March 28, 2022

I have reviewed the draft provisions for technology-related disputes and thought this is an excellent and comprehensive set of provisions and commentary. I have one comment that I would like to pass along for consideration.

The comment relates to Draft provision 6, section 1 – which sets out exceptions to confidentiality of the proceedings and materials exchange in the arbitration proceeding. In my experience, a party in arbitration (particularly the respondent) will often seek insurance coverage for the losses and costs incurred in the arbitration. Many if not most insurance policies contain notification and cooperation requirements that must be satisfied to qualify for such reimbursement. Therefore, the party will be required to notify the insurer – or the insurer's agent (which could be a separate law firm or company) – of the existence of the arbitration, as well as to provide updates and summaries of evidence exchanged and often the evidence itself. Disclosure of information about the underlying arbitration may also be required if the party ends up having to appeal a denial of coverage in a new proceeding against the insurer. I do not believe that this scenario is covered in any of the four exceptions under section 1.

Therefore, I would propose a subsection (e) which states something along the lines of: "(e) To the party's insurers, reinsurers, or agents of the same, to the extent required by the insurance or reinsurance policies, and provided that the insurer, reinsurer or agent agree to be bound by the same confidentiality provisions as the parties."

I also believe that section or paragraph 5 (requiring a party making such a disclosure to notify the arbitration tribunal and the other parties of the disclosure) should not be required when one party shares information with its insurer – as that may negatively impact the insured party's posture in any settlement negotiations.

Thank you for your consideration.

Ellen Wahl Parker
Senior Vice President, CPR Institute