



A Briefing Note on the New International Arbitration Form

By Jonathan Sacher and Edward Lenci

For some time, the International Committee of ARIAS•U.S. has been considering a model or standard international arbitration form (IAF). The form that follows this report received the approval of the ARIAS•U.S. Board of Directors at its March 2019 meeting.

The idea behind the IAF is that it may encourage participants in some international reinsurance transactions to apply this form. The IAF is along the lines of “Bermuda Form” arbitration clauses in that it is designed to—

- (1) deal with the situation where the cedent and the reinsurer are in different jurisdictions and may need a neu-

- tral forum to resolve their disputes;
- (2) give the parties the opportunity to select an applicable substantive law that may differ from the substantive law in one of their jurisdictions;
- (3) be flexible, although the likelihood is that the applicable law (if any is selected) for contracts between U.S. cedents and non-U.S. reinsurers would be New York substantive law, whereas the jurisdiction or forum for the resolution of the dispute and, therefore, the procedural law will often be outside the United States, such as Bermuda, England (London), or Canada (Toronto); and
- (4) provide for all-neutral panels, which will make it more acceptable to international commerce.¹

The IAF may not be of interest to a U.S. cedent who has a strong negotiating position and may insist on U.S. law and U.S. jurisdiction for any dispute resolution. It may also not assist any non-U.S. reinsurers who have a strong negotiating position and who can insist on their own applicable law and jurisdiction. However, it is more likely to be chosen where there is an equal bargaining position, or if the balance of the cedent’s and reinsurer’s negotiating position changes and the cedents might have to concede the applicable law and/or the jurisdiction of the contract.

Looking it at from the ARIAS•U.S. point of view, the form is an attempt to

encourage cedents and reinsurers who may currently not be involved with ARIAS to consider the IAF. The IAF ideally provides for New York law, which is likely to be seen as favorable to cedents, and a jurisdiction that is likely to be seen to be more efficient in the handling of disputes, such as London.

One of the International Committee's concerns has been that U.S. attorneys might not encourage their clients to use the IAF for fear they will be deprived of work. Our experience with Bermuda Form arbitrations, however, is that they primarily provide work for U.S. attorneys, but with some input from lawyers in the jurisdiction in which the dispute is resolved, such as London. Often the insured who is U.S.-based (in a Bermuda Form arbitration) or its offshore captive will instruct U.S. attorneys, whereas the insurers or reinsurers who are often based in Europe (or Bermuda) may instruct their local lawyers to defend them.

Bermuda Form tribunals tend to be a mixture of a U.S. appointee on behalf of the insured and a non-U.S. appointee on behalf of the foreign insurers, with (ideally) a third arbitrator/umpire/chair from an independent/unconnected jurisdiction. As the IAF tribunal will be neutral and impartial, it addresses one of the concerns of foreign reinsurers in the U.S. market, in which they feel they do not have an equal bargaining position or may lose the arbitration purely on the basis of the "coin toss" as to who the umpire might be. So, essentially, the proposal is that ARIAS will offer an alternative form of arbitration clause, the IAF, on the basis that it will offer mixed jurisdiction and applicable law provisions and a neutral panel.

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NOTES

1. "Bermuda Form" insurance contracts are typically between U.S. insureds (or the offshore captives of U.S.-based insureds) and Bermuda-based insurers/reinsurers, where the insurers/reinsurers are not keen to be exposed to courts and tribunals in the United States but recognize that the insureds prefer a substantive law with which they are familiar or are prepared to accept New York substantive law, which is considered more balanced in protecting the interests of insureds and insurers. The parties often opt for London arbitration, where the tribunals are neutral and the process is considered to be more efficient and less expensive.



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ARIAS (US) Model International Arbitration Form

1. Any dispute, claim, or controversy arising out of or relating to this Agreement (but no other agreement between the parties), including but not limited to the breach, termination, interpretation, validity, formation or application of this Agreement, or the scope, interpretation, validity, formation or application of this arbitration provision, shall be arbitrated by three neutral arbitrators ("the Panel") in [place, e.g., London], who shall follow, for procedural purposes, the [statute, e.g., the English Arbitration Act 1996] and any statutory modifications or amendments thereto, for the time being in force.
2. In the event of any dispute, claim or controversy covered by the preceding section 1, a party to this Agreement shall send a written Demand for Arbitration to the other party, or parties, to this Agreement concerning each dispute, claim or controversy to be arbitrated and, in the Demand for Arbitration, shall also state the name of the neutral arbitrator it appoints. Within thirty (30) days of receipt of the Demand for Arbitration, the other party, or parties, shall in writing notify the party that requested arbitration of the name of the second neutral arbitrator it appoints and may assert counterclaims but only those encompassed by section 1. If a party shall fail or refuse to nominate the neutral second arbitrator within thirty (30) days of receipt of the Demand for Arbitration, the party which sent the Demand for Arbitration shall have thirty (30) days to apply to [ARIAS [UK], [US] [Other] [or] name the court, e.g., the High Court of Justice of England and Wales] to request appointment of the second neutral arbitrator by that court, in which case the second arbitrator appointed shall be deemed to have been appointed by the party that refused or failed to select the second arbitrator. Within thirty (30) days of appointment of the second arbitrator, the two arbitrators shall choose a third neutral arbitrator who shall serve as Chair of the Panel. In the event of the failure of the first two arbitrators to agree on a third arbitrator within thirty (30) days of appointment of the second arbitrator, any of the parties may apply to [same [ARIAS] or court] for the appointment of a neutral third arbitrator. The Panel shall be deemed fully constituted and empowered upon appointment of the third arbitrator and must be a neutral panel at all times.
3. The Arbitrators shall be persons (including those who have retired) with not less than ten (10) years' experience of insurance or reinsurance as an officer or director within the industry or as a lawyer or other professional adviser serving the industry.
4. The Panel may, in its sole discretion, make such orders and directions as it considers necessary for the final determination of the disputes, claims or controversies being arbitrated, and the Panel shall have the widest discretion in making such orders or directions.
5. Notwithstanding any provision of the [statute in section 1] or any other statute or law, the Panel is, unauthorized to, and shall not, award punitive or exemplary damage or a party's attorneys' fees except a) where all parties to the arbitration request them, or b) a controlling statute authorizes an arbitrator or arbitration panel to award them. Other than as already set out in this arbitration agreement, the Panel shall render its final decision in a written, reasoned, final award. [Option 1 : In rendering that award, the Panel shall, other than as already set out in this arbitration clause, interpret this Agreement as an honorable engagement and shall not be obligated to follow the strict rules of law or evidence and, instead, shall apply the customs and practices of the insurance and reinsurance industry with a view to effecting the general purpose of this Agreement] [or Option 2 : The Panel shall apply the proper law of the Agreement[/New York law] without regard to its conflict of laws principles].