ARIAS·U.S. Sample Form 3.3: Confidentiality Agreement

One-Hour Panel Session | ARIAS·U.S. Fall Conference 2026

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ARIAS U.S. – SAMPLE FORM 3.3: CONFIDENTIALITY AGREEMENT

In the Matter of the Arbitration Between

Petitioner,	)	*Before:*
- and -	)	Umpire:
	)	Arbitrator:
	)	Arbitrator:
Respondent.	)	

~~CONFIDENTALITY~~CONFIDENTIALITY AGREEMENT AND PROTECTIVE ORDER [1]

The Form: A Template, Not a Mandate

- ARIAS Forms & Procedures Committee is revising Form 3.3 for the first time since 2019; to be submitted for Board approval
- The form is "intended to be a template and not a mandated form to be used in all reinsurance arbitrations"
- Parties "may and should consider amending the provisions"
- This panel examines what is changing, why, and how to use the new form

Practitioner Notes: Using the Form

Negotiating Tip:

- The form is expressly a template; neither side should treat the default text as a neutral baseline it must justify departing from
- Propose amendments before or at the organizational meeting—when the panel is most receptive and before either side knows which provisions help or hurt on the merits

Query:

- If there's a dispute between the parties over this form, does the panel have the discretion to mandate this form?

Confidentiality as a Hallmark of Reinsurance Arbitration

- Confidentiality is a principal reason cedents and reinsurers choose arbitration over litigation
- How do repeat-player dynamics in reinsurance change the stakes compared with other commercial arbitration?
- Offensive use (keeping a prior award from a later panel) versus defensive use (shielding underwriting and claims information)?
- What is the tension between confidentiality and consistency when awards on recurring issues are never seen by other panels?
- Absent a signed agreement, what protections do parties realistically have in U.S. reinsurance arbitration?

Practitioner Notes: No Confidentiality by Default

- Do not assume arbitration is confidential by default
- In the U.S., neither the FAA nor most institutional rules impose a general confidentiality duty on parties
- Protection usually depends on a signed agreement or a panel order
- Approaches diverge internationally—consider matters with non-U.S. counterparties or a non-U.S. seat

Proposed Changes

Paragraph 2: Definition of Arbitration Information

Paragraph 3(e): Use of Arbitration Information in future arbitrations

Paragraph 6: Cyber Breaches

Paragraph 7: Artificial Intelligence

Paragraph 2: Arbitration Information

Except as provided in Paragraph 3 below, and absent written agreement between the Parties to the contrary, it is agreed and ordered that all briefs, depositions and hearing transcripts generated in the course of this arbitration, documents created for the arbitration, documents produced in the proceedings by the opposing party or third-parties, materials produced by the opposing party or third-parties in response to discovery requests served in the course of this arbitration, the result and all other terms of the final award and any interim decisions, and all correspondence, oral discussions and information exchanged in connection with the proceedings (hereinafter collectively referred to as "**Arbitration Information**"), whether generally or specifically, will be kept confidential and not disclosed or characterized.

Redefining “Arbitration Information”

- The definition drives every other obligation in the form
- Revised Paragraph 2 expressly captures documents produced by an opposing party or third parties, and materials produced in response to discovery requests
- These sit alongside briefs, transcripts, interim decisions, the final award, and all correspondence and oral discussions

Practitioner Notes: Negotiating the Definition

- The producing party (often the cedent) generally favors a broad definition and should resist narrowing
- The receiving party should press for a carve-out preserving each party's use of its own documents in the ordinary course, plus a provision that information already known or independently developed is not Arbitration Information
- Common compromise: keep the broad definition but add a "nothing herein restricts a Party's use of its own documents" sentence

Paragraph 3: Permitted Disclosures

1. Disclosure of Arbitration Information may be made:

    a. as is necessary to obtain compliance with the interim decisions or the final award issued in this arbitration, or to secure payment from reinsurers or retrocessionaires of amounts at issue in or incurred for this arbitration;

    b. as is necessary in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify, vacate or enforce an award issued in this arbitration;

    c. as is necessary in communications with auditors retained by any party, or with any regulatory body;

    d. as is necessary to comply with subpoenas, discovery requests or orders of any arbitral authority (i.e., a single arbitrator or panel) or court;

    e. as is necessary in any future arbitration proceedings between the Parties and under the same reinsurance agreement(s) for the same period(s), provided the arbitral authority in the future arbitration proceeding finds, after hearing from both Parties, that the Party seeking to introduce Arbitration Information has first established good cause for introducing that specific Arbitration Information in the future arbitration proceeding;

    f. to the extent Arbitration Information is already lawfully in the public domain.

Paragraph 3 (continued): Permitted Disclosures

Any disclosures pursuant to subparagraphs (a) (compliance/payment) and (c) (auditors/regulators) shall be accompanied by a copy of this Agreement and Order and an instruction to any recipient to maintain the confidentiality of all Arbitration Information. In connection with any disclosures pursuant to subparagraph (b) (court proceedings) and (e) (future arbitration proceedings), the Parties agree, subject to court or arbitral authority approval, that all submissions of Arbitration Information to a court or arbitral authority shall be sealed and/or redacted so as to limit disclosure of Arbitration Information. If a party is requested or required under subparagraph (d) (subpoenas/discovery requests) to disclose Arbitration Information, the procedures as further outlined in paragraph 5 shall govern.

Permitted Disclosures Under Paragraph 3

- Paragraph 3 exceptions define when Arbitration Information may leave the arbitration
- They matter most to parties answering to reinsurers, auditors, and regulators
- Revisions broaden several exceptions and extend sealing and redaction to future arbitrations

Key Changes

- **(1) Regulators:** broadened from "federal or state regulators" to "any regulatory body"
- **(2) Subpoenas:** minor but meaningful update (plural)
- **(3) Future arbitrations:** substantially overhauled (Segment 5)
- **(4) Sealing:** requirements extended to future arbitration proceedings in addition to court proceedings

3(e): Future Arbitrations and the "Good Cause" Standard

- Subparagraph 3(e) limits disclosure in a future arbitration to the same Parties, the same reinsurance agreement(s), and the same period(s)
- And only if the future arbitral authority finds, after hearing both Parties, that the proponent first established good cause for that specific information
- This replaces the 2019 test (same agreements "and/or" good cause)
- The provision governs whether prior awards and rulings can be reused

Discussion: Future Arbitrations and Good Cause

- What disputes arise over whether a renewal or successor contract is the "same" agreement or the "same" period?
- What shows "good cause"—inconsistent positions, issue preclusion, efficiency—and should the form define it?
- How do you describe the information to a future panel without disclosing it before a ruling?
- Should a prior award be treated differently from prior deposition testimony or documents?
- To use a favorable award against the same counterparty on a different treaty year, should parties negotiate around (e) at the outset?

Example: Allocation Ruling Across Treaty Years

- A reinsurer wins an allocation ruling on the 2015 treaty year, then arbitrates the 2016 renewal with the same cedent
- Under the 2016 form, it could argue "same reinsurance agreement" **or** good cause
- Under the new form it must establish **both** the same agreement for the same period **and** good cause—difficult for a different treaty year
- **Takeaway:** negotiate preclusive effect across treaty years

Case-Study Scenarios for Permitted Disclosures

- Direct insurance versus captive
- Facultative versus treaty
- Legacy losses versus recent and emerging issues (COVID-19, Russian aviation, wildfires)
- Concerns about disclosure in future matters

Discussion: The Arbitrator's Role

- How should an arbitrator handle information from one matter when later sitting on a panel involving the same parties or contracts?
- When panels admit information or rulings from prior panels, how was the earlier confidentiality protected?
- How are deliberations, notes, and draft rulings protected, including after conclusion?

Paragraphs 6-7: Cybersecurity & Artificial Intelligence

6. All persons subject to this Agreement and Order shall use reasonable methods to protect Arbitration Information from cyber breaches. Any person who becomes aware of any breach or loss of data as a result of a cyber breach or otherwise shall report the breach or loss to the other Party(ies) and the Arbitration Panel as soon as reasonably possible, so that appropriate remediation measures may be undertaken.

7. All persons subject to this Agreement and Order shall ensure:

   a. That they have read and are familiar with the ARIAS Rules for the Use of Artificial Intelligence ("AI") Tools in ARIAS·U.S. Arbitrations (capitalized terms in this paragraph are defined in the Rules),

   b. That they shall not submit any Arbitration Information to any Public AI Tool,

   c. That they use a Private AI Tool only if the tool provides the ability to prevent or destroy any machine learning knowledge that is premised, in whole or in part, on Arbitration Information, and

   d. That their use of AI does otherwise not violate this Agreement and Order.

This provision is not intended to limit the use of Passive AI or technology-assisted review via qualified data storage persons (i.e., electronic discovery or litigation support vendors). Any Party receiving Arbitration Information must ensure that the contract, software license, terms of use, or any other agreement or terms for use of the AI Tool complies with this Agreement and Order.

The Arbitrator's Role: "Subject To" but Not a "Party"

- What obligations flow to an arbitrator who is "subject to" the agreement without party status?
- Arbitrators sign the Agreement to evidence an undertaking to maintain confidentiality, but are "subject to" the Agreement rather than "Parties" to it
- This raises questions about protection of deliberations and the panel's role in policing confidentiality
- How does the Confidentiality Agreement interact with the Hold Harmless Agreement?
- Does a party have recourse against an Arbitrator who inadvertently (or advertently) discloses confidential Arbitration Information?
- Would the circumstances differ if there was a physical loss of information as opposed to an electronic/cyber breach?

Cybersecurity and Artificial Intelligence

- The 2019 form had only a bracketed placeholder for cyber
- Revised **Paragraph 6:** all persons subject to the Agreement and Order must
  1. **use reasonable methods** to protect against cyber breaches and
  2. **report any breach** or loss to the other Parties and the Panel
- **Revised Paragraph 7 — ARIAS Rules for Use of AI Tools**
  - Users must have read and be familiar with the Rules
  - No Arbitration Information may be submitted to any Public AI Tool
  - A Private AI Tool may be used only if it can prevent or destroy machine learning knowledge premised on Arbitration Information
  - Passive AI and technology-assisted review through qualified vendors remain permitted
  - Parties must ensure AI tool terms comply

Discussion: Cybersecurity and AI

- How do you verify that a Private AI Tool can "prevent or destroy any machine learning knowledge," and what license terms should be confirmed?
- The draft changed "comply with" the AI Rules to "read and [being] familiar with"—is that a softening, and why?
- Where is the line between permitted "Passive AI or technology-assisted review" and restricted generative AI (for example, AI in e-discovery platforms or word processors)?
- What are "reasonable methods" of cyber protection—should parties agree on specific measures such as encryption or secure file-sharing?
- Who is responsible when a vendor or expert suffers a breach, and what should the report include?
- Same question, but the arbitrator suffers the breach.

Court Proceedings, Remedies, and Survival

- Confidentiality is most vulnerable in court—on motions to confirm, modify, vacate, or enforce
- **Paragraph 3**: The form calls for sealing or redaction, subject to court approval
- **Paragraph 8:** parties may "seek" (correcting the prior "see") injunctive or equitable relief for breach; preserves the Panel's power to order relief before or with the final award
- **Paragraph 9:** the agreement survives the arbitration and related court proceedings

Discussion: Court Proceedings, Remedies, and Survival

- Given the presumption of public access, how do you build a record for sealing—and what happens if it is denied?
- After the final award, who enforces—a court, a new panel, or both—and how does the survival clause (**Paragraph 9**) operate?
- What relief have panels ordered for breaches, and do courts find the **Paragraph 8** irreparable-harm acknowledgment persuasive?
- Should the form address the costs of sealing orders or remedies, including fee-shifting?

Exposure of Arbitration Information in Direct Coverage Disputes

- Cedents regularly face discovery requests from insureds for communications with reinsurers.
- Some courts are allowing unprecedented levels of discovery not only into reinsurance communications, but Arbitration Information.
- No Confidentiality Agreement can provide absolute protection.

What's next?

- The Committee expects to submit a proposed form to the Board soon after this Conference.
- We welcome comments and suggestions.
- Q&A?

Thank you!

