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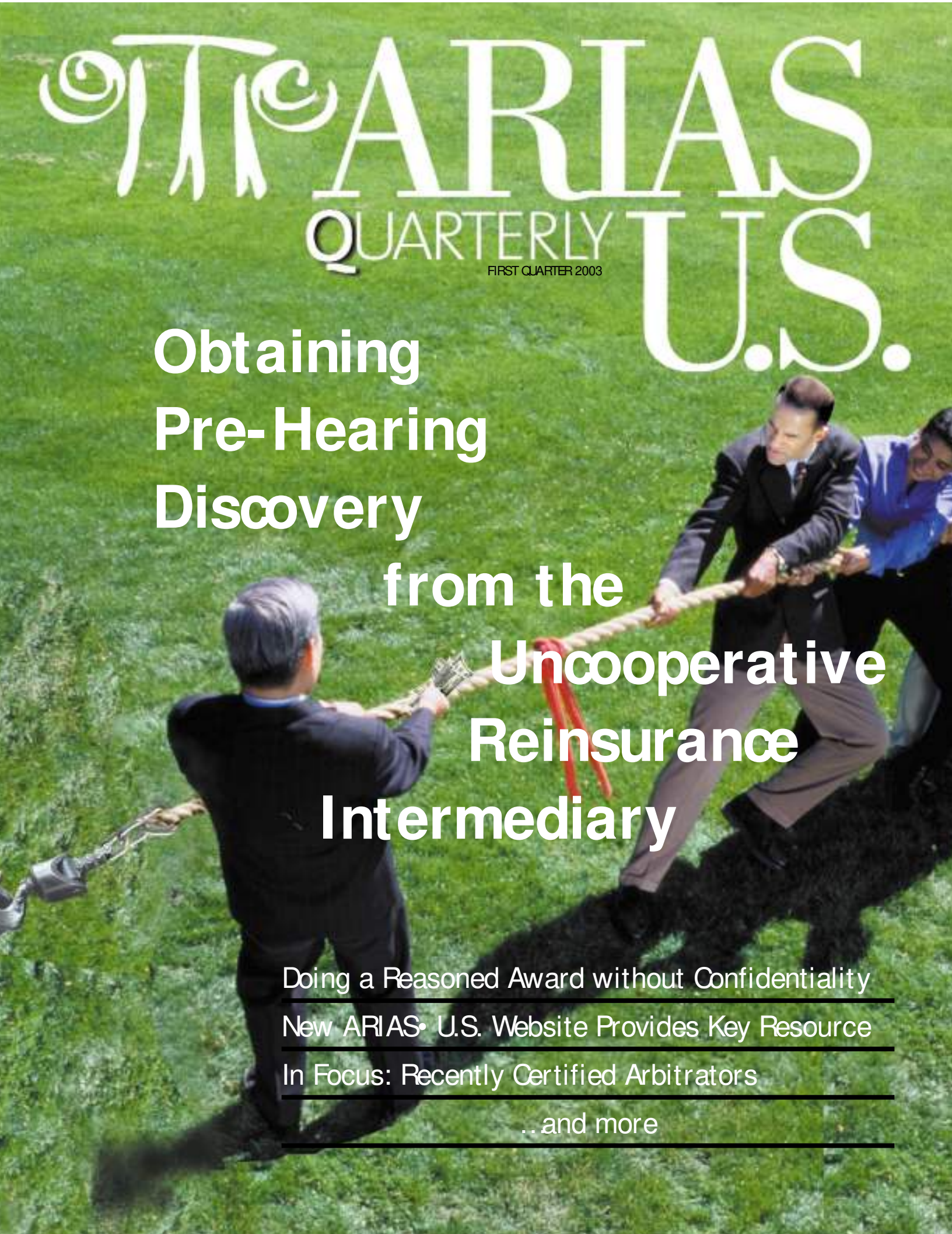

Obtaining Pre-Hearing Discovery from the Uncooperative Reinsurance Intermediary

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Obtaining Pre-Hearing Discovery from the Uncooperative Reinsurance Intermediary:

The Current State of the Law and Avenues for Reform

Michele L. Jacobson, Robert Lewin, and Royce F. Cohen
Stroock & Stroock & Lavan LLP[1]

Introduction

Reinsurance intermediaries play an integral role in the formation of contracts of reinsurance. They are responsible, in large measure, for the negotiation and placement of reinsurance agreements, the wordings of the agreements, and the flow of funds under those agreements. The reinsurance agreements placed by intermediaries often contain, as is customary in the industry, arbitration clauses. These clauses require that the parties to the reinsurance contract arbitrate their disputes and, hence, are governed by the body of state and federal law concerning arbitration. Surprisingly, as many practitioners and arbitrators have found, arbitration law can be unfriendly towards pre-hearing discovery of non-parties, especially when it comes to oral examination prior to the arbitration hearing. Standing on the reluctance of some courts to require non-parties to submit to pre-hearing discovery, and to the frustration of parties to arbitrations and their panelists, intermediaries have increasingly refused to participate in pre-hearing discovery. Oftentimes, the dispute at hand involves alleged misrepresentations concerning the risks ceded under a treaty or interpretation of wordings. The reinsurance intermediary is in a unique position to provide crucial information concerning these matters. However, whether due to concerns relating to their own errors and omissions liability, or the desire not to take positions in disputes between clients, intermediaries have simply refused to produce documents and appear for depositions, even when subpoenaed by arbitration panels. Unlike other non-parties to reinsurance contracts, reinsurance intermediaries are not strangers to the contracts that they have negotiated, and should be treated differently than other non-parties to those agreements.

This article examines the current state of the law regarding pre-hearing discovery, and argues that reinsurance intermediaries should be held to a different standard than other nonsignatories to arbitration agreements. We submit that reinsurance intermediaries, having benefited from the reinsurance agreement containing the arbitration clause, should be held to be third-party beneficiaries and required under that clause to submit to discovery ordered by arbitration panels. Finally, this article examines various proposals designed to confront the reinsurance intermediary discovery issue, and makes recommendations for the industry and parties to reinsurance agreements.

I. The Integral Role of the Reinsurance Intermediary

A reinsurance intermediary has an integral role in reinsurance transactions, usually (1) placing the risk on behalf of a ceding company; (2) participating in the negotiation of the reinsurance contract; and (3) serving as a conduit for communication between the cedent and the reinsurer, transmitting payments, collecting balances due and settling losses.[2] The intermediary usually receives a percentage of the premium ceded to the reinsurer.[3]

As a general rule, most cases recognize an

> ...intermediaries have simply refused to produce documents and appear for depositions, even when subpoenaed by arbitration panels.

Michele L. Jacobson and Robert Lewin are partners in the Litigation Department of Stroock & Stroock & Lavan LLP's New York office. Ms. Jacobson and Mr. Lewin concentrate in complex insurance and reinsurance matters. Royce F. Cohen is an associate in Stroock's Litigation Department.

Reinsurance intermediaries possess critical information and may, indeed, be the sole source of that information.

agency relationship between the intermediary and the cedent.[4] However, depending upon the relationship between the reinsurer and the intermediary, it is possible that an intermediary could be deemed a dual agent.[5]

The intermediary is generally not a signatory to the reinsurance agreement, although it is a beneficiary thereunder. Many, if not most, reinsurance agreements contain "intermediary clauses" which designate an intermediary, setting out its role in communications between the parties and its agency status as for purposes of collecting amounts due between the parties. The intermediary is generally responsible for drafting the intermediary clause and including it in the reinsurance agreement.[6] The following is a sample intermediary clause:

> *(Intermediary Name)* is hereby recognized as the Intermediary negotiating this Contract for all business hereunder. All communications (including but not limited to notices, statements, premium, return premium, commissions, taxes, losses, loss adjustment expense, salvages and loss settlements) relating thereto shall be transmitted to the Company or the Reinsurer through *(Intermediary Name and Address)*. Payments by the Company to the Intermediary shall be deemed to constitute payment to the Reinsurer. Payments by the Reinsurer to the Intermediary shall be deemed to constitute payment to the Company only to the extent that such payments are actually received by the Company.[7]

The intermediary may therefore be said to have consented orally or by conduct to a duty of faithful transmission under the intermediary clause or estopped to deny it.[8] It has been held that the reinsurance contract is a three-party contract, even though it was only signed by two parties, once the intermediary begins performance under the contract or accepts benefits under it.[9] Moreover, reinsurance intermediaries are often the architects of the wordings for the reinsurance agreement, utilizing their own forms. Therefore, although the reinsurance intermediary may not be a signatory to a reinsurance contract, having drafted the clause, and having accepted the benefits and responsibilities thereunder, it should be bound to the parties via that contract, and be required to cooperate with the parties as their fiduciary in the dispute resolution mechanisms set out in that contract.

II. The Current State of the Law With Respect to Pre-Hearing Documentary and Testimonial Discovery from Non-Parties

There is a growing amount of case law concerning non-party discovery, specifically with respect to pre-hearing non-party documentary and testimonial evidence. This issue is especially important and relevant when the non-party/nonsignatory is the reinsurance intermediary. Increasingly, reinsurance intermediaries have become less than cooperative when dealing with arbitration panels. Reinsurance intermediaries possess critical information and may, indeed, be the sole source of that information. Parties may have lost their documents due to the passage of time, personnel changes or document retention policies. And, where rescission on the grounds of misrepresentation of the reinsured risk is at issue, or the wordings are ambiguous, the reinsurance intermediary is the lynchpin. Thus, broad discovery from the intermediary in the arbitration process is essential. The current state of the law may not, however, be hospitable towards broad discovery when the intermediary refuses to produce documents or submit to oral examination as set forth in subpoenas issued by an arbitration panel.

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA")[10] defines an arbitration panel's authority to require nonsignatories or third

parties to submit to discovery.[11] Within an agreement, parties cannot only agree to arbitrate but they can also impose discovery obligations on the signatories. Parties cannot, however, impose discovery obligations on nonsignatories. Section 7 of the FAA states:

> 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*. 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; 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.

Federal Arbitration Act, 9 U.S.C. § 7 (emphasis added).[12] While specifically addressing the subpoena power of arbitration panels to require non-parties to appear and produce at the arbitration hearing, the FAA does not address the arbitrators' power to require non-parties to submit to pre-hearing discovery. This "gap" in the FAA has resulted in a split of authority, which can be divided into four categories: (1) no pre-hearing discovery from non-parties permitted unless there is a special need; (2) pre-hearing discovery allowed for non-party document requests but not allowed for non-party depositions; (3) broad pre-hearing discovery permitted; and (4) non-party discovery as set forth in arbitration agreement.

1. Interpreting the FAA Strictly: No Pre-Hearing Discovery Absent "Special Need"

The most restrictive approach, embraced by the United States Court of Appeals for the Fourth Circuit, permits pre-hearing discovery from non-parties only in instances of demonstrated "special need." In *Comsat Corporation v. National Science Foundation*,[13] the Fourth Circuit held that, since non-parties are not bound by the underlying arbitration agreement, an arbitrator has no power to compel non-party participation in discovery absent authority derived from the FAA. There, an arbitration panel had issued a pre-hearing subpoena to non-party National Science Foundation ("NSF") to produce certain records and employee testimony related to a construction contract between Comsat Corporation ("Comsat") and Associated Universities, Incorporated ("AUI"). NSF refused to comply with the subpoena and a district court ordered it to do so.[14] The Fourth Circuit reversed the holding, and restricted the arbitrators' power over non-parties to the actual appearance before the arbitration panel at the hearing.[15]

The Court held that the subpoena powers of an arbitrator should be strictly limited to those explicitly provided for in the FAA. Reading section 7 of the FAA narrowly, the Fourth Circuit held that the phrase "before them" meant attendance before the arbitrator at the actual hearing.[16] The Court explained its rationale as follows: Parties in arbitration have waived their right to rely on the discovery devices available in conventional litigation, opting instead to resolve disputes in a less lengthy, more cost-efficient, manner than litigation.[17] Since both parties have elected to arbitrate, neither may reasonably expect to obtain full-blown discovery from the other or from third parties.[18] The Fourth Circuit noted, however, that there is no blanket rule prohibiting non-party discovery. The Court acknowledged that there could be cases where "special needs" would require an exception to the general rule prohibiting discovery. While not defining "special needs," the Court emphasized that a party would have to demonstrate an inability to get the information elsewhere.[19]

A few months later, the Fourth Circuit affirmed a district court's decision permitting pre-hearing discovery from a party where the lower court had found a "special need." *In Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*,[20] the petitioner contended that a ship it had chartered had sub-par speed due to engine problems. The petitioner sought to inspect the vessel, arguing that the respondent was making repairs to the ship, including the engine. Thus, absent the taking of pre-hearing evidence, it would have no evidence of the ship's condition. It requested perpetuation of evidence that if not preserved was going to disappear and or be materially altered.[21] The Fourth Circuit held that:

> [i]n this narrow set of facts, we agree with the district court's conclusion that Deiulemar faced a "special need" that justified preserving the evidence on the *Allegra*. . . . We leave for future determination the proper scope of the "special need" exception as it applies to other forms of discovery in aid of arbitration.[22]

Under the Fourth Circuit's approach, parties to a reinsurance arbitration agreement would need to demonstrate that they had a "special need" in order to obtain pre-hearing discovery from a reinsurance intermediary. This "special need" may be shown, for example, by arguing that the intermediary possesses vital information not obtainable from other sources. This is especially true where the issue before the arbitration panel is one of misrepresentation in the placement of the reinsurance agreement. Only the intermediary's placement file and testimony will show what was commu-

nicated to the reinsurer, and what was originally communicated to the intermediary by the ceding company. Where the issue is one of intent, the intermediary similarly possesses crucial information. Finally, in instances where the parties' records are unavailable, the intermediary's records and recollections may be the only source of information dispositive of a dispute. Thus, while overly restrictive, there is "wiggle room" within the Fourth Circuit's rubric to obtain pre-hearing discovery from intermediaries and other non-parties.

2. Cases Upholding Pre-Hearing Discovery for Non-Party Document Requests

Another approach, adopted by the United States District Court for the Eighth Circuit, is more expansive. In *In re Security Life Insurance Company of America*,[23] the Eighth Circuit upheld an arbitration panel's exercise of its implicit power to order the pre-hearing production of documents. There, Security Life Insurance ("Security") purchased reinsurance from a pool of reinsurers managed by Duncanson & Holt ("D & H").[24] When the reinsurance pool refused to reimburse Security for a loss, Security demanded arbitration against D & H. Security then served a subpoena issued by the arbitration panel on Transamerica Occidental Life Insurance Company ("Transamerica"), one of the reinsurers, to produce documents and testimony of one of its employees. Security petitioned for an order compelling either the reinsurer's compliance with the subpoena or its participation in the arbitration proceedings.[25] Transamerica refused to respond to subpoena. The district court ordered Transamerica to do so, and Transamerica appealed.[26] The Eighth Circuit held that

> [a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.[27]

The Court, however, did not analyze whether the arbitration panel could compel pre-hearing depositions, because the appeal was moot as to the request for witness testimony.

Likewise, the United States District Court for the Southern District of New York came to a similar conclusion. In *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.*,[28] the district court directed a third-party, pursuant to its authority under Section 7 of the FAA, to comply with an the arbitrator's subpoena. There, a party obtained a subpoena from an arbitrator for certain documents from a third-party, Laser Tech Color Corporation ("LTC").[29] American Color Graphics, Inc. ("ACG") asserted a counterclaim in which ACG alleged, *inter alia*, that Brazell had breached the noncompetition, confidentiality and nonsolicitiation clauses in the Employment Agreement; specifically, that Brazell violated these clauses in dealings with LTC. The court noted that, while LTC was not a participant in the arbitration, it had an established history with the parties and was not a mere third-party drawn into the matter capriciously. After analyzing the case law in both the district and outside, and the district court upheld the arbitrator's authority to provide for pre-hearing production of documents from third parties.

Another district court in the Southern District, however, has taken a slightly different approach, stopping short of authorizing subpoenas compelling third parties to submit to pre-hearing depositions. In I*ntegrity Insurance Co. v. American Centennial Insurance Co.*,[30] a dispute arose out of a number of reinsurance agreements. The liquidator of Integrity instituted arbitration proceedings against American Centennial Insurance Co. ("ACIC") pursuant to those agreements.[31] Subpoenas were issued by an arbitrator at the request of ACIC, compelling non-parties[32] to appear for deposition and produce documents relating to the reinsurance agreements at issue between ACIC and Integrity, as well as a related director's and officer's action involving Integrity.[33] The district court held that an arbitrator may compel the production of documents prior to the arbitration hearing but may not compel attendance of a non-party to a pre-hearing deposition.

The district court reasoned that,

> [a]rbitration is, however, a creation of contract, bargained for and voluntarily agreed to by the parties. The petitioners, who are not parties to the arbitration agreement, never bargained for or voluntarily agreed to participate in an arbitration. After weighing the policy favoring arbitration against the rights and privileges of non-parties, this Court concludes that an arbitrator does not have the authority to compel non-party witnesses to appear for pre-arbitration depositions.[34]

The Integrity court found a significant distinction between testimonial evidence and documentary evidence. Since the FAA specifically states that documentary evidence is required at the hearing from parties and non-parties alike, the Integrity court explained that documents are only produced once, whether it is at the arbitration hearing or prior to it.xxxv However, the court was unwilling to burden non-parties with, potentially, two appearances. The court found that

> [c]ommon sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The non-party may be required to appear twice—once for deposition and again at the hearing. That a non-party might suffer this burden in a litigation is irrelevant; arbitration is not litigation, and the non-party never consented to be a part of it. Furthermore, as the deposition is not held before the arbitrator, there is nothing to protect the non-party from harassing or abusive discovery.[36]

The Court then concluded that pre-hearing depositions of non-parties should not be permitted in arbitration proceedings.

As a drafter and beneficiary of the reinsurance contract, the intermediary is no stranger to the reinsurance contract, and should not be treated as one. Generally speaking, the intermediary has an established history with the parties and is not a mere third-party drawn into arbitration impulsively. Given the intermediary's role in drafting the reinsurance agreement, it is well familiar with the terms, including those requiring arbitration. Thus, the intermediary should anticipate that it may be drawn into arbitration proceedings at some point should a dispute arise between the parties. The policy reasons behind not requiring non-parties to submit to pre-hearing depositions articulated by the district court in Integrity, therefore, are not applicable in the reinsurance intermediary context.

3. Broad Pre-Hearing Discovery Permitted

In *Stanton v. Paine Webber Jackson & Curtis, Inc.*,[37] investors brought an action alleging violations of the Commodity Exchange Act, Florida security law and common law. The United States District Court for the Southern District of Florida granted the defendants' motion to compel arbitration pursuant to the FAA. The various defendants then sought documents from non-parties before the hearing.[38] In response, plaintiffs sought an order enjoining the defendants from requesting the issuance of and serving subpoenas for the attendance of witnesses and/or production of documents before the hearing.[39] The court observed that the plaintiffs were trying to impose judicial control over the arbitration proceedings, and gave strong consideration to the overall purpose of the FAA.[40] The court acknowledged that:

> Such action by the court would vitiate the purposes of the Federal Arbitration Act: "to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation." (Citation omitted) . . . Furthermore, the court finds that under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary.[41]

The United States District Court rejected, without explanation, the contention that the FAA only permits the arbitrators to compel witnesses at the hearing and prohibits pre-hearing appearances.[42]

Similarly, in *Meadows Indemnity Company, Ltd. v. Nutmeg Insurance Co.*,[43] the United States District Court for the Middle District of Tennessee perceived value in broad pre-hearing discovery. There, Meadows Indemnity Company, Ltd. ("Meadows") had commenced a lawsuit against several insurance companies and their pool managers relating to the operation of a casualty insurance/reinsurance pool. The district court compelled arbitration, and stayed litigation vis-à-vis the pool managers, including Willis Corroon. The arbitration panel issued a subpoena requiring the production of documents from Baccala & Shoop Insurance Services ("BSIS"), a company wholly owned by Willis Corroon. Willis Corroon moved for a protective order, arguing that, as a non-party to the arbitration proceedings, the arbitration panel lacked statutory authority to require it to produce numerous documents, not for the panel's review at the hearing, but for inspection and copying by Meadows prior to the hearing.[44] The district court rejected Willis Corroon's contention, finding that non-party discovery was vital for the arbitrator to make a "full and fair" determination of the issues in dispute. The court also found that since the arbitrator has the authority to require non-parties to produce documents at the hearing, the arbitration panel implicitly has the power to do the same before the hearing.[45] The *Meadows* Court deferred to the arbitrator's judgment to establish the potential burdens and benefits of pre-hearing discovery. Of interest to our discussion, the *Meadows* court drew further support for its conclusion from the fact that Willis Corroon was not a stranger to the parties to the arbitration:

> While Willis Corroon and BSIS are not parties to the arbitration, they are intricately related to the parties involved in the arbitration and are not mere third parties who have been pulled into this matter arbitrarily.[46]

Like the pool manager in *Meadows*, the reinsurance intermediary is "intricately related" to the parties. Although the *Meadows* court did not deal directly with pre-hearing testimonial evidence, its rationale should apply to any discovery relating to reinsurance intermediaries. Only if the arbitration panel has all documentary and testimonial evidence can it make a "full and fair" determination of the issues. Broad pre-hearing discovery rules are suitable for reinsurance intermediaries.

4. Non-Party Discovery Agreed to in Arbitration Agreement

Another example of broad pre-hearing non-party discovery comes from the United States District Court for the Northern District of Illinois. *In Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*,[47] the arbitrator of the dispute between two corporations issued a subpoena to a non-party to produce documents and send a representative to testify at a deposition.[48] The subpoenaed party argued that there were territorial restrictions in the FAA, which prevented the court from enforcing the subpoena. At the outset, the district court held that the arbitrator was within his right to issue a pre-hearing documentary and testimonial subpoena to a non-party to an arbitration proceeding. Citing the Stanton and Meadows decisions with approval, the district court held that "implicit in the power to compel testimony and documents for purpose of a hearing is the lessor (sic) power to compel such testimony and documents for purposes prior to hearing."[49] Turning to the jurisdictional issue, the court concluded that the parties' agreement in their contract that the Federal Rules of Civil Procedure would govern the arbitral discovery process permitted the courts to enforce a subpoena issued by an attorney pursuant to Rule 45 of the Federal Rules of Civil

Procedure. The district court noted that the parties' agreement to incorporate the Federal Rules of Civil Procedure meant that the Federal Rules, which "contemplate and provide both for a mechanism for nationwide discovery, and preserving the testimony of witnesses unavailable at trial because they are outside the district, by use of evidence depositions" would govern.[50]

5. Summary

Pre-hearing discovery is a crucial and essential part of the arbitration process. Further, since Section 7 of the FAA gives the arbitrators the power to order both documentary and testimonial evidence at the arbitration hearing, it is illogical that they would not have the power to issue pre-hearing subpoenas if they deem them to be necessary and relevant. The purpose of arbitration is to provide a quick, easy and fair resolution of disputes. That resolution can only be fair if the arbitration panel has all of the vital information it requires. Pre-hearing discovery is especially important where the non-party is outside the subpoena power of the panel for attendance at the hearing. Pre-hearing discovery also promotes settlement, by eliminating surprise at the hearing. Case law restricting pre-hearing discovery is often founded on the notion that, in general, since non-parties did not agree to become part of the arbitration process, they should not be burdened by pre-hearing discovery. This rationale does not apply to the reinsurance intermediary. A reinsurance intermediary is not a stranger to the contract. It is very familiar with the reinsurance agreement and, in most instances actually drafted it. Therefore, broad pre-hearing discovery for intermediaries, benefits all involved and ensures an equitable outcome.

III. Obtaining Discovery from Intermediaries through Principles of Contract Interpretation and Agency

While case law concerning non-party discovery is one means of obtaining discovery from recalcitrant intermediaries, principles of contract and agency law may also assist in the discovery process. Practitioners may persuasively argue that, as third-party beneficiaries of the reinsurance agreement and as agents for one or more of the principals to that agreement, reinsurance intermediaries are bound to the arbitration clauses contained in those agreements. Thus, one could argue that disputes with intermediaries are subject to arbitration, and, that, accordingly, the intermediaries should also be bound to the discovery orders of panels in arbitrations between the reinsured and reinsurer.

A. The Intermediary as a Third-Party Beneficiary under the Reinsurance Agreement

Where parties to a contract intend that a third-party should benefit from that contract, the third-party is an intended beneficiary who has enforceable rights under the contract.li The Restatement (Second) of Contracts defines an intended beneficiary as:

§ 302. Intended and Incidental Beneficiary

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary as appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[52]

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In order for third-party beneficiaries to benefit from the terms of the contract, the third-party beneficiary must also abide by the terms of the contract. A third-party beneficiary is bound by the terms and conditions of the contract that it attempts to invoke.[53] The beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract.[54]

Third-party beneficiary law is determined by state contract law, rather than the FAA. In fact, case law is split from jurisdiction to jurisdiction as to whether there needs to be an intention to bind the third-party beneficiary to the arbitration clause under the contract in which it is a beneficiary.[55] Thus, it is unclear whether merely being a third-party beneficiary under a contract containing an arbitration clause sufficiently binds a third-party beneficiary to those arbitration provisions.

We believe, however, that a strong argument can be made that an intermediary is a third-party beneficiary under a reinsurance agreement which contains an intermediary clause.[56] Intermediaries benefit from the terms of the reinsurance agreement, and receive fees from the operation of that agreement. Thus, by accepting the benefits from the reinsurance agreement, intermediaries should be bound thereunder. Accordingly, as a third-party beneficiary, the reinsurance intermediary should be bound by the arbitration clause of the contract, and should be required to participate in the arbitration proceedings commenced by the parties to the contract.

B. Binding Non-Signatories to the Agreement to Arbitrate

The United States Supreme Court has held that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[57] Nevertheless, in cases arising under the FAA, courts have consistently held that "a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency."[58] Expanding upon that theme, the Second Circuit stated in T*homson-CSF,*

S.A. v. Prudential Bache Securities, Inc.:[59]

> This Court has recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.[60]

A reinsurance intermediary, although a nonsignatory, is an agent of the parties under the reinsurance agreement, having accepted the fees thereunder, and the responsibilities associated with communications and payment. Many courts have held that where a principal is bound under the terms of a valid arbitration clause, its agents, employees and representatives are also covered under the terms of such agreements.[61] Notably, the United States District Court for the Southern District of New York has held that an intermediary who was not a party to a reinsurance arbitration was collaterally estopped from relitigating the issues decided by the arbitration panel.[62] Even though reinsurance intermediaries are nonsignatory third parties, as agents under the reinsurance contract, they ought to be bound to the arbitration clause of the reinsurance agreement and participate in pre-hearing discovery.

IV. Proposals for Obtaining Broad Discovery from Reinsurance Intermediaries

Although, as discussed above, there are opportunities for practitioners and arbitration panels to obtain broad discovery from reinsurance intermediaries, this area is not free from doubt under existing case law. Certain jurisdictions are plainly more favorable than others. Even courts permitting discovery from non-parties will often undergo a fact-specific analysis with respect to the case at hand.

Uniformity and certainty, therefore, do not exist in this area. It is unlikely, moreover, that evolving case law will give arbitration panels and practitioners any comfort that they will be able to secure the pre-hearing discovery that they require from reinsurance intermediaries. This industry, however, should agree that access to a reinsurance intermediary's information in a pre-hearing context is critical to the success of the arbitration process. Reform, whether contractual or regulatory, is therefore in order.

One commentator, Robert M. Hall, an ARIAS-certified arbitrator and umpire, has suggested three options for reform: (1) amending the FAA; (2) making the intermediary a party to the reinsurance agreement; and (3) amending intermediary laws and regulations.[63]

A. Amending the Federal Arbitration Act

As noted above, it is the "gap" in the FAA that has created uncertainty in the case law with respect to the availability of pre-hearing discovery from non-parties. Thus, an amendment of the statute to expressly permit the taking of pre-hearing discovery from non-parties and provide for the enforceability of an arbitration panel's subpoenas in that regard would, plainly, be the best solution. However, an amendment of the FAA would have broad applicability, and would not affect this industry alone. As noted by Robert Hall, suggesting an amendment of a federal statute is intricate and would have consequences that are difficult to predict. With the required lobbying effort, potential political opposition and bureaucratic red tape, what appears to be the best solution is also the most impractical one.

B. Contractual Methods of Binding Reinsurance IntermediariesTo Pre-Hearing Discovery

There are two different contractual methods of requiring reinsurance intermediaries to provide pre-hearing testimonial and documentary evidence. First, the intermediary may be made a party to the reinsurance agreement, by either (1) signing the wordings as a whole, and making the reinsurance agreement a three-way agreement among the ceding company, reinsurer(s) and the intermediary; or (2) signing the reinsurance agreement as to the intermediary and arbitration clauses alone. The arbitration clause would then provide that the intermediary must submit to pre-hearing discovery ordered by the arbitration panel in disputes arising out of the reinsurance agreement. Disputes with the intermediary would also be subject to arbitration under this approach. This approach is especially attractive where the intermediary is located outside of the United States, such as in the United Kingdom, where discovery devices are even more limited in the arbitration setting. Contractual provisions would thus bind the intermediary without need to resort to normally available discovery. While attractive, however, it should be noted that this approach would undoubtedly meet with resistance from intermediaries, who often are the draftspersons of the reinsurance agreement, and who have little incentive to submit to additional obligations, which may inure, ultimately, to their detriment (*i.e.*, by exposing themselves to errors and omissions liability).

Second, ceding company clients can require their intermediaries to add a provision in the contract (or letter of authorization) between the intermediary and the ceding company that requires the intermediary to cooperate with an arbitration panel in pre-hearing discovery in the event that a dispute arises under a reinsurance contract that it places on behalf of the ceding company. This approach provides an incentive for the intermediary: If the intermediary will not sign the contract, the ceding company can use another intermediary for its reinsurance business.

C. Amending Reinsurance Intermediary Laws and Regulations

Almost all states have laws and regulations governing the activities of intermediaries. It is possible, through the amendment of these laws and

regulations, to impose pre-hearing discovery requirements upon intermediaries, and to provide for penalties in the absence of compliance with pre-hearing subpoenas served in arbitration proceedings. In his article, Robert M. Hall has suggested the following should be sanctionable:

> Failure to comply with the order of a reinsurance arbitration panel to produce documents or testimony with respect to a dispute being considered by the panel unless the intermediary obtains an order of a court of competent jurisdiction quashing the panel's order on non-jurisdictional grounds.[64]

This language would still permit the intermediary to protest the *scope* of discovery to a court, but not the ability to protest pre-hearing discovery in its totality.

Notably, this approach suffers from a similar problem as with amending the FAA. However, since the constituency is more uniform, its chance of success is greater. It should be noted, however, that even if the laws and regulations were modified to require intermediaries to submit to pre-hearing discovery at the risk of sanction, in order to be meaningful, these laws and regulations would need to be enforced. This would require the cooperation of state regulators and the devotion of resources that some state departments of insurance lack.

V. Conclusion

Reinsurance intermediaries, as nonsignatory third-party beneficiaries to the reinsurance agreements that they negotiate and provide services under for a fee, should be bound to the agreement to arbitrate and to pre-hearing discovery requirements. They are in a unique position to provide vital documents and testimony to the parties and to the arbitrators. The reinsurance intermediary must be held to the same standard as a party to the reinsurance contract and should be compelled to produce documentary and testimonial evidence in advance of the arbitration hearing. Pre-hearing discovery fosters settlement, reduces surprise at the arbitration proceeding, and will work to shorten the arbitration hearing itself. Given the current uncertain state of the law, participants in the arbitration process must look toward different approaches in obtaining pre-hearing discovery from recalcitrant intermediaries. The most efficient and prompt option is to add a provision to the reinsurance contract or letter of authority between the ceding company and the intermediary that requires the intermediary to participate in the arbitration process should disputes arise under the reinsurance agreements it places. This approach may also be combined with an industry effort to amend existing intermediary laws and regulations to provide for sanctions in the absence of intermediary cooperation with orders of arbitration panels.

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2 Ostrager, Barry R. & Mary Kay Vyskocil, *Modern Reinsurance Law and Practice* §§ 1.03, 4.03[a] (2d ed. 2000).

3 *Id.* § 4.03[a].

4 *Houston Casualty Co. v. Certain Underwriters at Lloyd's London*, 51 F. Supp. 2d 789, 799-800 (S.D. Tex. 1999)(holding that the reinsurance broker was the agent of the ceding company); *Pritchard & Baird, Inc. v. Francis,* 8 B.R. 265 (D.N.J. 1980), aff'd, 673 F.2d 1301 (3d Cir. 1981) (upholding ruling of the bankruptcy court that Pritchard & Baird, the intermediary, was the agent of the ceding company while holding premiums intended for the reinsurer); *Calvert Fire Insurance Company v. Unigard Mutual Insurance Company*, 526 F.Supp. 623 (D.Neb. 1980), aff'd, 676 F.2d 707 (8th Cir. 1982) (holding that the intermediary was the agent of the reinsured).

5 *See, e.g., Capitol Indemnity Corp. v. Stewart Smith Intermediaries, Inc.,* 593 N.E.2d 872, 876 (Ill. App. Ct. 1992) (finding that although a reinsurance intermediary typically represents the reinsured, the intermediary may also become the agent of the insurer or both parties); Paul M. Hummer, *Reinsurance Intermediaries: When Are They Liable and To Whom?*, Mealey's Litigation Reports September 25, 1996 § Commentary; Vol. 7, No. 10 (affirming that "courts have found intermediaries to be the agents of reinsurers for purposes of collecting premiums, but the agents of cedents for purposes of misrepresentations made in the underwriting process").

6 Staring, Graydon S., *Law of Reinsurance* § 7:4 (1993)

7 The Brokers & Reinsurance Markets Association Contract Wording Reference Book, § 23A Intermediary available at http://www.brma.org/contracts/index.htm.

8 Staring at § 7:4.

9 *U.S. International Reinsurance Co. v. Saturn Intermediaries, Ltd., No. 91 C 3739, 1992 WL* 51694 (N.D. Ill. March 9, 1992).

10 9 U.S.C. § 1, *et. seq.*

11 The FAA applies to any written agreement to arbitrate "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Reinsurance agreements typically involve commercial entities in different jurisdictions, and hence are properly considered interstate commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (FAA extends to limits of Congress' commerce clause power); see also *Hart v. Orion Ins. Co.,* 453 F.2d 1358 (10th Cir. 1971); *Woodmen of World Life Ins. Society v. White*, 35 F. Supp. 2d 1349, 1355 (M.D. Ala. 1999)(FAA applied because insurance involves interstate commerce); *VCW, Inc. v. Mutual Risk Management, Ltd.*, 46 S.W.3d 118 (Mo. Ct. App. 2001). When the FAA applies, state courts are constrained to apply federal, and not state, law. *Webb v. R. Rowland & Co.*, 800 F.2d 803 (8th Cir. 1986); *Masthead MAC Drilling Corp. v. Fleck,* 549 F. Supp. 854 (S.D.N.Y. 1982); *Bunge Corp. v. Perryville Feed & Produce, Inc.,* 685 S.W.2d 837 (Mo. 1985).

12 Unlike the FAA, the Uniform Arbitration Act ("UAA"), does have a provision for pre-hearing discovery. The UAA of 1956 has been adopted in thirty-three jurisdictions and the UAA of 2000 has been adopted in four jurisdictions (and has been "introduced" in fourteen jurisdictions). As noted above, however, to the extent that a state has adopted the UAA, or a modified version thereof, the UAA would not apply where the matter at hand involved interstate commerce. Section 7 of the UAA, which is the same in both the 1956 Act and the 2000 Act, provides:

> a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.
>
> 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.

The Uniform Arbitration Act is available at http://www.lectlaw.com/files/adr06.htm.

13 190 F.3d 269 (4th Cir. 1999),

14 *Id.* at 274.

15 *Id.* at 275.

16 *Id.*

17 *Id.* at 276.

18 *Id.*

19 The record in Comsat showed that Comsat could have obtained the materials it sought through the Freedom of Information Act, as it had earlier obtained hundreds of responsive documents through that process. *Id.* at 276.

20 198 F.3d 473, 481 (4th Cir. 1999)

21 *Id.*

22 *Id.* The Fourth Circuit also found that the "extraordinary circumstances" presented in this situation warranted the granting of petitioner's Federal Rule of Civil Procedure Rule 27 motion for the perpetuation of evidence. *Id.* at 486-7.

23 228 F.3d 865 (8th Cir. 2000)

24 *Id.* at 867.

25 *Id.* at 867-8.

26 *Id.* at 868-9.

27 *Id.* at 870-1.

28 No. M-82 AGS, 2000 WL 364997 (S.D.N.Y. April 7, 2000)

29 *Id.*

30 885 F. Supp. 69 (S.D.N.Y. 1995)

31 See *Id.* at 69-70.

32 Although non-parties, one of the subpoenaed individuals was not a "stranger" to Integrity, being a former officer and/or director of the company. The other subpoenaed individual was his attorney. *Id.* at 70.

33 *Id.*

34 *Id.* at 71.

35 *Id.* at 73.

36 *Id.* at 73.

37 685 F. Supp. 1241 (S.D. Fla. 1988)

38 *Id.*

39 *Id.*

40 *Id.* at 1242.

41 *Id.*

42 The *Integrity* court attempted to distinguish *Stanton* on the grounds that (1) the objection to the subpoenas was made by a party as opposed to the subpoenaed non-party; and (2) the subpoenas issued by the arbitration panel were for documents only. *See Integrity Insurance Co. v. American Centennial Insurance Co.*, 885 F. Supp. at 72. These attempted distinctions, however, fall flat. Although the subpoenas directly at issue were *duces tecum* only, the plaintiffs in *Stanton* sought an order enjoining the defendants from "requesting the issuance of and serving subpoenas for the attendance of witnesses or production of documents, other than for attendance or production before the arbitration panel." 685 F. Supp. at 1241. Thus, the *Stanton* court, in rejecting the plaintiffs' application, directly considered whether the arbitration panel was authorized to issue subpoenas compelling testimony before the hearing.

43 157 F.R.D. 42 (M.D. Tenn. 1994)

44 *Id.* at 44.

45 *Id.* at 45.

46 *Id.* at 45.

47 879 F. Supp. 878 (N.D. Ill. 1995)

48 *Id.*

49 *Id.* at 880.

50 *Id.* at 883.

51 *Gomez v. Huntington Trust Co.,* No. 3:98CV7436, 2001 WL 1110350, at *11 (N.D. Ohio August 28, 2001).

53 Restatement (Second) of Contracts: Chapter 14 Contract Beneficiaries § 302 Intended and Incidental Beneficiaries (American Law Institute Publishers, 1982).

54 *Interpool Limited v. Through Transport Mutual Insurance Association,* 635 F. Supp. 1503, 1505 (S.D. Fla. 1985).

55 *Id.*

56 *Compare* In re *Prudential Ins. Co. of America Sales Practice Litigation*, 133 F.3d 225, 229 (3d Cir. 1998)(requiring that there be "an expression of the requisite intent between the third party and the plaintiff to arbitrate their claims"); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1117 (1st Cir. 1986) with *Nesslage v. York Securities, Inc.*, 823 F.2d 231, 233-34 (8th Cir. 1987) (holding that third-party beneficiaries could enforce terms of arbitration clause without a discussion of intention to bind those beneficiaries to arbitration clause).

57 It should be noted that, in at least one instance, a court has held, under the facts before it, that intermediaries were not third-party beneficiaries of a reinsurance pool management agreement for purposes of standing to compel arbitration under that agreement. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 866-67 (D.N.J. 1992). There, the management agreement at issue authorized a line slip manager to obtain insurance risks on behalf of pool members. The agreement made no explicit reference to the intermediaries. The only "hook" that the intermediaries had under the management agreement was the implicit possibility that the line slip might employ other intermediary brokers to obtain risks for the line slip. The court concluded that this "indirect reference to third parties" could not establish that the intermediaries were third-party beneficiaries under the contract. *Id.* This case is readily distinguishable from reinsurance agreements which contain intermediary clauses identifying the intermediary, and requiring it to perform tasks under the agreement.

58 *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960).

59 *Thomson-CSF, S.A. v. American Arbitration Association,* 64 F.3d 773, 776 (2d Cir. 1995); see also *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (stating that a variety of nonsignatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles); *Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 7 (2d Cir. 1981) (granting trial on whether alleged principal-agent relationship bound nonsignatory party to arbitration agreement).

60 64 F.3d 773 (2d Cir. 1995)

61 *Id.* at 776; see also *Wells Fargo Bank v. London Steam-Ship Owners' Mutual Ins. Ass'n*, 408 F. Supp. 626, 628-30 (S.D.N.Y. 1976) (in determining who is bound to arbitration agreement, federal courts look to state-law contract principles).

62 *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110 (3rd Cir. 1993) (holding that arbitration agreement applied to consultant and sister corporation, even though they had not signed it); *Arnold v. Arnold Corp.—Printed Communications for Business*, 920 F.2d 1269 (6th Cir. 1990) (holding that officers of corporation were entitled to arbitration as agents of corporation even though they had not signed the arbitration agreement); *The North River Ins. Co. v. Transamerica Occidental Life Ins. Co.,* No. Civ.A. 399-CV-0682-L, 2002 WL 1315786 at *6 (N.D. Tex. June 12, 2002).

63 *Commonwealth Insurance Co. v. Thomas A. Greene & Co., Inc.,* 709 F. Supp. 86 (S.D.N.Y. 1989) (holding the reinsurance intermediary was bound by the arbitration because: 1) it was in privity with the ceding company; and 2) the ceding company's theory, previously rejected by the arbitrators, was identical to that of the intermediary).

64 Hall, Robert M., *Intermediaries and Discovery in Reinsurance Arbitrations*, Mealey's Litigation Report: Reinsurance, December 2, 2002 at 30-1.

65 Hall, Robert M. I*ntermediaries and Discovery in Reinsurance Arbitrations*, Mealey's Litigation Report: Reinsurance, December 2, 2002 at 31.

news and notices

Spring Conference a Sell-out

To the distress of many who had been considering going to Bermuda but had not taken steps to register, on March 4 Bill Yankus announced by email to all members that registrations were closed. This startling announcement came 25 days before the registration deadline and over five weeks before the conference, itself.

The conference facilities at Elbow Beach had been reserved in May of last year, just after the Spring Conference in Puerto Rico. With that meeting having drawn 118 attendees, the 150 capacity of Elbow Beach's largest room seemed to offer a cushion of extra meeting space. However, by the time registrations could be closed, 174 attendees were already on board.

Elbow Beach went to work re-configuring the space to see how many could be accommodated for the general assembly sessions. The absolute maximum came out to 170 seats, with no standing room. It will be a very cozy series of meetings.

Interest and membership in ARIAS•U.S. has been increasing in recent months. Also, the early publicity and ease of registration through the website registration system may have contributed to the sudden surge. Even spouses have increased their attendance. Last year, 30 attended in addition to the 118 attendees; this year, the number is 52. Bermuda seems to have an extra attraction.

Bill has assured everyone that all future large ARIAS•U.S. conferences (Spring or Annual) will have a contingency for expansion, so that registration closing of these meetings will not happen again.

Interest and membership in ARIAS•U.S. has been increasing in recent months. Also, the early publicity and ease of registration through the website registration system may have contributed to the sudden surge.

Board Decisions

Recent decisions of the ARIAS•U.S. Board of Directors that you might like to know about.

January 16, 2003 Meeting:

Term Limits Resolution

WHEREAS, management of ARIAS-U.S. (hereinafter the "Society") is vested in a nine-member Board of Directors (hereinafter the "Board") elected pursuant to Article VI of the By Laws;

WHEREAS, under Article VI, Board members are elected for three year terms and the By Laws impose no limit on the number of terms a Board member may serve;

RESOLVED, Effective with Board elections in 2003 and thereafter, the Board will not nominate for re-election a member who has served two full terms, unless the Board determines that an additional term for a particular member would be in the best interests of the Society.

FURTHER RESOLVED, the Chairman of the Nominating Committee is directed to publish this resolution in the next available edition of the Society's newsletter and report to the Board periodically on Board candidates brought to the Committee's attention.

New Certifications

The following members were certified as ARIAS•U.S. arbitrators:

George A. Budd
Janet J. Burak
John R. Cashin
Theodor Dielmann
Peter F. Reid
Peter A. Scarpato
Michael J. Toman
James Veach
Andrew S. Walsh

February 28, 2003 Meeting:

First Year Dues

A dues pro-ration schedule will go into effect April 1 that reduces the amount of the first-year dues for individual and corporate members.
A reduction of one-third occurs on April 1, another one-third on July 1. Any member joining after October 1 will be considered paid for the upcoming calendar year. The new schedule is reflected on the membership form on page 31 of this issue of the Quarterly.

Designated Representatives

The Board clarified the handling of fees when a firm's designated representative leaves. That person may transfer to another firm and be designated, without payment of an initiation fee. However, if transfer is to an individual membership, an initiation fee must be paid. If the representative is a certified arbitrator, membership must be continuous for certification to be maintained.

New Certifications

The following members were certified as ARIAS•U.S. arbitrators:

Paul D. Brink
Kevin J. Tierney
I. Davis Jessup

ARIAS Members on the Move

Peter H. Bickford has left Cozen O'Connor to focus on his arbitration and consulting work. He can be found at 750 Lexington Avenue, 31st Floor, New York, NY 10022. His new contact numbers are: phone 212-826-3817, fax 212-593-4283, email phbickford@aol.com.

New Addresses

In each issue, we'll list the address changes, both postal and email, that have come in over the quarter, so that members can compare the list with their address books and Palm Pilots. Don't forget to notify us when *your* address changes. If we missed your change here, please fill out and fax the form on page x so we will be sure to catch you next time. Or send an email to byankus@cinn.com with the subject "Quarterly News."

T. RICHARD KENNEDY
16 Sutton Place, Apt 8B
New York, NY 1002
phone 212-893-8722
fax 212-893-8744
cell 917-796-2106
email trk@trichardkennedy.com

PETER SCARPATO
American International Group
175 Water Street
4th Floor
New York, NY 10038

JIM MCCARTHY
Diamond McCarthy Taylor
Finley Bryant & Lee, LLP
1201 Elm, Suite 3400
Dallas, Texas 75270
phone 214-389-5307
fax 214-389-5399
email
jmccarthy@diamondmccarthy.com

THOMAS M. DALY & Associates
19 West Ridge Road
New Fairfield, CT 06812

JOHN ALLARE:
jpallare@zoomtown.com

RICHARD WATERMAN:
northwest_re@msn.com

EMORY WHITE:
ewhite@thompsoncoc.com

J. MICHAEL GOTTSCHALK:
Acceptance Insurance Companies, Inc.
Suite 1600
300 West Broadway
Council Bluffs, IA 51503
phone: 712-329-3751
fax: 712-329-3834

ARIAS•U.S. Conferences Bring Credit to Members

For the past three years, ARIAS•U.S. has been an accredited provider of CLE courses in New York State. This means that our conferences are pre-approved by the state CLE Board for continuing legal education credits for New York attorneys. In fact, the CLE Board has just renewed this status for another three-year period.

Attorneys from other states often submit ARIAS•U.S. conferences individually to their state boards for credit. However, where a number of attorneys require credit for a conference, their applications have recently been facilitated by direct submissions from ARIAS. This was done with several states after the fact, for last November's Annual Conference. Pennsylvania, Wisconsin, Texas, and Ohio have given credit for that meeting.

Texas and Pennsylvania have approved the Spring Conference in advance. Documentation will be available in Bermuda for Texas and Pennsylvania attorneys.

While New Jersey does not give credit for out-of-state conferences, other states may. ARIAS will assist members whose CLE boards give out-of-state credit. Contact Bill Yankus at byankus@cinn.com to initiate the process.

feature

Doing a Reasoned Award without Confidentiality

Both parties asked that the written reasons be made known in the market because of the market importance of the decision in the arbitration: *Is a peril an occurrence in a catastrophe treaty?*

by Angus H. Ross

North American arbitration decisions are normally closely guarded secrets between the parties, and while the results occasionally trickle out into the market, the reasons almost never do. An unusual instance took place in Canada in 1997. *Both* parties asked that the written reasons be made known in the market because of the market importance of the decision in the arbitration: *Is a peril an occurrence in a catastrophe treaty?* Nowadays, it is the common practice in Canada for written reasoned decisions to be requested; however, they are almost never publicized!

In the hope that it will assist my fellow ARIAS arbitrators and umpires in drafting their own written reasons, following is the full written decision (with anonymity for the parties and the witnesses). This decision was prepared by me, serving as umpire, with the assistance of James Cameron and Douglas Cutbush, who were the arbitrators. For clarification purposes, it should be noted that Reinsurer A was a direct participant and prepared its own wordings; the other reinsurers used wordings prepared by an intermediary.

AWARD

Introduction

The claim is made pursuant to the arbitration provisions in the Property Catastrophe First and Second layer treaties entered into by the Applicant and Respondents. The Respondents had refused to settle a claim arising from hail damage in Winnipeg, Manitoba and in Calgary, Alberta on July 16th, 1996 made upon them by the Applicant on the basis of a single occurrence. By agreement of the parties the matter proceeded with written submissions followed by an oral hearing on October 6th and 7th, 1997.

It was agreed between the parties that certain variances from the Arbitration clause contained in the treaties were acceptable. These variances were:

Agreed modification of the time constraints contained in the clause.

Agreed that the appointed arbitrators would not act as advocates but as disinterested parties.

Agreed that the Umpire would participate in all proceedings of the Arbitration.

Facts

On July 16th, 1996 between the hours of 1900 and 2400 (local times) thunderstorm activity with accompanying hail took place in Winnipeg, Manitoba and in Calgary, Alberta.

The Applicant sustained 822 claims in Winnipeg and 513 claims in Calgary.

The storms causing the damage were not the same storm; they were separate atmospheric disturbances.

The Applicant takes the position that the claims arose out of one occurrence and that the losses should be aggregated for the purposes of claim under their property

Angus H. Ross is an ARIAS•U.S. Certified Arbitrator. Now Chairman of L & A Concepts, a reinsurance, arbitration, and environmental consultancy, Mr. Ross spent over 36 years in domestic and international property/casualty reinsurance, retiring as President of Sorema N.A.'s Canadian operations in June, 2000. He is a past Chairman of the Reinsurance Research Council of Canada.

catastrophe excess of loss treaties.

The Respondent takes the position that the claims arose out of two separate occurrences.

Quantum is not in dispute and if the claims are one loss occurrence, the limit of the Catastrophe First layer treaty would be exhausted.

The relevant occurrence section of the contracts, Article VI of the Agreements, reads as follows:

> DEFINITION OF OCCURRENCE.
> The word "occurrence" shall have the following meanings:
>
> The word "occurrence" shall mean the sum of all individual losses directly occasioned by any one disaster, accident or loss or series of disasters, accidents or losses arising out of one event which occurs within the area of one state of the United States or province of Canada and states or provinces contiguous thereto and to one another. However the duration and extent of any one "occurrence" shall be limited to all individual losses sustained by the REINSURED occurring during any period of 168 consecutive hours arising out of and directly occasioned by the same event, except that the term "occurrence" shall be further defined as follows:
>
> As regards windstorm, hail, tornado, hurricane, cyclone, including ensuing collapse and water damage, all individual losses sustained by the REINSURED arising out of and directly occasioned by the same event. However the event need not be limited to one state or provinces or states or provinces contiguous thereto.
>
> As regards riot, riot attending a strike, civil commotion, vandalism and malicious mischief, all individual losses sustained by the REINSURED occurring during any period of 72 consecutive hours within the area of one municipality or county or municipalities or counties contiguous thereto arising out of and directly occasioned by the same event. The maximum duration of 72 hours may be extended in respect of individual losses which occur beyond such 72 hours during the continued occupation of an assured premises by strikers, provided such occupation commenced during the aforesaid period.
>
> As regards earthquake (the epicentre of which need not necessarily be within the confines referred to in Paragraph A. of this Article) and fire following directly occasioned by the earthquake, only those individual fire losses which commence during the period of 168 consecutive hours may be included in the REINSURED'S "occurrence".
>
> As regards "freeze" only individual losses occasioned by collapse, breakage of glass and water damage (caused by bursting frozen pipes and tanks) may be included in the REINSURED'S "occurrence".
>
> Except for those "occurrences" referred to in subparagraphs 1 and 2 of paragraph A. above, the REINSURED may choose the date and time when any such period of consecutive hours commences, provided that it is not earlier than the date and time of the occurrence of the first recorded individual loss sustained by the REINSURED arising out of that disaster, accident or loss and provided that only one such period of 168 hours shall apply with respect to one event.
>
> However, as respects those "occurrences" referred to in subparagraphs 1 and 2 of paragraph A. above of greater duration than 72 consecutive hours, then the REINSURED may divide that disaster, accident or loss into two or more "occurrences", provided that no two periods overlap and no individual loss is included in more than one such period, and provided that no period commences earlier than the date and time of the occurrence of the first recorded individual loss sustained by the REINSURED arising out of that disaster, accident or loss.
>
> No individual losses occasioned by an event that would be covered by 72 hours clauses may be included in any "occurrence" claimed under the 168 hours provision.
>
> For the purposes of this Agreement,

CONTINUED ON PAGE 20

It could even be argued that hail damage in Australia and hail damage in Canada were the same event. This is patently not the intent nor purpose of a catastrophe treaty.

New ARIAS•U.S. Website

"With this feature, those who are involved in a dispute have a powerful tool for focusing on a highly qualified pool of candidates."

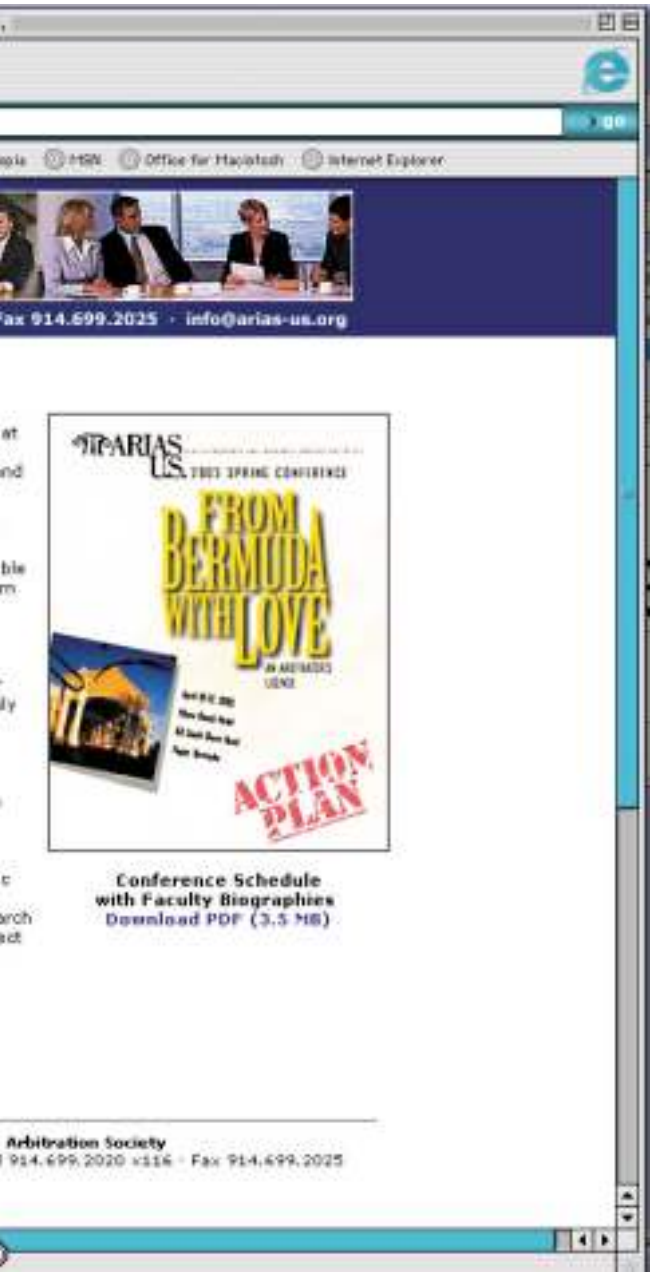
If you haven't visited the ARIAS•U.S. website recently, you should stop by and take a look (www.arias-us.org). The re-constructed website opened in January with features that make it a highly useful tool for anyone who has any interest in ARIAS or in reinsurance arbitration. Here are some of its key features:

1. **Improved Navigation** – The major sections of the site are listed down the left side of the screen on every page, except the arbitrators' profile pages (which open in a new browser window). As a result, moving from one area of the site to another is quick, easy, and never confusing.
   Also, any links to pages within each of those sections appear in a drop-down menu, as soon as your arrow is placed over the section name. Clicking within the menu opens the link.

2. **ARIAS•U.S. Quarterly** – The society's quarterly publication, which is sent in printed form to all members, is also available online, along with a growing number of past issues. It opens through the ADOBE Portable Document Format system, which enables printing out pages with a high degree of clarity.

3. **Arbitrator and Umpire Biographies** – Profiles of all certified arbitrators are available on the site, and those who qualify as umpires are also separately listed and linked to their profiles. All of the information about applying and qualifying is there for easy reference.

Provides Key Resource



4. **Search by Keyword** – The search system, available at the bottom of the fixed navigation panel throughout the site, allows visitors to the site to locate information or arbitrators by a wide variety of criteria. For example, using a search keyword, such as, "asbestos," brings up names of eleven certified arbitrators who have indicated asbestos experience in their backgrounds. With this search feature, those who are involved in a dispute have a powerful tool for focusing on a highly qualified pool of candidates.

5. **Code of Conduct and Practical Guide to Reinsurance Arbitration Procedure** – These two publications are the primary manuals for guidance of ARIAS•U.S. members in the process of arbitration. They are provided on the website in their entirety. In addition to reformatting them for easier understanding, the re-construction project added links throughout that take the user directly to forms as they are mentioned in the text.

6. **Online Registration for Conferences** – All large conferences are now featured on the home page, and a registration system enables immediate registration, using a credit card. Workshops are not included, since attendance must be closely monitored due to registration limits.

The ARIAS•U.S. administrative team worked closely with the Technology Committee, chaired by Larry Schiffer, in specifying and implementing these changes. Mountain Media of Saratoga Springs, New York provides design and support services. While Phase II of the website reconstruction will bring further improvements, responses from members to changes already completed have been very positive.

Intensive Workshop Record Book

The Intensive Arbitrator Workshop, held in Washington, D.C. on January 28, was the fourth in this series of events that are becoming the core of the initiation process for ARIAS•U.S. arbitrators. Opening with a reception the night before at LeBoeuf, Lamb, Greene & MacRae, the group of 27 students and 20 faculty members became quickly involved in the scenario of the mock dispute. When they met the next day at Chadbourne & Parke's Edwin Muskie Conference Center and broke into their respective panels, they tracked through the three stages of the arbitration with only slightly less intensity than a real world arbitration.

These intensive one-day workshops began in January of 2001, under the guidance of Charlie Foss. As he takes over Presidential responsibilities, he is being assisted in the organization and fielding of these events by Board member Mary Lopatto.

Not only do these sessions provide new arbitrators with a taste of the pressures of dispute resolution, but also they give law firm associates the experience of presenting arguments and defending their positions. Everyone benefits from the guidance and critiques provided throughout the course of the day by experienced ARIAS•U.S. arbitrators.

As of January, the workshops have turned out a total of 101 graduates. They have been supported by the contributions of 12 law firms and 14 experienced arbitrators. The complete record of participants involved in the four workshops is provided here.

ARIAS•U.S. wishes to thank everyone who has contributed to make these workshops such valuable training experiences.

New York City
January 2001

LAW FIRMS:

- Bingham Dana
- Choate, Hall & Stuart
- Simpson Thacher & Bartlett

EXPERIENCED ARBITRATORS:

- Charles L. Niles, Jr.
- Daniel E. Schmidt, IV
- Robert F. Hall

GRADUATES:

- Howard Anderson
- Theodore Dielmann
- William W. Fox
- Ronald S. Gass
- Lawrence F. Harr
- Jim Hazard
- John H. Howard
- Mark Kantor
- James I. Keenan, Jr.
- Michael A. Knoerzer
- Walter A. Milbourne
- David L Rader
- John H. Reimer
- David Robb
- Debra Roberts
- Franklin Sanders
- Wolfgang Schlaeger
- Gilbert J. Stallings
- Walter C. Squire
- Jeremy Wallis
- Emory L. White, Jr.
- W. Mark Wigmore
- John M. Wulfers

Chicago
January 2002

LAW FIRMS:

- Lord Bissell & Brook
- Lovells
- Sidley & Austin Brown & Wood

EXPERIENCED ARBITRATORS:

- Frank Barrett
- Richard Waterman
- Eugene Wollan

GRADUATES:

- 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
September 2002

LAW FIRMS

- Choate, Hall & Stuart
- Day, Berry & Howard, LLP
- Edwards & Angell

EXPERIENCED ARBITRATORS:

- Robert B. Greene
- Robert M. Hall
- Thomas Tobin
- Eugene Wollan

GRADUATES:

- 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

Washington
January 28 2003

LAW FIRMS:

- Chadbourne & Parke LLP
- LeBoeuf, Lamb, Greene & MacRae LLP
- White & Williams LLP

EXPERIENCED ARBITRATORS:

- Ronald S. Gass
- Martin D. Haber
- T. Richard Kennedy

GRADUATES:

- Clive Becker-Jones
- Katherine L. Billingham
- James Cameron
- John R. Cashin
- John D. Cole
- Robert Comeau
- Charles F. Cook
- R. Dennis Corrigan
- Clement S. Dwyer
- William D. Hager
- I. Davis Jessup, II
- W. James MacGinnitie
- Paul J. McGee
- David Nichols
- Barbara Niehus
- John Nonna
- James M. Oskandy
- John M. Parker
- Michael R. Pinter
- Robert C. Quigley
- Radley D. Sheldrick
- David Thirkill
- David W. Tritton
- Jacobus Van de Graaf
- Michael T. Walsh
- Charles J. Widder
- Philip Jay Wilker

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"province" and "provinces" include the Northwest Territories and Yukon.

It should be noted that in the wording provided by the intermediary, Article VI begins:

"DEFINITION OF LOSS OCCURRENCE

The word "occurrence" shall mean.....

Throughout the intermediary wording the word "Company" is used wherever the word "REINSURED" appears in the above wording. These variations are of no significance.

Submissions of the Applicant

It was admitted that there were two storms 90 minutes apart. The storms occurred in Winnipeg and Calgary but geography and time are not an issue. The circumstances and language of the contract are such that one occurrence took place. In particular the event causing all individual losses is hail damage and it was the same event in both Winnipeg and Calgary.

In 1995 and 1996 Reinsurer A agreed to delete the phrase "out of one atmospheric disturbance" and replace it by "occasioned by the same event, a most significant change. The other subscribing reinsurers followed that wording.

Submissions of the Respondents

The Applicant admitted that there were two storms, hence it follows that there were two occurrences and two losses. The meaning of words in the contract is critical and the definition of event is bound by time and place.

The intention of the parties was clear and the change in contract wording from "out of one atmospheric disturbance" in 1994 to "occasioned by the same event" in 1995 and 1996 did not give rise to a change in the interpretation.

The evidence

We were provided with written submissions of the parties and heard evidence of three witnesses for the Applicant and two witnesses for the Respondents, all with considerable experience in their respective fields. They gave their evidence in a forthright and articulate manner. The witnesses were:

For the Applicant:

Mr. A – Vice President - Applicant

Mr. B – Reinsurance Broker

Mr. C – Climatologist

For the Respondents:

Mr. D – Assistant Vice President, Reinsurer A

Ms. E – London reinsurance consultant

The claim

After due consideration of the submissions of counsel and the evidence of the witnesses, we conclude that the claim by the Applicant hinges on two specific aspects: the intentions of the parties in the negotiation of the contracts, and the meanings of "event", "peril" and "occurrence".

Intentions

Evidence given by Mr. A and by Mr. D confirmed that the first layer of coverage was taken over by Reinsurer A in 1994 and the wording for that year was prepared by Reinsurer A. The change in contract wording referred to above was made at the request of the Applicant in order to have consistency of wording and was just one of a number of items where there was non-concurrency. Both agreed that the question of any change in coverage was not addressed by either party and neither party anticipated or expected that the "cosmetic" changes to the treaty wording expanded or restricted the coverage. Mr. D said there had been no talk of aggregate losses nor of categorization. There had been no discussion of changes in reinstatements nor information provided on aggregated losses, which would have meant different loss patterns. From the absence of discussion on coverage issues and the stated purpose of change being to ensure consistency of wordings, it is logical and reasonable to conclude that the coverage intended and granted under the 1994, 1995 and 1996 wordings was similar.

The 1994 wording used the expression "out of one atmospheric disturbance". Given that the coverage intentions for 1995 and 1996 were unchanged, what would have been the effect on the 1996 losses if, instead of "occasioned by the same event", the contract had read "out of one atmospheric disturbance"? The answer to this lies unequivocally in paragraph 5 on page 2 of the Applicant's written submission:

> "5. The Applicant acknowledges that the thunderstorms which occurred at Winnipeg and Calgary within 91 minutes of each other were not the same thunderstorm. They arose out of two atmospheric disturbances."

This view was substantiated by Mr. C.

The changes requested by the Applicant and agreed by Reinsurer A were for the purposes of consistency and not change in coverage. We accept that position. It follows that coverage under the 1996 contract should be no different from that which would have obtained had the 1994 wording continued to be used. The 1994 wording would clearly have had two losses as there were two atmospheric disturbances. It must follow that the result under the 1996 wording should be no different. We conclude that the parties did not intend to treat losses such as these as one loss occurrence. If we rely on the intentions of the parties these would be two loss occurrences.

"Event", Occurrence" and "Peril"

The written submission of the Applicant supported by the evidence given by Mr. A postulated that the word "event" as used in the 72 hour clause refers to the listed perils. The argument was that losses caused by the same peril are indeed caused by the same event. Under cross-examination Mr. A stated that a hypothetical loss of hail damage in British Columbia followed two days later by a separate hail loss in Newfoundland would be the same event. To the question of whether there would

therefore be two losses for damage arising out of two perils (and hence two events) – hail in Winnipeg and storm/water damage in Calgary there was no answer.

Evidence given by Mr. B indicated that there had been problems with definitions in the past in Canada which had resulted in arbitrations. The most notable was the Barrie/Leamington storms where two arbitrations were held. Where the words "atmospheric disturbance" had been used in the definition it was found that there were two occurrences; where these words had not been used, it was found to be one occurrence. The purpose of an hours clause was to have a capping effect and to make the definition of event easier. It is not intended to expand the coverage but to limit it to a time frame. The hours limitation has not in fact been triggered in a Canadian catastrophe. On the question of the words " further defined" in paragraph A. of Article VI he stated that on first reading he believed it meant that it further expanded on the definition but a second meaning could be redefinition.

Ms. E. in her evidence gave the opinion that the contracts in question are occurrence-based and that they respond to a single loss occurrence defined as arising out of one event and then further defined according to the peril involved. The occurrence clause is primary and the hours clause subsidiary. A peril is not in itself an event and more than one peril can be involved in an event. In this instance it is agreed that there were two storms emanating from two weather systems and common sense would say there were two events. An insured peril poses a danger or threat and an event may be due to a peril. The cause and the event are not interchangeable.

In light of the conflicting views expressed by the witnesses it behoves us to examine the arguments in detail.

Is a peril an event? If the answer to this is in the affirmative, then there are two conclusions which can be drawn. Firstly, that if losses in an occurrence are occasioned by more than one peril, then the losses from each peril must be split out, for each forms a separate event. This is not historical market practice and nor is it realistic. A company could have five separate perils implicated in the same occurrence, each giving rise to losses equalling its retention under its catastrophe protection. Were each peril considered as an event, there would be no catastrophe claim although the total loss occurrence is five times the company's retention.

Secondly, in a *reductio ad absurdam* argument, if a peril is an event then all losses occasioned by unrelated fires during a 168 hour period could be aggregated and presented as one catastrophe occurrence arising from the same event. It could even be argued that hail damage in Australia and hail damage in Canada were the same event. This is patently not the intent nor purpose of a catastrophe treaty.

Mm. Justice L'Heureux-Dube stated in the Supreme Court of Canada case, *Scott vs Wawanesa Mutual Insurance Company*, recorded as [1989] 1 S.C.R.1445, 59 D.L.R. (4th) 660, at page 1467:

> *When the wording of a contract is unambiguous ..... courts should not give it a meaning different from that which is expressed by its clear terms, unless the contract is unreasonable or has an effect contrary to the intention of the parties.*

Applying market practice, usage and logic, we find that the meanings of the words used in the occurrence definition (Article VI) are clear and free of ambiguity. All insured perils fall firstly within the 168 hours clause in the main definition (paragraph A.) Certain listed perils are then subject to further limitations of time (72 hours), geography (municipality or county) or type ("freeze" perils). A step by step reading in this order leaves no doubt as to the clarity of the definitions.The Arbitration clause in the treaties provided that:

> The arbitrators and umpire shall make their award with regard to current insurance and reinsurance market practice rather than in accordance with a literal interpretation of the language of this Agreement. They shall interpret this Agreement as an honourable engagement rather than only as a legal obligation and may abstain from judicial formalities and strictly following the rules of law.

We have analyzed the wording as introduced in evidence by the parties and have applied common sense meanings to the words used and the treaty agreement as a whole. We are not obliged to resort to a strict legal interpretation on the construction of the contract but conclude that it would lead us to the same findings. We therefore find that on interpretation of the contract there were two occurrences.

Conclusion

The hail damage losses occasioned in Winnipeg and in Calgary on July 16th, 1996 did not result from "one occurrence" as defined in the Agreement. The claim made by the Applicant therefore fails.

The hail damage losses occasioned in Winnipeg and in Calgary on July 16th, 1996 did not result from "one occurrence" as defined in the Agreement.

in focus

Recently Certified Arbitrators

Paul D. Brink

George A. Budd

John R. Cashin

ARIAS•U.S. encourages members to apply for certification.

For procedure, see our web site at www.arias-us.org

Paul D. Brink

Paul Brink is recently retired from The Dow Chemical Company where, for the last several years of his career, he was Corporate Director of Risk Management and Insurance. In addition he was CEO and President of Dorinco Reinsurance Company, a Michigan-based reinsurance subsidiary of Dow Chemical.

Earlier in his career, Mr. Brink held various positions as a corporate finance and taxation attorney for Dow, residing in Hong Kong, Switzerland and Michigan. For several years prior to taking on the insurance responsibilities, he was Corporate Director of Taxation, responsible for all of the company's global tax compliance and planning. He was also at various times an ex officio member of the Corporate Finance, Audit, and Environmental Health and Safety Committees of the Dow Board of Directors.

As the Director of Risk Management and Insurance, he had overall responsibility for the company's insurance risk assessment, risk financing and claims prosecution activities. This included oversight of group insurance subsidiaries in Bermuda, Vermont and Jersey.

In his separate role as CEO of Dorinco, he had overall responsibility for this A.M. Best "A" rated reinsurance company, with approximately $250 million of annual premium income.

Mr. Brink has a bachelor's degree in mechanical engineering from Purdue University and a law degree (J.D.) from Indiana University. He is an active member of the State Bar of Michigan and has served on numerous industry and civic associations. This included serving as the chief U.S. delegate to the International Chamber of Commerce Tax Committee in Paris, France, and serving as a member of the Risk Management and Decision Process Advisory Committee of the Wharton School and the University of Pennsylvania.

George A. Budd

George A. Budd, CPCU, recently retired as President and Chief Operating Officer of AXA Corporate Solutions Insurance Company. Previously, he was Senior Vice President and manager of the company's treaty reinsurance operation in New York City. At present, he is consulting and working on arbitrations involving reinsurance matters.

Mr. Budd began his insurance career in 1962 as a multiple-lines underwriter with the Royal Insurance Company. He joined Great American Insurance, as a data processing senior systems analyst in 1969, but returned to Royal the following year and managed the Corporate Planning and Research Department for the next eight years.

In 1979, Mr. Budd changed careers into reinsurance as a treaty underwriter with Worexco (today, QBE Re). In 1984, he joined AXA, as it was just beginning its own U.S. operations, to establish the treaty underwriting department. In this capacity, he was responsible for the marketing and underwriting of reinsurance business and built a substantial and profitable book. In early 2002, he was asked to take over AXA C.S. Insurance until his retirement, which he had announced a year earlier.

A graduate of Georgetown University (1962), Mr. Budd received an MBA from Fairleigh Dickinson University in 1970; he achieved the Chartered Property Casualty Underwriter designation in 1969. While at AXA Re, he actively participated on the Reinsurance Association of America's Natural Disasters Committee and was a member of the Natural Disasters Coalition, an intra-industry group dedicated to finding ways that allow the insurance/reinsurance industry to provide protection for losses from major natural disasters. He is past chairman of the Society of CPCU's Reinsurance Interest Section Committee and has been a director of the New York Chapter of CPCU. He was also an officer and committee chairperson of the Society of Insurance Research, author of the CPCU New York Chapter's research project on punitive damages and has been a speaker at numerous insurance and reinsurance functions.

John R. Cashin

John Cashin is of Counsel to the law firm of Stroock & Stroock & Lavan LLP in New York City. With over thirty years experience in the insurance and reinsurance industry, he has had broad exposure to many aspects of the primary and reinsurance segments of the business.

Prior to joining Stroock, he was Deputy Superintendent of Insurance for the State of New York. There, he was responsible for the property/casualty bureau that provides regulatory oversight to all p&c carriers, reinsurers, agents and brokers licensed in the state. While at the Insurance Department, he presided over the dissolution of the Medical Mutual Insurance Association through a loss portfolio transfer and a winding up of the company's affairs. He has also conducted numerous Department hearings on fines and penalties, proposed regulations and similar matters.

Previously, Mr. Cashin had spent twenty years in the reinsurance brokerage business, most recently as Executive Vice President at Willis Re. He held numerous executive positions at other reinsurance intermediaries, beginning in 1980 at Guy Carpenter& Company.

Prior to joining Guy Carpenter, he served for two years as chief counsel to the Senate Insurance Committee in the New York State Senate. His experience also includes ten years of sales and systems engineering at IBM focusing solely on Information Technology for the property and casualty industry.

Mr. Cashin has served on the Board of Directors for the United Nations Development Corporation and the Jacob Javits Convention Center Operating Corporation. He is a member of the American Bar Association Torts and Insurance Practice and Excess and Reinsurance Sections. He was admitted to the New York State Bar in 1977 and is admitted to the Federal District Court for the Eastern and Southern Districts of New York (1978), The US

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Court of International Trade (1991) and the United States Supreme Court (1991). He is a graduate of St. Francis College (1968); he holds an MBA from Baruch College of the City University of New York (1972), a law degree from Fordham Law School (1976), and an LLM in International Law from NYU (1993).

Theodor Dielmann

Theodor Dielmann is the chief executive of his own consulting firm, Th.Dielmann GmbH, Hannover, Germany, founded in 1991.

His reinsurance career dates back to the year 1967. He learned his trade in the London Market as non-marine reinsurance broker at Willis, Faber & Dumas Ltd., being one of the first foreign nationals actively broking in the market.

Mr. Dielmann returned to Germany in 1972 to join the Hannover Re, where his tenure as a senior executive (member of the executive board) spanned over almost 20 years. He was instrumental in developing the US reinsurance business, being the chief underwriter for the USA and various other markets, such as UK, Canada, Japan and South Africa, to name a few. The US book of business remained profitable over the entire period, not a mean accomplishment given the vagaries of this market.

He was also very actively involved in the settlement of all major US claims, initiated the "finite risk" reinsurance book, was responsible for the actuarial services, and set up offices in Canada and South Africa.

Theodor Dielmann has travelled widely in Asia, Europe and USA. His main activities as consultant are reinsurance dispute resolutions. He was an exclusive consultant for a major Japanese and Finnish insurance company for many years.

His former company is again one of his major clients.

Mr. Dielmann also acted as expert witness in a number of reinsurance disputes and chaired one of the largest reinsurance arbitrations on record in the USA.

Due to his multi-faceted experience in the reinsurance field over 35 years, he hopes to contribute to the continued success of ARIAS• U.S., now that he is one of its certified arbitrators.

Theodor Dielmann is a German national with a high-level command of English.

He also speaks Spanish fluently and has a basic knowledge of French.

Sylvia Kaminsky

Sylvia Kaminsky has been in the insurance/reinsurance industry for more than 20 years, having extensive experience in the conduct and supervision of insurance and reinsurance disputes.

From 1995 to 1998, Ms. Kaminsky was Senior Vice President, General Counsel and Corporate Secretary of Constitution Reinsurance Corporation ("CRC"). In this position, she was responsible for all legal activities supporting the business operations of the company, including the handling of all arbitrations and litigations, overseeing regulatory matters, drafting reinsurance agreements and corporate contracts, and commutations.

Ms. Kaminsky served on the Board of Directors of CRC. In 1998, CRC was acquired by Gerling Global Reinsurance Corporation where she became Senior Vice President and Deputy General Counsel. She later assumed the role of Senior Vice President of Claims where she oversaw the claims in the runoff operation of Gerling's New York branch office. Her duties included handling all arbitrations and litigations as well as the supervision and management of the claims staff. She coordinated all claim payments, retrocessional recoveries and audits. Previously, Ms. Kaminsky worked for 14 years in private law practice providing all aspects of legal services to domestic and foreign insurance and reinsurance companies.

Ms. Kaminsky is a member of the Federation of Defense and Corporate Counsel, The American Corporate Counsel Association, and Association of Professional Insurance Women. She was a former member of the Reinsurance Association of America Law Committee and Reinsurance Dispute Task Force. Ms. Kaminsky is admitted to practice law in New York State and the federal Courts in the Eastern and Southern Districts of New York, the District of Arizona and the Ninth Circuit Court of Appeals.

Peter F. Reid

Peter Reid is the President/CEO of European-American Inc, an insurance management, consulting and services firm with offices in New Jersey, New York City and London, England. The firm, which he founded in 1990, represents foreign insurance companies in the U.S, assists U.S. insurers expanding overseas, and provides insurance consulting and risk management assistance to multinational commercial and professional firms, both domestic and foreign. Peter Reid is also a principal of Weichert European-American, an intermediary joint venture with the Weichert organization, in New Jersey. He is personally active in ADR for insurance industry disputes, as mediator, arbitrator, umpire or expert witness.

Prior to forming European-American, Mr. Reid was Senior Vice President – International for Continental Insurance Companies in New York from 1987-1990, and Senior Vice President and Director of Alexander and Alexander International Inc. from 1976-1987. From 1990- 2001, he also acted as President and CEO of Gothaer USA Inc., the US representative office for the Gothaer Insurance Group, Cologne, Germany.

Peter Reid's 35 years experience in the insurance business has encompassed most major aspects of senior level insurance activity in underwriting, claims, reinsurance, brokerage and consulting in both the Property/Casualty and Life/Health areas. In addition to ARIAS• U.S., Mr. Reid is an active member of numerous professional organizations including, the CPR Institute for Dispute Resolution (Panel of Insurance Neutrals), the Reinsurance Association of America (Arbitrators Directory), the American Arbitration Association (Insurance Panel). He is also an Associate of the Chartered Insurance Institute, London where he holds the designation A.C.I.I. and "Chartered Insurer," as well as an Associate of The Chartered Institute of Arbitrators, London, where he hold the designation of A.C.I.Arb.

His current and past board directorships include Gothaer

Theodor Dielmann

Sylvia Kaminsky

Peter F. Reid

in focus

Peter A. Scarpato

John W. Thornton, Sr.

Michael J. Toman

U.S.A. Inc., New York (President); Seaboard North American Holdings, Vancouver; Seaboard Life Insurance Company (USA); VASA Insurance Group of Companies, Indianapolis; The German-American Round Table, New York; United Americas Insurance Co., New York; GAN Anglo Insurance Co., New York; Lombard Continental Insurance PLC, London (Chairman); Groupe Barthelemy Insurance, Paris; InterContinental Insurance, Sao Paulo, Brazil; Continental Insurance U.K. Ltd; Continental Insurance (Europe) Ltd; The Corinthian Group, New Jersey; The Americas Group Inc, New Jersey.

Peter Reid holds insurance intermediary licenses in major states, as well as Reinsurance and Surplus Lines intermediary licenses. He is British born and a naturalized US citizen since1982. He is not a lawyer, but rather a senior level industry executive with strong operating experience in the insurance/reinsurance business both domestically and internationally. He believes strongly in ADR and the special value that seasoned professionals with strong industry background can bring to the arbitration process.

Peter A. Scarpato

Peter Scarpato is the Chief Operating Officer of AIG's Global Surety Division and Vice President - Counsel of its Run Off Divisions.

Mr. Scarpato's 18-year career as an in-house legal officer and management executive for both active and run off, domestic and international insurance and reinsurance companies makes him uniquely qualified to fully consider the business, legal and strategic aspects of every case. During that time, he has participated as sole and panel arbitrator, counsel, mediator, negotiator, and party in hundreds of arbitrated and litigated disputes and negotiated settlements. His combination of active and run off experience has required him to understand and resolve virtually all of the most common, and many less common, issues from all sides of the business, including assumed and ceded reinsurance, primary and excess insurance, bankruptcy and liquidation, and other less traditional matters (e.g., surety, warranty).

In addition to his ARIAS• U.S. certification, he participates in several arbitration and mediation organizations, including the Reinsurance Association of America, as Certified Arbitrator for the NASD and New York Stock Exchange, and as mediator for the Federal District Court for the Eastern District of NY and MediateArt program sponsored by Volunteer Lawyer for the Arts in New York.

Mr. Scarpato is a licensed attorney in and for the State and Federal Courts of New Jersey and New York, and the United States Supreme Court. He is a member of the American Bar Association, New Jersey and New York State Bar Associations and Association of the Bar for the City of New York.

John W. Thornton, Sr.

John Thornton grew up in northwestern Ohio and received his undergraduate degree from Notre Dame. He served three years as an officer in the U.S. Navy, before returning to Notre Dame Law School, where he graduated second in his class in 1956.

Mr. Thornton began his legal career in Miami over thirty-five years ago. He has practiced a wide variety of defense litigation, including personal injury, environmental torts, governmental liability, commercial liability, professional liability, including medical and dental malpractice, hospital, ER, nursing home, and ALF defense, and coverage disputes for insurers and insureds. In 1968, he formed the partnership of Stephens, Demos, Magill & Thornton. In 1976, he formed his own firm John W. Thornton, P.A., which now operates in conjunction with the law firm of Thornton & Mastrucci.

Over the years, Mr. Thornton, in addition to successfully trying hundreds of lawsuits, has also served the legal profession through chairmanships of and membership in numerous professional organizations, including the American Bar Association, International Association of Defense Counsel, Federation of Insurance and Corporate Counsel, and Defense Research Institute. He has presented and prepared over seventy speeches and articles for lawyers, insurance claims personnel, and other professionals. Mr. Thornton has also produced expert analyses and expert testimony concerning insurance coverage and bad faith litigation, as well as providing state and federal legislative support in tort and insurance matters.

Michael J. Toman

Michael Toman's reinsurance career began in 1973 with General Reinsurance Corporation in their pricing/actuarial department where he worked closely with their actuaries developing year-end IBNR studies. Subsequently he drafted reinsurance agreements for two years, developing their first standard contract library. Finally he worked as an account assistant in their treaty marketing department.

Mr. Toman then spent the next fifteen years at National Reinsurance Corporation, starting in 1981 as an Assistant Secretary in the treaty underwriting department and was promoted into areas of increasing responsibility, which led to his appointment as Senior Vice President, Manager of treaty underwriting and a member of National Re's internal Board of Directors. Significant accomplishments included the formulation of corporate positions and new products in response to changing accounting regulations including finite risk products, the introduction of actuarial techniques to the treaty rating process, the institution of comprehensive underwriting reviews as a service to clients and prospects, and the production and negotiation of complex reinsurance transactions.

Subsequent to the purchase of National Re by General Re, he was recruited by PXRE Reinsurance Corporation in 1998 as Executive Vice President and a member of its internal Board of Directors to establish and manage the start-up of its direct writing treaty division. In 2001, he was hired by CNA Re as Executive Vice President to manage their standard lines, surplus lines and catastrophe divisions.

In 2002, Mr. Toman established MJT, LLC an independent consulting firm specializing in the following areas: Arbitration, Underwriting Reviews, Forensic Investigations, Strategic and Operational Planning, Runoff and Records Analysis.

Mr. Toman holds both BA and MBA degrees from the

University of Connecticut.

James Veach

James Veach grew up near Carbondale, Illinois. He attended Vanderbilt University and then NYU Law School, a fateful decision that turned him, at least in the eyes of his boyhood friends, into a New Yorker. After several years with the Manhattan District Attorney's Office, Mr. Veach joined what was then Rein, Mound & Cotton. He never left. A veteran of many years of insurance litigation and reinsurance arbitration, he now concentrates his practice on reinsurance arbitration and litigation, insurance (and reinsurance) regulatory matters, and insurer (and reinsurer) insolvency.

Over the years, he has arbitrated and litigated questions concerning a variety of property, liability, and life/health treaties. These disputes involved issues ranging from the allocation of Agent Orange losses, to the application of sunset clauses, to the determination of per risk and per occurrence limits, to fact-specific late notice and misrepresentation problems.

Mr. Veach has tried a reinsurance case to a jury, and argued the scope of the Federal Arbitration Act before the Second Circuit. He is particularly interested in how motion practice, the fine points of the hearsay rule, and other litigation devices have gradually migrated from the courtroom to the arbitration panel. See, e.g., Confirming Confidential Arbitration Awards in "Open Court," Mealey's Report: Reinsurance (December 30, 1999).

Mr. Veach is a frequent speaker at insurance and reinsurance seminars and gatherings sponsored by Mealey's, PLI, American Conference Institute, and the Reinsurance Contract Wording Discussion Group, and has participated in ARIAS•U.S.-sponsored seminars, as well. He has written for Best's Review, Mealey's, Global Reinsurance, the Environmental Claims Journal, and other publications.

He has argued (not always successfully) for arbitration with the receivers of insolvent insurance or reinsurance companies. Stephens v. American International, 66 F. 3d 41 (2d Cir. 1995); Corcoran v. Ardra Insurance Co., 566 N.Y.S.2d 575 (N.Y. Ct. App. 1990). He has seen the rehabilitation, liquidation, and winding-up process from at least three angles – acting on behalf of cedants, reinsurers, and receivers – and been involved in many U.S., U.K., and Bermuda insolvency proceedings. He is looking forward to arbitrating for or against cedants, reinsurers, retrocessionaires, and receivers immersed in next wave of insurance and reinsurance failures. See, "Buffet Letter Raises Concerns on Reinsurer Not Paying Claims," WSJ, p. C11, March 11, 2003.

Mr. Veach resides in Teaneck, New Jersey with his wife, Deborah, also an attorney, and Zachary, an accomplished middle-school trumpet player who recently discovered the electric guitar.

Andrew S. Walsh

Andrew Walsh is Senior Vice President and General Counsel of Legion Insurance Company (In Rehabilitation), joining the company upon its acquisition by Mutual Risk Management Ltd. in 1987. At Legion, he has been involved in developing many innovative captive, rent-a-captive and alternative risk transfer products. In his capacity as head of the legal department, he has been responsible for managing the dispute resolution function, involving matters with reinsurers, agents, brokers, and insureds. His duties also include providing legal counsel on regulatory, employment law, corporate, and contract issues.

In May 2002, he established an independent arbitration and consulting practice, specializing in property and casualty, workers' compensation, accident and health treaty and facultative reinsurance, and agent, broker, TPA and MGA dispute resolution.

From 1982 to 1987, Mr. Walsh served in various capacities in the legal department of Colonial Penn Group, providing regulatory counsel and litigation management services, with emphasis on reinsurance and managing general agency disputes. From 1980 to 1982, he was in private practice, where his practice concentrated on union labor law issues.

Mr. Walsh is a member of ARIAS•U.S., the American, Pennsylvania and Philadelphia Bar Associations, the Delvacca Chapter of the American Corporate Counsel Association, and is former chair of the Philadelphia Association of Corporate Insurance Counsel. He graduated from the New York University School of Law in 1979 and Union College in 1976. He obtained his Chartered Life Underwriter designation in 1985. He is admitted to practice in Pennsylvania.

Ronald L. Wobbeking

Ronald Wobbeking is an actuary by training. His entire working career was at Allianz Life Insurance Company of North America (formerly North American Life & Casualty). He retired as President in 1999 and was responsible for all Accident, Health and Group Life insurance and reinsurance, as well as Individual Life reinsurance. He was also responsible for all Variable Life and Annuity operations for three years.

He served as Chair and CEO of Preferred Life Insurance Company of New York, a wholly owned subsidiary marketing variable and group insurance programs, Chair of North American London Underwriters that provided $75 million of corporate capital to Lloyds, and Chair of Ultralink that provided nationwide network services for health programs offered to multi-state employers.

Mr. Wobbeking served on the Board of Directors for Health Insurance Association of America (HIAA) for several years, as a member of its Executive Committee, and as Secretary and Chair of the Membership and Ethical Standards Committee. He was Chairman of the Nontraditional Marketing section of the Society of Actuaries and Chair of the Twin Cities Actuarial Club.

Mr. Wobbeking has served on committees of various industry organizations – Group Insurance Company Committee, the PIMA Advisory Committee and Group Officers Round Table Committee for HIAA.

in focus

James Veach

Andrew S. Walsh

Ronald L. Wobbeking

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

case notes corner

Panel's Monetary Award Upheld as Not "Indefinite" or the Product of a "Rough Justice" Compromise

Case Notes Corner is a regular feature in which Ron Gass reports on a significant court decision related to arbitration.

by RONALD S. GASS*, The Gass Company, Inc.

Reinsurance arbitration panels frequently order monetary awards that are not derived in a strict arithmetic fashion but rather reflect a balancing of the relative equities involved in the dispute based on the evidence. The question of whether such awards may be vacated on the grounds that they are too "indefinite" or the product of a "rough justice" compromise in violation of the Federal Arbitration Act was the subject of a recent Illinois federal district court ruling confirming a panel's contract damages award.

In this dispute, the cedent wrote certain warranty contracts administered by a managing agent in the context of a 100% fronting arrangement. In the wake of huge losses, the reinsurers sought rescission of the reinsurance agreement or, alternatively, breach of contract damages due to the managing agent's alleged maladministration of the program. Following an eight-day hearing, the panel denied the reinsurers' rescission claim but awarded $4.82 million arising from the agent's payment of uncovered claims, unreported claims, and late reported claims; unreported premiums; and lost investment income, stating that its decision reflected "the panel's evaluation of the relative responsibilities of the parties for the problems resulting from the Reinsurance Agreements."

In its motion to vacate, the cedent argued in federal district court that the panel's monetary award violated § 10(a)(4) of the Federal Arbitration Act, which provides that an award may be vacated by the court "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Observing that the scope of its review of the panel's decision was "grudgingly narrow" and that "mere ambiguity" was an insufficient basis on which to vacate an award, the district court held that the monetary award was "clear, final and definite" on the issues submitted to the panel regarding the managing agent's alleged maladministration of the warranty program. Thus, it rejected the cedent's argument that the award was "indefinite" because it did not take into account the reinsurers' ongoing contractual payment obligations and that it should be treated as an offsetting credit against monies the reinsurers allegedly owed it and not as a lump sum payable to them outright. The award could only be vacated, according to the court, if it was not sufficiently clear and specific enough to be enforced, which was not the case here.

With regard to the cedent's "rough justice" compromise argument, the court was not persuaded that the panel had ignored the rule of law in fashioning its award in light of the court's review of the hearing record and post-hearing briefing. Even if the panel had made an "equitable" decision, the court concluded that the cedent had waived application of a "strict rule of law" standard given both parties' reliance on, inter alia, general legal principles regarding agency, industry custom, and "business fairness" rather than strict adherence to the governing state law.

Commenting on this case, several U.K. correspondents of mine indicated that English courts would probably reach a similar result under § 46(1) of the Arbitration Act of 1996, which applies to all arbitrations commenced after January 31, 1997. This provision reportedly departs from the old rule that English arbitrators were bound to apply the law strictly and now authorizes them to reach equitable or compromise resolutions that may not be strictly aligned with the applicable law.

Certain Underwriters at Lloyds' v. BCS Insurance Co., No. 01 C 1374, 2003 U.S. Dist. LEXIS 83 (N.D. Ill. Jan. 3, 2003).

*Mr. Gass is an ARIAS-U.S. Certified Arbitrator providing reinsurance and insurance dispute resolution services to the industry as an umpire and party-appointed arbitrator. He may be reached via E-mail at rgass@gassco.com or through his Web site at www.gassco.com. If you would like to receive his occasional reinsurance case notes by E-mail, please send him a request, and he will be delighted to add you to his mailing list.

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(As of February 28, 2003)

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.

Searchable biographies of all certified arbitrators are online at www.arias-us.org

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News About You and Your Activity

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

"ARIAS Members on the Move" (on page 13)

For this section to be valuable, we need you to 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 to Bill Yankus with the subject "Quarterly News."

Tell us about a job or company change, recent honors or promotions, major events in your business, community, or personal life. Or just 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.

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Fax or mail this sheet, or just send an email with the information to byankus@cinn.com.
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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

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AIDA Reinsurance & Insurance Arbitration Society
35 BEECHWOOD AVENUE
MT. VERNON, NY 10552
PHONE: 914.699.2020
FAX: 914.699.2025
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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
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Membership is open to law firms, corporations and individuals interested in helping to achieve the goals of the Society.

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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.

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