Corporate Policyholders

Insurance companies hire arbitrators as part of their business. They are repeat consumers of arbitration services. They keep track of how arbitrators handle their insurance disputes. They know who is good for them, and who is not, and they are not about to take any chances by proposing an arbitrator who does not pass their internal results-oriented tests.

For this reason, arbitrators that routinely handle insurance coverage arbitrations are generally not the best choice for corporate policyholders. Future work drives any service oriented business and arbitration is no exception. Corporate policyholders should assume that experienced Insurance coverage arbitrators know that insurers can drive their future business. Arbitrators need future work to remain employed, and insurers may not be inclined to agree to use an arbitrator again if that arbitrator finds against them in a high-dollar insurance coverage arbitration.

This is not to say that arbitrators cannot see their way through this morass and find for corporate policyholders. Rather, it is one of many important issues for corporate policyholders to consider when selecting an arbitrator for an insurance coverage arbitration.

4) Some Insurance Arbitration Organizations are Mere Extensions of Insurance Companies

Insurance carriers are always concerned about the possibility that an arbitrator who they have not vetted properly will be appointed for an insurance coverage arbitration. To protect against this, insurers have formed specific trade associations disguised as arbitration tribunals. The most infamous of these is ARIAS. ARIAS arbitrators have experience working for insurers, and they translate this knowledge into finding for

insurers in arbitration. An arbitration before ARIAS is like an arbitration with the insurance company claims adjuster who denied the claim acting as arbitrator. Policyholders should never agree to an arbitration with an ARIAS arbitrator.

Conclusions

Insurance carriers favor insurance coverage arbitrations because insurance coverage arbitration is better at limiting insurer exposure than litigation. A number of important lessons can be learned from understanding this, including:

1) Policyholders should not agree to arbitration clauses in insurance policies;

2) Policyholders should resist insurance company efforts to arbitrate, unless adequate precautions have been taken to select a neutral arbitrator;

3) Arbitrators with extensive insurance coverage experience are likely not neutral; the fact that they have been repeatedly selected for insurance matters could mean that they have rendered numerous decisions favorable to insurers; and

4) Arbitrators with minimal insurance experience are more likely to provide policyholders with a fair arbitration.

A good friend who runs the arbitration group for a major multinational corporation once said to me, “if you get the wrong arbitrator, you lose your case upon selection of that arbitrator, but you will not know it until years later.” These are sound words to live by.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration between NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA, on behalf of Itself and each of the related insurers that provided Coverage to Respondents Petitioners, v. BEELMAN TRUCK COMPANY, et al. Respondents,	)	Civil Action No.: 1:17-cv-2946 VEC

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S PETITION FOR THE APPOINTMENT OF AN UMPIRE

Respondents Beelman Truck Company, Beelman Logistics, LLC, Granite City Slag, LLC, Beelman River Terminals, Inc., Racehorse Investments, LLC, Transhold, LLC, Beelman Materials, LLC, Beelman Ag Service, LLC, and Transload Realty, LLC (hereinafter collectively referred to as "Beelman") respectfully submit this memorandum of law in opposition to Petitioner's Petition for the Appointment of an Umpire based on the following grounds: (1) Petitioner's repeated assertions that the arbitrators must be ARIAS certified is not based on the Payment Agreements between the parties; (2) Beelman's umpire candidates are qualified under the plain terms of the Payment Agreements; (3) the Payment Agreements do not require or suggest that arbitrators have prior arbitration experience, and (4) Petitioner's insistences that the arbitrators be certified through ARIAS, the histories of the proposed arbitrators and umpires by Petitioner, and the fact that all arbitrators proposed by Petitioner show ARIAS arbitrators have a pro-insurance bias and cannot be impartial as required by law.

As indicated above, since the beginning of the arbitration process in this case, Petitioner has repeatedly stressed that only an ARIAS arbitrator could serve as an umpire, appointed an ARIAS arbitrator as its party-nominated arbitrator, and sought to disqualify Beelman's own party-nominated arbitrator without providing a basis. All of Petitioner's candidates for umpire and its nominated arbitrator are former employees and executives of insurance companies or have businesses where they are inextricably linked to garnering favor with the insurance industry as either consultants or serving as professional arbitrators or mediators. See Exhibits H, R – T. These individuals are therefore dependent on insurance companies for their livelihood, and this dependency heightens the likelihood of a bias in favor of Petitioner and negating the neutrality an umpire must possess. "Under any model of alternative dispute resolution, it is axiomatic that the third party must be impartial so that its decisions 'will be based upon the merits of the dispute rather than the personal influence or identity of the disputants.'" In re: Travelers Indem. Co., 2004 WL 2297860, *3 (citing Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 Ohio St. J. on Disp. Resol. 37, 49 (1996)). Travelers adds that because an umpire in a tripartite arbitration occupies a position similar to a judge, that impartiality is necessary "in order for parties to feel that they are being treated fairly; it supports their confidence in the decision-making process." Id.

Also relevant to the issue of potential biases regarding Petitioner's umpire candidates lie with the eligibility requirements to become an ARIAS certified arbitrator, like Petitioner's party-nominated arbitrator. To be eligible, one must have at least ten years of experience in the insurance/reinsurance industry, and obtain three sponsor recommendations from individual ARIAS members that the candidate has known for at least five years. See https://www.arias-us.org/certification/certification-procedures/ (last visited on June 15, 2017). This, reasonably,

leaves a small pool of potential candidates who are likely well-acquainted with one another through business dealings, prior arbitrations, and other contacts, which could lead to a situation where the "neutral" umpire would be tempted to be sympathetic to the insurance company. Since Beelman and Mr. Stock are not members of this "exclusive" club, it seems reasonable that an ARIAS arbitrator is not appropriate.

Here, we should recognize the tactics pursued by Petitioner for what they are, which is the real attempt to game the system by packing the arbitration panel in its favor. Beelman hereby asks this Court to not appoint any neutral arbitrator from ARIAS because any such arbitrator would come with biases which would impede the process.

CONCLUSION

For the aforementioned reasons, Beelman asks that this Court appoint one of its candidates as the third arbitrator to the panel because they meet the qualification as set forth in the Payment Agreement and they have sufficient experience to act as the neutral arbitrator, and for the Court to: (a) not place a special emphasis on ARIAS certification because it is not required under the Payment Agreements or law; and (b) not choose a neutral arbitrator from ARIAS because any such arbitrator would be tainted by their past and present ties to the industry.

Respectfully submitted,

/S/

Anthony Xanthakis, Esq. #2254
Galvano & Xanthakis, P.C.
358 St. Marks Pl., Ste. 202
Staten Island, NY 10301
Phone (212)349-5150 Fax (212) 349-5298

Does ARIAS Have a Role to Play in Direct Insurance Arbitrations?

By Peter K. Rosen

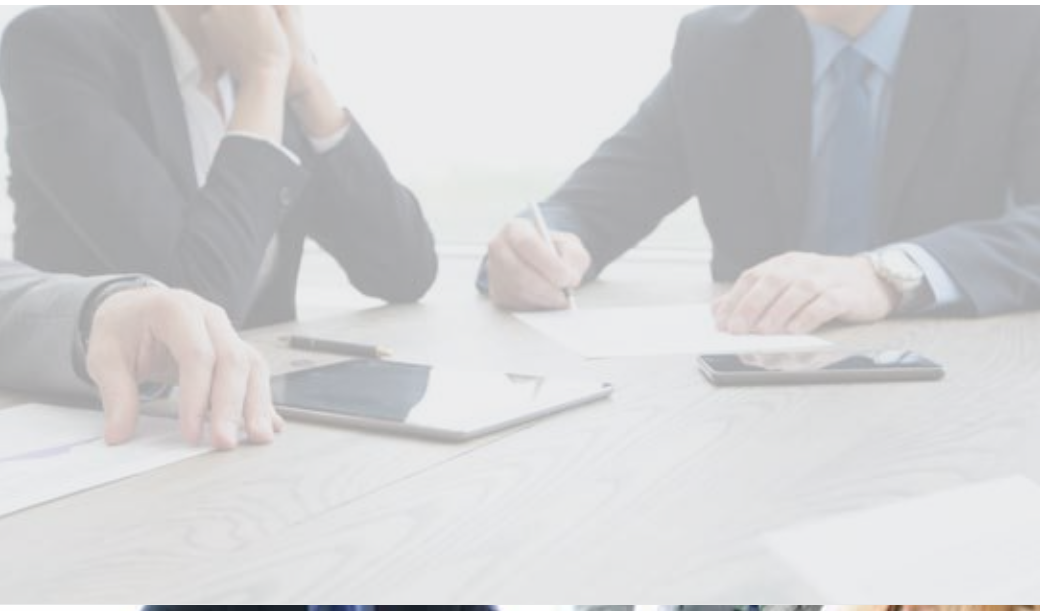
Eight months ago, I joined two of my policyholder counsel colleagues, Mitchell Dolin of Covington and Paul Zevnik of Morgan Lewis, on a panel chaired by Deirdre Johnson, now of Squire Patton Boggs, to discuss ARIAS•U.S.'s potential foray into the arbitration of direct insurance coverage disputes. Perhaps to the surprise of many in our audience, we all said we were cautiously optimistic that ARIAS could develop an attractive arbitration product for direct insurance coverage disputes.

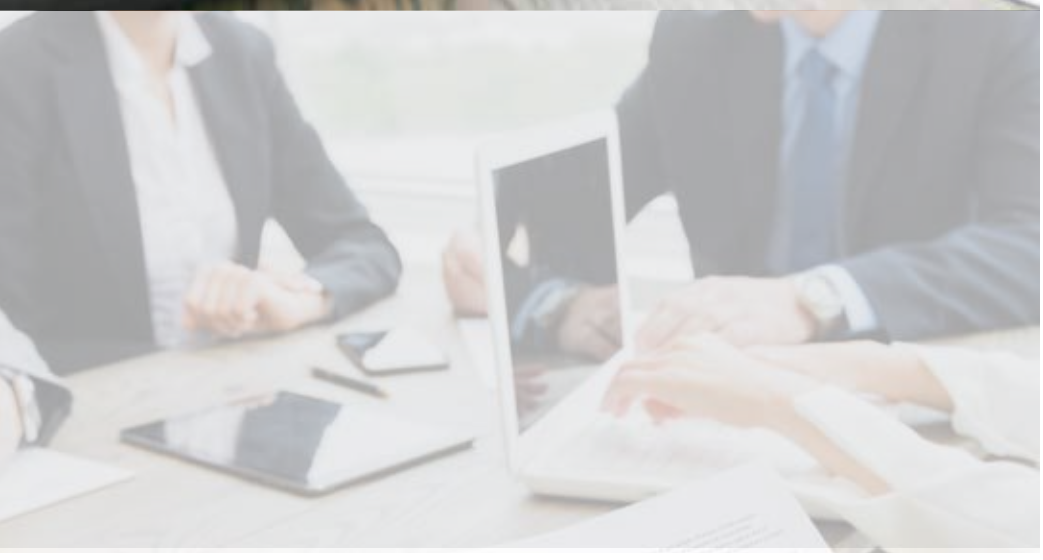
Why were we cautiously optimistic? First, as litigators and trial lawyers, we recognize that there is a greater emphasis on arbitration as a binding forum to resolve controversies. Many of our commercial clients see arbitration as an efficient, speedy, and confidential alternative to litigation to resolve controversies. Moreover, as I describe in more detail below, we are seeing more and more commercial insurance policies with arbitration as a method—sometimes a binding method—to resolve disputes about the policies.

Most of the policies we see, however, are form policies sold to our policyholder clients without much input from our clients or their brokers, especially concerning their alternative dispute resolution (ADR) provisions. As policyholder counsel, it behooves us to ensure that, if the only ADR method made available in our clients' policies is binding arbitration, the policies include a rules set that works with insurance coverage disputes. We also must be confident that the organization behind the development and implementation of this rules set is training and certifying arbitrators who are knowledgeable about direct insurance coverage disputes. As we discussed during our panel presentation, we see ARIAS (and its non-administered rules set) as a viable organization to provide this support.

Second, each of the arbitration and mediation organizations (e.g., the American Arbitration Association, JAMS, FedArb, the International Institute for Conflict Prevention & Resolution, and the International Chamber of Commerce) is encouraging its corporate members and their law firms to select it as the arbitration administrator (with its rules set) or as the provider of

Peter Rosen is a partner in the Los Angeles office of Latham & Watkins and the former global chair of the firm's Insurance Coverage Litigation Practice. Most recently, he was the lead lawyer for the retail leaseholder at the World Trade Center in the massive insurance coverage litigation arising out of the 9/11 attacks. He is recognized by *Chambers USA* as a leading lawyer in the insurance area and teaches insurance law and corporate governance at the USC Gould School of Law.





the non-administered rules set in the transactional agreements they sign and their law firms negotiate. For example, CPR, of which each of our firms is a member, has an online arbitration clause tool (available at https://www.cpradr.org/resource-center/model-clauses/clause-drafting/clause-selection-completion-tool) that its member clients and their law firms can use to draft arbitration clauses in their stock purchase agreements, merger agreements, and asset sales agreements. Similarly, JAMS provides that, if a rules set is not provided in an arbitration clause in which JAMS is designated as the arbitration administrator, the parties will default to JAMS' rules set (see https://www.jamsadr.com/rules-comprehensive-arbitration).

These organizations generally encourage the parties to match the rules set (and the administrator, if the arbitration is not self-administered) in all of the agreements governing a transaction or relationship, including the insurance policies that will be affected by the transactions. However, they don't yet provide the same level of training for, or the same degree of consistency among, insurance coverage dispute arbitrators and mediators that ARIAS can provide for direct insurance disputes arising out of these transactions (or, for that matter, any insurer-policyholder disputes). Similarly, while both JAMS and CPR have insurance coverage panels, both are largely self-selecting (with some level of scrutiny by the arbitration organization). Importantly, neither organization sponsors training for, or provides for certification of, mediators and arbitrators specializing in insurance disputes to an extent that is remotely similar to what ARIAS currently offers for reinsurance disputes (in Europe, the Chartered Institute of

Arbitrators offers training; see http://www.ciarb.org/). In the absence of training and certification, matching the rules set and, as appropriate, the administering arbitration organization set out in the underlying transactional documents may not make sense for the insurance policies that would come into play in the event there is an insurance coverage dispute arising under or out of the underlying transactional documents.

Coverage-in-Place Agreements

Third, aside from the policy-specific arbitration clauses discussed above, there are other areas of focus where ARIAS could provide meaningful arbitration products. Many coverage-in-place agreements provide for binding arbitration (during our panel discussion, we provided some examples). Following are three such agreements, one administered by the AAA, one administered by JAMS, and one utilizing CPR's non-administered arbitration rules.

Example #1

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.

Example #2

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 is obligations under this Agreement.

Example #3

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, in association with the arbitration.

Other coverage-in-place agreements provide for a multi-phase dispute resolution process—negotiation, mediation and arbitration—requiring the parties to select arbitrators with, as set out in Example #3 above, "substantial background in risk management or insurance coverage law." ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

Captive Insurance and Reinsurance

Captive insurance and reinsurance agreements are another opportunity for an ARIAS arbitration program. During our panel presentation, we highlighted the following provision in a captive insurance agreement:

XIX. GOVERNING LAW AND DISPUTE RESOLUTION

ARIAS clearly could provide a set of non-administered rules to govern coverage-in-place agreement arbitrations and supply certified arbitrators with the necessary background and experience.

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·U.S. 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.

In another example we provided during our panel presentation, we noted that the policy between the insured company and its captive insurer did not have an arbitration clause, but the reinsurance agreement between the captive and its reinsurers contained the following:

1. Any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be settled by a panel of three arbitrators; [and]

4. The arbitration shall take place in New York City, N.Y., unless the arbitrators select another location. Insofar as the arbitration panel looks to substantive law, it shall consider the laws of New York.

We also pointed out that the provision in the captive reinsurance agreement between the captive insurer and the company's fronting insurer contained the following language:

Arbitration

a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall be submitted for decision to a panel of three arbitrators . . .

d. All arbitrators shall have at least ten (10) years of insurance or reinsurance experience and be disinterested with knowledge about the lines of business at issue.

Specialty Insurance

As we note above, many of the specialty policies our clients purchase contain alternative dispute resolution clauses, all of which could benefit from an ARIAS-sponsored arbitration program. For example, AIG's public entity directors and officers liability insurance policy has contained an ADR clause for many years. Its current form provides as follows:

ADR Options: All disputes or differences which may arise under or in connection with this Coverage Section, whether arising before or after termination of this policy, including any determination of the amount of Loss, shall be submitted to an alternative dispute resolution (ADR) process as provided in this Clause. The Named Entity may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR. In that case, the Named Entity shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Insured's choice of ADR shall control.

ADR Rules: In considering the construction or interpretation of the provisions of this policy, the mediator or arbitrator(s) must give due consideration to the general principles of the law of the State of Formation of the Named Entity. Each party shall share equally the expenses of the process elected. At the election of the Named Entity, either choice of ADR process shall be commenced in New York, New York; Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; or in the state reflected in the Named Entity Address. The Named Entity shall act on behalf of each and every Insured under this Alternative Dispute Resolution Clause. In all other respects, the Insurer and the Named Entity shall mutually agree to the procedural rules for the mediation or arbitration. In the absence of such an agreement, after reasonable diligence, the arbitrator(s) or mediator shall specify commercially reasonable rules.

Specialty policies sold by other insurers also provide that any arbitration shall be conducted under ARIAS (UK) or ARIAS·U.S. rules.

E7 Jurisdiction and Governing Law / Arbitration

This policy shall be governed by and 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 . . .

Some even provide that ARIAS shall appoint the second and third arbitrators in the event the counterparty fails to timely appoint the second arbitrator or the parties cannot agree on the third arbitrator (this is from a product recall policy):

Arbitration

Seat: New York

Appointer: ARIAS (US)

Further, many of the transactional liability policies (representations and warranties and tax liability policies) insurers are placing in the United States contain ADR clauses:

(a) ADR Options. All disputes or differences which may arise under or in connection with

this Policy, whether arising before or after termination of this Policy, including any dispute regarding the determination of the amount of Loss, shall be submitted to an alternative dispute resolution ("ADR") process as provided in this Section 9(a). The Named Insured may elect the type of ADR process discussed below; provided, however, that absent a timely election, the Insurer may elect the type of ADR process. In that case, the Named Insured shall have the right to reject the Insurer's choice of the type of ADR process at any time prior to its commencement, after which, the Named Insured's choice of ADR process shall control. The parties shall only be entitled to pursue judicial proceedings in connection with this Policy (which judicial proceedings shall be in accordance with Section 11(a) hereof) (i) in connection with a dispute, if the parties have first elected and complied with the mediation ADR process provided below with respect to such dispute, or (ii) to enforce any arbitral award.

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.

There certainly are many other insurance companies that sell commercial liability and first-party insurance policies to policyholders that contain binding arbitration provisions, all of which could benefit from ARIAS-certified and -trained arbitrators.

The Path Forward

What, then, are the next steps? As my colleagues and I noted during our presentation, policyholders and their counsel have generally viewed ARIAS with suspicion because it handles only insurance industry disputes. Our concern is that, as largely an industry group, ARIAS is not well suited to handle direct disputes.

This can change (as we discussed during our presentation) with the identification and selection of arbitrators whom both insurers and policyholders will embrace. This will require a revamping of ARIAS' certification process. Among the changes that likely will need to be made are the following:

- modify the "Industry Experience" to include 10 years of specialization in representing policyholders in insurance-related matters;
- add an Option D that permits a member to satisfy the eligibility requirements to be a certified arbitrator by participating as an arbitrator or umpire or as lead trial counsel in a certain number of direct dispute arbitrations; and
- update the ARIAS·U.S. Rules, Code of Conduct, Practical Guide, and Panel Selection Procedures and Forms to account for the addition of direct insurance disputes arbitrators and mediators.

ARIAS•U.S.
7918 Jones Branch Dr., Suite 300
McLean, VA 22102
Phone: 703-574-4087
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

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Comparing Policyholder Arbitrations to Reinsurance Arbitrations

By David W. Ichel and Carlos A. Romero, Jr.

During the last 20 years, arbitration proceedings have been on the rise in disputes, not only between insurers and reinsurers and between reinsurers and retrocessionaires (reinsurance arbitrations) but also between direct policyholders and insurers (policy arbitrations). Although there are differences between the two categories of arbitrations, there are more similarities than differences.

In this article, the authors draw on their personal experiences to review key similarities and differences between both categories of arbitrations. Note: This article will consider only policies and reinsurance agreements that cover U.S.-based risks.

Arbitration Provisions

Policy arbitrations. In the United States, many states still do not permit arbitration provisions to be included in policies issued by admitted insurers, particularly for personal lines policies. Some states take a middle ground and permit arbitration only for limited purposes, such as determining the value of the loss of covered property in a property insurance policy.

Even though there is strong Supreme Court precedent requiring enforcement of arbitration provisions under the Federal Arbitration Act (FAA),[1] practitioners must be sensitive to other laws that could trump the FAA. For example, courts have held that when a state affirmatively prohibits or restricts arbitration provisions in insurance policies, the McCarran-Ferguson Act[2] not only grants a state primary regulatory authority to govern the business of insurance but also will "reverse preempt" the FAA, thus permitting the state prohibition or restriction.[3] On the other hand, courts have enforced arbitration clauses in insurance policies in the absence of any state regulation or statute specifically prohibiting or restricting the arbitration agreement.[4]

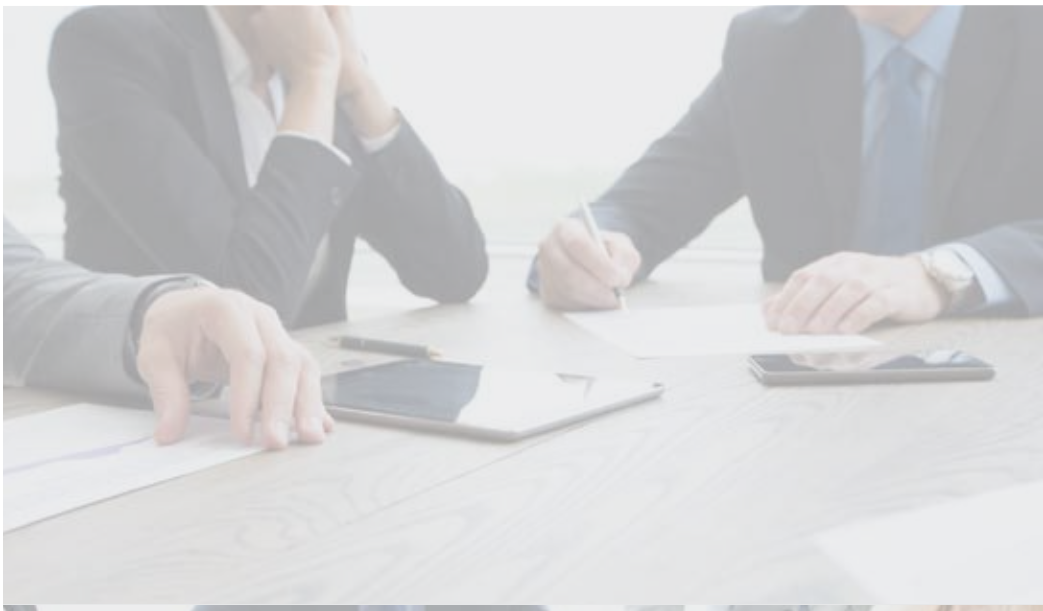
David Ichel serves as an arbitrator and mediator for complex commercial disputes, including insurance and reinsurance disputes. A longtime partner at Simpson Thacher & Bartlett LLP, he is a member of the Panel of Distinguished Neutrals of the Institute for Conflict Prevention and Resolution (CPR) and the Commercial Mediation and Arbitration Panel of Federal Arbitration Inc. (FedArb). He also teaches classes on complex civil litigation at both Duke Law School, where he has taught since 2011, and the University of Miami School of Law.
Carlos Romero is a partner at Post & Romero and has been practicing in a broad array of insurance matters since the early 1980s. He has participated in insurance-related arbitrations as an advocate and arbitrator and enjoys handling complex insurance pool disputes coupled with substantial accounting disputes and discrepancies (along with claims of fraudulent billings and allocations). He has handled insurance disputes concerning many foreign jurisdictions, including Panama, Mexico, Venezuela, Colombia, Bermuda, and Argentina.

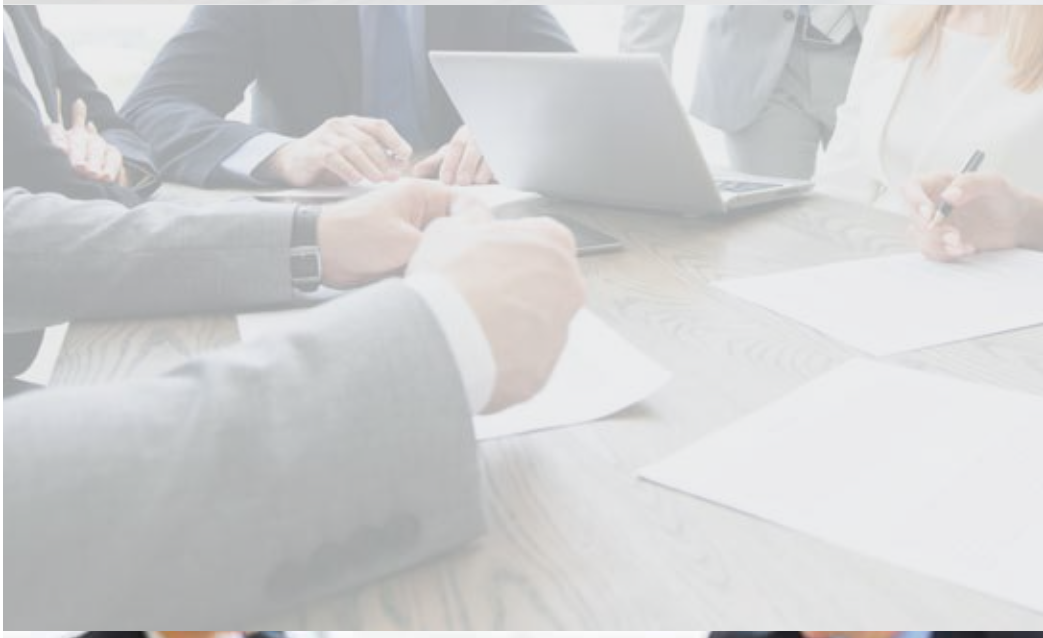
In contrast, it is not uncommon for excess and surplus lines policies issued to commercial entities to contain an arbitration clause. The permissiveness within the commercial risk context reflects a lower regulatory and public policy concern than in the personal lines arena. For example, in the standard Bermuda Form for excess insurance policies and in London market policies, an arbitration clause is common. Arbitration clauses are now found in many types of policies, such as directors and officers, errors and omissions, employment liability, and cyber liability.

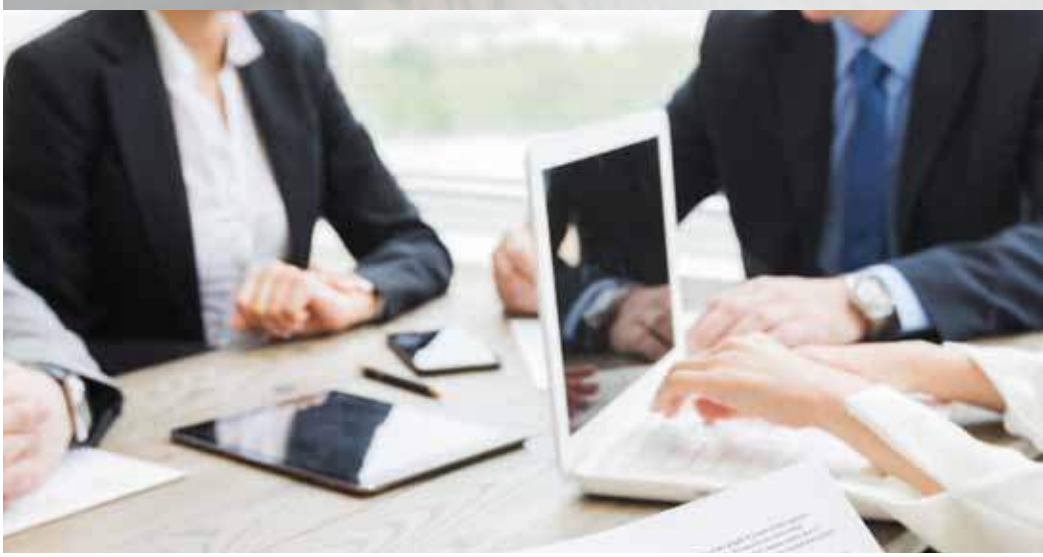
Reinsurance arbitrations. Reinsurance arbitration clauses are used generally by most reinsurers. The authors, in their experience, have never seen a reinsurance agreement without an arbitration clause. The range of detail in arbitration provisions can vary, from the sparse (providing few provisions) to the comprehensive (addressing numerous topics).

Older arbitration clauses were quite sparse and at times consisted of a simple notation (like "Arbitration," without anything more) in the cover notes between the insurers. Indeed, arbitration clauses often did not select arbitration rules, were not administered by any organization, called for two party-appointed arbitrators and one umpire, and mandated experience requirements of all sorts (e.g., present or former executive or lawyer in the insurance industry for a requisite number of years). Arbitration clauses in some older agreements sometimes made reference to an arbitration organization (or its rules) that no longer existed or had changed its name.

The more recent arbitration clauses lean toward a more comprehensive provision. They may (or may not) adopt







The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator.

arbitration rules, require particular experience of the arbitrators, specify administration by a particular arbitration organization, mandate choice of law, impose time frames to issue a final award, set forth rules for discovery, and define a broad scope of arbitrable issues. Even today, however, there are reinsurers using arbitration clauses that contain no arbitration rules for the panel to follow or provide for administration by an arbitration organization. In such "no rule" arbitrations, arbitrators must fashion their own procedures "on the fly," which often triggers resistance from counsel and presents challenges to obtaining desired party consent.

Arbitration Rules/ Organization/Arbitrator Selection

Policy arbitrations. Arbitration provisions differ significantly from one policy to the next. Bermuda Form policies provide for an "ad hoc" (i.e., non-administered) arbitration and allow policyholders the choice of applying New York, Bermuda, or English substantive law. (Most policyholders tend to choose New York law). Also, although most Bermuda Form policies provide for the procedural rules of the British Arbitration Act of 1996 (along with situs in London), others provide for the Bermuda Arbitration Act (with situs in Bermuda).[5] Various London market and other excess and surplus lines policies frequently provide for the application of New York law under the arbitration rules published by either the American Arbitration Association (AAA), International Institute for Conflict Prevention and Resolution (CPR), Federal Arbitration Inc. (FedArb), or JAMS (formerly known as Judicial Arbitration and Mediation Services).[6] Finally, policy arbitrations can be, at times, non-administered, although usage in the industry leans toward administered proceedings by organizations like the AAA, FedArb, and (recently) CPR.[7]

Certain policies and arbitration rules of more recent vintage now provide additional and optional procedures—if mutually acceptable to the parties—for mediation (it may be conducted by a mediator not on the panel of arbitrators) and for "one" appeal (it may be conducted by a different arbitrator or arbitrators not on the panel that conducted the trial).

Most policy arbitration clauses provide for a panel of three arbitrators, with each side to select an arbitrator and the two selected arbitrators then selecting the panel chair. In case of a deadlock when selecting a chair, Bermuda Form policies provide for selection by lots or by petition to the High Court of Justice of England & Wales.[8] Under AAA, CPR, or FedArb rules, the deadlock can be resolved by the arbitration organization through methods including appointment by the arbitration organization, circulation of a list of additional candidates, a drawing by lots, or other agreed method. Various state arbitration statutes and the Federal Arbitration Act allow deadlocked parties to petition the court for the appointment of arbitrators.[9]

Reinsurance arbitrations. Historically, the reinsurance industry resolved disputes with a gentleman's handshake. Older insurance agreements did contain arbitration clauses, but they were rarely invoked and were sparse in content. Oftentimes, the reinsurers and retrocessionaires, as well as the insurers and reinsurers, signed cover notes with no treaty or facultative agreement. The cover notes contained the general terms of the agreement—they would make

reference to mandatory arbitration and the selected forum, but would omit inclusion of the arbitration clause (the intent being to formalize the agreement at a later date, which sometimes did not happen).

Over the last 20 years, however, two events have contributed to significant changes, ranging from one extreme (how to avoid arbitration entirely) to another (how to exploit drafting more comprehensive arbitration clauses). These two events are as follows: first, discontent has increased over perceived disadvantages, monetary expenditures, and procedural limitations encountered in arbitrations; second, our society has become more litigious, thus spurring (not surprisingly) more detailed arbitration clauses.

Older agreements tended not to define the scope of arbitrable issues. This omission inevitably triggered litigation as to whether specific issues in dispute were even arbitrable. As more recent arbitration clauses began to specifically provide for a broad, all-inclusive scope of authority and arbitrable issues, litigation over the scope of arbitrable issues has been waning. The trend in more modern arbitration clauses shows a preference for maximizing not only the scope of arbitrable issues, but also the authority of the arbitrator (which now includes jurisdiction to resolve not only whether any claim is arbitrable under the arbitration clause, but the jurisdiction of the panel, too).[10] Some arbitrators obtain, at an organization meeting or preliminary hearing, the mutual consent of the parties to reaffirm or expand the scope of arbitrable issues and the authority of the arbitrator to resolve additional issues.

To improve the effectiveness of arbitrations, reinsurers have taken steps to improve arbitration clauses (or to appease the never-ending drafting by corporate attorneys who never litigated). These steps include, among others, the following:

- specifying a time frame for issuing an award;
- specifying the arbitration rules that apply;
- requiring proceedings to be administered by arbitration organizations;
- relying on arbitration organizations to supply a list of qualified arbitrators;
- requiring all arbitrators to be neutral;
- mandating qualified arbitrators from a recognized arbitration organization; and
- expanding the scope of arbitrable issues (like fraud in the inducement, rescission, void or voidable, enforceability, attorney fee award, other agreements between the parties that either do not have arbitration clauses or provide for a different forum, and third parties related to the dispute).

More recently, some reinsurers have started to experiment with requiring mediation prior to an arbitration proceeding. The AAA now has a rule that requires mediation, but either party may opt out.[11] ARIAS also has a voluntary mediation program.

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page. These lengthy clauses cover a host of issues so as to be all-inclusive, but often this effort is not as productive as was intended. The drafter, facing a time or budgetary constraint, may neglect to read the designated organi-

Today, reinsurance agreements sometimes contain comprehensive arbitration clauses that are longer than one page so as to be all-inclusive, but often this effort is not as productive as was intended.

zation's rules, may draft rules that are either duplicative or confusing, and may (unwittingly) create expensive procedures. Other times, the rules are too restrictive—requiring arbitrators to issue an award within 60 days of the appointment of a three-member panel, mandating no depositions under any circumstances (which can help settle a case), and denying the use of expert witnesses or forensic accountants (thus complicating resolution). In fairness to the drafter, it is simply not possible to predict the nature and complexity of issues that can arise many years after signing a reinsurance agreement.

In an effort to reduce the cost of a panel of three arbitrators, the AAA recently adopted a new rule granting the parties full flexibility to agree to designate a single arbitrator (typically the chairperson) to be the sole decision maker for (a) part or parts of the proceeding, (b) the entire proceeding (and, if agreed by the parties, even the final hearing and issue of the final award), (c) all issues up to the final hearing (at which point the entire panel participates and issues the final award), (d) the issuance of one or more partial awards, or (e) all issues (including dispositive motions on the merit) up to the final hearing and issue of the final award.[12] This rule is sufficiently flexible to allow the parties to adopt this procedure mid-stream during the proceeding. Doing so basically eliminates the fees of two arbitrators and maximizes the flexibility and speed with which a single arbitrator (who is truly dedicated and responsive) can take action.

Arbitrator Neutrality

Policy arbitrations. The neutrality of arbitrators is a key ingredient in policy arbitrations. All of the Bermuda Form, AAA, CPR, JAMS, and FedArb rules require that all arbitrators (including party-appointed arbitrators) be neutral, impartial, and independent, unless the parties specifically agree otherwise. Ex parte communications with the arbitrators, excepting initial communications to select a party-appointed arbitrator, to discuss the availability or qualifications of a candidate, or to select the panel chair, generally are prohibited.

Reinsurance arbitrations. Traditionally, once a party provides the other with an arbitration notice, each side has a short window of about 30 days to appoint an arbitrator. The two arbitrators then select an umpire. Unless the parties agreed otherwise, the party-appointed arbitrators are not expected to be neutral; the selected umpire will be the sole neutral arbitrator.

Newer arbitration clauses are more comprehensive but still provide for two party-appointed arbitrators, who in turn appoint the umpire. The clauses generally provide no guidance on the extent to which ex parte communications with party-appointed arbitrators are permissible or prohibited. Restrictions and prohibitions can be imposed if (a) the governing arbitration rules contain restrictions and prohibitions, (b) the parties agree to require all arbitrators to be neutral from inception, or (c) the parties agree that the two party-appointed arbitrators must refrain from ex parte communications either before or even after the initial organization meeting or preliminary hearing.

For example, the AAA rules provide (unless agreed otherwise) that the party-appointed arbitrators shall not engage in communications with their appointing party and that the parties must communicate with the entire panel, with a copy to all parties. The ARIAS·U.S. rules allow for ex parte communications up to certain points in the proceeding or as established in or after the initial organization meeting.

Recently, ARIAS adopted neutral panel rules that require three neutral arbitrators and prohibit ex parte communications. Also, more members of ARIAS are suggesting that the practice of permitting ex parte communications with party-appointed arbitrators is creating friction and controversy in arbitrations that detract from the desire for a fair and unbiased award. The concern is that allowing a party-appointed arbitrator to campaign and watch out for the interests of the appointing party not only injects bias but also invites secret conferences between a party-appointed arbitrator (who has a vested financial interest in being selected for future panels) and the attorney representing the appointing party. (This almost suggests that counsel is unable to represent the client competently without discussing the "inside scoop.")

The Initial Organizational Conference, Scheduling, and Pre-Hearing Disputes

Policy arbitrations. In policy arbitrations, the arbitrators will hold an initial organizational conference with counsel for all parties to address the pre-hearing schedule, scope of discovery, pre-hearing briefing, exchange of exhibits intended to be used at the final hearing, witness statements, expert reports, witness list, rebuttal witness statements, expert and rebuttal expert reports, and (often) even the final hearing dates. The arbitrators, after typically maximizing agreement on all subjects with counsel, will issue a procedural order that should outline all agreed-upon subjects as well as matters that remain open for resolution. In

Bermuda Form arbitrations under the British Arbitration Act of 1996, the initial order is called the Directional Order No. 1. Under the AAA rules, it is often called Procedural Order No. 1 or Scheduling Order for Final Hearing.

Unless otherwise agreed by the parties, discovery is limited. In Bermuda Form arbitrations, discovery is generally limited to "standard disclosures" of documents to be relied upon or that adversely affect one's position. These documents can be supplemented by limited specific requests for categories of relevant documents. Depositions are generally not permitted.

Similarly, no depositions are permitted generally under AAA and ICDR Rules, although they are permitted under certain circumstances to preserve evidence. There has been a growing trend over the past 15 years to permit depositions on a limited basis upon insistence by counsel. FedArb and JAMS rules permit at least a limited number of depositions, unless otherwise agreed by the parties. This trend evidences the difficulties that counsel often face in handling litigation without the use of depositions.

Under the International Bar Association's (IBA) Rules on the Taking of Evidence in the International Commercial Arbitration, the parties must disclose all documents "relied upon" and are allowed to request specified additional categories of documents. Discovery disputes are often resolved using a Redfern schedule that requires a party to identify a sought document in one column of the schedule and justify its relevance in the next column, then allows the other party to state its objections in another column. The arbitrators then rule on the requests and objections and note their ruling in the final column of the schedule.[13]

In Bermuda Form arbitrations, prehearing submissions begin with the filing of original pleadings in the form of a Statement of Claim and a Statement of Response (often containing both defenses and counterclaims). Typically, at the preliminary or organizational hearing, the parties are allowed to amend their initial filings. Similar procedures are required under the arbitration rules of the other major organizations, although the names of the pleadings differ.

Disputes can be raised by motion of either party, at or after the initial organizational conference. Experienced arbitration panels will ask the parties to confer and attempt to agree on all prehearing disputes prior to seeking panel resolution of the issue.

Reinsurance arbitrations. The procedures governing reinsurance arbitrations are substantially similar to those governing policy arbitrations. The issues litigated in reinsurance disputes, if concerning a pool of risks, will entail a complex interaction of coverage, annual caps, and the year in which the loss is incurred. The complexity escalates as the number of reinsurers and retrocessionaires participating in the pool, the number of tiered excess loss coverages, the differing annual caps among the policies for different years, the allocations of loss payments among different years and different excess layers, and the years of coverage in question increase.

Manner of Proof

Policy arbitrations. It is the general practice in Bermuda Form and many AAA, CPR, and FedArb arbitrations for witness statements and expert reports to be submitted in advance of the

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine that has existed for more than a century.

hearing. These statements and reports often are provided in lieu of direct testimony from any witness or expert. Typically, the arbitrators will allow the proffering party to elicit some live, direct testimony to introduce the witness before cross examination. Cross examination and re-direct will then follow. FedArb follows the Federal Rules of Evidence absent the parties agreeing otherwise. Bermuda Form arbitrations are conducted under either the British or Bermuda Arbitration Act, which often depends on whether London or Bermuda is the chosen situs. AAA, CPR, and JAMS arbitrations have some simple rules to follow, but they do not require the application of strict rules of evidence. International commercial arbitrations often are guided by the IBA Rules on the Taking of Evidence.

There are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist.

Reinsurance arbitrations. The procedures for reinsurance arbitrations are substantially similar to those applicable in policy arbitrations, where strict evidentiary rules are disregarded.

Rules of Policy Construction

Policy arbitrations. The Bermuda Form generally provides that policies shall be construed in an "even handed fashion" and precludes use of the *contra proferentem* (construction against the drafter) doctrine or "reasonable expectations" doctrine (what a policyholder should reasonably expect). It also prohibits "parol or other extrinsic" evidence for policy construction. AAA, CPR, FedArb, and JAMS do not provide any specific rules for policy construction. FedArb arbitrations simply follow the Federal Rules of Evidence unless the parties agree otherwise.

Reinsurance arbitrations. The "traditional" theme in reinsurance arbitrations leans toward informality and away from strict rules of law. Reinsurance arbitration clauses generally contain language that encourages custom and practice over the application of the law. For example, arbitration clauses containing the following text are quite common (but are being replaced by a new generation of corporate counsel that do not share the same traditional values):

This contract [or arbitration provision] is an honorable engagement, and the panel shall not be obligated to follow the strict rules of law or evidence. In deciding the award, the panel shall [or may] apply the custom and practice of the insurance and reinsurance business.

There is a new crop of reinsurance agreements that specifically disavow the application of the "follow the fortunes" doctrine. This doctrine is being replaced by a complicated host of rules that trigger noncoverage in the event of noncompliance by the reinsured entity. This change will significantly affect the traditional "follow the fortunes" analysis that has existed for more than a century.

Relief and Award

Policy arbitrations. The Bermuda Form allows for coverage of punitive damage awards against a policyholder, and its New York choice of law provision specifically excludes any prohibition on such coverage.[14] The arbitral panel is also empowered to award to the prevailing party recovery of all costs, including reasonable attorney fees, under English (or Bermuda) law applicable to Bermuda Form arbitration procedure, as well as under most arbitration organization rules for other policy arbitrations. Unless specifically agreed by the parties, there is no rule regarding punitive damages coverage in AAA, CPR, FedArb, or JAMS arbitration rules, but arbitrators acting under these rules are permitted to award attorney fees and costs among or between the parties. Parties in policy arbitrations can choose either a reasoned award, full award, or standard award. Reasoned awards tend to be the preferred choice.

Reinsurance arbitrations. Often, the reinsurance treaty or agreement relieves the reinsurer from any bad faith, punitive, or exemplary damages (extra-

contractual liability) that the insurer may have paid the insured in a judgment or settlement. The arbitration clause generally would not cover this issue; instead, the reinsurance agreement typically contains a separate clause that precludes indemnity by the reinsurer to the ceding insurer for such damages. The arbitration clause, however, may contain a provision that strips the arbitrator of authority to grant the insurer or the reinsurer any entitlement to bad faith, punitive, or exemplary damages either as between the reinsurer and the insurer or between the insured and the insurer. Such a provision would seem to ensure consistency between (a) the terms of the reinsurance agreement and (b) the scope of authority of the arbitrator and the scope of arbitrable issues. One might ask whether such limitations could be challenged when the arbitration clause contains language that permits the panel to interpret the agreement as a "gentleman's engagement" and to disregard strict rules of law or evidence (and follow industry custom and practice), where the conduct of a culpable party was egregious.

Confidentiality

Policy arbitrations. Arbitrations under the Bermuda Form will be confidential pursuant to the British Arbitration Act of 1996 and British common law (for London chosen situs) and the Bermuda Arbitration Act (for Bermuda chosen situs). Although the scope may differ as enforced in the United States, confidentiality is the general practice. In contrast, although confidentiality is not strictly mandatory under AAA, CPR, FedArb, and JAMS rules, the arbitrators have authority to order confidentiality for particular materials presented in the proceeding and generally conduct private proceedings that are not open to the public. Typically, the parties agree as to confidentiality in either the arbitration provision or in the initial procedural hearing. Although hearings are private, the parties often engage a court reporter and order transcripts when desired. Confidentiality as to any award often ends as a practical matter if the final award must be filed in court to seek its enforcement.

Reinsurance arbitrations. The rules on confidentiality will differ among the arbitration clauses adopted, and often the parties submit to the panel an agreed order for entry. The hearings are not open to the public, and in this sense all hearings are private. Confidentiality provisions are rarely seen in arbitration clauses in reinsurance agreements.

Conclusion

In summary, there are more similarities than differences between policy and reinsurance arbitrations. Nevertheless, differences do exist. Should ARIAS·U.S. seek to develop a policy arbitration procedure, it should consider state restrictions and limitations where permitted, be fair to the policyholder, promote the neutrality of the panel, and grant the panel maximum authority to resolve all issues that can arise.

NOTES

1. See, e.g., *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (enforcing arbitration provision that prohibited class actions in an antitrust dispute even though the pursuit of an individual claim would not be financially viable or justifiable for an attorney to pursue).
2. 15 U.S.C. §1012(b) (providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . .").
3. See, e.g., *Standard Security Life Insurance Co. v. West*, 267 F.3d 821 (8th Cir. 2001) (declining to enforce an arbitration clause in a sports injury policy that was prohibited by Missouri statute governing the business of insurance); *Continental Insurance Co. v. Equity Residential Properties Trust*, 565 S.E. 2d. 603 (Ga. App. 2002). See also Rhode Island General Laws §10-3-2 (1998) (providing that insurer has the option to arbitrate as follows: ". . . and provided further, that in all contracts of primary insurance, wherein the provision for arbitration is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured, and in the event the insured exercises the option to arbitrate, then the provisions of this chapter shall apply and be the exclusive remedy available to the insured.")
4. See, e.g., *Monarch Consulting, Inc. v. National Union Fire Insurance Co.*, 26 N.Y. 3d 659, 47 N.E. 3d 463, 27 N.Y.S. 3d 97 (upholding enforcement of arbitration clause in workers compensation policy payment agreement, because the State of California did not prohibit the use of this clause).
5. For references on the Bermuda Form policies and arbitrations, see Richard Jacobs, Lorelie Masters and Paul Stanley, *Liability Insurance in International Arbitration: the Bermuda Form* (Second ed. 2011); Davd Scorey, Richard Geddes and Chris Harris, *The Bermuda Form: Interpretation and Dispute Resolution of Excess Liability Insurance* (Oxford University Press 2011); Leon B. Kellner and Vivek Chopra, "Bermuda Form Arbitration: A Policyholder Perspective" (Perkins Cole LLP, ARIAS·U.S. Fall 2017 Conference presentation); Mina Matin, "The Bermuda Form Arbitration Process: A Glimpse Through the Insurer's Spectacles" (Norton Rose Fulbright LLP, ARIAS·U.S. Fall 2017 Conference).
6. AAA rules can be found at adr.org, CPR rules can be found at cpradr.org, Federal Arbitration rules can be found at FedArb.com, and JAMS rules can be found at jamsadr.com.
7. The standard FedArb arbitration rules provide for the application of the Federal Rules of Civil Procedure, except as modified by agreement of the parties.
8. British Arbitration Act of 1996 §18.
9. Federal Arbitration Act, 9 U.S.C. §5.
10. See, e.g., Rule 7(a), AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that the "Arbitrator shall have the power to rule on his or her own jurisdiction, including . . . the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."
11. Rule 9, AAA Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large and Complex Commercial Disputes), effective October 1, 2013, stating that, in disputes involving a claim or counterclaim in excess of $75,000, the parties must mediate during the proceeding, unless either party opts out. Any party has the right to opt out.
12. "Streamlined Three-Arbitrator Panel Option for Large Complex Cases" issued by the AAA, stating that this rule "allows parties to take advantage of this by utilizing a single arbitrator to manage the early stages of the case, decide issues related to the exchange of information and resolve other procedural matters without incurring the costs associated with the entire panel. The AAA has found that a three-arbitrator panel can actually cost five times as much as a single arbitrator. By maximizing the use of a single arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator while still preserving their right to have the case ultimately decided by a panel of three arbitrators."
13. IBA Rules on the Taking of Evidence in International Arbitrations at Art. 3 (Documents).
14. Bermuda Form Policy, Condition O.