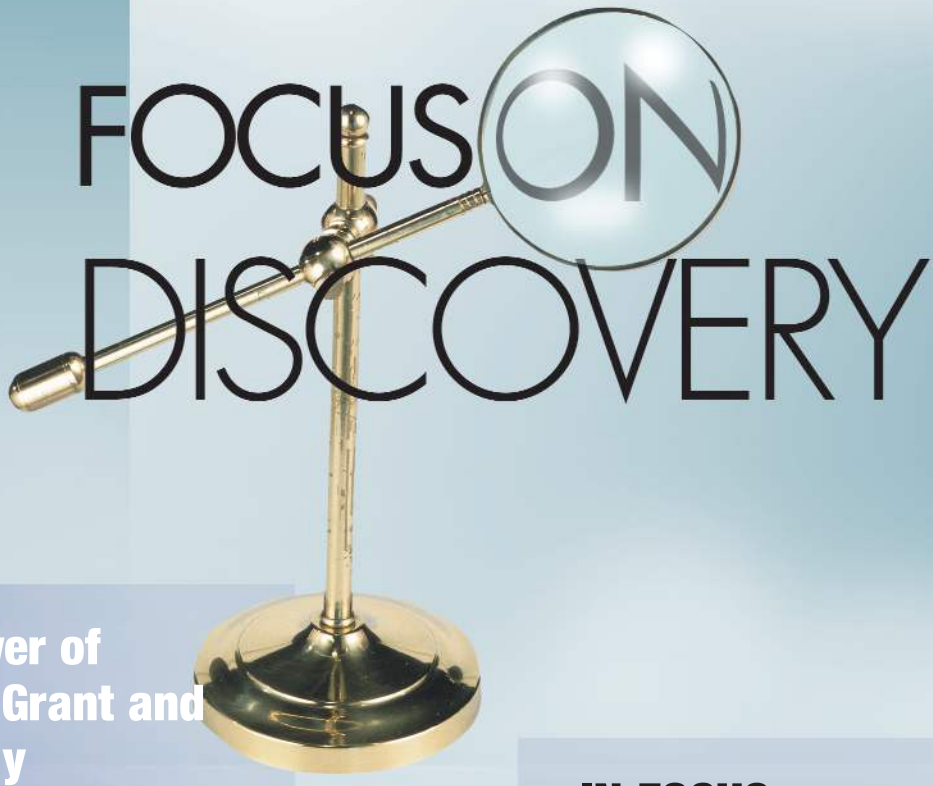
ARIAS U.S.
QUARTERLY
FOURTH QUARTER 2002

# 2002 ANNUAL CONFERENCE REPORT

# FOCUS ON DISCOVERY



**The Legal Power of Arbitrators to Grant and Limit Discovery**

**The Production of Documents in a Reinsurance Arbitration Proceeding**

**Discovery in Reinsurance Arbitration**

**IN FOCUS:**
**Newly Certified Arbitrators**

**Intensive Workshops Turn Out Enlightened Graduates**

**...and more**

# contents



ARIAS•U.S. Board of Directors page 3

Save the Date page 3

COVER: 2002 Annual Meeting – Focusing on Discovery page 4

FEATURE: The Legal Power of Arbitrators to Grant and Limit Discovery ROBERT A. KNUTI and T. MONIQUE JONES page 6

2002 Annual Meeting – Committee Reports page 14

FEATURE: The Production of Documents in a Reinsurance Arbitration Proceeding P. JAY WILKER page 18

IN FOCUS: Newly Certified Arbitrators page 25

FEATURE: Discovery in Reinsurance Arbitrations THOMAS R. NEWMAN page 28

Case Note Corner RON GASS page 32

Intensive Workshops Turn Out Enlightened Graduates page 34

ARIAS•U.S. Certified Arbitrators page 35

ARIAS•U.S. Umpires page 36

Special Report - AIDA World Congress in New York T. RICHARD KENNEDY page 36

Invitation to Join ARIAS•U.S. page 38

Membership Application page 39

ARIAS U.S.
AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY
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# save the date

# April 10-12, 2003

ARIAS•U.S. 2003 SPRING CONFERENCE

## "From Bermuda With Love: An Arbitrator's License"

ELBOW BEACH HOTEL

PAGET, BERMUDA

**Two days of focused training and education in beautiful Bermuda make this a "must attend" event for all members.**

**Plan to arrive by lunchtime on Thursday April 10.**

**Program begins at 1:00 pm.**

**The meeting will wrap up at noon on Saturday.**

cover story

# 2002 Annual Conference — Focusing on Discovery

The discovery process in arbitration proceedings was brought into focus from many directions during this year's Annual Conference on November 7th and 8th. The New York Hilton meeting rooms were crowded, as 285 ARIAS•U.S. members, faculty, and guests addressed the main question, "Discovery: Too much of a good thing?"

The topic of the first morning was **Burdensomeness in the Discovery Process.** Bob Knuti gave a jump-start to the deliberations with a presentation of the core concepts of his paper, *"The Legal Power of Arbitrators to Grant and Limit Discovery."* (That paper is reprinted in this issue of the Quarterly on page 6.) After breakout sessions for exchanging of individual perspectives, the morning concluded with a panel discussion of the topic, representing viewpoints of clients, arbitrators, and lawyers.

Jay Wilker led off the afternoon with a presentation of his paper, *"The Production of Documents in a Reinsurance Arbitration."* (See page 18.) A panel discussion and breakouts followed with extensive analysis of **How to Deal with Privilege Objections.**

As an overview of the central theme of the conference, Tom Newman's paper, *"Discovery in Reinsurance Arbitrations,"* was provided to all conference attendees. (See page 28.)

While the main occupation of the conference was discovery, much other business was accomplished, as well. The annual meeting re-elected three Board members, Charles M. Foss, Thomas S. Orr, and Eugene Wollan. Also, Thomas L. Forsyth was elected to the Board, replacing Robert M. Mangino, who retired. The Board of Directors meeting elected a new slate of officers, consisting of Daniel E. Schmidt, IV as Chairman, Charles M. Foss as President, and Thomas S. Orr as President Elect. Vice Presidents elected were Thomas A. Allen and Mary A. Lopatto.

The second morning opened with thorough and productive committee discussions. Activities at these meetings are summarized on Page 14. Committee reports were made to the general assembly before moving on an open meeting to discuss **Issues Related to the Arbitration Process**.

The open meeting allowed members to exchange views on a wide range of subjects that had been solicited dur-

ing the registration process. Topics ranged from how to deal with inordinate requests for depositions and contracts, to the dilemma of balancing fairness with speed and efficiency.

There was a pervasive atmosphere of enthusiasm as the conference ended. The feeling seemed to be that it was highly productive and worthwhile in all respects.

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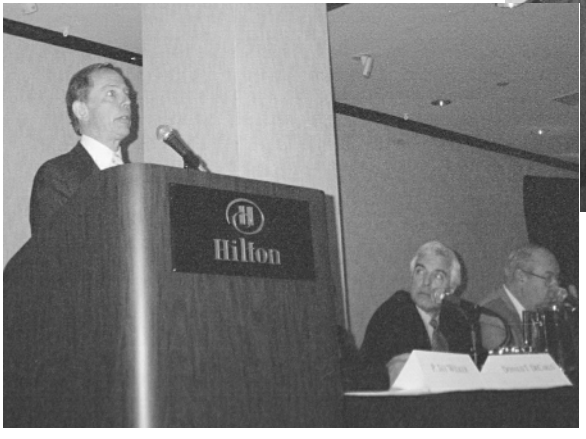


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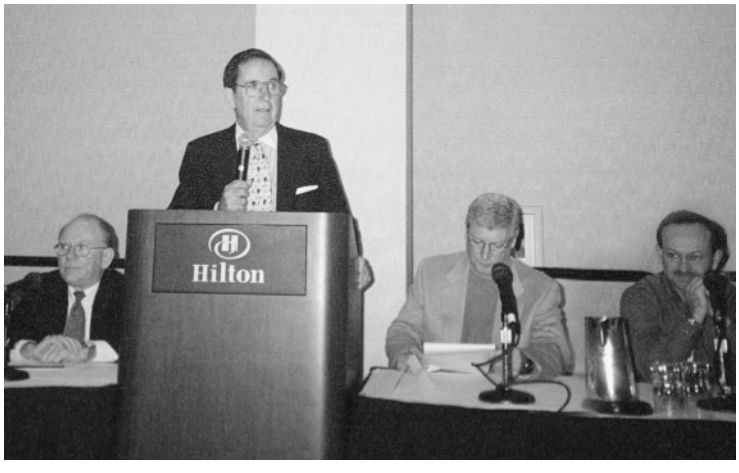


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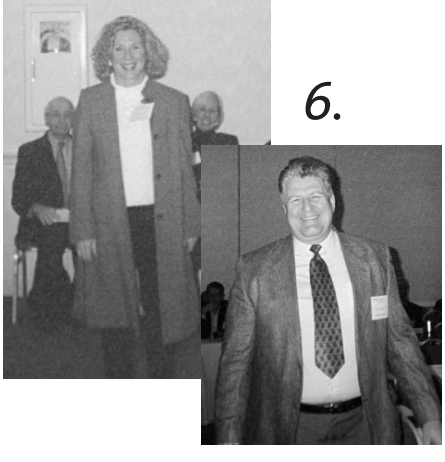

1. *There were few empty seats as a record number of attendees crowded the conference rooms at the New York Hilton.*
2. *Jay Wilker led the afternoon session, presenting a summary of his paper on document production.*
3. *Chairman Mark Gurevitz and President Elect Charlie Foss present a plaque to retiring Board member Bob Mangino.*
4. *Dick Kennedy and the other committee chairmen reported on their Friday morning meetings.*
5. *Mark Gurevitz led an open disucssion of arbitration issues.*
6. *Jim Leatzow and Carol Correia were two of the six newly certified arbitrators introduced to the conference.*

feature

# The Legal Power of Arbitrators to Grant and Limit Discovery

ROBERT A. KNUTI
T. MONIQUE JONES

## Introduction

In today's ever more litigious society and with the greater complexity of many disputes, arbitration has too frequently become as tedious, costly and contentious as cases decided in a courtroom. Although pre-hearing discovery in arbitration can enhance the panel's ability to make rational decisions in even a complex case, it also presents the risk that the arbitration process can bog down in a morass of acrimonious debates over technical discovery rules.

The parties grant arbitrators the power to determine the merits of a dispute and render a decision accordingly. The source of this power stems from both the mutual consent of the parties to arbitrate and the nature of the office of the arbitrator.[1] By virtue of the arbitration agreement, the parties grant powers to the arbitrators not only as stated in their agreement but also implicit powers to exercise authority necessary to resolve the underlying dispute.

Arbitration is contractual and the power of an arbitrator to grant or limit discovery is given by the parties.

Despite the risks attendant to this grant of extraordinary power, which is subject to minimal judicial oversight, arbitration can be an advantageous method for parties to resolve their disputes in a fast, inexpensive, and efficient manner. The parties value the option of appointing an arbitrator who is an expert in the field relating to the subject matter of the dispute. However, among the potential disadvantages of arbitrating a reinsurance dispute is the lack of judicial or other authority to guide arbitrators on dispute resolution procedures. Reinsurance arbitrators are increasingly asked to decide not only substantive reinsurance issues, but also issues arising from the application of current courtroom practices and procedures, such as discovery, to the arbitration proceeding.

This paper addresses the legal power of arbitrators to grant and limit discovery in reinsurance arbitrations.[2]

## Contractual Source of Arbitrators' Power: The Arbitration Agreement

Arbitration is contractual and the power of an arbitrator to grant or limit discovery is given by the parties. Therefore, any analysis of the powers of an arbitrator to order pre-hearing discovery must begin with the parties' arbitration agreement. There are a number of common reinsurance arbitration agreement provisions that may relate to the panel's exercise of its discovery powers.

Some reinsurance arbitration agreements expressly grant to the panel the power to make procedural rules for the arbitration, including discretionary power with respect to pleadings, discovery, access to and copying of documents, examination of witnesses and the admissibility of evidence.[3] These provisions typically appear in more recent contracts and it remains to be seen how helpful they will be.

Some reinsurance contracts include access to records clauses granting a reinsurer the right to examine or inspect the cedent's records that relate to the underlying claim. These substantive contractual provisions are distinct from the arbitration agreement, but may form a basis for granting a reinsurer's request for pre-hearing arbitration discovery. However, the source of a panel's powers to grant such a request as a matter of discovery is not found in the explicit language of either the reinsurance agreement or its arbitration clause.[4]

Some reinsurance arbitration agreements contain "honorable engagement" terms, such as: "The arbitrators shall consider this Agreement an honorable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and

may abstain from following the strict rules of law." This grant of discretionary authority has been cited by courts as a basis for a panel's power to control discovery.[5]

Some reinsurance arbitration agreements provide: "Each party shall submit its case to the arbitrators within thirty days of the appointment of the arbitrators." This time limitation implies that the parties agreed there should be no discovery.

Some reinsurance arbitration agreements provide that a particular state law shall govern. This provision may extend to the state's arbitration law and, thus, to the discovery rules under that state's arbitration law.[6]

Some reinsurance arbitration agreements provide for a place of arbitration: "Any such arbitration shall take place in [Chicago, Illinois] [city of ceding company's home office] unless some other location is mutually agreed upon by the ceding company and the reinsurers." The place of the arbitration usually establishes which law governs. Different jurisdictions may have different rules on arbitration discovery.

Some reinsurance arbitration agreements provide for the allocation of costs in language that may imply the parties did not agree to grant the panel power to assess attorneys' fees or costs as a sanction for a finding of discovery misconduct.

Some reinsurance arbitration agreements provide for the permissive or compulsory joinder of multiple reinsurers who may have disparate discovery views.

When a pool of reinsurers enters into a contract through an underwriting manager, the arbitration agreement may be ambiguous as to who is or is not a party to an arbitration, and thus subject to discovery treatment as a party or a nonparty.[7]

Court decisions sometimes characterize the scope of the party's agreement to arbitrate as "broad" or "narrow." The panel's power to grant discovery may vary depending on the scope of the arbitration clause. For example, where the reference to arbitration is limited to "the interpretation of" the reinsurance agreement, discovery might logically be expected to be more limited than where the parties have agreed to refer to arbitration "all disputes arising from or related to" their reinsurance relationship.

It has been argued that arbitration agreements be interpreted in accordance with the "custom and practice" of arbitrating reinsurance disputes at the time the arbitration agreement was signed. If a panel were to consider such an argument, it might accept evidence or take "notice" (as a court might take judicial notice) of a custom and practice that grants or limits the panel's power over various forms of pre-hearing discovery.

Although reinsurance arbitration agreements are usually governed in some respects by federal law, the liberal discovery provisions of the Federal Rules of Civil Procedure do not apply by operation of law to arbitration proceedings.[8] Nevertheless, those rules may provide a point of departure for a panel in exercising its powers in a fashion a court will understand and accept when considering petitions to confirm or vacate an award.[9]

In establishing a context for judicial consideration of an arbitration discovery issue, the district court in *In the Matter of the Arbitration Between Integrity Ins. Co. and American Centennial Ins. Co.,* 885 F. Supp. 69 (S.D.N.Y. 1995), observed that the arbitrator's power over the parties derives from both the arbitration agreement and the FAA. This court noted that the arbitration agreement relieved the arbitrators of all judicial formalities and the panel would not be obliged to follow judicial formalities or the rules of evidence. After analyzing the parties' arbitration agreement, the court stated:

[T]here is nothing within the reinsurance agreements that explicitly limits the power of an arbitrator to order discovery. *See Chiarella v. Viscount Indus. Co. Ltd.,* 1993 U.S. Dist. LEXIS 16903, No. 92 Civ. 9310, 1993 WL 497967 (S.D.N.Y. Dec. 1, 1993).

885 F. Supp. at 71. It is also the usual case that nothing in the arbitration agreement explicitly restricts the power of arbitrators to limit discovery. The court continued:

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Although reinsurance arbitration agreements are usually governed in some respects by federal law, the liberal discovery provisions of the Federal Rules of Civil Procedure do not apply by operation of law to arbitration proceedings.[8]

Because the parties to a contract cannot bind nonparties, they certainly cannot grant such authority to an arbitrator. Thus, an arbitrator's power over nonparties derives solely from the FAA.

*Id.* In construing the arbitration agreement, the parties and arbitrators should keep in mind the federal policy that strongly favors arbitration as an alternative dispute resolution process. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S.1 (1983). Therefore, courts should interpret the FAA so as to further rather than impede arbitration.

## Federal Statutory Sources of Arbitrators' Power: The Federal Arbitration Act

The FAA, 9 U.S.C. §§101 *et seq*., is the principal statute governing arbitrations. The FAA applies to arbitrations involving interstate commerce and maritime transactions. Since it applies to both interstate and international commerce, the FAA is likely to apply to all U.S. reinsurance arbitrations. However, Chapter 1 of the FAA, 9 U.S.C. §§1-16, does not by itself constitute a basis for federal court jurisdiction and, therefore, in some instances, issues governed by the FAA can be heard only in a state court.10 Chapter 2 of the FAA implements the Convention on the Enforcement and Validity of Foreign Arbitral Awards (the New York Convention), a treaty governing international arbitrations. 9 U.S.C. §§ 201 *et seq*. Section 203 provides for federal court jurisdiction for actions falling under Chapter 2.

The FAA does not expressly state how the arbitration itself is conducted, but rather deals primarily with the events surrounding an arbitration, *e.g.,* proceedings to compel arbitration or stay inconsistent litigation. There is no provision of the FAA that expressly addresses discovery, but there are two sections particularly pertinent to discovery issues. They are Sections 7 and 10.

## Section 7 of the FAA

Actions to enforce panel subpoenas, addressed to either parties or nonparties, are brought under § 7 of the FAA. Section 7 begins with a grant of power to arbitrators to issue subpoenas:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and **in a proper case** to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. ...

(emphasis added) The phrase "in a proper case" is a limitation, which may involve, for example, issues of materiality, relevance, burden, privilege, etc., to be considered by the panel and a court. Two initial questions for the panel, the parties and the nonparty respondent to a subpoena are: (1) what is a proper case and (2) who decides this question. The nonparty has not agreed to refer any issue to arbitration or to the authority of the panel and may prefer to state his position to a court in an action brought to enforce the panel's subpoena. The risk to the nonparty is that a court may defer to the arbitrators' judgment as to what is a proper case.11

Section 7 of the FAA continues with a prescription for the form and mechanics of issuing the subpoena:

> The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and **shall be served in the same manner as subpoenas to appear and testify before the court; ...**

(emphasis added) When a witness will not respond to an arbitration panel's subpoena, its enforcement becomes a matter of federal and state law, with conflicting decisions turning on, among other factors, whether a federal court has jurisdiction, whether the witness or documents or both are located in the same judicial district as the situs, or place, of the arbitration and the nature of the relationship of the nonparty discovery respondent to the parties in the arbitration and the issues in their dispute.

Section 7 of the FAA also governs which court should enforce actions concerning nonparty discovery. Section 7 continues with this provision:

> if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition **the United States district court for the district in which such arbitrators, or a majority of them, are sitting** may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt **in the same manner provided by law for securing the attendance of witnesses** or their punishment for neglect or refusal to attend in the courts of the United States.

(emphasis added) Thus, the situs of arbitration determines which federal district court hears a reinsurance arbitration discovery dispute. Therefore, not only may different panels decide the same discovery issue differently, the same panel might consider the same issue differently depending on the governing law in different jurisdictions.

The decision in *In Re Security Life Ins. Co.*, 228 F.3d 865 (8th Cir. 2000), reflects the view that a panel has broad authority to compel discovery from a nonparty. A restrictive view of a panel's power to compel nonparty discovery is reflected in *COMSAT Corp. v. National Science Found*., 190 F.3d 269 (4th Cir. 1999), and *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, 33 Fed. Appx. 26, 2002 U.S. App. LEXIS 6797 (3d Cir. Feb. 26, 2002).12 The court in

*Security Life* does not discuss the earlier *COMSAT* decision and the court in Legion cites neither *Security Life* nor *COMSAT*. Under the current state of the law, the Third Circuit (southeastern states) and the Eighth Circuit (midwestern states) conflict on whether a panel's subpoena may be enforced beyond the territory of the district court in which the panel sits. According to the Fourth Circuit (including Pennsylvania and New Jersey), subpoenas for pre-hearing discovery from nonparties are unenforceable absent a showing of special need or hardship.

In order for the arbitration to proceed expeditiously, it may be appropriate for the panel to take into account the enforceability of a subpoena before issuing it. Since nonparty discovery raises issues beyond those the panel can control, the parties and the panel may be well advised to balance the degree of materiality and relevance of the documents or testimony sought to be discovered against the potential for delay, distraction and expense. The parties and the panel should also be mindful of the possibility that the record they make on these issues may resurface when a court considers a challenge to the award under the FAA.

Some issues presented by the limitations on the panel's subpoena powers may be resolved by moving the situs of the arbitration to a place where the nonparty witness is clearly subject to a subpoena, but this alternative works only when the parties and the panel agree to relocate. However, the party with the benefit of an arbitration situs clause may not agree to proceedings elsewhere.

Pre-award court decisions regarding the scope of an arbitrator's power to order discovery are typically in the guise of interpreting § 7 of the FAA. For example, a judge of the United States District Court for the Southern District of New York recently wrote:

> Section 7 of the FAA, 9 U.S.C. § 7, gives broad authority to arbitrators in terms of discovery. (footnote omitted) ... [S]ection 7 has been interpreted by courts in this district to include pre-hearing discovery among parties. See In re Technostroyexport, 853 F. Supp. 695, 697 (S.D.N.Y. 1994) (finding that pre-hearing discovery among parties is "a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrator decides"); Chiarella v. Viscount Indus. Co. Ltd., 1993 U.S. Dist. LEXIS 16903, *4, 1993 WL 497967, *4 (S.D.N.Y. 1993) (arbitrators did not exceed authority by ordering parties "to mutually exchange all documents and witness lists (i.e. full discovery)").

*In Re Arbitration Between Douglas Brazell against Am. Color Graphics, Inc.,* 2000 U.S. Dist. LEXIS 4482 at *3-4 (S.D.N.Y. Apr. 6, 2000). The issue before the court in *Brazell* was whether the court should compel compliance with an arbitrator's subpoena calling for discovery of documents from a nonparty prior to the arbitration hearing.13 The court's analysis started from the point that the arbitrator had the power to grant and limit discovery between the parties. From there, the court further considered nonparty discovery and distinguished pre-hearing document production from discovery depositions.

In *Integrity*, the court found that the arbitrator lacked authority to compel a nonparty witness to appear for a discovery deposition because the witness who was not a party to the arbitration agreement "never bargained for or voluntarily agreed to participate in an arbitration." *Integrity*, 885 F. Supp. at 71. In contrast, the court in *Brazell* concluded that the *Integrity* decision, as well as *Meadows Indemn. Co. v. Nutmeg Ins. Co.,* 157 F.R.D. 42, 44-45 (M.D. Tenn. 1993), and *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F. Supp. 1241 (S.D. Fla. 1988), support the arbitrator's authority to require pre-hearing production of documents from nonparties[14]

The District Court for the Northern District of Illinois, in *Amgen, Inc. v. Kidney Ctr. of Delaware County*, 879 F. Supp. 878 (N.D. Ill. 1995), also held it could not compel a nonparty witness outside the district to appear for a deposition under § 7 of the FAA, but that it could do so under Federal Rule of Civil Procedure 45(a)(3)(B) because the parties to the arbitration agreement had provided it would be governed by the Federal Rules. 15

All these nonparty discovery cases arose from discovery undertaken subject to the control of the arbitrators. The cases reached the courts only when the arbitrators had initially decided to issue a subpoena for the nonparty discovery. The *Meadows, Stanton* and *Security Life* cases may be read to suggest that in discovery issues involving nonparties who are closely related to parties in the arbitration, the courts are more inclined to let the arbitrators exercise their judgment and discretion whereas with nonparties who are unrelated, the court will take a closer look at the merits of the discovery issues.

## Section 10 of the FAA

Where there is no judicial intervention during the pre-hearing discovery process, the panel's power over discovery will only be subject to challenge in an application action to vacate a final award. Section 10 of the FAA provides, in part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> * * *
>
> (3) 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.
>
> (4) Where the arbitrators

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> exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(emphasis added)

Would a panel's denial of discovery that could lead to evidence pertinent and material to the controversy constitute "misconduct" and therefore a ground for vacating an award? This argument was recently made and rejected in *Nationwide Mutual Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10 (D. Mass. 2002). The court observed that the arbitrators were not bound "to hear all the evidence tendered by the parties" and held the panel was not guilty of misconduct when it refused to reopen discovery after the parties had over two years to conduct discovery and the panel had announced an interim award. *Id*. at 19. Likewise, in *Prozina Shipping Co. v. Elizabeth-Newark Shipping, Inc.*, 1999 U.S. Dist. LEXIS 14298 (S.D.N.Y. Sept. 8, 1999), the district court rejected the cross motion of Elizabeth-Newark Shipping ("ENS") to vacate an arbitration award upon finding that ENS had failed to show an arbitration panel was guilty of misconduct or a violation of fundamental fairness under § 10(a)(3) by denying ENS discovery. The court quoted the arbitrators' conclusion that "such discovery would have 'served only to further impede [the] already unnecessarily prolonged arbitration at considerable additional costs without any substantive impact on the relevant documents and pleadings already submitted ...'"16 Id. at *10.

In *In the Matter of the Arbitration Between Generica Ltd. v. Pharmaceutical Basics, Inc.*, 1996 U.S. Dist. LEXIS 13716 (N.D. Ill. Sept. 16, 1996), the court considered a similar argument made under Chapter 2 of the FAA, 9 U.S.C. §§ 201 et. seq. The court rejected the contention that the award should not be recognized on the ground the cross-petitioner was "unable to present his case" because the arbitrator had refused to require the petitioner to produce a letter and refused to draw a negative inference from that failure. The court found the arbitrator had made an appropriate discretionary determination.

A case illustrating circumstances in which a court would vacate an arbitration award pursuant to § 10(a)(3) is *In the Matter of the Arbitration Between Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997). In that case, the panel refused to keep the hearing record open until a witness, unavailable because of his wife's illness, could testify. The conflicting perspectives of the arbitrators and the court are shown in the following passages from the opinion.

> After deliberation, the panel concluded the hearings without waiting for Pollock's testimony. The arbitrators stated:
>
> > We as arbitrators have to decide does Mr. Pollock have any information that if he was here in person and you fellows are banging him with questions that some new information comes out that we haven't heard or is it going to be a rehash of what we've heard from other witnesses.

*Id*. at 18. After the district court confirmed the award, the Second Circuit vacated it with this comment on the arbitrators' decision.

Because Pollock as sole negotiator for Bertek was the only person who could have testified in rebuttal of appellees' fraudulent inducement claim, and in support of Bertek's fraudulent inducement claim, and the documentary evidence did not adequately address such testimony, there was no reasonable basis for the arbitrators to conclude that Pollock's testimony would have been cumulative with respect to those issues.

Id. at 21. Although not a discovery case, this decision suggests the importance of the circumstances as well as the nature of evidence the arbitrators had to refuse to hear before the court was willing to vacate an award.

This case law reinforces the common understanding that courts are strongly disposed to defer to arbitrators' discretionary judgment on when to refuse to hear further evidence. In the same vein, the courts evidence little inclination to second-guess arbitrators on discovery issues.

## State Statutory Sources of Arbitrators' Power: State Arbitration Acts

While the FAA preempts contrary state law, state arbitration statutes may also apply in many arbitration cases, especially when parties choose to apply a particular jurisdiction's arbitration law in their agreements. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). While in most instances, state and federal arbitration law will be the same, both parties and panel members should be aware of the potential for conflicts and thus have some familiarity with state law.

The Uniform Arbitration Act ("UAA") was an attempt to create a homogenous set of rules and procedures for state arbitrations. Of the 49 jurisdictions with arbitration statutes, 35 have adopted the UAA and 14 have based their statutes in some form upon the UAA.17 In 2000, the Revised Uniform Arbitration Act ("RUAA") was introduced. To date, it has been adopted by 4 states — Hawaii, New Mexico, Nevada, and Utah — and there are efforts to introduce the RUAA into 15 other jurisdictions.

Section 17 of the RUAA covers pre-hearing discovery. It allows the arbitrators to order discovery when they deem it appropriate and to issue subpoenas compelling a party or witness to attend a deposition or produce documents and other evidence. This is an extraordinary departure from its predecessor, the UAA, which did not specifically address pre-hearing discovery.

Neither the New York Arbitration Act (N.Y. Civ. Prac. L.&R. § 7501 (Consol. 2000)) nor the Illinois Arbitration Act (710 ILCS 5/1 (2002)) have express provisions governing pre-hearing discovery. However, California's arbitration law mandates that certain pre-hear-

ing discovery provisions be incorporated into every agreement to arbitrate any matter relating to injury or death of a person caused by the wrongful act or neglect of another. In other arbitration agreements, these discovery provisions are applicable only if the parties agree to them in their arbitration agreement. California law will then afford the parties the right to take depositions and obtain discovery, availing themselves of "all of the same rights, remedies, and procedures" in the arbitration as if the matter were pending before a California superior court. Cal. Civ. Pro. Code Ann. §§ 1283.05, 1283.1 (LEXIS L. Publg. 2001).

## State Statutory Sources of Arbitrators' Power: International Arbitration Acts

For international arbitrations, the UNCITRAL Model Law on International Commercial Arbitration (UN Doc. No. A/40/17 (Annex I)) (adopted by the United Nations Commission on International Trade Law on 21 June 1985) reflects a sentiment against American style liberal pre-hearing discovery. Connecticut adopted UNCITRAL's model international arbitration law without adding any provision for pre-hearing discovery. Conn. Gen. Stat. § 50a-101 (2001). Likewise, California's international arbitration statute also makes no mention of pre-hearing discovery. Cal. Civ. Proc. Code Ann. § 1297.11 (LEXIS L. Publg. 2001). While these statutes do not contain explicit provisions either allowing or denying pre-hearing discovery, they do provide for the arbitral tribunal's discretion to conduct the arbitration in the manner it deems appropriate. In contrast, the Illinois International Commercial Arbitration Act contains unequivocal language precluding pre-hearing discovery. It provides that the arbitral tribunal may subpoena parties and nonparties to appear as witnesses and produce evidence, but such production "will be for the purpose of presenting evidence at the arbitration hearing and will not include pre-trial discovery as known in common law countries." 710 ILCS 30/20-50 (2002).

## Non-Statutory Arbitration Rules as Sources of Arbitrators' Power

The American Arbitration Association ("AAA") has developed rules and procedures along with a roster of mediators and arbitrators. The AAA's Commercial Dispute Resolution Procedures, which are occasionally employed in reinsurance arbitrations, mandate that, when requested, the arbitrator may direct the parties to exchange information relating to the identification of witnesses, the production of documents, and other information. Pursuant to the Optional Procedures for Large, Complex Commercial Disputes, the arbitrator is permitted to control the scope of discovery. Most expansive is the provision allowing the arbitrator, upon good cause, to order a deposition or interrogatory for any person "who may possess information determined by the arbitrator(s) to be necessary."

The UNCITRAL18 Arbitration Rules were adopted in 1976 and were designed to apply to international arbitrations. As respects pre-hearing discovery in arbitration, they provide only that the arbitration tribunal may require a party to deliver to the tribunal and the other party a summary of the documents and other evidence that the party intends to present, along with the names of the witnesses a party intends to present and the subject of their testimony.

## Arbitrators' Power to Sanction Non-Compliance with Discovery Rulings

Case law is sparse on what arbitrators may impose as a sanction for failure to adhere to a panel's discovery ruling. One of the few cases is *Norfolk & Western Ry. Co. v. Transportation Communications Int'l. Union*, 17 F.3d 696 (4th Cir. 1994), where upon Norfolk & Western's refusal to produce records, the arbitration board drew an inference that the information within those records was adverse to its position. The arbitration agreement stated only that the arbitrator could "request" (not compel) the submission of additional evidence. Based primarily on this adverse inference, the board sustained the opposing party's claim. On appeal, the Fourth Circuit reasoned that given the contract did not address the powers of the board to draw inferences, the panel did not exceed its authority. Instead, "it merely assumed an evidentiary power that could reasonably be understood as implicit in the powers expressly conferred upon it by the parties." *Id.* at 701. Furthermore, the court noted that the drawing of an adverse inference against a party who fails to come forward with relevant evidence within its control is a reasonable and well-recognized evidentiary rule, which has been routinely applied in labor arbitrations. *Id.* at 702.

Since most reinsurance arbitrations are resolved without a reasoned decision, the adverse inference may never become a part of the record. However, if the panel makes its record as an interlocutory ruling, this might enable both the party seeking the discovery and the party resisting discovery the ability to expressly deal with the issue at the hearing. Another possible sanction could be a panel order striking a claim or defense or barring evidence on an issue. Some commentators also have suggested the use of monetary penalties,[19] but it is difficult to envision the parties to a reinsurance arbitration agreement having intended to grant arbitrators such a power.[20]

Some arbitrators fear that to enforce their discovery rulings with stringent measures may evoke an adverse judicial reaction in confirmation or vacation proceedings. One way to reduce this risk is for the parties and the panel to create a decision-making record that will be clear to a court in a confirmation or vacation action.

CONTINUED

## Conclusion

The analysis of an arbitration panel's powers should begin with the arbitration agreement, then the applicable statutes, including both the FAA and state arbitration acts, and then case law. While the case law may be on point in some instances, a judicial opinion is unlikely to be controlling unless the court has given a reasoned opinion on facts that resemble those of the case before the panel.

At this date, it appears widely accepted that by virtue of the parties' agreement to refer disputes to arbitration, arbitrators have the power to develop and enforce procedures by which they will decide the issues before them. Discovery, now an integral part of the arbitration process, is as much subject to the panel's control as the manner of conducting the hearing or otherwise receiving evidence. The award of the panel is subject to only limited judicial review. The parties acknowledged this when they made their arbitration agreement. Therefore, the parties bargained for arbitrators with authority to grant and limit discovery according to their judgment and discretion.

In considering requests for nonparty discovery, the parties and the panel should consider the enforcement issues that might arise from any subpoena the panel issues. Those enforcement issues will be less problematic for document discovery as opposed to depositions and for discovery within the same judicial district as the arbitration as opposed to discovery elsewhere.

1 See Sigvard Jarvin, *"Choosing the Place of Arbitration - Where Do We Stand?,"* 15 International Business Lawyer 417, 422 (1988).

2 *Compare* ARIAS U.S. Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, p. 12 (September 1999).

3 For example, the reinsurance agreement construed by the court in *Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 840 F.Supp. 578 (N.D. Ill. 1993), aff'd 37 F.3d 345 (7th Cir. 1994), had an arbitration clause which provided "The rules and procedures for pre-hearing investigations shall be established by the board of arbitrators," 840 F. Supp. at 579. The court found this provision to authorize a "discovery-oriented" panel order precluding information discovered in the arbitration from being shared with co-reinsurers.

4 Although the arbitration clause is ordinarily a part of the reinsurance agreement, for many purposes it is treated separate from the substantive contract between the parties. See Martin Domke, domke on Commercial Arbitration §8:01 (Gabriel M. Wilmer Rev. Ed., West 2002).

5 *E.g., In the Matter of the Arbitration Between Integrity Ins. Co. and American Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995). There are many communications that members of the insurance industry commonly understand to be confidential notwithstanding the fact such information might not qualify for protection from discovery on grounds of the attorney-client privilege or work-product doctrine in litigation. Under this clause, an arbitration panel might exercise its power to protect the confidentiality of a cedant's communications with its reinsurance collection counsel and a reinsurers' communications with its reinsurance coverage counsel for the simple reason the parties exchange the positions developed by their counsel and therefore the potentially protracted and technically nuanced debates on privilege will burden the panel with issues of marginal relevance that it may be ill-equipped to properly decide.

6 If state law (*e.g.* Illinois International Commercial Arbitration Act, 710 ILCS 30/1-1, 30/20-50 (2002)) expressly rejects pre-hearing discovery, does the panel lack the power to grant or compel discovery through reliance on federal court decisions under the Federal Arbitration Act? See discussion of issues raised by potential conflicts between such state and federal law in the article by Peter Chaffetz and Steven Schwartz, *"When Worlds Collide,"* Reinsurance, p. 29 (February 1, 2001).

7 This was an issue in the discovery dispute in *In Re Security Life Ins. Co.,* 228 F.3d 865 (8th Cir. 2000).

8 Federal Rule of Civil Procedure 81(a)(3) allows application of the Federal Rules of Civil Procedure to judicial proceedings that are before the court pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), to the extent that the FAA does not provide appropriate procedural rules. Rule 81(a)(3) clearly does not import the Federal Rules of Civil Procedure to private arbitration proceedings that underlie proceedings under the FAA. *See Government of U.K. of Gr. Brit. v. Boeing Co.,* 998 F.2d 68 (2d Cir. 1993); Compare also *Yasuda*, supra, 840 F. Supp. at 579 ("no *right* of discovery exists in arbitration") (emphasis in original), and *Commonwealth Ins. Co. v. Beneficial Corp.,* 1987 U.S. Dist. LEXIS 8828 at *13 (S.D. N. Y. September 22, 1987) ("discovery is not totally unavailable in arbitration").

9 *See* discussion below of statutory bases for vacating arbitration awards.

10 *See* discussion of federal court jurisdictional issues in Susan A. Stone, Thomas D. Cunningham and Patricia M. Petrowski, *"Even Infinity May Have Its Limits: Issuance and Enforcement of Nonparty Discovery Subpoenas in Arbitration,"* ARIAS U.S. Quarterly, p. 24 (Second Quarter 2002) and Teresa Snider, *"The Discovery Powers of Arbitrators and Federal Courts Under the Federal Arbitration Act,"* 34 Tort & Ins. L. J. 101 (1998).

11 The significance of the choice is illustrated by the approaches of the courts in *Meadows Indem. Co. v. Nutmeg Ins. Co.,* 157 F.R.D. 42, 44 (M.D. Tenn. 1993) (deferring to arbitrators' judgment as to materiality and relevance where nonparty closely related to parties to arbitration); *Stanton v. Paine Webber Jackson & Curtis Inc.,* 685 F. Supp. 1241, 1242-1243 (S.D. Fla. 1988) ("arbitrator in his judgment may permit

and supervise discovery as he deems necessary"); and *COMSAT Corp. v. National Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("[O]nce subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena. By failing to do so, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel.")

12 *See* discussion and analysis of non-party discovery cases in Stone, Cunningham and Petrowski, *supra*, n. 9, at 26.

13 The dictum on the interpretation of § 7 of the FAA may be correct, but none of the cases that the court cited interpreted § 7.

14 The Fourth Circuit, in *COMSAT,* likewise held that the FAA does not authorize an arbitrator to compel testimony by nonparties at a pre-hearing deposition. The Eighth Circuit in *Security Life* did not have to address the issue of pre-hearing depositions, stating that it was a moot issue in that case and it could "reserve the question for another day." 228 F.3d at 872. In addressing the issue of pre-hearing document production, the Eighth Circuit in *Security Life* noted: "The burden of producing documents need not increase appreciably with an increase in the distance those documents must travel."

15 A number of commentators have suggested that the *Amgen* decision contains major flaws. *See* Stone, Cunningham and Petrowski, supra n. 9, at 28. *See also* Sean T. Carnathan, "*Discovery in Arbitration? Well it Depends, Business Law Today"* (March /April 2001). Among its flaws is the fact that there was no federal court jurisdiction to decide the issue. This presents the interesting question of what an Illinois state court would have done under the circumstances.

16 Other cases in which an arbitration award survived a Section 10(a)(3) motion to vacate notwithstanding a denial of discovery include: *Chiarella v. Viscount Ind. Co., Ltd.,* 1993 WL 497967 at *5 (S.D.N.Y. Dec. 1, 1993) (denying motion to vacate based on argument arbitrators refused to compel production of documents they had erroneously concluded were privileged); *In the Matter of the Arbitration Between Metalex Corp. v. Sunline Shipping Co.*, 2000 WL 1793195 at *2 (S.D.N.Y. Dec. 6, 2000) (the party moving to vacate failed to demonstrate arbitrator's rejection of its broad discovery request affected aribtration's outcome); I*n the Matter of the Arbitration Between Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement,* 668 F. Supp. 267, 274 (S.D.N.Y. 1987) (a party moving to vacate on the ground arbitrators failed "to insure that relevant document evidence in the hands of one party is fully and timely made available to the other side" must show some resulting prejudice); *Rodriguez v. Prudential-Bache Sec., Inc.*, 882 F. Supp. 1202, 1210 (D.P.R. 1995) ("imposition of discovery cutoff is well within the panel's discretion"); *Dean v. Painewebber, Inc.,* 1992 WL 309606 at *1 (S.D.N.Y. Oct. 14, 1992) (arbitrators' refusal to grant discovery was not ground to vacate arbitration award); and *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002) (arbitrators' refusal to provide reinsurer with discovery with respect to spread sheets prepared by insurer did not render arbitration fundamentally unfair and thus did not provide basis to vacate decision).

17 Section 7 of the UAA provides:
(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence ...
(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

18 United Nations Commission on International Trade Law.

19 *See* Wendy Ho, *"Discovery in Commercial Arbitration Proceedings,"* 34 Hous. L. Rev. 199, 227 (1997). This commentator discusses monetary penalties, but cites no case in which a court approved such penalties imposed by arbitrators as a discovery sanction. An interim award of a monetary penalty might also be subject to immediate judicial review. See *Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) (pre-hearing judicial review of interim security award). A simple option would be to issue a subpoena directed to the party and apply to the court for enforcement.

20 In *Polin v. Kellwood Co.,* 103 F. Supp. 2d 238 (S.D.N.Y. 2000), the arbitration panel did sanction the plaintiff's attorney for misconduct and contempt and awarded the defendant one-half of the arbitration costs, to be paid by the plaintiff's attorney. The panel based its authority for imposing the extreme sanction on the parties' arbitration agreement, rules of the American Arbitration Association, and a municipal ordinance permitting an award of attorney's fees and costs to the prevailing party in an age discrimination claim. The court upheld the panel's sanction.

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*The views expressed herein are not necessarily the views of Lord, Bissell & Brook or its clients.*

# 2002 Annual Conference — Committee Reports

A significant part of the 2002 Annual Conference was the Friday morning breakout into working committees for thorough discussions of each committee's area of responsibility. Following are summaries of those discussions, provided by the chairmen. In many instances, issues were raised that will require further discussion, analysis, and resolution. In some cases, submission to the Board of Directors would be required for adoption.

## Certification

ROBERT M. MANGINO, CHAIR

The ARIAS•US Certification Committee met to discuss the need to make recommendations for changes in the function of the Committee, as well as the criteria for certification. The discussions can be summarized as follows:

1. The Committee need not function as an ongoing committee since it does not review certification applications and does not review the certification criteria on a periodic basis. It might be more appropriate from time to time for the Board of Directors to appoint a Certification Criteria Task Force to review the criteria after a certain amount of time has elapsed since the prior review.
2. The industry experience minimum of ten years is appropriate and should not be changed.
3. The arbitration experience criteria requiring a combination of having completed three arbitrations or having attended three ARIAS seminars or a combination of them totaling three should be retained. However, there was strong feeling among the membership that the required attendance at one ARIAS seminar be satisfied by attendance at one of the hands-on workshops where applicants get intensive practical training.
4. The requirements of three sponsoring letters and approval by a two-thirds majority of the Board of Directors should remain.
5. Questions about military service are passé and should be removed from the application.
6. If a certified arbitrator loses his or her certified status because of a lapse in the payment of dues with a corresponding loss of membership, re-certification should involve some additional obligation:
    a. The membership was evenly split on requiring the former member to pay (1) the lower of all past dues or the initiation fee or (2) only the current dues.
    b. It was also evenly split on whether the applicant (1) should have to go through the full certification process again or (2) complete the process again without the need for sponsoring or seconding letters.
7. Comments on the umpire list:
    a. It would be better to emphasize an arbitrator's umpire experience on the

web site rather than on a list separate from the arbitrators list. (Editor's note: they are linked from the umpire list, as of September.)

b. An arbitrator should not be on the umpire list without demonstrating at least some umpire experience.

## Ethics

RICHARD G. WATERMAN, CHAIR

The ARIAS•U.S. Ethics Committee held a working committee meeting, open to all attendees, to informally address membership concerns about ethical behavior and discuss whether the Guidelines for Arbitrator Conduct need revisions to bring best practice standards into line with current arbitration practices.

Committee members Richard Waterman, Jim Rubin and Susan Grondine led the discussion. Susan recently joined the Ethics Committee to replace Dan Schmidt who has taken on greater responsibilities as Chairman of ARIAS•U.S.

Faced with the ever present challenge to conduct the arbitration process in a fair and impartial manner as well as ethical issues encountered from practical experience, the Ethics Committee meeting produced lively and thoughtful discussion. The recent Sphere Drake v. All American Court of Appeals ruling coupled with the well established practice of arbitrators disclosing relationships with the parties was a particularly hot issue. Jim Rubin, lead counsel for the plaintiff, explained his perspective of the court's ruling and responded to an array of questions from the members in attendance.

By and large, members in attendance believed that party appointed arbitrators should make pre-appointment disclosures of facts that would likely affect their judgment. Moreover, party appointed arbitrators should make a reasonable, good faith effort to identify and disclose any significant personal or business relationship with the parties, their lawyers and with the other arbitrators. It was also suggested that party appointed arbitrators should be willing to make written disclosures, if requested, before the first meeting of the parties and arbitrators.

Another subject that drew a great deal of attention was ex parte communication. Typically, during the pre-appointment process, a prospective arbitrator has limited discussions with the appointing party or counsel concerning the general nature of the case to determine his or her suitability and availability for the appointment. After appointed, the party arbitrator customarily confers with the appointing party concerning the choice of the third arbitrator. Any further communication with party appointed arbitrators is usually determined at the first organizational meeting with the parties and counsel. There was no strong consensus among members in attendance as to whether ex parte communication should end at the organizational meeting or at a later date, perhaps when the initial briefs are filed. Pros and cons for both practices were identified and the opinion of those in attendance seemed to split about evenly. However, when asked separately, a large majority of arbitrators preferred to end all substantive ex parte communication at the organizational meeting.

Repeated arbitration appointments by a law firm or appointing party was another topic that attracted thoughtful discussion. While some members in attendance believed that frequent appointments should be avoided because it may create the appearance of closeness, others did not find the practice unacceptable. No one could quantify how may appointments over what time frame is too many. Members in attendance generally believe that it behooves the individual to make a good faith personal judgment concerning repeated appointments.

And finally, Sue Grondine distributed a summary of the proposed revisions to the ABA Code of Ethics for Arbitrators along with a comparison to the ARIAS•U.S. Guidelines for Arbitrator Conduct. The revised ABA Code of Ethics proposal is a collaborative effort of the ABA and AAA. It has not yet been adopted; however, the final product is not likely to have any substantive changes. As Sue pointed out, the main difference between the proposed ABA Code and ARIAS•U.S. Guidelines is the presumption of "neutrality" for all arbitrators, including party appointed arbitrators, unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide that party-appointed arbitrators will serve as partisans, party advocates or non-neutrals. The Ethics Committee will continue to monitor and evaluate the ABA Code revisions.

## Forms & Procedures

THOMAS S. ORR, CO-CHAIR

The next issue of the Quarterly will include a review of upcoming changes to the Practical Guide.

## Mediation

ROBERT M. HALL, CHAIR

The meeting of the Mediation Committee was well attended.

There was a general consensus of the members that: (a) mediation is an effective technique for the resolution of disputes between insurers and reinsurers; (b) as an ADR technique, meditation does not conflict with arbitration but merely provides an additional tool to be utilized by the disputants; (c) support of mediation as an ADR technique was not in conflict with the charter of ARIAS•U.S.; and (d) ARIAS•U.S. should support mediation as an effective ADR technique.

The Chair announced that the Board of Directors of ARIAS•U.S. had agreed to sponsor a mediation training session in 2003 using a professional trainer and several ARIAS•U.S. members as coaches. The Chair, along with Linda Lasley and Richard Waterman, will be organizing this effort.

Members of the Committee recommended a future presentation to the members of ARIAS•U.S. concerning the benefits of mediation to insurers,

reinsurers, law firms, and intermediaries. The Chair agreed to attempt to organize such a presentation and received a number of volunteers both for this effort as well as to support mediation training.

## Publications

T. RICHARD KENNEDY, CHAIR

The Publications Committee resolved to move forward in improving ARIAS•U.S. communications both among members and with related outside organizations. Improved communication necessarily involves keeping all of our members informed of important developments in arbitration practice. Our principal vehicle for accomplishing this will be the ARIAS Quarterly. We will strive to include in each edition articles dealing with both current legal issues and matters of interest to industry persons involved in the complex field of dispute resolution. We also want to encourage members to submit notes about their business activities so that we can keep each other informed about what we are doing.

You will note that this Quarterly carries three excellent articles by Attorneys Bob Knuti, Tom Newman and Jay Wilker regarding discovery issues that increasingly confront arbitrators and counsel in insurance and reinsurance arbitrations. Our many lawyer members, including both arbitrators and counsel, are encouraged, likewise, to submit quality articles for publication.

We are exploring the possibility of making our Quarterly available to law schools and judiciary entities to broaden the knowledge and enhance the understanding of legal developments in the field of insurance and reinsurance dispute resolution.

I am happy to report that Ron Gass has agreed to report on a significant court decision for each of our Quarterly publications. His first "Case Note Corner" appears in this edition.

In future editions, we intend to publish more articles of interest to the insurance industry. Likely subjects include whether arbitration procedures today are better or worse than in the past, means of holding down the costs of arbitrations, and whether mediation may be "the next big thing" in resolution of insurance and reinsurance disputes. Paul Walther of our Committee will be calling on non-lawyer members in particular to contribute such articles.

Charles Fortune and Angus Ross of our Committee are spearheading an effort to improve communications with existing national chapters of ARIAS in the United Kingdom and France, as well as with interested AIDA organizations in other countries or regions of the world. We hope to report on developments abroad in future issues of the Quarterly, and to encourage our counterparts in the other countries to report to their members about the activities of ARIAS•U.S.

The Publications Committee, together with Larry Schiffer and his Technology Committee, is working to make the past issues of the Quarterly available online so that members will have instant access to articles and news developments. With the continuing support of Bill Yankus and the CINN staff, we hope to reach the online goal within the next several months.

We welcome your ideas regarding the Quarterly and other means of improving communications among and about our members and our organization. Most of all, we welcome your articles and news items to be submitted for publication.

## Technology

LARRY P. SCHIFFER, CHAIR

The Technology Committee attendees included your chair, Larry Schiffer, Carol Correia, Jim Leatzow, Nasri Barakat, Tom Tobin, Mark Gurevitz, and Bill Yankus. A new web site design was demonstrated and discussed. The new design is in the process of being readied for implementation in the near future.

An open discussion was held concerning potential improvements and enhancements to the web site and the use of technology for ARIAS•U.S.

The ideas discussed, in no particular order, were as follows:

- developing a searchable arbitrator database on fields such as name, location, and expertise/line of business
- activating email and website links on arbitrator biographies
- developing the ability for arbitrators to update their biographies by themselves through a password-protected login
- developing a members-only area on the website that would include a library of conference papers and a threaded discussion area
- posting of workshop and fact pattern materials prior to conferences
- enabling the umpire selection procedures for use on the website
- developing the ability to become a member on-line
- making all ARIAS•U.S. forms downloadable in more-useable word processing format
- creating an announcement section on the website for member moves, changes, and other developments
- developing the ability to have electronic proxy voting for membership meetings
- providing members with the option to receive the Quarterly electronically instead of by mail
- raising the profile of the website on Internet search engines
- creating an email address for the Board to allow members to email the Board directly on issues
- adding the ability to show the number of appointments as an umpire to the names of the certified arbitrators on the umpire list

Many of these suggestions are already on our priority list with the new web site developer. The Technology Committee invites all members to email or contact us with suggestions for improvements at any time.

ARIAS•U.S. Spring Conference

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# The Production of Documents in a Reinsurance Arbitration Proceeding

P. JAY WILKER

When reinsureds and reinsurers find themselves in arbitration they inevitably are going to be required to disclose sensitive files relating to their underwriting practices and claims decisions. What are their likely obligations in this regard? More specifically, to what extent and under what circumstances can a request for production be successfully resisted?

This paper will address the circumstances of when a cedent or reinsurer can protect its underwriting files, and particularly its sensitive claims and "legal" files, from discovery, and what can be done to increase the odds of success in objecting to a demand for production. The issues revolve around relevance of the material in the first instance; and then since often the most sensitive files are those containing the advice or work-product of their lawyers, when are those files deemed protected by the attorney-client privilege or the work-product doctrine?

## When is a Document Irrelevant?

In a reinsurance arbitration, the arbitration panel is not ordinarily bound by any rules of procedure relating to discovery. Yet, absent an agreement requiring a more restrictive standard, normally a panel will find guidance in Rule 26 of the Federal Rules of Civil Procedure, which requires the production of documents containing information "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence." A good definition of "relevant evidence" is found in Rule 401 of the Federal Rules of Evidence, which states that relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the dispute "more probable or less probable than it would be without the evidence."

It is not likely that a panel will order a party to produce such documents that have no bearing on the issues in dispute. There are two considerations as to whether a party in an arbitration proceeding should be required to produce such documents requested by the opposing party: the burden on the producing party and the degree to which the requested documents are proprietary and confidential.

Ordinarily, a panel will not order the production of marginally relevant documents if the search for or gathering of such documents would be overly burdensome relative to the likelihood that the documents might prove or disprove an issue in dispute or lead to relevant evidence that might do so. In other words, the panel typically weighs the burden of production against the potential relevance.

This balancing can be particularly important where so called "electronic" discovery is requested because of the inherent burden of searching through masses of e-mails (including so-called "deleted" e-mails, which often can be recovered by experts despite the deletion) and other computer-stored data. Computer records, including records that have been "deleted," are deemed to be documents for discovery purposes under Rule 34 of the Federal Rules of Civil Procedure. *See, e.g., Simon Property Group v. mySimon*, 194 F. R. D. 639 (S. D. Ind. 2000). The best way for a company to limit the potentially disastrous consequences lurking in the production of its e-mail traffic is to adopt a "retention" (or, more precisely, non-retention) program. Such a program entails routine destruction of different categories of electronic documentation pursuant to a written time schedule; routine deletion of all e-mails unless they are needed as a record; and training of employees to avoid putting into e-mail communications statements that would be embarrassing if disclosed in the event of a dispute.

Computer records, including records that have been "deleted," are deemed to be documents for discovery purposes under Rule 34 of the Federal Rules of Civil Procedure.

Often a party will request the production of documents that are highly confidential, such as client lists, pricing data, unique reinsurance programs, or files relating to settling or paying claims in situations that are argued to be similar to the one in dispute in the arbitration. While such information may be relevant to the issue in dispute, it is often vital that such information not fall into the hands of the producing party's competition because it is proprietary to the party that created the document; that is, the information gives that party what it considers to be a competitive advantage, which would be lost if its competition could gain access to that information.

Normally an arbitration panel should take into consideration the obvious confidential nature of the material requested in deciding whether it should be produced at all. If the requested material is only marginally relevant, then perhaps it should not be produced. If it is seen as relevant, however, then there are ways of protecting its confidentiality. One way is to strictly limit production to the panel alone *in camera*. Another way is to allow it to be viewed by counsel alone, and not the officers and employees of the opposing party itself, pursuant to a confidentiality order from the panel. Another less restrictive confidentiality order might permit the requesting party's specifically identified personnel and its counsel and any experts to see the documents.

An issue that occasionally presents itself in reinsurance arbitrations is how to obtain discovery from a reinsurance broker or intermediary. This issue will inevitably arise where the cedent's records are maintained by the broker, which is typically the case with Lloyd's syndicates. Since the broker is almost always the agent for one of the parties in an arbitration (usually the cedent), the panel may direct the party-principal to ask its broker-agent to produce certain documents requested by the opposing party. Under such circumstances the broker needs to be given precise instructions as to the scope of its search and to protect any arguably confidential or privileged documents. Often the broker will seek indemnity under such circumstances in addition to precise written instructions.

A more difficult problem is presented when the broker is not the agent of any particular party in an arbitration because there is no longer any relationship between the cedent or reinsurer and the broker which still maintains the documents being sought. It may be difficult, or even impossible, to compel the broker to produce discovery. *See, Viking Ins. Co. v. Rossdale*, Queen's Bench Division, Commercial Court, [2002] 1 Lloyd's Rep 219 (August 1, 2001), where the London High Court refused to order the depositions of former employees of a London broker pursuant to a request by an arbitration panel in a reinsurance arbitration between Viking Insurance Co. and another insurance company against certain Lloyd's underwriters and others pending in New York.

## Attorney-Client Privilege and Work Product Immunity in Arbitration

Assuming that requested documents are relevant, they still should not have to be produced if they are protected by the attorney-client privilege or the work-product doctrine. Since most disputes between cedents and their reinsurers are resolved through arbitration, as opposed to litigation, it should be noted at the start that the attorney-client privilege and the work product doctrine generally apply in an arbitration proceeding with the same force they would in a litigation. *Paine Webber Group, Inc. v. Zinsmeyer Trusts Partnership,* 187 F. 3d 988, 991 (8th Cir. 1999); *Metelex Corp. v. Sunline Shipping Co., Ltd.*, 2000 U. S. Dist. LEXIS 17462, at *6 (S. D. N. Y. 2000) ("The arbitrator is the judge of the admissibility and relevance of evidence submitted in an arbitration hearing ... and courts will not reverse his evidentiary decisions unless they deprive a party a fundamentally fair hearing.")

## Definition of Attorney-Client Privilege

The classic definition of the attorney-client privilege was set forth by Judge Wyzanski in United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950), as follows:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication

... the attorney-client privilege and the work product doctrine generally apply in an arbitration proceeding with the same force they would in a litigation.

was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

## Definition of Work Product Doctrine

The work-product doctrine is not a privilege that protects confidential communications between a client and attorney. Rather, it is essentially a discovery rule. Thus, it makes sense that the doctrine is set forth as a discovery rule in various state codes, such as New York's Civil Practice Law and Rules §3101(d) (2), and Federal Rules of Civil Procedure 26 (b) (3). Rule 26(b) of the Federal Rules of Civil Procedure provides as follows:

> [A] party may obtain discorvery of documents and tangible things otherwise discoverable...and prepared in anticipation of litigation for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Unlike the attorney-client privilege, which provides complete protection for confidential communications, the work product doctrine provides a *qualified* protection from discovery in a civil action when materials are:

- documents and tangible things otherwise discoverable;
- prepared in anticipation of litigation or for trial; and
- prepared by or for another party or by or for that other party's representative.

To overcome the qualified protection, the party seeking discovery must make a showing of:

(1) substantial need for the materials; and

(2) inability to obtain the substantial equivalent of the information without undue hardship.

*See* Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* at p.482 (4th ed 2001) (hereinafter "Epstein"). Even upon such a showing, however, the court is required to protect the attorney's mental processes from disclosure to the adversary. *Id.*

## Attorney-Client Privilege and Work-Product Doctrine at a Corporation

There is no doubt that the attorney-client privilege and work-product doctrine apply to communications with and work done by in-house counsel. In the federal context, the leading case is *Upjohn v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981). New York, too, recognizes an attorney-client privilege for corporations for communications with in-house counsel. *See Rossi v. Blue Cross & Blue Shield,* 73 N.Y. 2d 588, 592, 542 N.Y.S. 2d 508 (1989). The *Upjohn* and *Rossi* decisions are classic cases, providing excellent guidance for counsel wrestling with the scope of the attorney-client privilege.

In essence, the four elements are required to establish the existence of the attorney-client privilege:

- A communication;
- made between privileged persons;
- in confidence;
- for the purpose of seeking, obtaining, or providing legal assistance to the client.

*Reinstatement 3d, The Law Governing Lawyers* §68 (2000). It is the fourth element that creates most of the problems for insurance and reinsurance companies. Before turning to that element in detail, a brief comment or two on the first three elements is warranted.

First, it is obvious that for there to be a privileged communication, there must be a communication, whether oral or in writing, and that the attorney-client privilege protects only the contents of the communication, not the facts themselves. It is important to remember that the privilege cannot make discoverable *facts* privileged by communicating them to a lawyer.

Second, the attorney-client privilege extends only to communications between "privileged persons." Privileged persons include the client, the client's attorney, the communicating agents of either the client or the attorney, and agents of the attorney for the purposes of representation.

Third, the communication must be confidential, and the corporation must take appropriate action to keep the communication confidential in order to preserve the privilege. At the same time, most courts hold that an "unintended and erroneous disclosure of a document containing privileged material does not constitute a waiver of the privilege if the attorney and client have taken reasonable precautions to ensure confidentiality." *Note Funding Corp. v. Bobian Inv. Co.,* 1995 U.S. Dist LEXIS 16605, at *14-15 (S.D.N.Y. Nov. 9, 1995).

## For the purpose of obtaining or providing legal advice

Because the privilege is intended to encourage legal advice, it does not cover communications to counsel that assist the attorney in performing business services, as opposed to legal services. If the attorney is rendering business advice, as opposed to legal advice, there is no privilege attached to the communication made in connection with that service. The big question is that: when is an attorney giving legal advice?

This is particularly problematic for in-house counsel who often wears two hats, and in-house counsel's communication may be relevant in both capacities. Thus, it is usually necessary to determine in what capacity the particular communication was made in order to determine whether a privilege attaches to that communication. The question of in what capacity the in-house counsel is functioning when giving advice arises with substantial frequency and is hard to resolve. Courts have held that drafting legal documents, being the recipient of a document, participating on a corporate committee, functioning as a business advisor, negotiating on behalf of the corporation, conducting an audit and acting as an information gatherer are *not* for the purposes of obtaining or rendering legal services and are, accordingly, not protected. *See* cases discussed in Epstein at pp 230-51.

## Claims Investigations

Probably the greatest uncertainty as to whether a communication to or from an attorney at an insurance or reinsurance company is to be protected from discovery arises in connection with the attorney's dual role as an attorney and a claims advisor/investigator. Both the attorney-client privilege and the work-product doctrine are often implicated in the context of claims investigations, and they will be discussed together at this point. It is important, however, to keep in mind the differences between the two potential protections when trying to determine the extent to which the attorney's services are protected from disclosure.

The application of the attorney-client privilege and work-product doctrine to the business of insurance and reinsurance raises difficult and complex issues not present in other areas of business. For most businesses, investigations done by counsel may be presumed to be privileged or covered by the work product doctrine. That is not necessarily the case for insurers and reinsurers, where claims investigation is an ordinary part of everyday business. Thus, for example, one court noted:

> Insurance Companies regularly take statements from witnesses during the routine adjustment of a potential insurance claim. The collection of [a witness's] statement during the ordinary course of business need not raise the protections afforded to attorney work product despite defendants' claim that prudent parties anticipate litigation and act with that possibility in mind. Defendants' assertions cannot protect the witness's statement from discovery absent a showing that their investigations were conducted primarily for the purposes of future litigation and outside the ordinary course of investigating a potential insurance claim.

Holton v. S & W Marine, Inc., 2000 U.S. Dist. LEXIS 16604, at *8 (E.D. La. 2000).

The application of the work-product doctrine is particularly difficult in the context of insurance and reinsurance claims. *See Connecticut Indem. Co. v. Carrier Haulers, Inc.,* 197 F.R.D. 564, 570 (W.D.N.C. 2000), where in a coverage dispute the court held that an attorney's claim investigation files were not protected by the work-product doctrine since they were generated in connection with determining coverage and not in anticipation of litigation. However, the court held that one letter between the attorney and the insurance company was protected by the attorney-client privilege since the advice he gave in that communication was legal advice and not business advice. Another court, noting that to the extent outside counsel acted as claims adjusters, their work-product, communications to client, and impressions about the facts would be treated as ordinary business of the insurance company and outside the scope of the attorney-client privilege and work-product doctrine, ruled that the "mental processes and opinions of counsel which truly bear on anticipated, choate litigation" will be protected from disclosure. *Mission National Ins. Co. v. Lilly,* 112 F.R.D. 160, 164 (D. Minn. 1986).

A case illustrating how difficult it is to protect the work-product of an attorney conducting a claims investigation is *St. Paul Reinsurance Co. v. Commercial Financial Corp.*, 197 F.R.D. 620 (N.D. Iowa 2000). In that case a group of London Market insurers, who provided employment practice liability coverage to Commercial Financial Corp. ("CFC"), alleged that CFC made material misrepresentations in its application for the insurance coverage and sought to rescind the policy. CFC counterclaimed, asserting that the insurers acted in bad faith by denying the claims, and sought discovery of documents generated by an outside attorney working for a claim adjusting organization in connection with his investigation of the issue of whether CFC had failed to disclose material information. CFC also sought to obtain information about other bad faith claims asserted against the London Market insurers. The court denied the request for information relating to other bad faith claims on the ground of irrelevance, but ordered production of the claim investigation file.

The London insurers argued that documents generated with regard to CFC's claims after they began to consider rescission of the policy were privileged. The documents reflected communications between an outside attorney heading up a claims management company hired by the London Insurers, and others, as part of the attoney's investigations of the claim that became the subject of the

litigation in the St. Paul Re case. CFC replied that the investigations were performed to evaluate and adjust the claim, not necessarily in anticipation of litigation, pointing out that because the dispute involved a first-party claim in which litigation is not a foregone conclusion (as might be the case with third-party claims), it could not be asserted that claims adjusting automatically anticipates litigation.

The court rejected the view that all claims investigation files might be protected from disclosure because they were prepared by an attorney and further rejected the contention that the reports had been prepared in anticipation of litigation. The court noted that the key issue is did a "shift" occur from determining coverage to preparing for litigation. The court, finding no clear distinction, held that even when the insurers and their attorney began to consider rescission on the grounds of nondisclosure, that consideration was part of the investigation of the availability of coverage, thus part of an insurer's normal business processes. The court further declared that even after a determination to litigate is made, some documents may still fall outside work product protections if the primary purpose for preparing specific documents is purely claims investigation. Thus, the court concluded that documents created after the decision to litigate simply to determine whether a factual basis existed to deny coverage were discoverable. Id. at 636-38. Finally, as to a possible attorney-client privilege, the court rejected assertions by the London Market insurers that the attorney claims investigator was acting as an attorney and rejected claims that the documents were protected by the attorney-client privilege. Id. at 640.

A recent case illustrating the importance of a carefully drafted privilege log when an insurer or reinsurer is attempting to prevent documents prepared by its attorneys from being disclosed is *Employers Reinsurance Corp. v. Mid-Continent Cas. Co.,* 2002 U. S. Dist. LEXIS 9636 (D. Kan. 2002). In that case, involving a dispute as to whether Employers Re had to pay a portion of the Mid-Continent's declaratory judgment expenses, the district court upheld a federal magistrate's order directing Employers Re to turn over documents concerning Employers Re's obligations with respect to a disputed claim that were prepared by attorneys for Employers Re for its in-house counsel in "the property and casualty department," including memos that were updated after the litigation had begun because Employers Re had failed to meet its burden of showing that the documents were prepared in anticipation of litigation as opposed to being prepared in the ordinary business of claims review. In particular, the court was critical of Employers Re's privilege log for failing to meet what the court considered to be Employers Re's burden of showing why the documents were protected by the attorney-client privilege or work-product doctrine. Id. at *16-17.

The distinction between what is prepared in the ordinary course of an insurance company's claims investigation and what is prepared in anticipation of litigation is illustrated in the case of *Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532 (S.D.Ind.1999). That case involved a products liability dispute between Goodyear as a supplier of rubber hoses to Chiles Power, where the hoses were failing, resulting in numerous claims being made against Chiles Power by its customers. Goodyear sought to obtain the investigation files of Chiles Power's insurer whose counsel had interviewed hundreds of Chiles Power customers. The court precluded production on the grounds that the documents were protected by the work-product doctrine. The court noted that at the time the investigation was being conducted there was a "prospect of litigation" as evidenced by many individual lawsuits and a threatened class action suit, and the "primary motivation in taking the witness statements was to prepare for litigation." The court placed considerable importance upon the fact that the lawsuits were third party claims, reasoning that any investigation of those claims would be more likely to be in anticipation of litigation than would be the case of an insurer's investigation of a claim by the insured against its insurer. *Id.* at 536-38.

At the risk of over simplifying the meaning of the *St. Paul Re* and *Goodyear* cases, one can assume that in the context of claims investigations done by or for an attorney, a document will not be protected under either the attorney-client privilege or the work-product doctrine unless the possessor of the document can show that the document was prepared in anticipation of litigation/arbitration. This is so because, with respect to the attorney-client privilege, the most practical way to satisfy the fourth element of "for the purpose of seeking, obtaining, or providing legal assistance," is to show that the work was in anticipation of litigation, as opposed to ordinary coverage determination. And in order to sustain work-product protection, it is of course essential that it be shown that the document was generated in anticipation of litigation. So how is this showing made? The best way is to analyze the "shift" factors to determine at what point an ordinary claims investigation "shifts" from the business of determining coverage to "in anticipation of litigation." The court in the *St. Paul Re* case, quoting a decision in the Southern District of New York entitled *United States Fidelity & Guaranty Co. v. Braspero Oil Services Co.*, 2000 U. S. Dist. LEXIS 7939 (S. D. N. Y. 2000), identified these factors as: (1) "the retention of an attorney" (although the court in the *St. Paul Re* case pointed out that "the hiring of an attorney should not necessarily insulate an insurance company behind the work-product privilege," *St. Paul Re,* 197 F.R.D. at 635); (2) "whether the parties were still jointly exploring ways to resolve their differences," *Id.*; (3) "whether either party had declared a definite position or both were still considering their positions," *Id.*; (4) "whether, once a position was declared, what was done would have been done for business purposes, regardless of the possibility of litigation," *Id.*; and (5) "what the parties' routine business practice of investiga-

tion was." *Id.*

As noted, the court in *St. Paul Re* found that the documents prepared by the outside attorney hired to do the London Insurers' claims investigations were not protected. The court did so utilizing the five "shift" factors, and distinguishing its situation from the investigation done by the investigators in the *Goodyear* case because in that case the "insurer had made the required showing of work product protection where it showed that it anticipated litigation when its lawyers and investigators obtained witness statements indicating a product defect, and the insurer presented 'specific facts' indicating that the statements were taken to prepare for that litigation." *Id.*

## The Cedent-Reinsurer Relationship

As bad faith claims against insurers have increased, so have discovery demands for reinsurers increased as policyholders look to reinsurers for information relating to cedents' decision to deny coverage or to refuse a reasonable settlement demand by the third party suing the policyholder. The policyholder may look to the reinsurer's reserve settings, or an evaluation of potential exposure, to support an argument that the insurer is wrongfully denying coverage or undervaluing a claim during settlement negotiations or litigation.

Policyholders may claim that an insurer's disclosure to its reinsurer of information otherwise protected by the attorney-client privilege constitutes a waiver of the privilege. In response, reinsurers often assert that a "common interest" exception to waiver applies in the context of the cedent-reinsurer relationship. It is recognized that the "common interest" exception to waiver is applied when the third party that received the communication shows a common interest in the litigation with the client not seeking discovery. See *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London,* 176 Misc. 2d 605, 611, 676, N.Y.S. 2d 727, 731-32 (N.Y. Sup. 1998.

A decision in the Southern District is somewhat troubling. In *Reliance Insurance Co. v. American Lintex Corp.*, 2001 U.S. Dist. LEXIS 7140 (S.D.N.Y 2001), the court ordered Reliance to produce correspondence between Reliance and one of its reinsurance underwriters containing a communication between Reliance and its counsel relating to the insured's claim against Reliance because "the existence of this relationship [between insurers and reinsurers] alone is not a sufficient basis upon which to find that the attorney-client privilege [bars disclosure.]" *Id.* at *11.

## Practical Considerations

1. You should always start with an assumption that there is no protection. It is best for in-house counsel for a reinsurer to operate on the assumption that the claims investigation/analysis services they provide for their company are not protected from disclosure under the attorney-client privilege or the work-product doctrine. Counsel should inform their staff and everyone in the company communicating with counsel that whatever is communicated to counsel by oral conversation, email, memo or otherwise on the subject of claims coverage is more likely than not to be considered ordinary business and not protected from discovery in the event of litigation or arbitration. All key personnel should be advised that just because a communication is to or from an attorney, the communication will not necessarily result in protection from discovery.

2. You should separate coverage investigations from dispute resolution. The determination of whether there is coverage of a cedent's claim or a cession to a retrocessionaire is not likely to be protected from discovery because such determinations are part of the ordinary business of a reinsurer. Indeed, since a reinsurer has an obligation to follow its cedent's fortunes, it cannot be said that there is a presumption that a claims audit or investigation is in contemplation of litigation. But, having conducted the audit or investigation, if the company then decides to dispute the issue, at that point communications and work-product are arguably protected by the attorney-client privilege and work-product doctrine. Thus, as a practical matter a reinsurer should set up and use two separate files: a claims file for documents generated in the course of ordinary processing of claims, and a litigation file for documents generated at the post-decision-to-dispute stage. A reinsurer should clearly differentiate between the two sets of files by establishing and recording the date when a decision is made to dispute the coverage issue. To use the term used by the *Mission National Insurance* case, determine an inchoate from a "choate" decision to litigate or arbitrate and maintain two sets of files based on that distinction.

3. You should maintain confidentiality. Communications and documents relating to dispute resolution should be designated and kept confidential. Communications should be limited to the decisionmakers and those working directly for the attorneys in connection with a specific dispute-related assignment. For example, just because a reinsurance broker is involved in a disputed claim, he or she should not be copied on a memorandum prepared by or for counsel that is intended to be protected.

4. You should make clear the intent to protect post-dispute communications and documents. In this regard, designate internal emails and memoranda with the notation "Confidential Attorney-Client Privilege/Work-Product" or the

like. Attorneys and their staff, and employees communicating with attorneys should make clear that their communications relate to a dispute, by using such phrases as "in connection with the dispute we have with X" or the like.

5. You should separate pre-dispute and post-dispute work assignments. Investigations and analytical work to determine if there is coverage should not be mixed with the similar type of work in furtherance of litigation or arbitration. Thus, wherever possible, when an assignment is made to an attorney or an attorney's staff, the assignment should be either clearly related to ordinary claims processing or to dispute resolution, not both.

6. Keeping in mind that "facts" are not protected by the attorney-client privilege or the work-product doctrine, counsel and their staff should not put documents generated in the ordinary course of business in a litigation file. Only the work-product and communications are protected, not the data assembled to do the work. Ordinary business generated data (i.e., documents recording the data) should be returned to the files kept in the ordinary course of business and not maintained in the litigation file. If a court sees non-protected information intertwined with arguably protected information, it may rule that the entire file should be produced in discovery. Thus, for example, in a dispute over the number of occurrences in a cession of a loss, an analysis of the reinsurer's past payment practices for similar cessions might be done after a decision to challenge the cession has been made. The analysis, and particularly the conclusions made in connection with the analysis, arguably are protected, but not the facts or data from which the analysis was made. Keep the two separate in order to improve the chances of keeping the analysis protected.

7. You should separate legal advice from business advice when communicating with management. For example, if a reinsurance attorney prepares a report to management on the status of claims, and the attorney recommends that certain of those claims be challenged potentially resulting in the likelihood of litigation or arbitration, any such recommendation and the reasons for such recommendation, including any legal analysis regarding the likelihood of success, should be set forth in a separate submission. Minutes of claims committee meetings should be prepared and maintained with the idea that they may be produced in discovery as ordinary business records as opposed to attorney work-product.

8. You should separate legal services from business services. When rendering legal advice or doing work which is legal, do not mix that advice and services (or communications and documents generated in connection with those services) with what is likely to be deemed business advice or non-legal work. For example, if the attorney is drafting a memorandum regarding claims processing, and the attorney also intends to render legal advice with respect to that subject, that advice should be put in a separate memorandum clearly identified as covered by the confidential attorney-client privilege and work-product doctrine.

9. You must avoid waiving the privilege. In the context of litigation or arbitration, whether a discovery demand is by document demand, interrogatories, or depositions, the attorney-client privilege and the work-product doctrine should be asserted where appropriate to avoid a waiver. To maintain the protection of the work-product doctrine, that doctrine must be separately asserted. Assertion of the attorney-client privilege alone is not sufficient. Keep in mind that a disclosure of one aspect of an arguably privileged matter to a third party, can result in a waiver of the entire matter.

10. Where a policyholder serves a discovery demand on the reinsurer of the ceding insurer in an insured vs. insurer dispute, the reinsurer should stress the common interest among the cedent and the reinsurer, pointing out the reinsurer's right to associate and duty to follow the cedent's fortunes/settlements. Where practical, the reinsurer should follow the cedent's lead in any discovery dispute brought on by the policyholder.

## Conclusion

When parties to a reinsurance agreement find themselves in an arbitration proceeding, it is inevitable that they are going to be required to produce documents from their files that contain highly confidential information relating to various aspects of their business and/or documents that are the product of their lawyers. The most that can be expected is that by taking the appropriate steps suggested in this article, the parties will be able to minimize what must be disclosed and then to obtain the appropriate confidentiality order to try to protect the information that must be disclosed.

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*P. Jay Wilker is a partner in Wilker& Lenci, LLP, a firm concentrating in reinsurance dispute resolution and complex commercial litigation. The views expressed herein are not necessarily the views of Wilker & Lenci or its clients.*

# Newly Certified Arbitrators

in focus

## Carol Correia

Carol Correia has 25 years of underwriting and management experience in the insurance and reinsurance industry. Currently, as the principal of Re: Insurance Solutions LLC, she acts as a consultant to the industry. She draws upon her background to offer expertise in areas of strategic and production planning, due diligence reviews, corrective action underwriting, product development, informational system design, run-off, arbitration.

Ms. Correia established her foundation underwriting skills at Aetna Life and Casualty. She expanded her casualty expertise at Hartford Specialty where she underwrote national accounts and specialty excess casualty lines.

She was a member of the original underwriting team which became Transamerica Reinsurance Co. in 1987 and evolved into TIG Reinsurance Co. in 1993. TIG Re was credited as being the largest insurance IPO to date and subsequently ranked among the top ten U. S. reinsurers, holding both a domestic and international presence. Ms. Correia was instrumental in placing worldwide retrocessional covers and establishing a London branch and a Lloyd's syndicate for the company.

From 1998 to 2000, Ms. Correia held an executive management position for a newly created casualty treaty division of the Kemper Group. During that period, the business, including a portfolio of $100,000,000 in U. S. and international clients, was sold to Rhine Re Global to serve as their U. S. reinsurance platform.

As a veteran of several start-up operations, Ms. Correia has been responsible for developing and maintaining strategic relationships with broker and client networks, instituting underwriting guidelines and processes, defining corporate culture, and negotiating critical market opportunities.

Ms. Correia graduated summa cum laude with a BA from University of Connecticut. She has completed a number of graduate courses in Business Administration.

## Lawrence F. Harr

Lawrence Harr is a partner in the Omaha, Nebraska law firm of Lamson, Dugan & Murray, LLP. With over 30 years experience in the insurance industry, he has a broad background in insurance, reinsurance and managed care. His practice focuses on insurance regulation and reinsurance issues. He is a member of the Board of Directors of Arch Reinsurance Company, Arch Excess and Surplus Insurance Company, Platte River Insurance Company (f/k/a Underwriters Insurance Company) and Protection Life Insurance Company.

Prior to joining Lamson, Dugan & Murray, he was with Mutual of Omaha Companies for 23 years. He held a variety of positions with that organization, including Executive Vice President and Chief Counsel. He was a member of the Board of Directors of several of the companies in the Mutual of Omaha Group.

Following his military service, he was an attorney for the Nebraska Insurance Department. He also served as Deputy Receiver in connection with liquidation of a property and casualty insurer. He was the Chief Executive Officer and General Counsel of the Consumer Credit Insurance Association.

Mr. Harr has served as a member of the Board of Directors and Chairman of the National Organization of Life and Health Guaranty Association, the Nebraska Insurance Federation, the Nebraska Guaranty Association and the Consumer Credit Insurance Association. In addition, he has also been actively involved with the American Council of Life Insurers and the Health Insurance Association of America. His professional memberships include the Nebraska Bar, Illinois Bar, Association of Life Insurance Counsel, Federation of Defense Counsel and Defense Research Institute.

Mr. Harr is admitted to practice in Nebraska and Illinois. He received a B.S.B.A. from Creighton University and a J.D. from Creighton University School of Law.

Carol Correia

Lawrence F. Harr

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Leo J. Jordan

Jim Leatzow

Lydia B. Kam Lyew

## Leo J. Jordan

Leo J. Jordan recently retired as vice president and counsel of State Farm Insurance Companies. As a member of the corporate law department, he was primarily responsible for the legal and regulatory activities of State Farm Mutual Auto Insurance Company and its property, casualty, life and health affiliates. Jordan also had legal responsibility for State Farm's reinsurance operations including treaty negotiations with foreign and domestic reinsurers. Prior to joining the corporate law department, he was responsible for property and casualty claims in State Farm's Southwestern Region, comprising Texas, Oklahoma and New Mexico.

Mr. Jordan's professional expertise is in insurance substantive law. From a practical viewpoint this includes (1) counseling corporate executives in complying with state and federal legislation and regulations; (2) managing litigation relating to major insurance claims involving coverage, extra-contractual and bad faith litigation; and (3) supervising non-claims litigation involving agents, antitrust, civil rights and class actions.

Leo Jordan is a graduate of King's College and the University Of Maryland School Of Law. He is admitted to practice in New York, Illinois, Maryland, Texas, as well as the U.S. Supreme Court. He is active in the American Bar Association, where he is past-chair of the Section of Tort Trial and Insurance Practice Section. He also served in the ABA House of Delegates and has authored numerous law review articles.

In addition to ARIAS•U.S. Mr. Jordan is a member of numerous professional organizations including, CPR Institute for Dispute Resolution and its insurance and fair housing panels, Defense Research Institute, Federation of Defense and Corporate Counsel and the National Institute for Dispute Resolution. He is also a certified mediator having completed 40 hours training at a federal court mediation program.

## Jim Leatzow

As an ARIAS•U.S. Certified Arbitrator, focusing on insurance and re-insurance disputes, Jim Leatzow brings to the process a perspective built on his 30+ years of experience creating and implementing specialized insurance programs, while managing and adjudicating claims. Jim Leatzow's knowledge, experience, and insight give him the foundation for effective dispute resolution.

In 1975, after nearly 10 years in the insurance business, Jim Leatzow built his own national insurance agency from the ground up. Leatzow & Associates has continued to operate nationally since that time. His specialties and those of his firm over the last 34 years have grown to include the creation of numerous national insurance programs; creation of off-shore insurance and reinsurance facilities; being "given the pen" as a national Managing General Agent for various insurance companies for the past 23 years; creation and implementation of specialized risk management programs to targeted industries for the last 20 years; managing and adjudicating claims as a national Third Party Claims Administrator for the last 10 years; and serving as Chairman and Chief Executive Officer of a reinsurance company for the last 10 years.

In fact, Mr. Leatzow has worn nearly every hat in the insurance industry, on the marketing, underwriting, and claims sides of the business. His unique perspective from all levels offers rare insight into every aspect of the insurance business.

Jim Leatzow is a frequent speaker to large national trade association meetings and is a guest lecturer at many large universities on such topics as risk management, claim avoidance, Risk Retention Act issues, creative thinking, and improving communications in organizations.

Jim Leatzow graduated from Ripon College, Ripon, Wisconsin and served as a Commanding Officer in the Army Corps of Engineers from 1970 to 1974.

## Lydia B. Kam Lyew

Lydia B. Kam Lyew established REnamics LLC in 2001 after 26 years as a senior executive in the reinsurance industry. REnamics LLC is an independent consulting firm specializing in insurance and reinsurance issues. Its consulting scope encompasses the following areas:

Arbitrations, Commutations, Runoff, Due Diligence Reviews (underwriting, claims, operational, processes), Strategic & Management Operational Planning, Marketing Strategies & Tactics, Product Development, Information Technology:

Needs & Utilization Assessments, Research Projects.

Prior to the establishment of REnamics LLC, Ms. Kam Lyew led the formation of a new reinsurance underwriting operation, Equus Re (Kemper), as its President and Chief Operating Officer. Ms. Kam Lyew was instrumental in successfully negotiating and facilitating its sale to Rhine Re (now Alea Group) whose majority owner is Kohlberg Kravis Roberts & Co. (KKR) in 1999. KKR is the leading private equity investment house in the United States. Equus Re was established to underwrite specialty reinsurance products (property and casualty treaties, program business, alternative risks, and London market produced treaties). Ms. Kam Lyew assumed Alea Group responsibilities for Corporate Marketing and Communications in October 1, 2000.

Preceding her tenure at Equus Re (Kemper), Ms. Kam Lyew was Executive Vice President and Chief Operating Officer of TIG Re. As Chief Operating Officer, she formulated and led the regeneration and transformation of the company's strategies and tactics. TIG Re's organization and processes were revamped to focus on client solutions on a global basis. She was also critical to the company's diversification of markets and products through the entry into new geographical areas and new risk transfer mechanisms. During Ms. Kam Lyew's tenure at TIG Re (1993 to 1998), the company grew to be one of the U.S. top ten property/casualty reinsurers and consistently outperformed its peers in its operating ratios and returns to its shareholders.

As Senior Vice President-Marketing & Underwriting of Transamerica Reinsurance from 1987 to 1993, Ms. Kam Lyew was responsible for the marketing and underwriting profitability of the various Business Units across the company. She provided technical oversight and negotiation skills on the most difficult and complex broker/ceding company client contacts. Ms. Kam Lyew was also responsible for the oversight and leadership of RUSCO (audit operations). From 1985 to 1987, Ms. Kam Lyew was Vice President- Casualty Reinsurance for Clarendon National and a founding member of the company. Clarendon was the predecessor company to Transamerica Re.

From 1978 to 1985, Ms. Kam Lyew held various underwriting and marketing officer positions with General Reinsurance including Assistant Vice President & Referral.

## William J. Wall

William J. Wall is a practicing attorney specializing in the area of Dispute Resolution. He serves as both arbitrator and umpire in insurance /reinsurance arbitrations. In addition, he serves as a Certified New York State Impartial Hearing Officer on matters involving students with disabilities.

His arbitration experience includes underwriting, claims and contract disputes. His most recent cases have centered on reinsurance disputes but he has also participated in disputes between agents and companies.

Mr. Wall has also served as an expert witness on several insurance topics including legal malpractice, trucking claims and various coverage matters. He continues to serve as an expert witness in insurance matters.

He began his insurance career as a systems analyst with Great American Insurance Company. Upon completion of law school, he joined Jefferson Insurance Company of New York, where he became general counsel. He entered private practice with the law firm of Wilson, Esler, Edelman and Dicker LLP. in New York. In 1979 he was recruited to become general counsel of the Alexander Howden group of companies in the United States in Atlanta, GA. He became Chairman and CEO of those companies when they were acquired by Alexander and Alexander.

In 1986, Mr. Law became executive vice president of another A & A group of companies in Evanston, IL These companies included Shand Morahan and the Evanston group of insurance companies. He established his own consulting firm in 1989 and merged with another consulting firm in 1991.

He returned to the practice of law and was asked to join the Chicago law firm of Tribler Orbett and Crone, PC in 1996. Family responsibilities brought him back to the east coast where he now practices as a sole practioner in Newtown, PA.

William Wall

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feature

# Discovery in Reinsurance Arbitrations

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Luce Forward Hamilton & Scripps LLP

## In general

Any discussion of the availability and extent of discovery in a reinsurance arbitration must begin with the understanding that "no *right* of discovery exists in arbitration."[1] As one court noted, "Full scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows that is so; . . ." [2] And as another explained:

An arbitration hearing is not a court of law. . .When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. . . One of these accoutrements is the right to pre-trial discovery.[3]

Discovery is a matter that is generally left entirely to the discretion of the Panel, subject to any relevant provisions that may be contained in the arbitration clause. If the arbitrators do not allow or limit the requested discovery, a court will seldom grant a party's application for further discovery in aid of arbitration. There are two reasons for this stance: to avoid wasteful "dual discovery,"[4] and to give effect to the arbitration process that the parties bargained for.[5]

While the full panoply of discovery procedures available under the Federal Rules of Civil Procedure may be regarded as a blessing or a curse, depending on your position in the litigation, they are not available in arbitration.[6] Therefore, if, at the time of contract formation, you want to preserve all of your rights and "be certain of full scale litigation discovery in the event of disputes," *do not agree to arbitrate.* A court will not relieve you of the choice you have made.[7]

Discovery is a matter that is generally left entirely to the discretion of the Panel, subject to any relevant provisions that may be contained in the arbitration clause.

## Federal Arbitration Act, § 7

Reinsurance arbitrations come within the scope of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16,[8] which pre-empts any conflicting state law on the same issue.[9]

Section 7 of the FAA empowers arbitrators to summon witnesses "to attend before them" and to bring "any book, record, document or paper which may be deemed material."[10]

The arbitrators' summons to a witness may take the form of a subpoena issued pursuant to Fed. R. Civ. Proc. 45, which, in the case of noncompliance, is backed by the contempt power of the U.S. District Court.[11] The person or entity receiving the subpoena may apply to the court for an order quashing or limiting it.[12]

## Where the application must be made

FAA §7 requires the application to compel to be brought in the District Court for the "district in which such arbitrators are sitting" — not the district where the subpoenaed party or entity resides, if it is a different district.[13] The arbitrators' subpoena power can reach no farther than the territorial limit of the court which can compel its enforcement, which is only for witnesses located within 100 miles of the federal court.[14]

## Pre-hearing discovery

By its terms, FAA §7 limits the arbitrators' power to compel the attendance of witnesses and production of documents to hearings that are held "before them." However, courts have upheld the authority of arbitrators to compel pre-hearing document exchanges and depositions as "implicit" in the Panel's power to subpoena relevant documents for production at the hearing.[15] The interest in efficient resolution of disputes through arbitration "is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[16]

## Obtaining discovery from non-parties

Frequently, key players in the reinsurance transaction (e.g., brokers, intermediaries, underwriting agents) are not signatories to the slip or final contract. Yet the evidence of such non-parties (and others, such as former employees) may be crucial to the fair resolution of the dispute. It has been held that their evidence can be obtained under the authority granted arbitrators by the FAA which "permits pre-hearing appearances by non-party witnesses for deposition and production of documents."[17]

However, with regard to *pre-hearing* discovery, some courts have limited the power of arbitrators over non-parties, restricting it to compelling attendance at the hearing itself, rather than compliance with pre-hearing discovery demands.[18]

Courts will further distinguish between compelling non-parties to appear for deposition, and compelling them to produce their documents in advance of the hearing.[19] They are more willing to grant the latter because non-parties, who did not contract to participate in the arbitration and receive no "bargained for" advantage from it, should not have to bear the burden of being compelled to attend to testify twice, once for a discovery deposition and a second time as a hearing witness.[20]

Documents are only produced once. Therefore, the burden on the party ordered to make production will be the same, whether the documents are produced in advance of the hearing or, ultimately, at it.[21] Moreover, "common sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents."

## Foreign arbitrations

In *In Re Application of NBC Inc.,* 1998 U.S. Dist. LEXIS 385 (S.D.N.Y. 1998), NBC moved to enforce six document subpoenas issued and served on third-party financial entities pursuant to an ex parte order in aid of an International Chamber of Commerce arbitration between NBC and Azteca, a Mexican TV company. NBC sought to enforce its subpoenas by relying on 28 U.S.C. § 1782.[22] The Azteca Parties opposed the application, contending that a private commercial arbitration is not " a tribunal" for § 1782 purposes. The court agreed and quashed the subpoenas, stating that "even if gaps emerge in the authority of federal courts to accommodate certain arbitration provisions, the Court's role here is to interpret the intent of Congress, not to legislate a discovery tool for arbitrations. Without any hint by Congress that private commercial arbitrations are intended to be covered, the Statute will not be interpreted to authorize the subpoenas here."[23]

Similarly, in *In re Application of Technostroyexport*.[24] the court, without citation or written analysis, held that "an arbitrator or arbitration panel is a 'tribunal' under § 1782."However, because Technostroy did not obtain a ruling from the foreign arbitrator that discovery should take place, but, instead, came directly to the district court, the court concluded "that, under these circumstances, it would be improper to order the discovery requested." [25]

## New York State law

In New York, as in other states, a section of the Civil Practice Law and Rules ("CPLR") is devoted to the subject of arbitration (Article 75).

CPLR § 7505, "Powers of arbitrator," provides that "An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas." However, these are "non-judicial subpoenas" and, unlike a subpoena issued in the context of a litigation in court, a person who fails to comply cannot be held in contempt. There is "no need to quash such a subpoena in order to avoid sanctions, and one who is serv ed and does not wish to comply may safely wait until the party who served the subpoena moves to compel compliance."[26] CPLR § 3102(c) provides that "Before an action is commenced, disclosure . . . to aid in arbitration, may be obtained, but only by court order." This broad grant of power is exercised only sparingly, because the Court of Appeals has flatly declared that "[u]nder the CPLR, arbiters do not have the power to direct the parties to engage in disclosure proceedings" and."[w]hile a court may order disclosure ' to aid in arbitration pursuant to CPLR 3102 (subd. [c]), it is a measure of the different place occupied by dis-

Therefore, if, at the time of contract formation, you want to preserve all of your rights and "be certain of full scale litigation discovery in the event of disputes," do not agree to arbitrate.

covery in arbitration that courts will not order disclosure 'except in extraordinary circumstances'."[27] The test is one of "necessity rather than convenience."[28] Court-ordered disclosure in arbitration proceedings "is not justified except where it is absolutely necessary for the protection of the rights of a party."[29]

## You can't have your cake and eat it too

Section 3 of the FAA provides that in a suit or proceeding brought in any federal court upon any issue that is found to be "referable to arbitration under an agreement in writing for such arbitration," the court in which such suit or proceeding is pending "shall on application of one of the parties stay the trial of the action" until the agreed upon arbitration has been had.

The statute's reference to "the trial of the action," does ***not*** mean that a party may take advantage of pre-trial discovery in the action and, after discovery is complete, move to dismiss or stay the trial pending arbitration. "The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration."[30]

While waivers of arbitration "will not be 'lightly inferred,'" litigation of "substantial issues going to the merits may constitute a waiver of arbitration."[31] However, "no waiver of the right to arbitrate can occur from conducting discovery on non-arbitrable claims."[32]

Where the litigation involves both arbitrable and non-arbitrable claims, the court, in determining whether discovery of documents concerning arbitrable claims constitutes waiver, will rely on the basic principle of prejudice: Whether "the party seeking the stay took advantage of judicial discovery procedures not available in arbitration."[33]

If a party to an arbitration agreement is made a defendant in a lawsuit, its first response should be an immediate motion to stay the proceedings. If, thereafter, it participates in discovery and notes its express reservation of the right to go to arbitration, it will not have waived its right to arbitrate.[34]

## A practical consideration

The parties, usually, will agree to produce their underwriting, placement and claims files and to make available for deposition the witnesses they intend to call at the hearing. They will also, generally, cooperate in obtaining discovery of a broker's or reinsurance intermediary's file and a deposition of the non-party employees involved in the placement of the reinsurance. If either party refuses to make or assist in obtaining such disclosure, a Panel will generally order it. You do not advance your case by resisting reasonable discovery of information needed to resolve the dispute.

1 *Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 840 F.Supp. 578, 579 (N.D. Ill. 1993), *aff'd* 37 F.3d 345 (7th Cir. 1994);

2 *Commonwealth Ins. Co. v. Beneficial Corp.,* 1987 U.S. Dist. LEXIS 8828 at *12-13 (S.D.N.Y. 1987).

3 *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980)(citations omitted).

4 *Corcoran v. Shearson/American Express,* 596 F.Supp. 1113, 1117 (N.D.Ga. 1984) ("additional discovery under the Federal Rules would create 'dual discovery' which would be contrary to the very expense and delay saving purpose for arbitration in the first place.").

5 *In re Integrity Ins. Co. v. American Centennial Ins. Co.,* 885 F.Supp. 69, 73 (S.D.N.Y. 1995).

6 *Foremost Yarn Mills, Inc. v. Rose Mills, Inc.* 25 F.R.D. 9, 11 (E.D. Pa. 1960).

7 *Commonwealth Ins. Co. v. Beneficial Corp.*, 1987 U.S. Dist. LEXIS 8828 at *15-16 (S.D.N.Y. 1987)("If Commonwealth must defend against ACIC's claims without the benefit of full pre-trial discovery, that is what Commonwealth and ACIC bargained for"); *DeSapio v. Kohlmeyer,* 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974)("If the parties wish the procedures available for their protection in a court of law, they ought not to provide for arbitration of the dispute.").

8 Reinsurance is part of the business of insurance, which is commerce within the meaning of the Commerce Clause to the Constitution of the United States. *United States v. South-Eastern Underwriters Assoc.,* 322 U.S. 533 (1944). In addition, most reinsurance disputes involve companies in different states or countries, so diversity jurisdiction is available.

9 *Aviall, Inc. v. Ryder Systems, Inc.,* 913 F.Supp. 830 (S.D.N.Y. 1996), *aff'd* 110 F.3d 892 (2d Cir. 1997)("For cases that fall within its reach, the FAA governs all aspects of arbitration procedure and pre-empts inconsistent state law").

10 §7. Witnesses before arbitrators; fees; compelling attendance
The arbitrators selected or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shalt issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of then, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provide by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the

courts of the United States.

11 Fed. R. Civ. Proc. 45(e)("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. . . .").

12 *Integrity Ins. Co. v. American Centennial Ins. Co.,* 885 F. Supp. 69, 72 (S.D.N.Y. 1995)("Implicit within the power to compel compliance with the arbitrator's summons must be the power to quash that summons if it was improperly issued").

13 *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.,* 1994 U.S. Dist. LEXIS 15451, *3 (E.D.Pa. 1994).

14 Fed. R. Civ. Proc. 45(c)(3)(A).

15 *In re Security Life Ins. Co. of America v. Duncanson & Holt,* 228 F.3d 865, 870-871 (8th Cir. 2000); *Matter of Koala Shipping & Trading Co.*, 587 F.Supp. 140, 142-143 (S.D.N.Y. 1984); *Integrity Ins. Co. v. American Centennial Ins. Co.,* 885 F. Supp. 69, 72 (S.D.N.Y. 1995).

16 *In re Security Life Ins. Co. of America v. Duncanson & Holt, supra,* 228 F.3d at 870.
In an arbitration under the rules of the American Arbitration Assn., which provide that "the parties shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute" (A.A.A. Rule 31), the court held this "confers on arbitrators broad powers to ensure that evidence is presented at arbitration hearings in such a manner as to ensure that legal and factual issues are sufficiently developed", and that includes directing pre-hearing discovery to allow for orderly presentation of evidence at the hearing." *Chiarella v. Viscount Industries*, 1993 U.S. Dist. LEXIS 16903, *13 (S.D.N.Y. 1993).

17 *In re Brazell v. American Color Graphics, Inc.*, 2000 U.S. Dist. LEXIS 4482, *5-6 (S.D.N.Y. 2000); *Stanton v. Paine Webber Jackson & Curtis, Inc.,* 685 F.Supp. 1241, 1243 (S.D. Fla. 1988)("arbitrators may order and conduct such discovery as they find necessary"); *Commonwealth Ins. Co. v. Beneficial Corp.*, 1987 U.S. Dist. LEXIS 8828, *14(S.D.N.Y. 1987); *Amgen Inc v. Kidney Center of Delaware County, Ltd.*, 1994 U.S. Dist. LEXIS 15451 (E.D.Pa. 1994).

18*Integrity Ins. Co. v. American Centennial Ins. Co.,* 885 F.Supp. 69, 71 (S.D.N.Y. 1995).

19 In *Meadows Indem. Co. Ltd. v. Nutmeg Ins. Co.,* 157 F.R.D. 42, 44-5 (M.D. Tenn. 1994), the court ordered production of documents without requiring the appearance of a witness, holding that "the power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing."

20 *Integrity Ins. Co. v. American Centennial Ins. Co., supra*, 885 F.Supp. at 73.

21 *Ibid.*

22 28 U.S.C. § 1782 provides:
The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

23 *In Re Application of NBC Inc. supra*, 1998 U.S. Dist. LEXIS at *23.

24 853 F.Supp 695 (S.D.N.Y. 1994).

25 *Id.* at 697. "There is authority that a court can enforce a discovery ruling of an arbitrator." 853 F.Supp at 698.

26 *Reuters, Ltd. v. Dow Jones Telerate, Inc.,* 231 A.D.2d 337, 662 N.Y.S.2d 450, 453 (1st Dep't 1997).

27 *DeSapio v. Kohlmeyer,* 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974); *Goldsborough v. New York State Dep't of Corr. Services*, 217 A.D.2d 546, 628 N.Y.S.2d 813, 814 (2d Dep't 1995)..

28 *State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 A.D.2d 519, 455 N.Y.S.2d 30 (2d Dep't 1982)(standard met and physical examination ordered of accident victim); *In re Moock*, 99 A.D.2d 1003, 473 N.Y.S.2d 793, 794 (1st Dep't 1989)("In order for the petitioner to present a proper case to the arbitrator [on valuation of his partnership interest], it is necessary for him to have access to books and records of the partnership.").

29 *Hendler & Murray v. Lambert,* 147 A.D.2d 442, 537 N.Y.S.2d 563, 564 (1989).

30 *DeSapio v. Kohlmeyer,* 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974).

31 S*teinberg & Lyman v. Takacs*,, 774 F.Supp. 885, 887 (S.D.N.Y. 1991).

32 *Rush v. Oppenheimer,* 779 F.2d 885, 889 (2d Cir. 1985); Russo v. Simmons, 723 F.Supp. 220, 223 (S.D.N.Y. 1989).

33 *Russo v. Simmons,* 723 F.Supp. 220, 223 (S.D.N.Y. 1989).

34 *Steinberg & Lyman v. Takacs*,, 774 F.Supp. 885, 887 (S.D.N.Y. 1991).

case note corner

This issue of the Quarterly begins a new regular feature in which Ron Gass will report on a significant court decision related to arbitration.

# 7th Circuit Reverses Vacation of Award for "Evident Partiality": Arbitrator's Failure to Disclose Fully Prior Attorney-Client Relationship with Appointing Party Does Not Spoil the Award

RONALD S. GASS

**On October 9th, the U.S. Court of Appeals for the Seventh Circuit reversed a controversial May 17, 2002 Illinois federal district court ruling vacating a reinsurance arbitration award for "evident partiality" because the reinsurer's party-appointed arbitrator failed to disclose fully a prior attorney-client relationship four years earlier with a subsidiary of the appointing reinsurer.**

Analogizing the disclosure requirements governing federal court judges to those applicable to arbitrators under the Federal Arbitration Act's ("FAA") "evident partiality" standard, the Seventh Circuit ruled that a party-appointed arbitrator cannot be held to a higher disclosure duty than federal judges. The degree of disclosure demanded of a party-appointed arbitrator, who, according to the court, is supposed to be an advocate and not a neutral, is even more circumscribed under the FAA. Thus, a failure to disclose fully an attorney-client relationship in a prior unrelated proceeding did not, in its view, violate the "evident partiality" standard and, thus, spoil the award.

In vacating the panel award, the trial court had fashioned a broad FAA § 10(a)(2) "evident partiality" standard – "arbitrators are required to disclose any dealings that might give rise to the appearance of bias," and they should err on the side of disclosure to prevent attacks on their decisions. In this case, the party-appointed arbitrator's failure to disclose fully his prior attorney-client relationship with a subsidiary of the appointing reinsurer violated that standard, according to the district court, because it deprived the parties of "a chance to reject or accept an arbitrator with full knowledge of the arbitrator's connections."

Reversing, the Seventh Circuit flatly rejected the trial court's sweeping appearance of bias "evident partiality" standard, observing that it was unprecedented in tripartite panel arbitrations "because in the main party-appointed arbitrators are *supposed* to be advocates." [Emphasis in original.] Citing labor arbitrations, which typically involve partisan arbitrators from both the union and the employer, as an example, the court of appeals commented, "no one

believes that the predictable loyalty of these designees spoils the award" because parties are entitled, by mutual consent, to waive the protection of § 10(a)(2) in their arbitration agreements by authorizing the "parties to select interested (even beholden) arbitrators." Recognizing that the use of experienced industry insiders as arbitrators and the smaller number of "repeat players" increases the likelihood that "the panel will contain some actual or potential friends, counselors, or business rivals of the parties," the Seventh Circuit observed that "all participants may think the expertise-impartiality tradeoff worthwhile; the [FAA] does not fasten on every industry the model of the disinterested generalist judge."

Turning next on the parties' arbitration agreement and the governing ARIAS-U.S. rules, the Seventh Circuit concluded that even if the party-appointed arbitrator were the umpire in this matter, there was no "evident partiality." Under the Code of Conduct for federal judges, he could have served as the judge in this case without challenge on the grounds of partiality, and § 10(a)(2) was "considerably more confined than the rule applicable to judges." "Nothing in the Code of Conduct for federal judges," observed the court, "makes prior representation of a litigant a disqualifying event," citing the "norm" among new federal bench appointees that once two years pass (or even earlier), a judge is free to sit in controversies involving former clients. If the arbitrator could have served as a federal judge, the court found it "impossible to see how his background could demonstrate 'evident partiality' within the meaning of § 10(a)(2)."

Responding to the cedent's complaint that the true harm here was not that the reinsurer's party-appointed arbitrator was partial but that he did not disclose before the arbitration the extent of his involvement in the unrelated proceedings four years earlier, the Seventh Circuit once again disagreed, citing the rules governing judicial conduct. Even if the disclosures in this case were less than candid, the court of appeals questioned how such shortcomings demonstrated "evident partiality" "when . . . the full truth would not have disclosed even a risk of partiality". It rejected the district court's view that candid and complete disclosure was a requirement in addition to disinterest, concluding that "that position has no purchase in the language of § 10(a)(2) – or for that matter in judicial practice." Federal judges are not required to disclose their role as counsel to one litigant in an unrelated matter "many years ago."

Summing up, the Seventh Circuit held: "Since disclosure, though often prudent, is not thought *essential* to impartial judicial service, it is hard to see how a disclosure requirement could be deemed implicit in § 10(a)(2), which, to repeat, addresses only a subset of the circumstances that would disqualify a judge." [Emphasis in original.] Because the party-appointed arbitrator in this case could have presided in court, "failure to make a full disclosure may sully his reputation for candor but does not demonstrate 'evident partiality' and thus does not spoil the award."

If the tenor of the discussions at the November ARIAS-U.S. Annual Conference are any indication, the implications of this important court of appeals decision will continue to reverberate throughout the New Year as members ponder and debate how the Seventh Circuit's "evident partiality" disclosure standard comports with Canons II ("Fairness") and IV ("Disclosure") of the ARIAS-U.S. *Code of Conduct*.

*Sphere Drake Insurance Limited v. All American Life Insurance Co.*, 2002 U.S. Dist. LEXIS 8876 (N.D. Ill. May 17, 2002), *rev'd*, 307 F.3d 617 (7th Cir. Oct. 9, 2002), *reh'g en banc denied*, 2002 U.S. App. LEXIS 23017 (7th Cir. Nov. 4, 2002).

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*Mr. Gass is an ARIAS-U.S. Certified Arbitrator providing reinsurance and insurance dispute resolution services to the industry and may be reached via E-mail at rgass@gassco.com.*



It rejected the district court's view that candid and complete disclosure was a requirement in addition to disinterest...

# Intensive Workshops Turn Out Enlightened Graduates

During the past year, ARIAS•U.S. conducted intensive arbitrator training workshops in Chicago and Boston. These sessions are particularly useful for ARIAS members who have not been much involved in the arbitration process during their earlier professional lives.

The workshops (some call them "boot camps"), involve a day-long session where the 27 students are broken up into three groups and go through mock arbitrations that have three phases: the organizational meeting, the discovery hearing, and the final hearing. Attorneys from three local law firms present their arguments to the panels. Experienced arbitrators offer guidance and critiques in the course of the day.

The reactions of student who have attended these workshops have been unanimous in their praise for the experience. The general feeling is that, apart form serving on a real panel, there is no other way to gain such a full understanding of the complete dynamics of the arbitration process.

The next workshop is scheduled for Washington, DC on January 28, 2003. Only those who have not previously attended a workshop will be eligible to attend. Announcements went out while the Quarterly was being printed. The 27 who register first win the slots. All positions should already be filled by the time you read this.

Attorneys from three local law firms present their arguments to the panels. Experienced arbitrators offer guidance and critiques in the course of the day.

**Following is the list of graduates for the 2002 sessions.**

## Chicago

David P. Behnke
Thomas Daly
Andrew Ian Douglas
Lawrence F. Harr
George E. III Hartz
John H. Howard
Joel S. Iskiwitch
Leo J. Jordan
James Killelea
Patricia Kirschling
John McKenna
Robert B. Miller
Edwin Millette
Jeffrey L. Morris
Francis J. Mulcahy
Gerald Murray
Peter A. Scarpato
Savannah Sellman
Lewis B. Shepley
Susan Stone
John W. Thornton
Kevin J. Tierney
Eugene Wilkinson
Thomas M. Zurek

## Boston

Stephen Adams
Howard Breindel
Paul Brink
George Budd
Janet Burak
Carol Correia
Thomas Daly
Brian Donnelly
Gregg Frederick
Colin Gray
James Hazard
Robert Holland
Lydia Kam Lyew
Jerome Karter
Jim Leatzow
Roderick Mathews
Frank Montemarano
Robert O'Hare
Andrew Pinkes
Rhonda Rittenberg
Kevin Ryan
Peter Scarpato
Robert Soderstrom
Allan Taylor
Raymond Tibbitts, Jr.
Michael Toman
Andrew Walsh

George F. Adams
John P. Allare
Howard N. Anderson
David Appel
Richard S. Bakka
Nasri H. Barakat
Linda Martin Barber
Frank J. Barrett
Peter H. Bickford
John W. Bing
John H. Binning
Mary Ellen Burns
Marvin J. Cashion
Robert Michael Cass
Dewey P. Clark
Peter C. Clemente
William Condon
James Corcoran
Carol K. Correia
Dale C. Crawford
John J. Cuff
Patrick Cummings
Paul E. Dassenko
Donald T. DeCarlo
John B. Deiner
Anthony L. Di Pardo
James F. Dowd
Charles Ernst
Peter J. Flanagan
Charles M. Foss
Caleb L. Fowler
William W. Fox, Jr.
James H. Frank
Peter Frey
Ronald S. Gass
Dennis C. Gentry
Ernest G. Georgi
William J. Gilmartin
George A. Gottheimer, Jr.
Robert B. Green
Thomas A. Greene
Alfred Edward Gschwind
Mark S. Gurevitz
Martin Haber
Franklin D. Haftl
Robert F. Hall
Robert M. Hall
Lawrence F. Harr
James S. Hazard
Charles W. Havens, III
Paul D. Hawksworth
John Harlan Howard
Robert M. Huggins
Ian Hunter QC
Wendell Ingraham
Ronald A. Jacks
Bonnie B. Jones
Leo J, Jordan
Sylvia Kaminsky
James I. Keenan
T. Richard Kennedy
William M. Kinney
Floyd H. Knowlton
Eric S. Kobrick
Anthony M. Lanzone
Mitchell L. Lathrop
Jim Leatzow
Lydia B. Kam Lyew
Peter F. Malloy
Andrew Maneval
Robert M. Mangino
Merton E. Marks
Richard E. Marrs
Walter R. Milbourne
Robert B. Miller
Edwin Millette
Lawrence Monin
Jeffrey L. Morris
Gerald F. Murray
Thomas Newman
Charles L. Niles, Jr.
Robert J. O'Hare, Jr.
Dr. Herbert Palmberger
David R. Robb
James P. Powers
John H. Reimer
Robert Reinarz
Debra J. Roberts
Robert L. Robinson
Edmond F. Rondepierre
Angus Ross
Daniel E. Schmidt, IV
James A. Shanman
Richard M. Shusterman
Richard D. Smith
Walter Squire
J. Gilbert Stallings
Jack M. Stoke
C. David Sullivan
Paul C. Thomson
Bert M. Thompson
N. David Thompson
John J. Tickner
John W. Thornton
Thomas M. Tobin
Theodore A. Verspyck
Jeremy R. Wallis
William J. Wall
Paul Walther
Richard G. Waterman
Norman M. Wayne
Emory L. White
Richard L. White
W. Mark Wigmore
Michael S. Wilder
P. Jay Wilker
Ronald L. Wobbeking
Eugene Wollan

# arias•u.s. certified arbitrators

(As of November 7, 2002)

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 sought and obtained certification from ARIAS•U.S. Others who are similarly qualified and experienced, have not yet sought certification.

**Biographies of all certified arbitrators are online at www.arias-us.org**

# special report

## AIDA World Congress in New York

T. RICHARD KENNEDY

The Eleventh Quadrennial World Congress of the International Insurance Law Association ("AIDA") took place at the New York Hilton from October 20 through 25, 2002. Delegates representing National Chapters of over 42 countries attended. The two major themes explored at the Congress were Integration of Financial Services and Alternative Compensation systems. Professor Jonathan R. Macey of Cornell Law School presented an excellent paper analyzing national reports from various countries on the subject of financial services. Professors Hubert Bocken of Germany and William Dufwa of Sweden presented a similar report on alternative compensation systems.

The standing committees of AIDA discussed such diverse subjects as reinsurance, aviation insurance, risk management, dispute resolution, government regulation, product liability insurance, and workers compensation. Of particular interest to the attendees was a program organized by the Reinsurance Committee. The program consisted of a mock reinsurance arbitration regarding whether the September 11th World Trade Center disaster involved one or two occurrences. Two panels of arbitrators – one American and one composed of arbitrators from Europe and Australia – heard arguments of counsel and then deliberated in open session before the audience.

ARIAS-US hosted a special program on Thursday morning, October 24th, to consider the organizational structures and operations of each of the existing ARIAS chapters in the United States, United Kingdom and France. Mark Gurevitz described the formation and growth of ARIAS-US, including our system of certifying persons who are deemed qualified to serve as arbitrators. John Butler of London, who – while serving as General Counsel of Mercantile and General Insurance Company of London – initially conceived the notion and need for ARIAS to be established by AIDA – spoke about the UK organization and future plans. Christian Boeckert of Paris discussed the French operation. Interestingly, neither the UK nor French chapters certify arbitrators, as does the U.S. However, each group does maintain lists of individuals who are well qualified to serve as arbitrators for particular types of disputes.

Representatives of other countries expressed interest in establishing additional national chapters of ARIAS. All in attendance at the ARIAS program agreed that it would be indeed helpful to increase communication and exchange of information between the three existing national chapters and those additional countries that are interested in forming additional ARIAS programs.

# arias•u.s.

## umpires

**(As of November 7, 2002)**

The ARIAS•U.S. Umpire List is comprised of ARIAS•U.S. Certified Arbitrators who have provided ARIAS•U.S. with satisfactory evidence of having served on at least three (3) completed (i.e. a final award was issued) insurance or reinsurance arbitrations.

David Appel
Richard S. Bakka
Frank J. Barrett
Peter H. Bickford
John W. Bing
John H. Binning
Mary Ellen Burns
R. Michael Cass
Dale Crawford
Peter C. Clemente
Paul Dassenko
Donald T. DeCarlo
John B. Deiner
Anthony L. DiPardo
Caleb L. Fowler
James H. Frank
Peter Frey
Dennis C. Gentry
William J. Gilmartin
George A. Gottheimer, Jr.
Thomas A. Greene
A. Edward Gschwind
Martin D. Haber
Franklin D. Haftl
Robert F. Hall
Robert M. Hall
Paul D. Hawksworth
Robert F. Huggins
Ronald A. Jacks
Peter F. Malloy
Robert M. Mangino
Charles L. Niles, Jr.
James J. Powers
Edmond F. Rondepierre
Daniel E. Schmidt, IV
Richard D. Smith
Jack Stoke
Thomas M. Tobin
Peter J. Tol
Bert M. Thompson
N. David Thompson
Paul C. Thomson III
Richard G. Waterman
W. Mark Wigmore
Eugene Wollan

# Members . . .
# NEWS ABOUT YOU and YOUR ACTIVITY

A new feature of the ARIAS-U.S. Quarterly, starting with the next issue, is a section reporting on news of ARIAS members.

## "ARIAS Members on the Move"

For this section to be valuable, we need to have you tell us what has happened recently in your life, that you feel fellow members might want to know about. Fill out the form below and send it in or just type the information into an email message.

Tell us about a job or company change, recent honors or promotions, major events in your business, community, or personal life. You can even let us know about changes in your contact information. We'll use it to update our database and list it for other members to bring their Palm Pilots up to date.

Name _____

Type of change (please indicate with a check):

❑News ❑Address ❑Phone ❑Fax ❑E-mail

Fax or mail this sheet, or just send an email with the information to byankus@cinn.com.
If you mail it in, send to ARIAS•U.S., 35 Beechwood Ave., Mount Vernon, NY 10553
If you fax it, send to 914-699-2025.

ARIAS U.S.

*Do you know someone who is interested in learning more about ARIAS•U.S.?*

*If so, pass on this letter of invitation and membership application.*

# AN INVITATION…

The rapid growth of ARIAS·U.S. (AIDA Reinsurance & Insurance Arbitration Society) gives testimony to the acceptance of the Society since its incorporation. Through numerous conferences, seminars, and literature, and through the establishment of an ambitious certification process, ARIAS·U.S. is realizing its goals. Today, ARIAS·U.S. is comprised of 261 individual members and 41 corporate memberships totaling 425 members, of which 119 have been certified as arbitrators.

In addition, ARIAS·U.S. in recent years has added to its list of accomplishments the launching of the ARIAS·U.S. Umpire Appointment Procedure and the approval of CLE "Accredited Provider Status" by the New York State Continuing Legal Education Board.

The Umpire Appointment Procedure includes a unique software program, created specifically for ARIAS·U.S., that randomly generates the names of umpire candidates from a list of ARIAS·U.S. arbitrators who have served on at least three completed arbitrations. The procedure is free to members and available at a nominal cost to non-members.

The CLE Accredited Provider Status allows those who attend ARIAS·U.S. conferences and seminars to earn CLE credits in the areas of professional practice, practice management, skills and ethics. ARIAS·U.S. is proud to be on the list among other prestigious Accredited Provider organizations.

ARIAS·U.S. also produces a Member Directory with Certified Arbitrator and Umpire Listings, the Practical Guide to Reinsurance Arbitration Procedure, and Guidelines for Arbitrator Conduct. These publications, as well as a Quarterly review, special member rates for seminars and workshops, and access to certified arbitrator training are among the benefits of membership in ARIAS-U.S.

In recent years, ARIAS·U.S. has held seminars across the county, including Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Boston, Miami, New York City, Puerto Rico, and Bermuda. The Society brings together many of the leading professionals in the field and serves as an educational and training forum. We invite you to enjoy all its benefits by becoming a member of this prestigious Society.

If you are interested in learning more about the organization or membership, examine the many information areas of this web site. If you have questions, contact Bill Yankus, Executive Director, at byankus@cinn.com or 914-699-2020, ext. 116.

Join us, and become active in ARIAS·U.S. – the industry's best forum for insurance and reinsurance arbitration professionals.

Sincerely,

Daniel E. Schmidt, IV
Chairman

Charles M. Foss
President

ARIAS U.S.

# Membership Application

AIDA Reinsurance & Insurance Arbitration Society
BOX 9001
MT. VERNON, NY 10552
PHONE: 914.699.2020
FAX: 914.699.2025
WWW.ARIAS-US.ORG

**ARIAS·U.S.** is a not-for-profit corporation that promotes the improvement of the insurance and reinsurance arbitration process for the international and domestic markets. The Society provides continuing in-depth seminars in the skills necessary to serve effectively on an insurance/reinsurance panel. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance market place by:

- ▲ Training and certifying individuals qualified to serve as arbitrators and/or umpires by virtue of their experience, good character and participation in ARIAS·U.S.-sponsored training sessions;
- ▲ Empowering its members to access certified arbitrators/umpires and to provide input in 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.

- ▲ MEMBERSHIP BENEFITS
  Benefits of membership include the newsletters, special rates for seminars/workshops, membership directory, access to certified arbitrator training, model arbitration classes and practical guidance with respect to procedure.

**Complete information about ARIAS·U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a calendar of upcoming events, and online registration for larger meetings.**

FAX: (914) 699-2025

(914) 699-2020, ext. 116

EMAIL: BYANKUS@CINN.COM

NAME & POSITION: _____

COMPANY or FIRM: _____

STREET ADDRESS: _____

CITY/STATE/ZIP _____

PHONE: _____ FAX: _____

E-MAIL ADDRESS: _____

## Fees and Annual Dues:

| | INDIVIDUAL | CORPORATION & LAW FIRM |
|---|---|---|
| INITIATION FEE: | $500 | $1,500 |
| ANNUAL DUES: | $250 | $750 |
| TOTAL | $750 △ | $2,250 △ |

*NOTE:* Corporate memberships include up to five designated representatives. Additional designated representatives are available for an additional $150 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, fax and e-mail.

PAYMENT BY CHECK: ENCLOSED IS MY CHECK IN THE AMOUNT OF $_____
PLEASE MAKE CHECKS PAYABLE TO
ARIAS·U.S. (FED. I.D. NO. 13-3804860) AND MAIL WITH
REGISTRATION FORM TO: ARIAS·U.S.
P.O. BOX 9001, MT. VERNON, NY 10552

PAYMENT BY CREDIT CARD (FAX OR MAIL): PLEASE CHARGE MY CREDIT CARD:
☐ AMEX ☐ VISA ☐ MASTERCARD FOR $_____
ACCOUNT NO.: _____EXP. ____/____/____
CARDHOLDER'S NAME (PLEASE PRINT): _____
CARDHOLDER'S ADDRESS: _____
SIGNATURE: _____

# REMINDER:

# 2003 Annual Dues are Due!

In the past few weeks, all members should have received an invoice for 2003 dues. Corporate membership invoices were sent to the key contact at each company.

The annual dues payments fund the administration of ARIAS•U.S., enabling the planning and execution of our many programs, publications, and Internet capability. With timely payment of dues, we are able to remain on budget while keeping all of our fees as low as possible (including special rates for members).

This year, we will be following up early with anyone who has not responded. We know that, in most cases, the delay of payment is inadvertent. Therefore, we will remind late payers in January, before the list is sent to the Board in February.

We have a busy and valuable year of training coming up. Be sure you are a part of it!

If you have any questions, contact Bill Yankus at byankus@cinn.com or 914-699-2020, ext. 116.

ARIAS QUARTERLY U.S.

PO Box 9001
Mount Vernon, New York
10552