Arbitration Clauses and Related Issues

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Arbitration is frequently the mechanism pursuant to which an insured and an insurer resolve coverage disputes, especially with respect to international insurance policies. The fundamental premise of arbitration is that the parties have contractually agreed to arbitrate a dispute rather than to litigate in court. Because it is contractual, arbitration is typically a confidential and closed proceeding limited to the parties concerned. However, arbitration provisions are also dealt with in federal and state statutes designed to protect and enforce an agreement to arbitrate.

Arbitration can have distinct advantages over litigating coverage in a court proceeding. Among other things, the insured and the insurer can select the arbitrator(s), rather than have the dispute assigned to a judge who may not be familiar with insurance or the kinds of coverage disputes at hand; there may be limited discovery in an arbitration; and resolving a dispute in arbitration is almost always confidential, while the exact opposite is typically true in a court proceeding. An arbitration can also be less expensive and more efficient than a court proceeding, although that is not always the case.

In certain circumstances, there can be disadvantages to arbitration. The confidential nature of arbitrations may hamper the development of precedent with respect to certain issues assuming the relevant policy provisions, facts, applicable law and other considerations are the same, which may or may not be the case. Where these considerations are the same, inefficiencies and potential inconsistent results may occur. Depending on the language of the arbitration provision, applicable statutes and caselaw, the process of selecting the arbitration panel could sometimes present opportunities for the insured or the insurer to engage in tactical maneuvering that would be absent when a coverage case is assigned to a judge.

Arbitration has been officially recognized legislatively and judicially in jurisdictions around the world. In the United States, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), was enacted nearly a century ago to overrule the refusal of courts to enforce agreements to arbitrate and to ensure arbitration in accordance with the terms agreed to by the parties. Frequently, an insured or an insurer will rely upon the FAA in seeking to compel arbitration and to stay coverage litigation, both of which are authorized under the FAA. *See* 9 U.S.C. §§ 3-4.

The arbitration provision in an insurance policy typically governs a wide variety of issues including the process for commencing an arbitration, the process for selecting an arbitrator or panel of arbitrators, the situs of the arbitration, certain arbitration procedures, and the timing and nature of an award. As a result, the arbitration clause is one of the first provisions of an insurance contract that the insured and the insurer consider in determining how to resolve their coverage disputes.

Arbitration clauses can vary significantly and may be influenced by history and forms in use in a particular market. Foreign insurers' arbitration provisions typically are different from arbitration provisions employed by U.S. insurers. For example, Bermuda insurers generally will use the same form of arbitration clause for a particular class of business, *e.g.*, Property, D&O, Excess Liability, but not one for all classes. Other foreign insurers may require arbitration, but their arbitration provision may be worded differently. While Bermuda, London and other insurers may use standard arbitration clauses in particular policies,[1] arbitration clauses can vary significantly and be the subject of negotiation, particularly in broker and manuscripted policy forms.

[1] Bermuda and London forms of arbitration clauses have been attached to this paper as Exhibits A and B respectively. This is not to suggest the wording of these clauses are not changed or

Foreign arbitration provisions typically require binding arbitration of all coverage disputes, whereas U.S. arbitration provisions are frequently less strict. For example, U.S. provisions may require arbitration only if requested by the insureds or may include binding arbitration as one of several optional alternative dispute resolution processes. *See* AIG Form (Ex. C).

The wording of arbitration clauses is important and affects key aspects of any arbitration. This paper outlines some of the key issues to consider.

1. How an arbitration is commenced and whether it is administered or unadministered

The commencement of an arbitration is typically prescribed by the applicable arbitration clause and usually begins by sending an arbitration demand to the other party to the insurance contract.[2] Subject to the wording of the arbitration provision and what procedural law governs, the arbitration demand can vary in form from barebones to a very detailed pleading. Almost always, the party demanding arbitration must identify their designated arbitrator and, in a tripartite arbitration, the filing of a demand for arbitration will normally trigger a time period for the opposing party to designate its arbitrator, though this time is sometimes extended by agreement. *See*, *e.g.*, Bermuda Form (Ex. A); London Form (Ex. B).

Subject to the wording of the arbitration provision, the manner of service of a demand or notice of arbitration usually depends on whether the arbitration is subject to

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modified, or that a Bermuda or London insurer may not use a different form of arbitration provision. U.S. policies vary significantly in whether they include an arbitration clause and, if so, the form of that clause. Exhibit C is an illustrative arbitration clause from an AIG D&O policy form.

[2] In some cases, the arbitration clause contains a prerequisite to arbitration, such as unsuccessful completion of a mediation or refusal of the insurer to pay in a particular amount of time.

the rules of some organization responsible for administering the arbitration such as JAMS, AAA, CPR, or the like. The rules of the specified arbitration organization typically provide for service on the parties and the administering organization. *See*, *e.g.*, AAA Rule R-4(h). When the arbitration is administered, the administering organization, usually in return for a fee, often takes responsibility for administering the process of selecting one or more of the arbitrators (often drawing on its own slates of arbitrators) and keeping it on track. *See* JAMS Std. Arb. Clause (https://www.jamsadr.com/clauses/#Standard).

An administering organization may have its own arbitration rules and procedures. *See*, *e.g.*, JAMS Comprehensive Arbitration Rules ("JAMS Rules"); JAMS Streamlined Arbitration Rules ("JAMS Streamlined Rules"); AAA Commercial Arbitration and Mediation Rules ("AAA Rules"); AAA International Dispute Resolution Procedures ("AAA International Rules"); CPR Administered Arbitration Rules ("CPR Rules"); CPR Rules of Arbitration of International Disputes ("CPR International Rules"). If so, absent other agreements of the parties, those rules will control many aspects of how the arbitration will be conducted.

Arbitrations under the Bermuda and London standard arbitration forms are not subject to the rules of an administering organization setting forth how the arbitration must be handled. Under these forms, the arbitration demand must comply with the arbitration provision and any applicable law. There is no required specificity in the arbitration demand or in the response to the arbitration demand. Regardless of whether an arbitration is administered or not, after the arbitration panel is selected, the parties and the tribunal will hold an organizational meeting to agree upon the manner and timeline in which the arbitration will proceed. *See*, *e.g.*, London Form (Ex. B); AIG Form (Ex. C).

A handful of states have enacted statutes that preclude or limit an insurer from requiring arbitration in an insurance policy. The majority of states have no such statutes.[3] The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which grants supremacy to state laws regulating insurance over federal law, applies to arbitration agreements within the U.S. but has no impact on international arbitration agreements governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Type Of State Laws "Saved" By McCarran, 1 Couch on Ins. § 2:5 (citing cases). As a result, statutes precluding or limiting arbitration do not apply to an international arbitration agreement under cases applying the FAA and the New York Convention. *See* J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 Vanderbilt Journal of Transnational Law 1535 (2008). On the other hand, certain state statutes have been applied to bar a domestic insurer from using a mandatory arbitration provision. *See*, *e.g.*, *State, Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 124 (Wash. 2013) (invalidating a mandatory arbitration clause, finding that the state statute was protected from FAA preemption).

[3] Sixteen states have statutes that prohibit enforcement of arbitration clauses in insurance contracts. The other states either have no statute prohibiting the use of arbitration provisions, have laws that restrict the application of arbitration provisions, or have regulations that restrict the application of arbitration provisions. Gilbert Samberg, *Competing Legal Factors Vex Insurance Arbitration Disputes* (July 8, 2019), https://www.law360.com/articles/1175182/competing-legal-factors-vex-insurance-arbitration-disputes.

2. Scope of arbitration

Most arbitration clauses broadly cover any dispute relating to the policy.[4] *See*, *e.g.*, London Form (Ex. B) ("any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof"); AIG Form (Ex. C) ("All disputes or differences which may arise under or in connection with this Coverage Section"). As a consequence, not only are coverage disputes subject to arbitration, but also claims or disputes with respect to claims handling, alleged bad faith, and compliance with insurance-related statutes, to mention a few examples.

Because arbitration is strongly favored in the U.S., England, and Bermuda, as well as elsewhere, should the insured or insurer commence a coverage lawsuit rather than arbitrate, the opposing party is almost always successful in staying, enjoining and/or or dismissing the coverage action based on the arbitration provision.[5] For example, under the FAA, the insurer is able to file a motion seeking to stay the coverage action even if arbitration has not been demanded, even if there is a dispute over the extent of the arbitration, and even if there is a dispute over whether the insurance policy is valid and binding. *See* 9 U.S.C. § 3. Even when the insured is in bankruptcy proceedings, courts will enforce arbitration provisions to stay a coverage action in favor of arbitration, except in a rare situation. *See*, *e.g.*, *In re Residential Cap., LLC*, 563 B.R. 756 (Bankr. S.D.N.Y. 2016); *In re MF Global Holdings Ltd.*, 571 B.R. 80 (Bankr. S.D.N.Y. 2017); *In re*

[4] There is, however, sometimes narrower language which has been argued to limit the scope of an arbitration clause to disputes over non-payment. These kinds of clauses should generally be avoided unless they are intended to create a basis for attempting to limit the scope of a clause.

[5] For example, where the arbitration provision is subject to English law, the insurer can obtain an anti-suit injunction in a London court to prevent the insured and the insured's lawyers from pursuing a coverage action. *See*, *e.g.*, *Markel Bermuda Ltd. v. Caesars Entmt., Inc.* [2021] EWHC 1931 (Comm).

Purdue Pharma L.P., Adv. Pro. No. 21-07005-rdd, ECF No. 164 (Bankr. S.D.N.Y. June 29, 2021).

3. Selection of arbitrator or arbitrators

A key issue in any arbitration clause is the process of picking the member(s) of the tribunal, which usually is addressed in the arbitration provision. If the arbitration provision provides that the arbitration is to be done pursuant to rules of an arbitration organization, then those rules may dictate the process for picking an arbitrator.

When there is to be only a single arbitrator, typically, such arbitrator is agreed to by the parties or appointed through a process provided by the administering organization. Tripartite arbitration panels normally consist of one arbitrator selected by each side and a third arbitrator selected by the first two, sometimes alone, or sometimes in consultation with the parties who appointed them. *See, e.g.*, Bermuda Form (Ex. A); London Form (Ex. B); AIG Form (Ex. C). In some cases, the third arbitrator is selected via a process established by the administering organization. *See*, *e.g.*, JAMS Rule 7(b); AAA Rules R-3, R-12-14. Where there is no administering organization, the arbitration clause often provides for a court to appoint the third arbitrator in the event the first two parties cannot agree. *See*, *e.g.*, Bermuda Form (Ex. A); London Form (Ex. B). In some cases, where the two party-appointed arbitrators cannot agree on the third arbitrator, the parties and/or the party-appointed arbitrators agree on a process like ranking or flipping a coin to pick the third arbitrator in order to avoid having the issue resolved by a court.

4. Arbitrator qualifications

Depending on the wording of the arbitration provision, there may be an issue of arbitrator qualifications. Some arbitration clauses prescribe certain qualifications for the arbitrators. *See*, *e.g.*, AIG Form (Ex. C) (“must be disinterested and have knowledge of

the legal, corporate management, or insurance issues relevant to the matters in dispute"). Where the arbitration clause is silent on this issue, the parties can either agree on qualifications or else appoint anyone they would like (subject to any applicable requirements of impartiality as discussed below). *See, e.g.*, Bermuda Form (Ex. A); London Form (Ex. B). In considering who to select as a party-designated arbitrator, the insured or the insurer often consider the following qualifications: retired judge in a particular jurisdiction; English Queen's counsel; lawyer licensed in a particular jurisdiction; persons with a specified period of experience in insurance law or some other area of expertise; ARIAS certification; and present or former officer, director, or employee of an insurance company. Whether a party will designate an arbitrator or agree to the Chair having been one or more of the foregoing usually turns on the particular underlying claims for which coverage is sought, the nature of the coverage disputes, and the perspective of the party as to who would be the most suitable or sympathetic arbitrator or Chair under the circumstances.

Absent a controlling provision in the arbitration agreement or applicable rules specifying arbitrator qualifications,[6] there are no general rules or requirements with respect to who an insured or insurer will select as its designated arbitrator or even the Chair of the arbitration panel. Every arbitration is different, and who is best suited to be an arbitrator in one matter may not hold true in another matter. For example, does a law license in a particular jurisdiction or the fact that someone sat as a judge qualify them to decide your insurance dispute? Will a policyholder feel comfortable with an arbitrator or

[6] *See*, *e.g.*, AIG Form (Ex. C); ARIAS Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 6.3.

panel of arbitrators who spent their careers working for insurance companies? Is there a pool of qualified individuals who fit the criteria and would be willing and available to serve as an arbitrator? These are issues that need to be carefully considered in drafting an arbitration clause and in selecting the most appropriate party-designated arbitrator and the Chair of the arbitration panel in the event of a dispute.

On the other hand, an arbitration provision may impose limitations on who a party may designate as its arbitrator or who may be the Chair of the arbitration panel. *See* AIG Form (Ex. C). For example, the arbitration provision may limit potential arbitrators to retired or former executives in the insurance industry. In that situation, absent subsequent agreement or waiver, both the insured and the insurer are limited to designating someone who satisfies the requirements set forth in the arbitration agreement.

An additional consideration in selecting a party-designated arbitrator or the Chair of an arbitration panel is whether the arbitrator has a disqualifying conflict and what disclosures the particular arbitrator has made in connection with any actual or potential conflict. Here, the rules with respect to disclosure and disqualifying conflicts will vary depending upon market practice and the arbitration statute or case law applicable to that arbitration. What disclosures must be made and what disqualifying conflicts exist will vary from an arbitration in the U.S. to an arbitration in London to an arbitration elsewhere. For example, the fact that the Chair of an arbitration panel in London has in the past been routinely selected by an insurer (or by one of the parties in the current arbitration) may not be a disqualifying conflict assuming it is properly disclosed to the parties. *See Halliburton v. Chubb*, [2020] UKSC 48.

5. Arbitrator impartiality

In any arbitration, a threshold issue is whether a party-designated arbitrator must be impartial or not. The arbitration provision may require that the arbitrator(s), even if selected by the insured or insurer, must be "disinterested" or "neutral." *See* AIG Form (Ex. C) ("must be disinterested"). If the arbitration provision provides that it follows the rules of an arbitration organization, then those arbitration rules will govern the issue of arbitrator impartiality. *See*, *e.g.*, AAA Rules R-13, R-18; JAMS Rule 7(c).

Some arbitration provisions require an arbitrator (or at least the Chair) to be "disinterested" so that "the arbitrator or umpire shall not be under the control of either Party, nor shall the arbitrator or umpire have a financial interest in the outcome of the arbitration." *See* ARIAS Panel Rules for the Resolution of Insurance and Contract Disputes, Rule 2.6. Today, however, absent agreement, it is more common to require all arbitrators to be neutral in the sense of being "disinterested" and "impartial." *See* ARIAS Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 2.6 (defining "neutral"); *see also* AAA Rules R-13(b), 18(b); JAMS Rule 7. This is also a requirement of the Arbitration Act 1996 (of England) § 24 (Power of court to remove arbitrator if circumstances give rise to justifiable doubts as to his/her impartiality) and the Bermuda International Conciliation and Arbitration Act 1993 ("Arbitration Act 1993"), though not necessarily of the FAA. *See Certain Underwriting Members of Lloyds of London v. Florida, Dep't of Fin. Servs.*, 892 F.3d 501, 510 (2d Cir. 2018) ("Expecting of party-appointed arbitrators the same level of institutional impartiality applicable to neutrals would impair the process of self-governing dispute resolution"); *see also Morelite Const. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79, 83 (2d Cir.

1984) (requiring "something more than the mere 'appearance of bias' to vacate an arbitration award").

Arbitration provisions vary in the extent to which they govern arbitrator partiality. In most cases, the arbitration provision does not specifically address the issue of arbitrator impartiality, in which case the issue turns on what arbitration statutes or law applies to the arbitration itself. For example, as noted above, in arbitrations done under London or Bermuda arbitration statutes, each arbitrator must be disinterested and neutral.

Where impartiality is required, disputes arise with seemingly increased frequency as to what constitutes impermissible partiality. For example, if an arbitrator (or the arbitrator's firm or partner) has an existing or prior business or personal relationship or experience with, or is or was adverse to a party or counsel for a party in the arbitration, does that fact disqualify the arbitrator? This can be a highly factual and subjective issue with limited authority to provide practical guidance. In administered arbitrations, the administering organization often has rules and procedures for resolving objections to an arbitrator. *See*, *e.g.*, AAA Rule R-18(c); JAMS Rule 15(i). In unadministered arbitrations, the resolution of these issues can be difficult and time-consuming, perhaps ultimately requiring the intervention of a court in cases where the parties cannot reach a consensual resolution.

Finally, there are situations where a party-designated arbitrator does not have to be impartial. Historically, party-appointed arbitrators in insurance and especially reinsurance arbitrations were expected to have some alignment with the parties that appointed them. *See* ARIAS Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 6.3. In this situation, the party-designated arbitrator can

argue on behalf of that party, can have ex parte communications with that party, and does not have to be impartial or disinterested when the arbitration panel deliberates and decides various issues.[7] *See*, *e.g.*, AAA Rule 19(b); ARIAS Panel Rules for the Resolution of Insurance and Contract Disputes, Rules 6.1 and 6.13 (permitting ex parte communications until the Organizational Meeting).

6. Situs of arbitration and controlling law

An arbitration clause often sets forth the situs or seat of an arbitration.[8] *See*, *e.g.*, Bermuda Form (Ex. A); London Form (Ex. B); AIG Form (Ex. C) (giving insured ability to pick from a slate of possibilities). Under the Bermuda standard form, the situs of the arbitration is typically London, but it can also be Bermuda or, in some cases, Canada. *See* Bermuda Form (Ex. A). London is the typical situs of arbitration under the London standard form. *See* London Form (Ex. B). The situs of arbitration is not just important in determining where the arbitration will be held, but also what substantive law and procedural law will govern that arbitration. It may also bear on whether the tribunal has authority to subpoena witnesses to testify and may depend on whether the witness is in the jurisdiction where the arbitration is being held or in some other jurisdiction.

There is an important distinction to be made about controlling law – is it substantive law or procedural law at issue? Typically, the arbitration provision specifies what

[7] Many times, the parties will agree that before the arbitration panel begins to deliberate, there will be no further ex parte communications between them and their designated arbitrator.

[8] Due to the pandemic, many arbitrations were not physically held at the designated situs but were done through a virtual hearing. In these situations, arbitration hearings have been done effectively by using Zoom Video Conferencing or some like form of communication/visualization. Notwithstanding that the parties were in different countries, their lawyers were in different countries and the Tribunal were in different countries, the situs of the arbitration was always deemed to be as provided in the arbitration agreement or as agreed by the parties.

procedural law governs, but if not, it would be the procedural law of the situs of the arbitration.

Substantive law is usually specified in the arbitration provision or in the insurance policy's choice of law provision. *See*, *e.g.*, Bermuda Form (Ex. A) (New York law with certain exceptions); London Form (Ex. B) (same); AIG Form (Ex. C) ("give due consideration to the general principles of the law of the State of Formation of the Named Insured").

Where this is not the case, the substantive conflict of laws principles of the law of the jurisdiction which is the situs of the arbitration would apply. This can be very important since insurance disputes are normally governed by state law and important insurance principles can vary significantly from jurisdiction to jurisdiction.

For example, absent a controlling choice of law provision in the parties' insurance contract, an arbitration seated in New York will normally act like a court sitting in New York in deciding governing law. *See* Restatement (Second) of Conflict of Laws § 188, Law Governing in Absence of Effective Choice by the Parties (1971) (citing cases); *see also Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.Y.2d 193, 202 (1995) ("in the absence of an explicit choice of law provision, governing Federal law would have precluded the courts in the appeals before us from addressing the Statute of Limitations issue"); *compare with Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward"). Alternatively, if the situs of the

arbitration is London, then English statutes and conflicts of law principles will determine what substantive law governs.[9]

The situs of an arbitration may also impact where appeals or court orders relating to the arbitration can be sought. For example, if the situs of an arbitration under the Bermuda form is Bermuda, then the parties must seek relief and appeals from the Bermuda courts; but if the situs is London, then they must go to courts in England. If the situs of an arbitration is in a state within the United States, then unless the action was removed to a federal court, the parties would have to seek relief from or file appeals to a state court.[10]

7. Multiple arbitrations

It is possible that there may be multiple arbitrations when the insured is seeking coverage for a particular claim or claims which implicate many different insurance policies, each having an arbitration provision. For example, the amount of the alleged damages or losses may be so large that many different layers of excess coverage are implicated when the insured seeks coverage, and yet each of these excess policies may have a provision requiring arbitration as between the insured and the insurer. Similarly, the insured may be seeking coverage for a claim or claims under a series of policies in

[9] The Bermuda arbitration provision provides that New York substantive law applies in many, but not all respects. For example, certain rules of interpretation under New York law and New York law limiting coverage for punitive damages are inapplicable.

[10] An action asserted against an insurer in state court that relates to an international arbitration agreement or award governed by the New York Convention can be removed to federal court. 9 U.S.C. § 205. However, for U.S. arbitration agreements, the FAA does not create independent federal question jurisdiction. Rather, some other basis for federal jurisdiction is required for removal. Todd Rosenbaum, *How to Compel Arbitration When Litigation is Commenced in State Court* (Nov. 29, 2018), https://www.lexology.com/library/compel-arb.

effect over a period of time, and yet each of these policies may have a separate provision requiring arbitration between the insured and the insurer.

The question arises whether an insured or an insurer can commence a single arbitration or commence different arbitrations and then have them consolidated, rather than go forward with separate arbitrations as to each insurer. The arbitration provisions at issue are frequently silent with respect to whether any arbitration under the insurance policy at hand can be consolidated with any other arbitration involving the same insured and the same claim but a different insurer with a different insurance policy.

As explained below, in the absence of an agreement of the parties in an arbitration provision or subsequently, it can be difficult for either the insured or the insurer to consolidate an arbitration under one insurance policy with another arbitration under a different policy, even though it may involve the same claim(s), the same basic policy terms, and the same underlying facts, and either the insured or the insurer (but not both) would like to consolidate. To oversimplify, as a general rule, unless all parties have agreed, a court is unlikely to order consolidation of multiple arbitrations.

If a policy issued by London or Bermuda insurers provides that it is subject to English law, then under the Arbitration Act 1996, a tribunal has the power to order consolidation only with the consent of parties. Arbitration Act 1996 § 35. Likewise, where arbitrations are subject to the Bermuda Arbitration Statute, they cannot usually be consolidated unless all parties agree in the arbitration clause or otherwise. *See* Adrian Hughes & John Denis-Smith, *The UNCITRAL Arbitration Rules* (Dec. 3, 2018), 39 Essex Chambers.

Under the FAA, a court is authorized to compel arbitration and stay a pending lawsuit if the dispute is "referable to arbitration." 9 U.S.C. § 3. While an insurer or an insured can invoke the FAA for many different reasons, the FAA has no specific provision authorizing a court to consolidate arbitrations. A long line of decisions holds that a court does not have power to compel consolidation of arbitration proceedings under the FAA where the arbitration agreement does not have a provision permitting consolidation of arbitrations.[11] Again, the rationale of these decisions is the concept that arbitration is a private contract between the parties and, as a result, multiple arbitrations cannot be consolidated unless all parties have agreed.

On the other hand, if the arbitration provision at issue can be construed to provide for consolidation of arbitrations, then a court may order consolidation at the request of a party in accordance with the provision.[12] Similarly, if the insurance policy provides that arbitration will be done pursuant to certain arbitration rules and those arbitration rules authorize consolidation of arbitrations, then a court, arbitrator, or the administering organization, as appropriate, can compel multiple parties to participate in the same arbitration or order consolidation of multiple arbitrations. *See*, *e.g.*, JAMS Rules 6(e);

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[11] *See*, *e.g.*, *Seretta Const., Inc. v. Great Am. Ins. Co.*, 869 So. 2d 676, 679 (Fla. Dist. Ct. App. 2004) (explaining that the better approach is to follow courts and states that have held that a court cannot order consolidation of arbitration proceedings arising from separate agreements absent the parties' agreement to allow consolidation); *United Food & Commercial Workers, Local 21 v. MultiCare Health Sys.*, 2011 WL 834141, at *3 (W.D. Wash. Mar. 3, 2011) (declining to order consolidation based on Ninth Circuit precedent); *Nath v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 993 N.Y.S.2d 644 (N.Y. Sup. 2014) (stating that courts may not order consolidation of arbitrations arising from separate agreements where the parties have not expressly agreed to consolidation).

[12] Of course, especially in one-off situations, the insurer and the insured may agree that one or more arbitrations may be consolidated such as where there is a subscription program or the insured has fronting or captive insurance above or below where there is actual insurance. In such cases, there may be compelling reasons why any arbitration of coverage disputes between the insured and the captive and the other insurer should be consolidated.

AAA Rules P-2(a)(vi)(c); AAA International Rules, art. 9. There are also state statutes that sometimes permit consolidation in the event that certain standards are satisfied. *See New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 3-5 (1st Cir. 1988) (discussing Mass. Gen. Laws Ann. ch. 251, § 2A); *see also* Uniform Arbitration Act § 10 (revised 2000).

Where there is a dispute as to whether there has been an agreement to consolidate, modern authorities suggest that is an issue of contractual interpretation to be decided by the arbitration panel. *See, e.g.,Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (quoting Uniform Arbitration Act § 6, comment 2 (revised 2000), "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability . . . and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003) (whether the contracts allowed for single arbitration was for the arbitrator to decide because such an inquiry "concerns contract interpretation and arbitration procedures," which "[a]rbitrators are well situated to answer"); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 587 (3d Cir. 2007) (explaining that consolidation is for arbitrators to decide).

8. Procedural rules and timelines

Some arbitration provisions prescribe that arbitration is subject to the rules of an arbitration organization like JAMS, AAA or CPR, and use of an organization is usually accompanied by its rules absent agreement to the contrary. *See*, *e.g.*, JAMS Standard Arbitration Clause for Domestic Commercial Contracts; JAMS Rule 1(b); AAA Rule R-1(a). On the other hand, some arbitration clauses leave the prescription of rules for the

conduct of the arbitration to the discretion of the arbitrators. *See*, *e.g.,* London Form, para. (2) (Ex. B); AIG Form (Ex. C).

Arbitrations vary significantly as to the extent of discovery provided. As a general rule, unless the arbitration provision provides otherwise or there is a contrary controlling rule of an arbitration organization, document discovery is often limited to what is "relevant" to the specific issues and claims as alleged by the parties in their Statement of Claim and Statement of Defense. *See*, *e.g.*, JAMS Rule 17(a); AAA Rule R-22(b). In London arbitrations, as a general rule, the parties do not have to serve document requests, but rather are under an obligation to produce to the other all non-privileged documents that are "relevant," with the word "relevant" meaning any document that is helpful or unhelpful to that party's case. However, it is also possible for parties to agree on a more formal procedure utilizing document requests and responses to document requests as well as reserving the right to go to the arbitration tribunal to resolve disputes.

As a general rule, in arbitrations done in London and Bermuda, depositions of parties and non-parties are not done and are usually not allowed, unless the parties agree. The arbitrators themselves do not have the authority or power to order a deposition, so the party would have to apply to a Bermuda or English court to obtain an order requiring any deposition. This holds true whether the deposition is for discovery purposes or to provide deposition testimony at the hearing in a London or Bermuda arbitration, even if the witness is unavailable to testify.[13]

[13] Theoretically, in a London or Bermuda arbitration, under the Arbitration Act 1996, the arbitrators essentially have all the powers of the English Court to compel witness evidence and can compel witness evidence by virtue of a witness summons. However, a witness summons is not the same as a deposition and would require a witness to appear and provide evidence at a hearing, not by way of deposition. There is further difficulty because an arbitration tribunal in London or Bermuda would have no authority to order a non-party to attend a deposition or hearing. This can also be

On the other hand, deposition discovery may be permissible where the procedural rules of an arbitration organization allow such deposition discovery. Governing rules vary with JAMS Streamlined Rules and AAA Rules not contemplating depositions, and JAMS Comprehensive Rules contemplating at least one deposition per side. *See* JAMS Rule 17 (b). The issue of depositions is subject to the request of the parties and the discretion of the arbitrator or arbitrators. *Id.*

9. Rendering the award

Some arbitration clauses set a specific amount of time after hearing for issuance of an award. *See* London Form (Ex. B) (90 days from hearing to render award). Times for decisions after an award are typically followed but can be extended by agreement of the parties, an extension of which is typically granted if requested by the arbitrator or arbitration panel.

In the absence of direction by the arbitration clause or subsequent agreement of the parties, arbitrations are typically controlled by applicable law. However, some arbitration clauses vary those expectations. For example, insurance and reinsurance clauses sometimes use some type of honorable engagement clause such as the following:

> The Panel shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their Decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general purpose of this contract.

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an issue in U.S. arbitrations, depending on the authority of the arbitrators under the arbitration provision and more importantly, under any applicable statute authorizing the issuance of subpoenas for testimony in aid of an arbitration.

ARIAS U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, p.1. The parties' contract may also vary applicable rules of construction such as in the following provision from the sample Bermuda Form (Ex. A) and London Form (Ex. B):

> the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the Insured and the [Company]; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the Insured or the [Company] or reference to the "reasonable expectations" of either thereof or to contra proferentum and without reference to parol or other extrinsic evidence).

Ex. A, ¶ O; Ex. B, ¶ O.

Arbitration awards can vary from briefly stating who won and who lost and who owes who what without any reasoning, to very detailed legal opinions. The lawyers and clients in a particular case may differ on the detail they would like in an award depending on the particular case. The timing and type of award is often governed by the arbitration clause, though it may be varied by agreement of the parties.

10. Costs and fees

The arbitration clause commonly sets forth any agreement of the parties on costs and fees. This can be particularly important in an arbitration since the costs of arbitration include fees of the arbitrator(s) and of any administering organization and can be substantial.

Absent agreement, the Arbitration Act 1996 (English) and Arbitration Act 1993 (Bermuda) generally provide for implementation of the English rule under which costs and fees are awarded to the prevailing party. *See* Arbitration Act 1996 §§ 59-65; *see also*

Arbitration Act 1993 § 32. Absent agreement, U.S. arbitrations typically follow the American Rule under which costs are sometimes awarded to the prevailing party, but attorney's fees are not normally awarded absent some applicable statutory provision for fee shifting. *See* AIG Form (Ex. C) ("arbitration award shall not include attorney's fees or other costs"); *see also* Uniform Arbitration Act § 21(b) (revised 2000) ("An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by agreement of the parties to the arbitration proceeding").

Arbitration rules and provisions on fees can vary considerably including: a mandate that fees and costs are paid by the prevailing party; providing the arbitrator(s) discretion as to whether to award fees or costs, London Form, para. (4) (Ex. B); providing that costs of arbitration be split, Bermuda Form (Ex. A); or providing that each party shall bear their own fees and costs and share the costs of an arbitrator or the umpire in a three arbitration panel. *See* JAMS Rule 31; *see also* AAA Rule R-47(b)-(c).

Many Side A D&O policies issued by Bermuda insurers contain a unique fees provision intended to address the reluctance of some companies to purchase a policy which requires U.S. directors and officers to personally arbitrate a coverage dispute in a foreign country. To minimize the potential for such a foreign arbitration and to protect the insured persons from inappropriate expenses, those Side A policies contain a hybrid fees provision – if the insured persons prevail in the arbitration, the insurer must pay the insured persons fees (outside the policy's limit of liability); but if the insurer prevails, the arbitrator(s) decide if the insured persons should pay any of the insurer's fees.

11. Appeals

An arbitration clause can also impact rights to appeal. Typically, in the absence of agreement, the grounds for overturning an arbitration award are very limited under English, Bermuda, and U.S. law. In each case, they are typically limited to challenging an award as to its substantive jurisdiction or challenging an award on the grounds of serious irregularity affecting the tribunal, the proceedings, or the award. *See*, *e.g.*, Arbitration Act 1996 §§ 67-69; *see also* 9 U.S.C. § 10 (one of the ways to overturn an arbitration award is to show that the arbitrator exhibited "evident partiality"); *Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1159 (9th Cir. 2016) (overturning an award where the arbitrator lied about his credentials). Arbitration provisions can alter these considerations by indicating where an arbitration award can be appealed to, by precluding any appeal (*e.g.*, Bermuda Form (Ex. A); London Form, ¶ N(3) (Ex. B)), or by providing a process for an appellate arbitration panel. *See*, *e.g.*, JAMS Rule 34.

Exhibit A

L. **CANCELLATION**

(1) Coverage A under this Policy may be cancelled on a pro rata basis:

(a) at any time by the **Named Insured** by delivering written notice to the **Insurer** at the address listed in Item 8(b) of the Declarations stating when, not less than thirty (30) days from the date such notice is received, cancellation shall be effective;

(b) at any time by the **Insurer** by delivering written notice to the **Named Insured** stating when, not less than ninety (90) days from the date the notice is received, cancellation shall be effective; or

(c) if any **Insured** shall institute a suit or proceeding against the **Insurer** other than as provided in Condition N below (or to enforce an award arising out of such arbitration), at any time thereafter by the **Insurer** by delivering written notice to the **Named Insured** stating when, not less than five (5) days from the date the notice is received, cancellation shall be effective.

(2) This Policy will be cancelled automatically retroactive to the commencement of the **Annual Period**, if the premium or proof of payment thereof is not received by the **Insurer** within five (5) business days of the commencement of such **Annual Period**.

(3) Coverage B may not be cancelled by either the **Named Insured** or the **Insurer**, except the **Insurer** may cancel effective immediately upon the delivery of written notice to the **Named Insured** if the **Insured** should institute a suit or proceeding against the **Insurer** other than as provided in Condition N below (or to enforce an award arising out of such arbitration).

M. **CURRENCY**

The premiums and losses under this Policy are payable in the respective currency(ies) set forth in Item 6 of the Declarations. Unless otherwise specified in Item 6, such currency(ies) shall be United States dollars. If judgment is rendered, settlement is denominated or another element of **Damages** is stated in a currency other than in the applicable currency, payment under this Policy shall be made in the applicable currency at the rate of exchange prevailing on the date the final judgment is rendered, the amount of the settlement is agreed upon or the other element of **Damages** is due, respectively.

N. **ARBITRATION**

(1) Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows:

Any party may, in the event of such a dispute, controversy or claim, notify the other party or parties to such dispute, controversy or claim of its desire to arbitrate the matter, and at the time of such notification the party desiring arbitration shall notify any other party or parties of the name of the arbitrator selected by it. The other party who has been so notified shall within thirty (30) calendar days thereafter select an arbitrator and notify the party desiring arbitration of the name of such second arbitrator. If the party notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator within thirty (30) calendar days following the receipt of such notification, the party who first served notice of a desire to arbitrate will, within an additional period of thirty (30)

cale r days, apply to a judge of the High Court 'ustice of England and Wales for the appointment of a second arbitrator and in such a case the arbitrator appointed by such a judge shall be deemed to have been nominated by the party or parties who failed to select the second arbitrator. The two arbitrators, chosen as above provided, shall within thirty (30) calendar days after the appointment of the second arbitrator choose a third arbitrator. In the event of the failure of the first two arbitrators to agree on a third arbitrator within said thirty (30) calendar day period, either of the parties may within a period of thirty (30) calendar days thereafter, after notice to the other party or parties, apply to a judge of the High Court of Justice of England and Wales for the appointment of a third arbitrator and in such case the person so appointed shall be deemed and shall act as the third arbitrator. Upon acceptance of the appointment by said third arbitrator, the Board of Arbitration for the controversy in question shall be deemed fixed. All claims, demands, denials of claims and notices pursuant to this Condition N shall be given in accordance with Condition U below.

(2) The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including, without limitation, discovery by the parties.

(3) The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing and shall cause a copy thereof to be served on all the parties thereto. In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto. Such decision shall be a complete defense to any attempted appeal or litigation of such decision in the absence of fraud or collusion. Without limiting the foregoing, the parties waive any right to appeal to, and/or seek collateral review of the decision of the Board of Arbitration by, any court or other body to the fullest extent permitted by applicable law.

(4) Any order as to the costs of the arbitration shall be in the sole discretion of the Board, who may direct to whom and by whom and in what manner they shall be paid.

(5) The **Insurer** and the **Insured** agree that in the event that claims for indemnity or contribution are asserted in any action or proceeding against the **Insurer** by any of the **Insured's** other insurers in any jurisdiction or forum other than that set forth in this Condition N, the **Insured** will in good faith take all reasonable steps requested by the **Insurer** to assist the **Insurer** in obtaining a dismissal of these claims (other than on the merits) and will, without limitation, undertake to the court or other tribunal to reduce any judgment or award against such other insurers to the extent that the court or tribunal determines that the **Insurer** would have been liable to such insurers for indemnity or contribution pursuant to this Policy. The **Insured** shall be entitled to assert claims against the **Insurer** for coverage under this Policy, including, without limitation, for amounts by which the **Insured** reduced its judgment against such other insurers in respect of such claims for indemnity or contribution, in an arbitration between the **Insurer** and the **Insured** pursuant to this Condition N, which arbitration may take place before, concurrently with and/or after the action or proceeding involving such other insurers; provided, however, that the **Insurer** in such arbitration in respect of such reduction of any judgment shall be entitled to raise any defenses under this Policy and any other defenses (other than jurisdictional defenses) as it would have been entitled to raise in the action or proceeding with such insurers (and no determination in any such action or proceeding involving such other insurers shall have collateral estoppel, res judicata or other issue preclusion or estoppel effect against the **Insurer** in such arbitration, irrespective of whether or not the **Insurer** remained a party to such action or proceeding).

O. **LAW OF CONSTRUCTION AND INTERPRETATION**

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws:

(1) may prohibit payment in respect of punitive damages hereunder;
(2) pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or
(3) are inconsistent with any provision of this Policy;

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the **Insured** and the **Insurer**; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the **Insured** or the **Insurer** or reference to the "reasonable expectations" of either thereof or to contra proferentem and without reference to parol or other extrinsic evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition N, the internal laws of England and Wales shall apply.

P. **LIABILITY OF THE INSURER**

The **Named Insured** and the **Insured** agree that the liability and obligations of the **Insurer** hereunder shall be satisfied from the funds of the **Insurer** alone and that the individual shareholders of the **Insurer** shall have no liability hereunder to the **Named Insured** or the **Insured**.

Q. **POLICY EXTENSION**

Subject to Condition L, Coverage A of this Policy may be extended at the expiration of each **Annual Period** for another **Annual Period**, subject only to agreement between the **Insurer** and the **Named Insured** as to the applicable premium and such other terms and conditions as the **Insurer** and the **Named Insured** may mutually deem appropriate. Coverage A shall expire at the end of an **Annual Period** if not extended (or upon cancellation thereof). Where Coverage A (or Coverage B) is cancelled or not extended, such cancellation or non-extension shall not affect the rights of the **Insured** as respects any **Occurrence** or **Integrated Occurrence** of which notice was given in accordance with the provisions of this Policy prior to such cancellation or non-extension and shall not limit whatever rights the **Insured** otherwise would have under this Policy as respects actual or alleged **Personal Injury**, **Property Damage** or **Advertising Liability** included in such **Occurrence** or **Integrated Occurrence** taking place subsequent to such cancellation or non-extension.

R. **REINSTATEMENT**

(1) At the time of each annual Policy extension of Coverage A, the aggregate limit of liability set forth in Item 2(b) of the Declarations (including the **Integrated Occurrences** sublimit under Article II, Section C) shall, unless otherwise agreed in writing between the **Named Insured** and the **Insurer**, automatically be reinstated with respect to covered **Occurrences** of which notice is first given during the following **Annual Period**. There shall be no separate premium charged for this automatic reinstatement in addition to that provided for in Condition Q above. There shall be no reinstatement of the aggregate limit of liability, unless otherwise agreed in writing by the **Insurer**, as respects Coverage B, and the remaining amount, if any, of the aggregate limit for the final **Annual Period** under Coverage A shall apply as respects the **Discovery Period**.

Exhibit B

(1) Coverage A under this Policy may be cancelled on a pro rata basis:

(a) at the end of any **Annual Period** by either the **Named Insured** or the **Company** by delivering prior written notice to the other;

(b) at any time by the **Named Insured** by delivering written notice to the **Company** at the address listed in Item 8(b) of the Declarations stating when, but in no event prior to the date such notice is received, cancellation shall be effective;

(c) at any time by the **Company** by delivering written notice to the **Named Insured** stating when, not less than ninety (90) days from the date the notice is received, cancellation shall be effective: or

(d) if any **Insured** shall institute a suit or proceeding against the **Company** other than as provided in Condition N below (or to enforce an award arising out of such arbitration), at any time thereafter by the **Company** by delivering written notice to the **Named Insured** stating when, not less than five (5) days from the date the notice is received, cancellation shall be effective.

(2) This Policy will be cancelled automatically retroactive to the commencement of the **Annual Period**, if the premium or proof of payment thereof is not received by the **Company** within five (5) days of the commencement of such **Annual Period**.

(3) Coverage B may not be cancelled by either the **Named Insured** or the **Company**, except the **Company** may cancel effective immediately upon the delivery of written notice to the **Named Insured** if the **Insured** should institute a suit or proceeding against the **Company** other than as provided in Condition N below (or to enforce an award arising out of such arbitration).

M. CURRENCY

The premiums and losses under this Policy are payable in the respective currency(ies) set forth in Item 6 of the Declarations. Unless otherwise specified in Item 6, such currency(ies) shall be United States dollars. If judgment is rendered, settlement is denominated or another element of **Damages** is stated in a currency other than in the applicable currency, payment under this Policy shall be made in the applicable currency at the rate of exchange prevailing on the date the final judgment is rendered, the amount of the settlement is agreed upon or the other element of **Damages** is due, respectively.

N. ARBITRATION

(1) Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each

controversy as follows:

> Any party may, in the event of such a dispute, controversy or claim, notify the other party or parties to such dispute, controversy or claim of its desire to arbitrate the matter, and at the time of such notification the party desiring arbitration shall notify any other party or parties of the name of the arbitrator selected by it. The other party who has been so notified shall within thirty (30) calendar days thereafter select an arbitrator and notify the party desiring arbitration of the name of such second arbitrator. If the party notified of a desire for arbitration shall fail or refuse to nominate the second arbitrator within thirty (30) calendar days following the receipt of such notification, the party who first served notice of a desire to arbitrate will, within an additional period of thirty (30) calendar days, apply to a judge of the High Court of Justice of England and Wales for the appointment of a second arbitrator and in such a case the arbitrator appointed by such a judge shall be deemed to have been nominated by the party or parties who failed to select the second arbitrator. The two arbitrators, chosen as above provided, shall within thirty (30) calendar days after the appointment of the second arbitrator choose a third arbitrator. In the event of the failure of the first two arbitrators to agree on a third arbitrator within said thirty (30) calendar day period, either of the parties within a period of thirty (30) calendar days thereafter, after notice to the other party or parties, apply to a judge of the High Court of Justice of England and Wales for the appointment of a third arbitrator and in such case the person so appointed shall be deemed and shall act as the third arbitrator. Upon acceptance of the appointment of said third arbitrator, the Board of Arbitration for the controversy in question shall be deemed fixed. All claims, demands, denials of claims and notices pursuant to this Condition N shall be given in accordance with Condition U below.

(2) The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including without limitation discovery by the parties.

(3) The Board shall, within ninety (90) calendar days following the conclusion of the hearing, render its decision on the matter or matters in controversy in writing and shall cause a copy thereof to be served on all the parties thereto. In case the Board fails to reach a unanimous decision, the decision of the majority of the members of the Board shall be deemed to be the decision of the Board and the same shall be final and binding on the parties thereto. Such decision shall be a complete defense of any attempted appeal or litigation of such decision and in the absence of fraud or collusion. Without limiting the foregoing, the parties waive any rights to appeal to, and/or seek collateral review of the decision of the Board of Arbitration by, any court or other body to the fullest extent permitted by applicable law.

(4) Any order as to the costs of arbitration shall be in the sole discretion of the Board, who may direct to whom and by whom and in what manner they shall be paid.

(5) The **Company** and the **Insured** agree that in the event that claims for indemnity or contribution are asserted in any action or proceeding against the **Company** by any of the **Insured's** other insurers in any jurisdiction or forum other than that set forth in this Condition N, the **Insured** will in good faith take all reasonable steps requested by the **Company** to assist the **Company** in obtaining a dismissal of these claims (other than on the merits) and will, without limitation, undertake to the court or other tribunal to reduce any judgment or award against such other insurers to the extent that the court or tribunal determines that the **Company** would have been liable to such insurers for indemnity or contribution pursuant to this Policy. The **Insured** shall be entitled to assert claims against the **Company** for coverage under this Policy, including, without limitation, for amounts by which the **Insured** reduced its judgment against such other insurers in respect of such claims for indemnity or contribution, in an arbitration between the **Company** and the **Insured** pursuant to this Condition N, which arbitration may take place before, concurrently with and/or after the action or proceeding involving such other insurers; provided, however, that the **Company** in such arbitration in respect of such reduction of any judgment shall be entitled to raise any defenses under this Policy and any other defenses (other than jurisdictional defenses) as it would have been entitled to raise in the action or proceeding with such insurers (and no determination in any such action or proceeding involving such other insurers shall have collateral estoppel, res judicata or other issue preclusion or estoppel effect against the **Company** in such arbitration, irrespective of whether or not the **Company** remained a party to such action or proceeding).

O. LAW OF CONSTRUCTION AND INTERPRETATION

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of the State of New York, except insofar as such laws:

(1) may prohibit payment in respect of punitive damages hereunder;

(2) pertain to regulation under the New York Insurance Law, or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the State of New York; or

(3) are inconsistent with any provision of this Policy;

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an evenhanded fashion as between the **Insured** and the **Company**; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the **Insured** or the **Company** or reference to the "reasonable expectations" of either thereof or to contra proferentum and without reference to parol or other extrinsic

evidence). To the extent that New York law is inapplicable by virtue of any exception or proviso enumerated above or otherwise, and as respects arbitration procedure pursuant to Condition N, the internal laws of England and Wales shall apply.

P. LIABILITY OF THE COMPANY

The **Named Insured** and the **Insured** agree that the liability and obligations of the **Company** hereunder shall be satisfied from the funds of the **Company** alone and that the individual shareholders of the **Company** shall have no liability hereunder to the **Named Insured** or the **Insured**.

Q. POLICY EXTENSION

Subject to Condition L, Coverage A of this Policy may be extended at the expiration of each **Annual Period** for another **Annual Period**, subject only to agreement between the **Company** and the **Named Insured** as to the applicable premium and such other terms and conditions as the **Company** and the **Named Insured** may mutually deem appropriate. Coverage A shall expire at the end of an **Annual Period** if not extended (or upon cancellation thereof). Where Coverage A (or Coverage B) is cancelled or not extended, such cancellation or non-extension shall not affect the rights of the **Insured** as respects any **Occurrence** or **Integrated Occurrence** of which notice was given in accordance with the provisions of this Policy prior to such cancellation or non-extension and shall not limit whatever rights the **Insured** otherwise would have under this Policy as respects actual or alleged **Personal Injury**, **Property Damage** or **Advertising Liability** included in such **Occurrence** or **Integrated Occurrence** taking place subsequent to such cancellation or non-extension.

R. REINSTATEMENT

(1) At the time of each annual Policy extension of Coverage A, the aggregate limit of liability set forth in Item 2(b) of the Declarations shall, unless otherwise agreed in writing between the **Named Insured** and the **Company**, automatically be reinstated with respect to covered **Occurrences** of which notice is first given during the following **Annual Period**. There shall be no separate premium charged for this automatic reinstatement in addition to that provided for in Condition Q above. There shall be no reinstatement of the aggregate limit of liability, unless otherwise agreed in writing by the **Company**, as respects Coverage B, and the remaining amount, if any, of the aggregate limit for the final **Annual Period** under Coverage A shall apply as respects the **Discovery Period**.

(2) If during any **Annual Period**, as respects Coverage A only, the aggregate limit of liability set forth in Item 2(b) ("Original Aggregate Limit") of the Declarations is or may be impaired by virtue of **Occurrence(s)** of which notice has been given previously during such **Annual Period**, then the **Named Insured** shall be entitled to elect one reinstatement of all or any portion of such aggregate limit, based on the following terms and conditions:

Exhibit C

13. ALTERNATIVE DISPUTE RESOLUTION

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.

Mediation

In the event of mediation, either party shall have the right to commence a judicial proceeding; provided, however, that no such judicial proceeding shall be commenced until the mediation shall have been terminated and at least ninety (90) days shall have elapsed from the date of the termination of the mediation.

Arbitration

In the event of arbitration, the decision of the arbitrator(s) shall be final, binding and provided to both parties, and the arbitration award shall not include attorney's fees or other costs.

ADR Process

Selection of Arbitrator(s) or Mediator: The **Insurer** and the **Named Entity** shall mutually consent to: (i) in the case of arbitration, an odd number of arbitrators which shall constitute the arbitration panel, or (ii) in the case of mediation, a single mediator. The arbitrator, arbitration panel members or mediator must be disinterested and have knowledge of the legal, corporate management, or insurance issues relevant to the matters in dispute. In the absence of agreement, the **Insurer** and the **Named Entity** each shall select one arbitrator, the two arbitrators shall select a third arbitrator, and the panel shall then determine applicable procedural rules.

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.

