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THE POWER OF ARBITRATORS

ARIAS FALL SEMINAR

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by John M. Nonna

"Absolute secrecy corrupts absolutely"
—Fred Hitz, 1995

1 Introduction

Arbitrators in reinsurance arbitrations possess almost absolute power over arbitration proceedings. Arbitration clauses traditionally found in reinsurance agreements confer broad power on arbitrators. Rarely do they contain procedural rules for the arbitration panel. They almost never contain any substantive rules except to absolve the arbitrators from the need to follow the law or apply the rules of evidence. Indeed, they typically confer wide discretion on arbitration panels to interpret the reinsurance agreements as "honorable engagements" and allow the arbitrators to determine the intent of the parties. Interlocutory rulings of arbitrators are generally not subject to court review. Certain interim rulings of arbitrators are deemed "final" and subject to review by a court. An example is an interim award requiring the posting of security.[1] Rulings of arbitrators on issues such as discovery are generally left undisturbed by courts unless they affect the rights of non-parties to the arbitration agreement. Courts overturn arbitration awards only when one of the narrow grounds under the Federal Arbitration Act or applicable state law is clearly demonstrated.[2] In examining an award challenged on one of these grounds, courts tend to interpret them strictly and apply them narrowly.

"Power tends to corrupt and absolute power corrupts absolutely."
—Lord Acton, 1887

This paper addresses those areas where arbitrators are called upon to exercise their broad authority during the course of an arbitration proceeding. It explores the possible criteria that arbitrators might apply in exercising their authority in deciding various procedural and substantive issues that arise during the course of an arbitration proceeding. This paper does not address arbitral awards or the merits of reasoned awards. Rather, it focuses on various issues upon which arbitrators are called to rule upon during the course of the arbitral process. The general thesis of this paper is that arbitrators should develop standards for exercising their authority. Further, arbitrators should apply those standards and articulate them so that the parties can understand the basis for the arbitral rulings. The parties should know the reasons for arbitral rulings so that they can focus upon issues that the arbitrators believe are material and point out any oversights or errors by the arbitrators in rendering rulings. Further, articulation of the basis for a ruling preserves the integrity of the arbitral process.

Throughout this discussion, we must keep in mind that arbitration is a creature of contract. The arbitrators have only so much authority and power as the parties confer upon them in the arbitration clause. Moreover, the parties, by agreement, can expand or limit the arbitration panel's authority. Ultimately, the almost absolute power that arbitrators possess stems from the parties themselves who have chosen to confer that power on the arbitrators.

2 Preliminary Procedural Matters

A. Arbitrability

There may be threshold question of whether there is an agreement to arbitrate between the parties or whether the agreement to

Continued on page 3

Letter from the Board

Dear Members:

As newly elected Chairman of ARIAS•U.S. I would like to take a moment to express my gratitude for the opportunity to serve this fine organization and its members in the coming year. I am especially pleased with the outstanding team of professionals who join me as officers of the Board. Mark S.Gurevitz of The Hartford Financial Services Group, Inc. will be serving as President, Charles L. Niles, Jr. of Charles L. Niles Reinsurance and Thomas A. Allen of White and Williams LLP will be serving as Vice Presidents.

We have an ambitious calendar planned for 1998. Our Spring Conference is scheduled for April 16-18 at the Marriott Castle Harbor in Bermuda. I hope you all plan on participating in what will be another outstanding event designed specifically for the members of this organization. A summer seminar is under consideration and our Annual Meeting, in early November, is scheduled to be held in New York City.

I very much hope that you will support ARIAS•U.S. with your attendance at our conferences and by corresponding with us actively through this newsletter and at our meetings. These events provide an outstanding opportunity to increase your knowledge and to share information and your experiences with other top professionals in the insurance field. A goal of ARIAS•U.S. is to keep you up-to-date with the latest dispute resolution activities in the reinsurance arena.

I pledge to continue the fine work of our first and past Chairman, T. Richard Kennedy and to continue to strive for excellence in our organization. I welcome your participation at upcoming events and I look forward to another successful year together.

Robert M. Mangino
Chairman - ARIAS•U.S.

Third Annual Report of the Chairman

November, 1997

T. Richard Kennedy

Chair, Board of Directors

I am pleased to provide you with this report of the activities of the Board of Directors since the Second Annual Membership Meeting on November 1, 1996. The Board has held 5 meetings during the course of the past year. In addition, much work has been done outside the regular Board meetings by our active committees.

Mark Gurevitz and Tom Allen have ably Co-chaired our active Forms and Procedures Committee. The substantial work product of that committee provided the basis for lively discussions at the workshops and general sessions of our recent Fall Conference in New York.

Charlie Havens has done a great job as Chair of both our Membership and Insurance Committees. Bob Mangino as Chair of the Certification Committee has helped the Board to assure that the applications for certification were in good order.

Charlie Foss has continued to Chair our Law Committee, making certain that we stay within the confines of legally permissible activity. Dan Schmidt has worked with Steve Acunto to produce timely and quality quarterly newsletters for our members.

Steve Acunto, as Vice President and Executive Director, has provided immeasurable assistance to the Board and to me in compiling materials for meetings, planning conferences and preparing course materials and keeping our accounts. Mike Scarsella has been

Continued on page 13

THE POWER OF ARBITRATORS

Continued from page 1

arbitrate encompasses the dispute before the panel. This issue usually arises at the outset of an arbitration following service of the demand for arbitration. Most often this issue is decided by the court. However, there are occasions where an issue of arbitrability is not readily apparent until the parties have proceeded along the arbitration path. An arbitrability issue can arise at the organizational meeting as the issues are discussed. Can the panel rule upon an issue of arbitrability, i.e., its own jurisdiction, or should it relegate the parties to a court determination of that issue? Generally, arbitrators cannot decide questions of arbitrability.[3] The parties, however, can agree to allow the panel to rule upon such issues, in effect giving the panel the authority to decide its own jurisdiction.

B. Challenges to the Panel

It is well settled that a court will generally not interfere with an arbitration proceeding until the rendering of any award. This general rule precludes challenges to the impartiality of arbitrators prior to issuance of an award.[4] Courts generally require that parties raise questions of arbitrator partiality in a final award.[5] A party cannot seek disqualification of an arbitrator at the commencement of the proceeding on the basis of bias or prejudice. An exception to this general rule is where an arbitrator does not satisfy the qualifications set forth in the arbitration clause.[6] In that case, a court will intervene to disqualify an arbitrator. Similarly, where a party has defaulted in the selection of an arbitrator in a timely fashion, a court will uphold a contractual provision permitting the non-defaulting party to select an arbitrator on behalf of the defaulting party.[7]

Assume one party seeks to challenge an arbitrator on the basis of bias, prejudice or a close relationship to one of the parties or their counsel at the organizational meeting. Can the panel rule on that objection? Should arbitrators rule on the issue or require the party to raise the issue in court upon a petition to vacate the arbitration award? Finally, if the panel does decide to rule on the issue, what standard should it apply? Under Section 10(d) of the Federal Arbitration Act, an award may be set aside for "evident partiality or corruption" of the arbitrators. Should an arbitration panel apply that authority in ruling whether one of its members should be disqualified? Under certain arbitration rules, arbitration panels have the authority to rule upon a challenge to a panel member.[8] Panels in reinsurance arbitration have ruled on the issue.[9] While it is unclear what weight a court may give to such a ruling, it appears that an arbitration panel may have the power to rule on the issue.[10]

3 Prehearing Procedural Issues

It is common at organizational meetings in reinsurance arbitrations for parties to agree to provide arbitrators with a hold harmless agreement. What if one party will not agree? A party cannot be compelled to sign a hold harmless agreement. The remedy for refusal by one party to agree is for the panel to refuse to serve if it so chooses. A related matter is confidentiality. Parties usually agree upon confidentiality. What if one party does not agree? In that case, (unlike the hold harmless situation), the arbitrators can impose a confidentiality order limiting disclosure of documents produced and transcripts of testimony.[11] How far can such an order go? Can it prohibit the parties from disclosing information in a court proceeding to confirm or vacate an award? A panel may not have the power to require papers filed in court under seal on a motion to confirm or vacate an award because ultimately a court decides whether to place court records under seal.

While the comparative privacy of arbitration is a factor strongly favoring confidentiality, should confidentiality be applicable in a subsequent litigation or arbitration that also involves the same reinsurance contract and the same issue? The courts have held that collateral estoppel is applicable in arbitration.[12] Several courts have held that the arbitration panel should decide whether the doctrine is applicable in a specific case.[13] Simply put, collateral estoppel is a legal principle which bars a party from relitigating an issue that it has already lost in a prior proceeding. For instance, if a cedent has been unsuccessful in recovering against a reinsurer under certain treaty language, should another reinsurer not be permitted to rely upon that award if it has raised the same issue? Conversely, an arbitration panel may have ruled that a particular reinsurer's facultative certificate covers declaratory judgment expenses. Should another cedent who has been issued the same certificate with the same language not be able to argue that the reinsurer is collaterally estopped from re-arbitrating the issue of coverage for declaratory judgment expenses under its certificate. If the award of one panel and all the proceedings before that panel are kept confidential, the issue of collateral estoppel cannot be resolved by a subsequent arbitration panel. Collateral estoppel prevents wasteful litigation of the same issue over and over again. Where collateral estoppel is applicable, secrecy may result in wasteful re-arbitration of issues already decided. An argument can be made that awards should not be subject to confidentiality where collateral estoppel may be applicable.

A. Security

One of the more hotly contested issues at the outset of an arbitration is whether an arbitration panel should require a party — usually the reinsurer — to post security for the amount demanded in the arbitration. The security question is illustrative of the broad power conferred upon arbitration panels. Most states have requirements that a non-admitted reinsurer must post security in the amount of a potential judgment in litigation against a cedent.[14] In some cases, the security statutes apply only to direct insurance and not reinsurance. When faced with this question, a court has no choice if the requirements of the security statute are satisfied to require the posting of security. An arbitration panel, however, has the power to ignore the security statute even though courts have held that the statute is applicable in arbitration.[15]

Moreover, as noted above, an interim award requiring a party to post security is subject to court review unlike most interlocutory arbitration rulings. Courts have held that arbitrators have inherent equitable power to require security to be posted by any party—even an admitted reinsurer.[16] The question is under what circumstances should a panel require

Continued on page 4

The Power of Arbitrators

Continued from page 3

security to be posted. In Pacific Reinsurance, the court upheld the Panel's authority to award interim security to preserve the status quo. What standards or rules should be applied by a panel to whom a request for security has been made? Should the decision rest upon the individual views of a particular arbitration panel whether a particular party is likely to pay? If a panel feels that a particular reinsurer is a "deadbeat," can it require posting of security for that reason alone? The nature of the arbitrators authority is such that a panel can award security for almost any reason it chooses or without any reason. If a panel decides to require the posting of security it should state the reasons for doing so.

B. Scheduling Matters

Like courts, arbitration panels have broad authority when it comes to matters of scheduling such as the filing of briefs, discovery, deadlines, hearings, location of the hearing, etc. If the terms of the reinsurance agreement are silent and a consensus cannot be reached with the parties, the panel can decide the issues with almost unfettered discretion.[17] The limitation to the panel's authority in scheduling is contained in section 10 of the Federal Arbitration Act which provides that an award can be set aside "where the arbitrators were guilty of misconduct in refusing to postpone the hearing...or of any other misbehavior by which the rights of any party have been prejudiced."

4 Discovery

Much has been written about the advantages and disadvantages of discovery. Despite folklore that arbitration involves less discovery than litigation, participants in the process know and recognize that discovery cannot be eliminated. The amount of discovery tends to depend on the nature and complexity of the particular arbitration. Discovery is an area where the panel can exercise its broad authority to tailor the discovery to the dispute before it.

What standards or principles should the panel apply in determining the appropriate scope of discovery? The arbitration panel must balance the desire to proceed expeditiously on one hand, and the need to assure a fair hearing of the issues.While a panel decision to deny all discovery to the parties would probably be upheld in court, arbitration panels seem to be concerned that if no discovery is permitted, an award might be subject to challenge. This is unlikely, since the courts have recognized that a party is not entitled to employ the discovery devices available in litigation.[18] However, arbitrators do have the power to require discovery even if the arbitration clause is silent.[19] Frequently, the parties generally agree that there will be document discovery and often, deposition discovery. Where there is a dispute as to the scope of discovery or number of depositions, the panel has broad authority to order or limit discovery. The panel should base its discovery rulings on the materiality and relevance of the discovery sought in the arbitration. Some deposition discovery, for instance, will assist in narrowing the issue for hearing and enable counsel to focus their cross-examinations at the hearing. The panel should state its reasons for granting or limiting discovery so that a party has the opportunity to at least address the panel on the issues that the panel believes are dispositive.

A. Privilege Issues

A sensitive discovery area is the applicability of the attorney client and work-product privileges. The scope and applicability of these privileges can be very controversial. Courts differ in determining the scope and effect of these privileges. Panels should take special care in ruling upon privilege issues. Panels should give reasons for finding the privilege applicable or not so that the parties can promptly seek to correct any misunderstanding the panel may have regarding the legal and factual bases for the claim of privilege or the argument that the claimed privilege is inapplicable.

B. Production of Documents Unrelated to the Parties in the Arbitration

Often parties request documents that go beyond the particular claims and underwriting files involved in a dispute concerning a specific claim. A demand may be made for information regarding all other claims of the type involved in the arbitration handled by the cedent or the reinsurer. In instances where broad requests are made for discovery of documents or where broad searches of files are required, panels should carefully evaluate the requests and should state in their ruling the reasons why the requests are being granted or denied.

C. Depositions

While there is no right to depositions in arbitration, most arbitration proceedings involve the taking of one or more depositions. The panel must make judgments as to an appropriate number of depositions and should state its reasons for deciding how many depositions to be allowed. More and more courts are restricting the number of depositions in litigation that can be taken without court approval. Panels can allow a certain number of depositions to be taken and require a party to establish the need for further depositions beyond the number initially allowed.

D. Non-Party Discovery

Another area that gives rise to controversy is discovery of non-parties. While arbitrators are given the right to subpoena persons for a hearing within certain jurisdictional boundaries, this power has traditionally been interpreted to apply to hearings. Questions arise as to the extent arbitrators can subpoena non-parties for (1) deposition testimony and (2) production of documents. Courts have upheld the authority of panels to subpoena documents from non-parties.[20] One court has ruled that arbitrators may not subpoena non-parties for depositions.[21] Further, the panel's authority is limited territorially. In Federal Arbitration Act arbitrations, the panels territorial authority is coterminus with that of the federal district court in the district where the arbitration is taking place.[22] If a non-party witness is beyond the hearing locale, the panel can always sit in a place where it has geographical jurisdiction to subpoena the witness. The exercise of that power should be accompanied by finding that the witness will have relevant testimony. Subpoenas to non-parties can result in delay and possible collateral court proceedings. A non-party served with an arbitration subpoena is entitled to seek to quash or modify the subpoena in court which can cause

delay in the progress of the proceedings. A panel should therefore consider the relevance and materiality of the document sought prior to issuance of the subpoena and the possible delay that may result. A panel can always subpoena a non-party for testimony before the panel at a hearing (as opposed to a deposition before parties) provided the panel acts within its territorial jurisdiction.

5 Hearing

In the conduct of a hearing, the panel possesses authority similar to that of a judge in the conduct of a trial. The panel's authority is subject to Section 10 of the Federal Arbitration Act, which provides that an award may be set aside where "the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced." A threshold question is whether a panel can dispense with a hearing and rule on the briefs alone. In litigation, procedural rules governing summary adjudication of cases require a court to determine whether there is a factual issue. The court's decision is subject to appellate review. In the case of arbitration, there are no rules permitting summary adjudication nor any appellate review. Arbitration agreements occasionally provide for a hearing but do not specify the form or scope of a hearing. (Some agreements provide that witnesses may be cross-examined). A panel should proceed cautiously in deciding a case by summary adjudication if one party requests a hearing. Where the agreement provides for a hearing, a party is entitled to have a hearing. Moreover, failure to conduct a hearing where one party seeks a hearing could result in the award being vacated. Courts have vacated awards where a hearing has not been afforded to a party seeking one.[23] Any waiver of a hearing should be confirmed on the record by a transcript or a written stipulation or acknowledgement that the party is waiving the right to a live hearing to call witnesses.

Under section 7 of the FAA arbitrators have the power to issue subpoenas and require witnesses to appear before them within their territorial limits of authority. Can the Panel decline to issue a subpoena and refuse to aid a party in obtaining evidence by subpoena? This issue is different from the question of the weight that the panel should afford the evidence that the subpoena would produce. Awards may be vacated for refusal of panels to honor a request for issuance of a subpoena for evidence that is relevant and may have affected the outcome of the arbitration.[24] Nevertheless, courts are generally reluctant to vacate awards for the refusal to hear evidence.

At the hearing itself, the panel has broad authority in determining the order of proof and conduct of the hearing. The rules of evidence do not apply. Questions regarding the admissibility of documents and testimony are to be decided by the panel.[25] Does the inapplicability of the rules of evidence allow for the submission of affidavits in lieu of live testimony? This issue is within the panel's authority. Panels can accept an affidavit in evidence and afford it little or no weight because the affiant has not been subject to cross-examination.

While the arbitrators have broad authority to refuse to admit evidence and to control the hearing process, they are bound to afford the parties a fundamentally fair hearing under section 10 of the FAA. The failure to admit evidence or issue a subpoena will likely result in the vacatur of an award only where that failure was prejudicial and resulted in unfairness to one of the parties. Unfairness is more likely to be found where the arbitrators conduct no hearing at all.

Experience in reinsurance arbitrations indicates that arbitration panels tend to err on the side of admitting rather than excluding evidence because of their concern for a fair hearing. Panels are also concerned that their efforts may be wasted if an award is later set aside for failure to allow a party to develop its case. On the other hand, panels can be so cautious as to allow evidence to be admitted that is unnecessary to their determination and that can prolong the cost and time required for the arbitration. Thus, arbitration panels must strike a balance, as must a court, in deciding how much evidence it will allow. There are extremes. Refusal to allow cross examination of a witness in a material area may jeopardize the award. Refusal to admit cumulative evidence or hear witnesses that would give repetitive testimony is not likely to jeopardize the award. The Panel, however, should protect the record by stating its reasons for hearing or refusing to hear evidence. By articulating reasons the parties and a court are aware that the Panel did consider the issue and reached a deliberative conclusion. This approach preserves the integrity of the decision making process.

In sum, the panel has broad authority in the conduct of the hearing subject to the narrow grounds for setting aside awards under the FAA and the overriding requirement of a fundamentally fair hearing. Denial of a hearing or cross-examination, are examples where a court may find that arbitrators have been guilty of misconduct by not affording a party due process.

6 Award

This paper will not treat an arbitration panel's broad authority in granting or denying relief. As noted before, the grounds for vacating awards are narrow and applied sparingly. An award will not be vacated because a panel has not set forth the reasons for the award. However, arbitration panels should give consideration to the prospective effect that their award may have on the parties' relationship and the benefit of providing guidance in the interpretation of contractual provisions that might continue to be an issue between the parties before them. The purpose is not to confer some precedential effect on the award generally, but to ensure that the effort expended in the arbitration will avoid future disputes between the same parties on the very contractual language that has caused the dispute before the panel. Whether to afford such guidance is in the discretion of the panel, but panels should consider the benefit of exercising such discretion in favor of providing guidance in appropriate circumstances.

Continued on back cover

ARIAS•U.S. Ethics Sub-Committee

Model Arbitrators' Code of Conduct

A true mark of professionalism is to act as ethically as possible in one's work. Increasingly, however, people who serve as arbitrators to resolve industry disputes find themselves faced with ethical dilemmas. Yet ethical standards are often unclear and imprecise.

To heighten the awareness and practice of ethical behavior among its members, ARIAS•U.S. established an Ethics Sub-Committee to study industry standards and draft a model Arbitrators' Code of Conduct. Mindful that professional codes are not an all-inclusive checklist of right actions, the committee set out to develop best-practice guiding principles premised upon the following objectives.

• Develop a Code of Conduct to promote the integrity and professionalism of arbitration as a forum for the fair and efficient resolution of industry disputes.

• Consider the ethos of practicing arbitrators in developing a Code acceptable to the preponderance of people making up the organization.

• Articulate a Code that is clear and unambiguous but allows flexibility for individual judgment governed by disparate circumstances.

• The Code should fairly represent industry practices and not exclude or limit participation of competent people from serving on arbitration panels for reasons not relevant to professional integrity.

• The Code should be reviewed periodically and amended if necessary.

The model Arbitrators' Code of Conduct presented herewith represents the collective effort of committee members to elucidate best practice standards. Additionally, it takes into account valuable input from a group of highly experienced attorneys and practicing arbitrators who graciously reviewed a working draft of the Code. We asked the reviewers if the draft Code effectively achieves the stated objective of professionalism. We also asked for their suggestions for improvement. Wherever possible, their recommendations were melded into the model Code. We are grateful and thank the reviewers for their sagacious and helpful contributions.

The model Code is intended to stimulate discussion between and among the membership professionals about what are appropriate ethical standards today. Our aim is to raise the level of professionalism by setting standards which give the industry reason to have confidence in the reputation of ARIAS•U.S. and the entire profession of arbitration. We have made some tradeoffs between idealism and pragmatism in drafting the model Code but we have not wavered from our obligation to the extraordinarily high personal and professional standards of the membership in making ethical choices.

ARIAS•U.S. members are encouraged to participate in development of the Code. The model Code was a subject or discussion at the breakout session during the November 7-8 fall seminar in New York. Additionally, members are encouraged to write or call committee members about any questions you may have or to offer valuable suggestions. After hearing from members who wish to participate, the committee anticipates that it will recommend that the ARIAS•U.S. board of directors adopt the Code in a finalized form at its first meeting in early 1998. Each of us can help make it better.

We look forward to hearing from you.

Richard G. Waterman, CPCU
Sub-Committee Chairman

Subcommittee Members
James I. Rubin, Esq.
Daniel E. Schmidt, Esq.

ARIAS • U.S. Arbitrators Code of Conduct

(As Proposed by ARIAS U.S. Sub-Committee) October 21, 1997
Richard C. Waterman, Chairman

INTRODUCTION

ARIAS • U.S. is a-not-for profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS • U.S. seeks to train knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS • U.S. Board of Directors certifies as arbitrators individual members who are qualified in accordance with criteria and procedures established by the membership.

The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to serve the parties fairly, an arbitrator must observe high standards of ethical conduct and must render decisions impartially. The provisions of this Code of Conduct should be construed to advance these objectives.

This Code is intended to provide standards of ethical conduct to guide both persons certified by ARIAS • U.S. and other persons who serve as insurance and reinsurance arbitrators. Comments accompanying the canons explain and illustrate the meaning and purpose of each canon. The Code does not, however, take the place of, or supersede, agreements entered into by the parties nor does it displace applicable laws.

Nothing in this Code should be deemed to establish new or additional grounds for judicial review of arbitration awards nor establish any substantive legal duty on the part of arbitrators.

The purpose of this Code is to provide guidance for ethical conduct applicable to insurance and reinsurance arbitrations, whether conducted by a single arbitrator or a panel of arbitrators, regardless of how appointed, except where inconsistent with the agreement of the parties or applicable law. Reinsurance agreements frequently contain provisions which establish that disputes will be resolved by a panel of three arbitrators. Each party, acting alone, appoints an arbitrator and the third arbitrator or umpire is then selected by the two arbitrators or, failing such agreement, by an agreed-upon procedure or an independent institution. The two arbitrators appointed by the parties should observe the same ethical standards as a single arbitrator or an umpire on a panel of arbitration except where noted below:

Canon I

Integrity and Fairness: An arbitrator should uphold the integrity and fairness of the arbitration process and conduct the proceedings diligently.

Comments:

1. Arbitrators selected to resolve industry disputes have a duty to the parties, to the industry, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of the parties.

2. The foundation for broad industry support of arbitration is confidence in the fairness of the process and competency of the arbitrators. Accordingly, arbitrators have a responsibility to act fairly in dealing with the parties, rendering their decisions objectively without being influenced by outside pressure, fear of criticism or self-interest.

Canon II

Impartiality: An arbitrator shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which he/she can remain open-minded and evenhanded. If at any time the arbitrator is unable to conduct the process in an impartial manner, the arbitrator should withdraw.

Comments:

1. The concept of impartiality of the arbitrator is central to all alternative dispute resolution processes. Impartiality means freedom from favoritism or bias either by word or action, and a commitment to serve all parties as opposed to a single party.

2. Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them; they should remain open-minded until both parties have had a full and fair opportunity to present their respective cases. It is preferable that an arbitrator advise the appointing party, when accepting an appointment, that he/she will decide issues presented in the arbitration without partiality. Party-appointed arbitrators are obligated to act in good faith with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and must make all decisions impartially and justly.

3. After accepting an appointment

Continued on page 8

ARIAS • U.S. Arbitrators Code of Conduct

Continued from page 7

and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship or acquiring any financial or personal interest which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias.

4. Where the arbitration clause is silent with respect to the impartiality or disinterestedness of the arbitrators, some parties, counsel and arbitrators have taken the position that the two party-appointed arbitrators are not required to adhere to the same degree of impartiality as those appointed under arbitration clauses that expressly state that the arbitrators are to be impartial or disinterested. This issue is unsettled in the courts.

Canon III

Competence: An individual should accurately represent his or her qualifications to serve as an arbitrator.

Comments:

1. An individual should provide up-to-date information regarding his or her relevant training, education and experience to the appointing party (or parties if selected to serve as the third arbitrator or umpire) to ensure that his or her qualifications satisfy the reasonable expectations of the party or parties.

2. Individuals who serve on arbitration panels have a responsibility to be familiar with the practices and procedures customarily used in arbitration that promote confidence in the fairness and efficiency of the process as an accessible forum to resolve industry disputes.

Canon IV

Disclosure: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias. Any doubt should be resolved in favor of disclosure.

Comments:

1. Before accepting an arbitration appointment, individuals should make a reasonable effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that is likely to affect impartiality or which might reasonably create an appearance of partiality or bias including any relationship with persons they are told will be potential witnesses.

2. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality or bias, the arbitrator should withdraw only when one or both of the following circumstances exists.

(a) When procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal; or

(b) If the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case impartially and fairly.

3. The duty to disclose all past and present interests or relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators.

Canon V

Communication with the Parties: An arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.

Comments:

1. If an agreement between the parties, or applicable arbitration rules referred to in that agreement, establishes the manner or content of communications among an arbitrator and the parties, the arbitrator should follow those procedures.

2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and about the merits of the case prior to acceptance of the appointment and until a determination of the extent to which exparte communications will be permitted. The party-appointed arbitrator should, at the first meeting with the parties, disclose the fact that such communication has taken place. In complying with this disclosure requirement, it is sufficient that the party-appointed arbitrator disclose the fact that such communication has occurred without disclosing the content of the communication, except that the party-appointed arbitrator should ensure that any documents that were examined prior to appointment are identified. Following appointment, party-appointed arbitrators may consult with the party who appointed them concerning the acceptability of persons under consideration for appointment as the third arbitrator or umpire.

3. Except as provided above, party-appointed arbitrators may only communicate with a party concerning the case provided all parties agree to such com-

Continued on page 9

ARIAS • U.S. Arbitrators Code of Conduct

Continued from page 8

munications and then only to the extent and for the time period that is specifically agreed upon.

4. When party-appointed arbitrators communicate in writing with a party concerning any matter as to which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

5. Unless otherwise provided in applicable arbitration rules or in an agreement between the parties, whenever the third arbitrator or umpire communicates in writing with one party, he/she should at the same time send a copy of the communication to each other arbitrator and party. Whenever a third arbitrator or umpire receives any written communication concerning the case from one party that has not already been sent to every other party, the arbitrator should forward the written communication to each other arbitrator and party.

6. Except as provided above or unless otherwise provided in applicable arbitration rules or in an agreement of the parties, an arbitrator should not discuss a case with any party in the absence of each other party, except in any of the following circumstances.

(a) Discussions may be had with a party concerning ministerial matters such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express its views.

(b) If a party fails to be present at a hearing after having been given due notice, an arbitrator may discuss the case with any party who is present and the arbitration may proceed.

(c) If all parties request or consent to it, such discussion may take place.

Canon VI

Confidentiality: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in the position of an arbitrator.

Comments:

1. An arbitrator is in a relationship of trust with the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain a personal advantage or advantage for others, or to affect adversely the interest of another.

2. Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.

3. It is not proper at any time for an arbitrator to inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties. in a case in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone concerning the contents of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in post-arbitral proceedings, except as is required by law.

4. Unless otherwise agreed by the parties or by applicable rules, arbitrators are not obligated to return notes taken during the arbitration. Notes, records and recollections of the arbitrator which are maintained are confidential and shall not be disclosed to the parties, the public, or anyone else, unless (1) all parties and the arbitrator agree to such disclosure, or (2) a disclosure is required by law.

Canon VII

Advancing the Arbitral Process: An arbitrator shall exert every reasonable effort to expedite the process including prompt issuance of procedural communications, interim rulings, and written awards.

Comments:

1. When the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules unless the parties agree otherwise.

2. Individuals should only accept arbitration appointments if they are prepared to commit the time essential to conduct the arbitration process promptly.

3. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

4. An arbitrator should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage similar conduct of all participants in the proceedings.

5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them assess the testimony; however, arbitrators should refrain from assuming an advocacy role.

Continued on page 10

ARIAS • U.S. Arbitrators Code of Conduct

Continued from page 9

Canon VIII

Just Decisions: An arbitrator should make decisions justly, exercising independent judgment and should not permit outside pressure to affect decisions.

Comments:

1. When an arbitrator's authority is derived from an agreement between the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely.

2. An arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

3. An arbitrator should not delegate the duty to decide to any other person.

4. In the event that all parties agree upon a settlement of issues in dispute and request an arbitrator to embody that agreement in an award, an arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

Canon IX

Advertising: An individual shall be truthful in advertising services offered and availability to accept arbitration appointments.

Comments:

1. It is inconsistent with the integrity of the arbitration process for persons to solicit a particular appointment for themselves. However, a person may indicate a general willingness to serve as an arbitrator.

2. An individual shall make only accurate and truthful statements about his/her skills or qualifications. A prospective arbitrator shall refrain from promising results.

3. In an advertisement or other communication to the public, an individual who is an ARIAS • U.S. certified arbitrator may use the phrase "ARIAS • U.S. Certified Arbitrator" or "certified by ARIAS • U.S. as an arbitrator."

Canon X

Fees: A prospective arbitrator shall fully disclose and explain the basis of compensation, fees and charges to the appointing party or both parties if chosen to serve as the third arbitrator or umpire.

Comments:

1. Information about fees should be discussed at the outset when an appointment is being considered so the party(ies) can determine whether they wish to retain the services of the prospective arbitrator. An arbitrator shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process. An arbitrator shall not give or receive any commission, rebate or similar remuneration for referring a person for alternative dispute resolution services.

2. The better practice in reaching an understanding about fees is to confirm the arrangement in writing at the time an arbitration appointment is accepted.

3. When a case is finally resolved or when an arbitrator withdraws from a case, an arbitrator should return any unearned retainer fees (not including minimum retainers, if any) to the appointing party or parties.

AIDA Reinsurance & Insurance Arbitration Society

Box 9001 • Mt. Vernon, NY 10552-9001
Tel: 800-951-2020 • Fax: 914-699-2025

Membership Application

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational society dedicated to improving reinsurance and arbitration panels and procedures. The Society provides education for arbitrators, attorneys, insurers and reinsurers in practices and procedures which will improve the arbitration of commercial disputes. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance marketplace by:

- Training and certifying individuals qualified to serve as arbitrators and/or umpires by virtue of their experience, good character and participation at ARIAS•U.S. sponsored training sessions;
- Empowering its members to access certified arbitrators/umpires and to provide input into developing efficient economical and just methods of arbitration; and
- Providing model arbitration clauses and rules of arbitration.

Membership is open to law firms, corporations and individuals interested in helping to achieve the goals of the Society.

Name & Position: _____

Company or Firm: _____

Street Address: _____

City, State, Zip: _____

Phone, Fax: _____

Fees and Annual Dues:

	Individual	Corporation & Law Firm
Initiation Fee:	$500.00	$1,500.00
Annual Dues:	$250.00	$750.00
Total First Year Cost:	$750.00 ☐	$2,250.00 ☐

Amount Enclosed: $_____

Return this application with check for Initial Fee and Annual Dues to:

ARIAS•U.S. Membership Committee
Stephen H. Acunto
Vice President, Executive Director / ARIAS•U.S.
P.O. Box 9001 Mount Vernon, NY 10552

SAVE THE DATE!

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Third Annual Report of the Chairman

Continued from page 2

extremely helpful as our Secretary Treasurer.

The Board to date has certified 38 persons as arbitrators under the ARIAS•U.S. program. Of course, each certified arbitrator was proposed and seconded under the rigorous criteria that has been adopted by ARIAS•U.S.

Following our successful program in Baltimore last November, ARIAS•U.S. conducted a mock-arbitration seminar in Miami, Florida in April. Ron Jacks organized the program. Over 100 persons from the U.S., South America, Europe and Australia attended. Comments by attendees confirmed the view of many of us that it was an extremely worthwhile training program.

Our program for the recent Fall Seminar, for which we had over 120 registrants, included outstanding lead-off speakers regarding various aspects of the arbitration process including proposed procedural forms. This was followed by discussion groups and an open forum to provide an exchange of views and experiences of attendees.

The Board approved the next ARIAS•U.S. seminar to be held April 16-18, 1998 in Bermuda.

I would like to remind everyone that one of the Board's first projects was to consider and adopt the following ARIAS•U.S. objectives, which are set forth in the By-Laws:

1. To promote the integrity of the arbitration process in insurance and reinsurance disputes;
2. To assure just awards in accordance with industry practices and procedures;
3. To certify objectively qualified and experienced individuals to serve as arbitrators;
4. To provide required training sessions for those persons certified as arbitrators;
5. To adopt rules of arbitration proceedings and development of a model arbitration clause;
6. To develop arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and just manner.

These must continue to be our guiding principles.

I informed the Board that I would step down as Chair at the end of the Fall meeting. After three years, it was time to turn over the reins to another. It has been an outstanding experience to serve as Chair of this very able Board of Directors and to be of service to all of you. Thank you very much for providing me with this opportunity.

ARIAS•U.S. Certified Arbitrators

As of November 10, 1997

Howard Anderson
Therese Arana-Adams
Richard Bakka
Peter Bickford
Michael Cass
Dewey Clark
James Corcoran
Anthony DiPardo
Caleb Fowler
James Frank
Peter Frey
Dennis Gentry
William Gilmartin
Richard Gilmore
Thomas Greene
Franklin Haftl
Robert Hall
Paul Hawksworth
Robert M. Huggins
Michael Isaacson
Ronald Jacks
Peter Malloy
Robert Miller
Charles Niles
Wayne Parker
James Powers
J. Daniel Reilly
Robert Reinarz
Debra Roberts
Edmond Rondepierre
Daniel Schmidt, IV
N. David Thompson
Thomas Tobin
Peter Tol
Norman Wayne
James White
Richard White
Eugene Wollan

Although ARIAS•U.S. believes certification is a significant and reliable indication of an individual's background and experience, it should not be taken as a guarantee that every certified member is an appropriate arbitrator for every dispute. That determination should be preceded by a review of several factors, including but not limited to, the applicable arbitration provision, potential conflicts or bias and the type of business involved in the dispute. In addition, ARIAS•U.S. wishes to acknowledge that its certified arbitrators are not the only qualified arbitrators. As noted above, the Society is gratified that many of the most respected practicing arbitrators have chosen to join ARIAS•U.S. There are others who are similarly qualified and experienced, but who have not chosen to join at this time.

More than 150 ARIAS•U.S. members attended the November 7, 1997 Fall Seminar.

Robert Mangino served as Program Chair.

T. Richard Kennedy, ARIAS•U.S. Chair, presented 1997 Year in Review.

Honorable Charles S.Haight, Jr. U.S.D.C.,S.D.N.Y.

Charles Foss mediated a breakout session.

The small group format provided the basis for lively discussions at breakout sessions.

Ron Jacks, an ARIAS•U.S. founder, led breakout discussion.

Tom Allen's workshop was quite animated. Tom will chair ARIAS•U.S. upcoming Spring Conference to be held in Bermuda in April.

The Honorable Charles S. Haight, Jr. and Charles Niles lead discussions on Hearings and Awards.

Robert Mangino, (left) newly-elected ARIAS•U.S. Chair, and Mark Gurevitz (right), newly-elected ARIAS•U.S. President, with immediate Past Chair, T. Richard Kennedy.

Program participants Gene Wollan and John Nonna (pictured left to right) as they addressed the attendees.

ARIAS • U.S.

ARIAS•U.S. Programs are regularly rated "A+" by attendees for content, participation and format. For information, call 914/699-2020.

Continued from page 5

7 Conclusion

There is no question that arbitrators have almost absolute authority in the conduct of the arbitration proceeding where parties have agreed to arbitrate a dispute and the agreement is silent on specific procedural rules. There are areas where an arbitration panel's authority is subject to some control. These are limited and usually apply only upon a challenge to the final award. Arbitration panels, however, should take care to articulate their reasons for certain rulings to preserve the integrity of the arbitral process and afford parties an opportunity to correct an error or misapprehension of facts that might be the basis for a ruling.

ENDNOTES

1. Yasuda Fire and Marine Co. of Europe Ltd. v. Continental Casualty Co., 37 F.3d 345 (7th Cir. 1994); Recyclers Ins. Group Ltd. v. Ins. Co. North America, 1992 U.S. Dist. Lexis 8731 (E.D. Pa. 1992).
2. See 9 U.S.C. § 10; N.Y. Civ. Prac. L. & Rules § 7510 (McKinney 1996). The Uniform Arbitration Act enacted in many states and other states and other state arbitration statutes generally track the Federal Arbitration Act's provisions. This paper will address Federal Arbitration Act provisions.
3. AT&T Tech. v. Communications Workers of America, 475 U.S. 643 (1986); Tehran-Berkeley Civ. & Env. Eng. v. Tippets-Albert, 816 F.2d 864 (2d Cir. 1987).
4. Sanko S.S. Co. v. Cook Industries, Inc., 495 F.2d 1264-5 (2d Cir. 1973); but see Metropolitan Property and Casualty Co. v. J.C. Penney Casualty Co., 780 F. Supp. 885 (D. Ct. 1991).
5. Under Section 10(b) of the Federal Arbitrators Act an award can be vacated "[W]here there was evident partiality or corruption of the arbitrators..."
6. In re Evanston Insurance Co., 1994 U.S. Dist. LEXIS 19219 (N.D. Ill 1994) (Court can determine whether nominated arbitrator is "disinterested" as required by reinsurance agreement).
7. Universal Reinsurance Co. v. Allstate Ins. Co., 16 F.3d 121 (7th Civ. 1994).
8. Center for Public Resources, CPR Model ADR Procedures and Practices, Rule 7.7 (1995).
9. Employers Insurance of Wausau v. National Union Ins. Co. of Pittsburgh, 933 F.2d 1481 (9th Cir. 1991).
10. See Mac Neil, Speidel & Stipanovich, Federal Arbitration Law § 28.2.6.2.
11. Yasuda Fire and Marine Ins. Co. v. Continental Casualty Co., 840 F. Supp. 78 (N.D. Ill) aff'd, 37 F.3d 345 (7th Cir. 1994).
12. Connecticut Light and Power Co. v. Local 420 Int'l Board of Elec. Workmen, 718 F.2d 14, 20 (2d Cir. 1983).
13. National Union Fire Insurance Co. v. Belco Petroleum, 83 F.3d 129 (2d Cir. 1996).
14. N.Y. Ins. Law § 1213.
15. Northwestern National Ins. Co. v. Kansa General Ins. Co., 1992 U.S. Dist. Lexis 1784 (S.D.N.Y. 1992); American Centennial Ins. Co. v. Seguros La Republica, 1996 U.S. Dist. Lexis 7729 (S.D.N.Y. 1996).
16. Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019 (9th Cir. 1991); Yasuda Fire and Marine Insurance Company v. Continental Casualty Ins. Co., 37 F.3d 345 (7th Cir. 1994).
17. Reinsurance contracts sometimes require the parties to submit their case to the panel within a period of time. The parties often dispute with these strict requirements by agreement. But, if there is a dispute, the panel has the authority to enforce these deadlines and should pay deference to the parties' agreement.
18. Corpman v. Prudential Bache Inc., 907 F2d 29 (2d Cir. 1990); Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359 (S.D.N.Y. 1987).
19. Stanton v. Paine Webber, Jackson & Curtis, 685 F. Supp. 1241 (S.D.N.Y. 1988); In Re Koala Shipping and Trading, 587 F. Supp. 140 (S.D.N.Y. 1984).
20. Meadows Indemnity Co. v. Nutmeg Ins. Co., 157 F.R.D. 45 (M.D. Tenn. 1994).
21. Integrity Insurance Co. v. American Centennial Insurance Co., 885 F. Supp. 89 (S.D.N.Y. 1995).
22. Commercial Solvents, Corp. v. Louisiana Liquid Fertilizer, 20 F.R.D. 359 (S.D.N.Y. 1957); Angen Inc. v. Kidney Center of Delaware County, 1994 WL 594322 (D. Pa. 1994).
23. Konkar Maritime Enterprises S.A. v. Compagnie Belge D' Affretement, 668 F. Supp. 261, (S.D.N.Y. 1987); Riko Enterprises Inc. v. Seattle Supersonics Corp., 357 F. Supp. 521 (S.D.N.Y. 1973), Seidner Corp. v. W.R. Grace Co., 22 F. Supp. 388 (D. Mich. 1938).
24. Chevron Transport Corp. v. Astyro Vencedor Co. Naviera SA, 300 F. Supp. 179 (S.D.N.Y. 1969); but see Hunt v. Mobil Oil Corp., 654 F. Supp. 1487 (S.D.N.Y. 1987).
25. Farkas v. Receivable Fin. Corp., 806 F. Supp. 84 (E.D. Va. 1992)

Thanks to John Nonna
for permission to reprint his remarks.
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