VOLUME 11 NUMBER 3

ARIAS U.S. QUARTERLY

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THE HISTORY OF ARBITRATION

See article by Richard E. Stewart starting on page 5

editor's comments

T. Richard Kennedy

The upcoming Annual Meeting will mark the Tenth Anniversary of the founding of ARIAS-U.S. Not everyone realizes that for a period of two years prior to the initial meeting, a working group of top industry and professional leaders held a number of sessions to discuss the best form of organization and method of operation of the new Society. The growth and success of ARIAS-U.S. as the preeminent arbitration organization in the insurance and reinsurance industry is in large part a tribute to the vision and foresight of the members of that working group.

Publication of the first Quarterly took place soon after the initial meeting of the Founding Board of Directors. Credit for getting the journal underway must go to Steve Acunto, who -- with scant support outside his CINN staff – cobbled together the first few issues mostly from reprints and news items from CINN's other insurance and reinsurance magazines. However, in recent years, we have been blessed with a number of outstanding articles contributed by respected industry professionals. We now have reached the enviable position of accepting only original and well-prepared feature articles for publication.

Your editors are compiling an index of articles published in the Quarterly during our first ten years. Hopefully, that index will be available as a handout to attendees at the Annual Meeting.

While preparing for or participating in an arbitration hearing, have you ever wondered how the process came about? Due to the exponential growth of arbitrated reinsurance disputes over the past few decades, it may seem that arbitration has developed in modern times – perhaps born of a frustration with costs and delay of more traditional litigation procedures. However, our lead article by Richard E. Stewart, *Arbitration and Insurance Without the Common Law,* shows quite the contrary. In this most interesting and scholarly review, the author demonstrates that both arbitration and insurance predated development of the common law. Because the footnotes are especially significant to the text of the article, our editorial staff has altered the standard format to display the footnotes at the bottom of each page rather than at the end of the article.

In *Panel Selection and Grounds for Disqualification of Arbitrators in Reinsurance Arbitration*, David A. Attisani thoroughly reviews the requirements and various authorities governing selection of panel members, including duty to disclose facts that may bear on partiality, and grounds for challenging appointments and vacating awards based on qualification of arbitrators. Every counsel and prospective arbitrator should be aware of the issues discussed in the article.

Recent articles in the Quarterly have criticized the reinsurance arbitration process as having become unduly costly, lengthy and contentious. Robert M. Hall in this issue offers techniques to promote greater efficiency and clarity in *How Reinsurance Arbitrations Can Be Faster, Cheaper and Better*. His suggestions deserve careful consideration and attention by the reinsurance arbitration community.

I look forward to seeing each of you at the Annual Meeting. ▼

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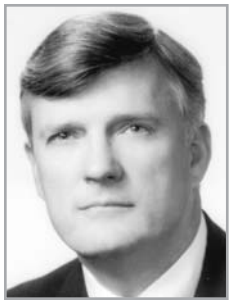
letter from the chairman



Charles M. Foss

Dear ARIAS Members,

You have all recently received your copy of the 2004 Revised Edition of the *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure*. The 2004 Edition has been extensively edited and reorganized into a tool for arbitration that is the most comprehensive and useful document of its type in our industry. From the Comments on the subtle nuances of the arbitration process to the Forms which are becoming a standard part of almost every arbitration, this Practical Guide will be an essential reference for arbitrators, industry executives, and attorneys regardless of their level of experience.

There are many individuals to thank for their efforts in producing the 2004 Edition, a process which actually began at the 2002 Annual Meeting. At that time, Tom Allen and Tom Orr provided the leadership to assemble the team of dedicated individuals who spent 18 months rewriting, editing, and providing comments on every Chapter and every Form. In addition to co-chairs Allen and Orr, this team included the following individuals:

Rick Shaw, Mike Davis, Bob Hermes, Jim Powers,Richard Voelbel, Bob Knuti, Edwin Millette, Bob Reinarz, Steve Schwartz

In addition, many other Society members provided valuable input during the drafting and editing process. With apologies to those I've inadvertently omitted, these additional contributions came from Floyd Knowlton, John Binning, Mary Lopatto, Gene Wollan, Tom Forsyth, Richard Waterman, Larry Schiffer, Richard White, Bob Bates, Dan Schmidt, Paul Walther, Marvin Cashion, Marty Haber, Bob Beckerlegge, and Bob O'Hare.

There are two other individuals who deserve our special thanks for their tireless work on this project. David Weiss (White & Williams) had the assignment of collecting the comments from the team, and from the other ARIAS members. Without David's artistry and discretion in incorporating this massive input into the final product, this project might still not be completed. The other special "thank you" goes to Peter Scarpato who volunteered to proofread the final drafts. His fresh set of eyes provided valuable input on grammar and style.

On behalf of the entire ARIAS organization, I sincerely thank everyone who worked on the 2004 Edition and congratulate them on the outstanding result they achieved.

As a final note, I am stepping down from the ARIAS board in November and would like to thank the ARIAS membership for giving me the opportunity to serve this organization for the last 10 years in the capacity of board member, president, and chairman. This organization has gone through an amazing transformation during that period - from little more than an "inspired idea" to the pre-eminent position it holds today as the leading forum for the discussion of arbitration ethics and procedures. Without the active support and participation of our members, this success would not have been possible and you are all to be thanked and congratulated, as well. As ARIAS•U.S. moves into its second decade, your support and participation will continue to be essential to the organization, and I look forward to joining with you in that important endeavor.

Very truly yours,

Charlie

Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to byankus@cinn.com.

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

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feature

Arbitration and Insurance Without the Common Law

Richard E. Stewart
Stewart Economics, Inc.

In reinsurance disputes, arbitration offers valuable advantages over courts of law. The advantages, in principle, include informality, speed, expertise, economy and business practicality, all within a controlled, adversarial format.

A natural tendency is to see arbitration as an informal and expert version of a court of law. Reinforcing the tendency are the facts that insurance is deeply infused with Common Law[1] principles, with its main product a legal contract, and that most participants in the arbitral process are members of the bar. The authority of the arbitrators themselves traces to a clause in the policy contract.[2]

Those ideas have natural tendencies of their own.[3] One is for arbitral procedure to come to resemble Common Law procedure. Another is for substantive rules in arbitrations to come to resemble, or fully to be, some jurisdiction's Common Law, with custom and practice translating into flexibility in applying it.[4]

The drift of reinsurance arbitration toward the methods and substance of the Common Law has sound reasons. The judicial model of decision-making is a strong one; it has been worked out in detail over centuries; and deep in our culture is a habit of obeying it. Court confirmation is needed to enforce arbitral decisions. Having courts comfortable with arbitral standards is helpful. And, as a practical matter, the judicial style is hard to resist when dealing with a particular question in a particular case.[5]

But the drift toward the judicial model of procedure and substance does not come without cost. It compromises the very advantages that arbitration offers – informality, speed, expertise, economy and business practicality.

This drift toward the judicial model is not occurring pursuant to anyone's grand plan. It is opposed by judges, legislators, arbitrators, business, labor, insurers and just about everyone else.[6] That mountain of opposition fails to stop the drift because it is abstract, whereas the drift proceeds via one specific, concrete decision after another – an extra deposition, an extra round of briefs, close eviden-

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Richard E. Stewart

> ...the drift toward the judicial model of procedure and substance does not come without cost. It compromises the very advantages that arbitration offers – informality, speed, expertise, economy and business practicality

1 "Common Law" is the legal system of England, the Commonwealth countries and the United States. Beginning in England in the 11th century, the Common Law developed through a long accumulation of judicial decisions, bound together by a flexible requirement of following earlier decisions on the topic. Statutes are used by Common Law states, but the distinctive quality of those states is their strong reliance on cumulative judicial rulings. Hence a great Common Law judge can have an astonishing impact on the law of his country. Modern Anglo-American commercial law was largely put together by two such judges – Lord Mansfield and T. E. Scrutton. By contrast, "Civil Law" legal systems rely on detailed statutory codes as the main source of law, and judicial decisions matter much less.

2 Hans Smit, Proper Choice of Law and the Lex Mercatoria Arbitralis, in Thomas Carbonneau (ed.), Lex Mercatoria and Arbitration, 100-02 (New Orleans: Juris Pub., 1998). As an illustration of how dependent upon the authority of the Common Law the arbitration tradition has become, one leading article on reinsurance arbitration cites court decisions 132 times, custom & practice once, and arbitral decisions not at all. Paul M. Hummer, Reinsurance Arbitrations from Start to Finish: A Practitioner's Guide, 63 Def. Counsel J. 228 (1996).

3 Arbitration is used in many industries. This paper concerns only reinsurance. It is a pure case for the reasoning later in the text, with insurers on both sides, the arbitration under an insurance contract, and insurance the subject-matter. The paper argues that insurance and arbitration both came from the same, distinctive source. That is not true of most other industries, so the reasoning here may or may not apply to them.

4 This tendency is to be distinguished from the issues in international commercial arbitration (in oil, shipping, war reparations and other multinational activities) about how much national judicial review of arbitral decisions is appropriate. There it is a question of international law, trade policy, harmonizing legal systems and arbitral independence. In reinsurance arbitration it is just a matter of adopting another institution's way of doing things. William W. Park, Control Mechanisms in the Development of a Modern Lex Mercatoria, in Lex Mercatoria and Arbitration, above, note 2, at 143-72.

5 The judicial style does not extend to the footnotes in this article. They are indications of source, support and illustration. But they are not rigorous. They do not distinguish among direct support, indirect support, contrast, comparison, etc. in the manner of law review footnotes.

6 In the last 40 years, arbitration has become much more attractive to the courts, and legislatures have codified their change in attitude. One perverse effect of that newfound popularity has been that more and more complicated disputes – complex antitrust, financial and reinsurance cases – are referred to arbitration, pushing arbitrators further into the arms of an institution with unmatched experience in dealing with complexity – the Common Law.

Richard E. Stewart is chairman of insurance-consultant Stewart Economics, Inc. He was NY Superintendent of Insurance, president of the NAIC, general counsel of Citibank, and CFO of Chubb.

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tiary rulings, additional motion practice, fine analysis of applicable law. The drift continues that way because it is indeed a drift, not a sudden event.

But it is not an aimless drift; it is a drift toward a powerful attraction – the substance and procedures of the Common Law.

The drift could not keep advancing without the support of arbitration practitioners. We don't want to do it, but we do it anyway, one little decision at a time. We are the drifters; the enemy is us.

What if we found out that the attraction of the Common Law is not based on the history and purposes of either arbitration or insurance? Perhaps we would feel more free to resist the drift in those small, specific, concrete decisions.

This paper looks at the background and derivation of arbitration and insurance, with their relationship to the Common Law always in mind.

A Thousand Years Ago

Most businesses can be understood through observation and measurement. Manufacturing, retailing and communications can be understood that way. Insurance and reinsurance cannot.[7] They can only be understood historically or, to put it in a modern idiom, they are exceptionally path-dependent. Where we are today and how we act today are largely foreordained by where we were and what we did yesterday and many years ago.

Today an insurance policy is a Common Law contract, and one might easily assume it is just another commercial contract – like a lease or a loan agreement – with a pinch of public policy or consumer protection thrown in. It is not. Neither arbitration nor insurance is a creation of the Common Law. Both began long before the Common Law had a working theory of informal, consensual contract and long before the Common Law supported commerce at all.[8] In fact, the story begins over a thousand years ago.

One of the great strengths of the Roman Empire was its uniform system of law.[9] It provided one legal system for the whole western world. Roman Law had well-developed rules of informal, consensual contract.[10]

As the Western Roman Empire collapsed after 500 A.D., Roman Law lost its hold on civic and commercial life.[11] Western Europe became a lawless, disorganized, and dangerous place, and it stayed that way for hundreds of years.[12]

In that vacuum new institutions arose. Feudalism, while hardly efficient, did provide a measure of peace and protection against bandits and marauders. The king and feudal lords could extend their peace to merchants nearby or from around the world.[13]

But what about long-distance trade – spices from the East, grain from the South, metals from the North? Transporting valuable

Neither arbitration nor insurance is a creation of the Common Law. Both began long before the Common Law had a working theory of informal, consensual contract and long before the Common Law supported commerce at all.[8]

7 In this paper, the word "insurance" will be used to include reinsurance, except where the text clearly indicates otherwise. The word "reinsurance" will be used to denote reinsurance by itself.

8 As used here, "informal" refers to contracts that are based on agreement between the parties, that is, the way we think of contracts today. They are distinguished from "formal" contracts, common in ancient legal systems (including early Roman and early English), which get their force by the exact performance of a ritual, usually reciting a specified phrase or performing a specified act like sealing a document. Formal contracts work without regard to what the parties intend or to the purpose of the transaction.

9 Edward Gibbon, The History of the Decline and Fall of the Roman Empire, vol. vii, pp. 301-88 (New York: Fred de Fau, 1907). As used here, "Roman Law" includes both the civil law, e.g., for contracts between citizens (ius civile) and the customary law of commerce with people outside the Empire (ius gentium). Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition, 339-406 (Cambridge US: Harv. U. Press, 1983), hereafter "Berman, Revolution."

10 H. F. Jolowicz, Historical Introduction to the Study of Roman Law, 294-320 (Cambridge UK: Camb. U. Press, 1954); Barry Nicholas, An Introduction to Roman Law, 159-207 (Oxford UK: Clarendon Press, 1962); Peter Stein, Roman Law in European History, 1, 20, 25-26 (Cambridge UK: Camb. U. Press, 1999).

11 Paul Vinogradoff, Roman Law in Medieval Europe, 1-31 (London: Harper & Brothers, 1909, reprinted Union NJ: The Lawbook Exchange, 2001).

12 Fernand Braudel, 2 The Mediterranean and the Mediterranean World in the Age of Philip II, 134-54 (New York: Harper & Row, 1973); Paul Vinogradoff, Feudalism, in 3 Cambridge Medieval History, 458-59 (Cambridge UK: Camb. U. Press, 1924).

13 Magna Carta, ch. 41 (1215).

materials across many feudal jurisdictions and across broad expanses of land or sea was a good way to get killed and an absolutely certain way to get robbed, taxed and squeezed again and again. In economic terms, the post-Roman disorder loaded transaction costs onto commerce and drove up prices. The situation, as a drag on trade, again called for new institutions.

Starting in the 11th century, the new institutions for trade included the Fair and later the Staple Town as safe and reliable places to trade.[14] Those scattered locations were tied together by generally accepted rules and customs to govern commercial activity. The rules and customs were compiled from time to time, combined with the rules of the sea, and called the Law Merchant.[15]

The Law Merchant

The Law Merchant consisted of the accumulated customary rules and practices of merchants in the trading cities and countries, particularly regarding foreign and maritime commerce.[16] The rules arose out of what the merchants really did and the rules they really followed. They were remarkably uniform in Europe and other trading lands in the Late Middle Ages.[17]

Customary laws, as accumulations of custom and practice, tend to concentrate on simple central ideas, in this case the idea of good faith. The Law Merchant was dedicated to efficient, ethical trade. Good faith was its simple central idea and speed its chief technique.[18] That whole approach is different from the approach of other systems of law, such as the Common Law, that concentrate on delimiting rights and duties rather than on vindicating central ideas, and which, therefore, devote a lot of time and effort to getting the limits just right.[19]

The Law Merchant first of all concerned the sea, the rights and duties of ship captains and crews in port and on the coastal waters of Europe and on the Mediterranean Sea. The earliest land trade it applied to was at the medieval Fairs.

Fairs were the largest places to trade in the Late Middle Ages.[20] A sovereign or a feudal lord or the mayor of a town would declare a Fair at a designated place on designated dates. The king or lord or mayor would extend his peace – meaning his military protection – to the Fair site on the Fair days, and to people traveling to and from the Fair. The rules to be applied to trade at the Fair were the custom and practice of trade everywhere – the Law Merchant.

Dispute Resolution under the Law Merchant

For disputes over transactions at the Fair, a resolution device was needed. The Common Law courts, and the neighboring manorial or municipal courts, were likely to be slow and technical and to apply the law of one country to merchants from several, with home-town bias to boot. More appealing was the Law Merchant, with its pro-business orientation and its arbitrations by the merchants themselves.[21] The arbitrations, like the Law Merchant itself, were outside the judicial system of any nation, and amounted to self-regulation by the merchant class.[22]

Arbitrations at Fairs were quick and informal.[23] Some panels were set up to resolve disputes between two tides, that is, in 24 hours from petition to award. Often they were called "piepowder courts," because participants still had the dust of the fairground on their feet (pieds poudrés). Enforcement was by the merchants and administrators of the Fair, but was apparently infrequent, as judgments could be secured and expulsion from the Fair was always possible.[24]

Fairs were temporary commercial centers, confined to a small area on set dates, and lasting a month or less. It would have

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14 Berman, Revolution, 340-41; Francis M. Burdick, What is the Law Merchant?, 2 Colum. L. Rev. 470, 478-82 (1902); Charles Kerr, The Origin and Development of the Law Merchant, 15 Va. L. Rev. 350, 356-61 (1928-29); J. E. S. Broadhurst, The Merchants of the Staple, in 3 Select Essays in Anglo-American Legal History 16 (Boston: Little Brown, 1909). Fairs were "new" in the sense that they achieved unique importance in the 11th and 12th centuries. They had existed for centuries.

15 Berman, Revolution, 333-56.

16 The best single source for the Law Merchant is William S. Holdsworth, A History of English Law, vol. 5, pp. 60-120, 131-148; vol. 8, pp. 99-300 (London: Sweet & Maxwell, 2d ed., 1937, reprinted 1991-92), hereafter "Holdsworth, H.E.L." It could be cited for much of the text, but will only be cited where especially useful. Among earlier descriptions of insurance under the Law Merchant, the best are Gerard Malynes, Consuetudo Vel Lex Mercatoria or The Ancient Law Merchant, 145-56 (London: Adam Islip, 1622; reprinted Amsterdam: Theatrum Orbis Terrarum, 1979); and Nicolas Magens, An Essay on Insurances, preface and vol. I, pp. 1-95 (London: J. Haberkorn, 1755).

17 Malynes, above, note 16, at 3; Leon E, Trakman, The Law Merchant: The Evolution of Commercial Law, 7-12 (Littleton CO: Fred B. Rothman & Co., 1983); William R. Vance, Handbook on the Law of Insurance, 243-44 (St. Paul: West Pub. Co., 1904, 3rd ed., 1951); 1 Holdsworth, H.E.L., 526-30.

18 Wyndam Anstis Bewes, The Romance of the Law Merchant, 93-107 (London: Sweet & Maxwell. 1923), hereafter "Bewes, Romance"; Charles Gross, Organization and Jurisdiction of Fair Courts, in 1 Select Cases on the Law Merchant, intro. at xxv-xxvi (London: Selden Society, 1908); Trakman, above, note 17, at 7-17.

19 Berman, Revolution, 339-56.

20 Fernand Braudel, The Wheels of Commerce, 81-94 (New York: Harper & Row, 1982); Thomas Edward Scrutton, General Survey of the History of the Law Merchant, 3 Select Essays in Anglo-American Legal History, 7 (1909), hereafter "Scrutton, Survey"; Bewes, Romance, 93-107.

21 Berman, Revolution, 346-48; Paul R. Teetor, England's Earliest Treatise on the Law Merchant: The Essay on Lex Mercatoria from The Little Red Book of Bristol (circa AD 1280), 6 Am. J. Legal Hist. 178, 182, 188-90 (1962). Sometimes the mayor or other official who had called the Fair would preside, but the decisions were by the merchants. Bewes, Romance, 87-88.

22 Malynes, above, note 16, at Epistle Dedicatorie ("Lex Mercatoria...is a Customary Law...of all Kingdomes...and not a Law established by...any Prince...."); Frederic W. Maitland, Review of "The Guild Merchant," Economic Review, 1891 (reprinted in Collected Papers of Frederic William Maitland, vol. II, Essays Part 3 (Cambridge UK: Camb. U. Press, 1911, reprinted http://oll.libertyfund.org/Texts/LFBooks)); Leon E. Trakman, From the Medieval Law Merchant to E-Merchant Law, Univ. of Toronto Law Journal, vol. 53, no. 3 (Toronto: U. of T. Press, 1993, reprinted www.utpjournals.com).

23 Burdick, above, note 14, at 470-74.

24 Teetor, above, note 21, at 196-201; J. H. Baker, The Law Merchant and the Common Law before 1700, 38 Camb. L. J. 295, 303 (1979).

Insurance was commonplace in the Mediterranean trade, certainly from the 14th century on.[40] It had to be accomplished, as they said at the time, "at the speed of commerce."

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been more efficient to have a full-time place that offered the Fair's advantages – safety, density of merchants, standard weights and measures, and reliable settlement of disputes.

The answer was the Staple Town (or "market town"), designated by the king or lord to host some or all trade with the rest of the world. The Staple Towns provided physical safety and the other advantages of Fairs, plus continuous operation, permanent residence and lower costs. They planted the Law Merchant enduringly on English soil. The Fairs began to decline in the early 14th century as the Staple Towns replaced them.[25]

In both Fairs and Staple Towns, the arbitrators and market courts observed the customs and practices of the Law Merchant. Consensual contracts were to be performed, and that included informal contracts and even oral ones. Hearsay evidence was admitted. The objective was to keep commerce moving, and the contribution of the arbitrators was to make decisions that were sensible and quick.[26]

Insurance under the Law Merchant

English Common Law did not develop a reliable theory of informal, consensual contract until the 17th century.[27] Before that, the only contract actions were excruciatingly slow, narrowly defined, formalistic, and unreliable, with ancient, dilatory and capricious defenses such as trial by oath-helpers.[28]

The Law Merchant had recognized consensual contracts as far back as 1200 A.D., and probably a century or two before that.[29] Insurance in the modern sense began around the same time. The insurance was marine. It could be on the ship or on the cargo. It could be combined with a loan on the ship or cargo (bottomry or respondentia), or it could be purchased separately, free-standing.[30]

Where insurance developed so early was in the trading city-states of northern Italy and Spain in the Late Middle Ages. Starting around 1200 A.D., Barcelona, Genoa, Florence and Venice dominated Mediterranean trade, and that trade brought grain, spices, metals, cloth and jewelry to Europe. The legendary merchant princes of the era made their money in the trade.[31]

The great traders needed to borrow, and modern deposit banking appeared. They needed to transfer title to goods without physical delivery and to make payment without carrying a lot of gold, and trade documents such as the bill of exchange were invented. They needed to cover the physical risks of transport, and modern insurance began.[32]

It was the Law Merchant that fostered these

25 One should not conclude that Fairs had only a brief existence. They had begun long before the Late Middle Ages. Bewes, Romance, 1-11.

26 William S. Holdsworth, The Early History of the Contract of Insurance, 17 Colum. L. Rev. 65, 91 (1917), hereafter "Holdsworth, Early History"; J. H. Baker, The Law Merchant and the Common Law before 1700, 38 Camb. L. J. 295, 299-301 (1979).

27 3 Holdsworth, H.E.L., 412-54; A. W. Brian Simpson, A History of the Common Law of Contract, 280-315 (Oxford: O. U. Press 1976, 1996); Nicholas, above, note 10, at 162.

The early Common Law had curious methods for determining which party to litigation enjoyed the favor of God. One was trial by battle. Another was trial by ordeal – crushing weights, red hot stones, near-drowning, etc. If you survived, it showed God was on your side. Oath-helpers were part of "waging one's law" or "compurgation," in which the defendant swore he hadn't done what he was accused of, and several residents of the area swore (without knowing) that he was telling the truth. Wyndham Beawes, Lex Mercatoria Rediviva: or The Merchant's Directory, 292 (4th ed., London: J. Rivington, 1783, reprinted Ann Arbor: UMI Books, 2001), hereafter "Beawes, Rediviva"; Frederick Pollock and Frederic William Maitland, The History of English Law before the Time of Edward I, vol. 2, pp. 184-233 (2nd ed., Cambridge UK: Camb. U. Press, 1898, reprinted 1952).

29 1 Holdsworth, H.E.L., 570; Bewes, Romance, 63-69.

30 Holdsworth, Early History, 88.

31 Raymond De Roover, The Rise and Decline of the Medici Bank, 142-66 (Washington DC: Beard Books, 1999); David Abulafia and Christopher Allmand eds., The New Cambridge Medieval History, vol. v, pp. 61-70, vol. vii, pp. 150-53 (Cambridge, UK: Camb. U. Press, 1998, 1999).

32 The importance of insurance to commerce has never been put better than this: "...by meanes of whiche Policies of Assurance it comethe to passe, upon the losse or perishinge of a Shippe there followethe not the undoing of any Man, but the losse lightethe rather easily upon many, then [than] heavily upon fewe, and rather upon them that adventure not then those that doe adventure, whereby all Merchantes, spiallie [especially] the younger sorte, are allured to venture more willinglie and more freelie ...." An Acte concerninge matters of Assurances, amongst Merchantes, 43 Eliz. c. 12 ¶1 (1601). For an impressive list of the contributions to commerce of the Law Merchant, see Berman, Revolution, 349-50.

imaginative, essential tools of emerging modern business, not English law or the law of any other state.

The Common Law as an Obstacle to Commerce

The English Common Law of the time was not supportive of commerce.[33] Land was the main form of wealth, and commerce in land meant alienating land. Preventing the alienation of land meant more of it would pass according to the mediaeval rules of tenure.[34]

Under the old feudal rules, the transfer of land (usually upon death) to descendents, spouses and churches, called for services and payments to be rendered to the lord of whom the land was held. So did certain events involving the tenant, such as wardship, marriage, escheat and forfeiture. These "incidents of tenure" significantly supplemented, and may eventually have exceeded in value, the annual services and payments that were owed to the lord for the right to farm the land and to live on it.[35]

The incidents of tenure were a main source of income for the landowning classes, including the King. If land could be freely alienated outside the system of feudal incidents of tenure, that revenue would be lost.[36] One suspects that the economic interest affected the law.[37] Certainly the interest was well served by the formidable and tenacious barriers the Common Law put up against free commerce in land.

In the Late Middle Ages, commerce in goods was picking up, but the English Common Law did not provide the necessary framework for it. If the Common Law courts had tried to use the law they had – land law – as the basis for the law of commerce in goods, the natural result would have been ill-fitting, cumbersome, slow, expensive and long delayed.[38] The result would also have been unlikely to support, or perhaps even to permit, the emergence of a modern insurance business.

Insurance as a Law Merchant Institution

From the 14th century on, more records of commerce and insurance survive. Insurance policies exist.[39] Official records exist. Here is what emerges from those sources and commentary on them.

Insurance was commonplace in the Mediterranean trade, certainly from the 14th century on.[40] It had to be accomplished, as they said at the time, "at the speed of commerce." So the underwriters and brokers thought up shortcuts. One was the binder. It was an ingenious way to keep up with commerce at a time when scriveners were slow and in great demand, and moveable-type printing had not yet been invented.

The trading city-states promulgated mandatory policies, so the binder did not have to specify the policy form. In most insurance transactions in those days, the full policy text was never written out at all.[41]

The trading states had insurance commissioners to establish rules.[42] They used arbitrators to resolve transaction-specific disputes. The arbitrators were to be from the merchant class and they were to apply the rules of mercantile custom and practice.[43]

The Law Merchant was dedicated to facilitating commerce. Insurance policies were to be construed "largely, for the benefit of trade, and for the insured."[44] That was the original reason policies were construed in favor of coverage. The Common Law concept of ambiguity came later.

But the Law Merchant had weaknesses. It was law for a class – the merchants – unlike the Common Law, which was for everyone. It did not generate precedents and records, for the arbitrators made awards without opinions.[45] And it had no enforcement mechanism once the Fairs

33 Frederic W. Maitland, The Law of Real Property, Westminster Review, 1879 (reprinted The Collected Papers of Frederic William Maitland (Cambridge UK: Camb. U. Press, 1911, reprinted http://oll.libertyfund.org/Texts/LFBooks)); Frederic W. Maitland, The Forms of Action at Common Law, 16-42 (Cambridge UK: Camb. U. Press, 1909, reprinted 1997).

34 William Blackstone, Commentaries on the Laws of England, vol. 1, pp. 263-64 (Oxford: Clarendon Press, 1765, reprinted Birmingham AL: Legal Classics Library, 1981); 4 Holdsworth, H.E.L., 446-47.

35 A. W. Brian Simpson, An Introduction to the History of Land Law, 21-23, 186-88 (Oxford UK: O. U. Press, 1961); S. F. C. Milsom, Historical Foundations of the Common Law 88-102 (London: Butterworths, 1969).

36 Thomas Edward Scrutton, Land in Fetters, 37-69, 101-07 (Cambridge UK: Camb. U. Press, 1886); Theodore F. T. Plucknett. A Concise History of the Common Law, 30-31 (4th ed., London: Butterworth & Co., 1948); Simpson, above, note 35, at 21-23, 48-60, 77-86, 171-75; 4 Holdsworth, H.E.L., 446-47.

37 Much of the five-hundred-year struggle over alienability of land was really over revenue. The King was always a landowner, and the peers and others of great wealth near the top of the feudal pyramid were usually landowners (being tenants only of the King and lords of everyone below them), so both wanted to maximize collections under the incidents of tenure. Tenants, on the other hand, wanted to avoid the incidents of tenure by transferring land by their own actions – sales, wills, etc. The fee tail apparently started that way in the 12th century. It enabled the tenant to ensure future succession in the family by the terms of his own grant, so the relevant incident of tenure (inheritance) would not have to be paid for each generation. Joseph Biancalana, The Fee Tail and the Common Recovery in Medieval England, 9-20 (Cambridge UK: Camb. U. Press, 2001). Other examples of the economics of revenue driving the law of land include three of the most famous statutes of the Late Middle Ages – the Statute of Marlborough (1267), De Donis Conditionalibus (1285) and Quia Emptores (1290).

38 Simpson, above, note 35, at 112-134; Pollock and Maitland, above, note 28, at 184-233; Maitland, above, note 33, passim.

39 Magens, above, note 16, at vol. II, pp. 4-5; Warren Freedman (ed.), Richards on Insurance, 2074 (5th edition, New York: Baker Voorhis, 1952). Both give the full text of a standard policy from Florence in 1523.

40 William R. Vance, The Early History of Insurance Law, 8 Colum. L. Rev. 1, 67 (1907), hereafter "Vance, Early History."

41 Holdsworth, Early History, 91; Beawes, Rediviva, 292. .

42 Edwin W. Patterson, The Insurance Commissioner in the United States, 513-15 (Cambridge US: Harv. U. Press, 1924).

43 5 Holdsworth, H.E.L., 81-84. While Law Merchant arbitrations were independent of the host country's law, the English central courts of Chancery and Common Law did occasionally reach in with the King's writs to remove cases, for special reasons such as royal policy or the international status of the parties. Hubert Hall, The Sources for Law Merchant Cases, in 2 Select Cases on the Law Merchant, intro. at ix-xlii (London: Selden Society, 1929).

44 James Allan Park, A System of the Law of Marine Insurances, 44 (London and Philadelphia: Joseph Crukshank, 1789), quoting with approval Lee, C.J. [1743], hereafter "Park, Insurances."

45 Beawes, Rediviva, 342.

and Staple Towns had dwindled. It had to rely on the host state, which meant its King and its courts.[46]

Those three weaknesses would become serious if the Law Merchant's authority were challenged. And it was challenged in England in the 17th century, as part of the struggle for supremacy between the King and the more popular branches – Parliament and the Common Law courts.

Why the Law Merchant was Absorbed by the Common Law

The 17th century was a strenuous time in English politics. Royal beheadings, riots, murders, government overthrows, switches from aspiring absolute monarchy to aspiring republic, then dictatorship followed by limited monarchy with foreign royalty. The net effect of all of this turmoil was to shift a lot of political power from the King to Parliament and the courts of the Common Law.

The Law Merchant was, when all was said and done, a creature of royal authority. It had grown under the protection of the royal prerogative – to keep the Fair ground or ocean transit safe, to enforce arbitrators' awards, and to keep competing courts (common law, ecclesiastical and admiralty) out of the merchants' way. Those protections were withdrawn when the monarchy could no longer sustain them. A system without enforcement, without written records, a system for an elite class in an era of government for the common man – such a system was in deep trouble in the 17th century.

During the struggle between the crown and the legislature and courts, the leader of the courts, Chief Justice Sir Edward Coke, declared that "the Law Merchant is part of the law of this Realm." [47] It was a political statement as well as a legal one.[48]

As a legal matter, Lord Coke did not claim that the mercantile customary law had been assimilated into the Common Law. It certainly had not, and to achieve an assimilation, a lot more work lay ahead.[49] Recall that the Common Law was primarily land law. The free transfer of land was far from being a goal of the Common Law. The free transfer of goods was at the heart of commerce.

The history of the Common Law has been the adaptation of its rules to help in the progress of commerce and community. But it was not to be easy. The Common Law was not only set against free trading in land; it was highly detailed, formalistic and tedious, with labyrinthine procedures that were not likely to move "at the speed of commerce."[50]

During the 16th and 17th centuries, the courts began the process of absorbing the Law Merchant into the Common Law, but their efforts were piecemeal and fell short of full integration.[51] That required a more sweeping approach, and got it, from William Murray, Lord Mansfield.

Lord Mansfield and the Law Merchant

William Murray was a Scot educated in both the Common Law and in the Scottish law that had received much of Roman Law. His learning extended well beyond the Common Law, to include several European legal systems and the Law Merchant.52

He became an illustrious barrister and then a Member of Parliament, Solicitor General and Attorney General of England. Looking for yet bigger things, he got himself named Lord Chief Justice of England, a post that put him at the helm of the Common Law. He took office in 1752.

Chief Justice Murray, now Lord Mansfield, took up the challenge of really integrating the Law Merchant and the Common Law. Consider what he faced. The bill of exchange, the insurance policy, the honoring of informal agreements, the theory of holder in due course, and the enforcement of market agreements even when they later appeared unfair – all were unimaginable under the Common Law of the time.

Yet he succeeded and is now universally regarded as the father of commercial law.[53] How he did it is significant for our inquiry.[54] For he found a way to bring into his deliberations the practical realities.

As a starting point, the Law Merchant was attractive for its furtherance of commerce, an activity that England was

46 Vance, Early History, 12-14; Holdsworth, Early History, 99-107.

47 Sir Edward Coke, The First Part of the Institutes of the Lawes of England, Or, A Commentarie Upon Littleton, §182a (1628), quoted in 5 Holdsworth, H.E.L., 145. Note that Coke did not say the Law Merchant was part of the Common Law, and he identified three elements of the law of England: statute, common, and mercantile.

48 William S. Holdsworth, Sir Edward Coke, 5 Camb. L. J. 332, 334-37 (1933-35).

49 Burdick, above, note 14, at 479.

50 Scrutton, above, note 36, 1-2 and passim; 3 Holdsworth, H.E.L., 217-56; Maitland, above, note 33, passim.

51 1 Holdsworth, H.E.L., 568-73. In the 16th century, the first shifts of insurance disputes from merchant arbitrators to Common Law courts led to deterioration in claims practices. The 1601 Statute of Elizabeth, quoted above, note 32, went on, in the next sentence, to find: "And whereas heretofore suche Assurers have used to stande so justlie and p'cisely [precisely] on their credites, as fewe or no Controv'sies have arisen thereupon, and if any have growen the same have from tyme to tyme bene ended and ordered by certaine grave and discreete Merchantes, appointed by the Lorde Mayor of the Citie of London, as men by reason of their experience fitteste to understande, and speedily to decide those Causes; until of late yeeres that divers psons [persons] have withdrawen themselves from that arbitrarie [arbitral] course, and have soughte to drawe the parties assured to seeke their moneys of everie severall Assurer, by Suites comenced in her Majesties Courtes, to their greate charges and delayes ...." Text of statute in David Jenkins and Takau Yoneyama (eds.), History of Insurance, vol. 7, pp. 3-5 (London: Pickering & Chatto, 2000).

52 Charles Kerr, The Origin and Development of the Law Merchant, 15 Va. L. Rev. 350, 362 (1928-29); William S. Holdsworth, Some Makers of English Law 161-62 (Cambridge UK: Camb. U. Press, 1938, reprinted 1966). Dr. Samuel Johnson, history's foremost deprecator of all things Scottish, paid tribute to Mansfield (who had been taken to England as a youngster) thus: "Much may be done of a Scotchman if he be caught early." James Boswell, Life of Johnson, 568 (London: H. Baldwin & Son, 1791, reprinted Salt Lake City: Project Gutenberg, 2003, www.gutenberg.net).

coming to see as central to national success. How to get it into the Common Law?

For centuries the Law Merchant had been proven in court just as any other foreign law was – as a fact for the jury. Jury verdicts left no precedents to guide merchants in the future, just as arbitration awards had left none in the past. Mansfield was trying to get Law Merchant principles into the Common Law and on the permanent, public record. He wanted to take such questions away from the jury and decide them himself, with reasoned opinions for future guidance.[55]

But he needed to learn the current customs and practices of the merchants. The Common Law reports were little help. Very few cases concerned commercial matters, as those had been resolved in arbitrations.[56] So Mansfield empanelled the businessmen themselves to give expert answers to his questions, and they came to be called "Mansfield's jurors."[57] The customs and practices they testified about were the Law Merchant. Mansfield adapted what he learned from the merchants to fit Common Law requirements. Then in his opinions, he made them the law of England.

As a result of Lord Mansfield's work and of his method, it is impossible to say whether the Common Law absorbed the Law Merchant or the Law Merchant dictated the substance of the Common Law. It is not a choice; both are true.[58]

The Significance for Insurance Arbitration

This historical survey tells us that neither insurance nor arbitration is a Common Law creation. Both have deeper, older roots, which are quite different from the roots of the Common Law. If one only looked at insurance and arbitration in a flat and static way, that heritage might not matter. But insurance does not yield to so simple an approach.

What this historical survey shows is that both insurance and arbitration are founded in a very old tradition whose purpose was furthering commerce, and which to that end employed informality, speed, low cost, and commercial realism.

Some more specific observations also flow from this historical survey.

One, the informality and speed of insurance arbitration can be traced to the circumstances in which Law Merchant arbitrations began – commercial settings on temporary Fair grounds and on merchant ships briefly in port. Basic good faith, speed and practicality had top priority. Speed, practicality and the core idea of good faith were the paramount qualities of the Law Merchant and its dispute resolution machinery, perhaps more than their substantive rules. Both are compromised by the drift of reinsurance arbitration toward the Common Law decisional model.

Two, insurance and arbitration entered the Common Law from the same source – the Law Merchant. That may be a reason why some Common Law rules – such as rules of evidence – seem too confining when applied in arbitrations. It is also the likely reason for the admonition in arbitration clauses that the panel not be bound to strict law.

Three, the rules to be applied in reinsurance arbitrations were those of custom and practice in the relevant trade, just as in all the Law Merchant. To this can be traced the direction in arbitration clauses to appoint experienced insurance people and to observe the custom and practice of the business.

Four, in early arbitrations, both parties were from the same class – the merchant class – and the rules of arbitration were from the system of law reserved exclusively for that class, the Law Merchant. That may account for the feeling of many today that insurance arbitrations work best when the dispute is between two members of the same insurance-merchant class (that is, reinsurance arbitrations) rather than between parties of different classes (that is, primary disputes between insurers and lay policyholders).

A final conclusion from this historical survey is that arbitration is not an offshoot of the Common Law trial, nor is insurance a subset of the Common Law of contract. They come from elsewhere, both of them with the purpose of promoting honorable commerce. What can look like quaint features of insurance arbitration, and of insurance itself, generally make good sense in terms of their origin and purpose, and often make good sense in today's terms as well. ▼

53 Could anyone else have done it? Maybe, but not then, for two reasons. First, a less cosmopolitan and confident Common Law judge would likely have embraced the law of commerce by trying to reform the Common Law of land. Given the radically different roots and objectives of the Common Law and the Law Merchant, that would have been just about impossible. The starting point had to be the Law Merchant. Second, Mansfield was not only exceptionally learned; he was exceptionally well-connected. As a former leader of the House of Commons, and as an Attorney General who kept that office for years after going on the bench, he was certainly not anybody's run-of-the-mill judge. Even Mansfield's influence was not unlimited – witness his failure to get the doctrine of consideration out of the Common Law of contract (it was not part of the Law Merchant). But a lesser jurist would surely have fallen further short of the goal of fully integrating the two systems. C. H. S. Fifoot, Lord Mansfield, 21-26, 36-42, 82-97, 126-144 (Oxford: Clarendon Press, 1936); Simpson, above, note 27, at 407, 617.

54 For Mansfield's approach to commercial law, see Fifoot, above, note 53, at 82-117 (Oxford UK: Clarendon Press, 1936); Holdsworth, above, note 52, at 160-75.

55 Park, Insurances, xlii-xliii.

56 Scrutton, Survey, 8.

57 James Oldham, The Mansfield Manuscripts, 93-99 (Chapel Hill: U. of No. Car. Press, 1992).

58 A practical illustration of the cross-assimilation of the Law Merchant and the Common Law is the standard Lloyd's marine policy from late in Mansfield's tenure, which remained the standard policy for hundreds of years. It was a Common Law contract which promised results as reliable as under the Law Merchant ("this...Policy...shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street...." – the merchant center of London). Charles Wright & C. Ernest Fayle, A History of Lloyd's, 127-8, 138 (London: Macmillan, 1928).

news and notices

ARIAS Quarterly Subscriptions Available for Member Libraries

At its June 9 meeting, the ARIAS•U.S. Board of Directors decided that member firm libraries would be offered subscriptions to The Quarterly. The fee was set at $100 per year. These subscriptions are available for libraries of corporate or individual members and can be ordered by fax or email request using a credit card to 914-699-2025 or info@arias-us.org . Through postal mail, requests should be sent to ARIAS at 35 Beechwood Avenue in Mount Vernon, NY 10553. Members may also purchase additional subscriptions for themselves.

Revised Practical Guide Installed on ARIAS Website

The 2004 Revised Edition of the ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, which was distributed in printed form to all members in June has now been fully installed on the website, www.arias-us.org.

The online version offers several advantages. The Table of Contents is fully linked so that users can quickly jump to a selected section. Also, if parties to an arbitration are involved in a telephone meeting or conversation, they are now able easily to refer others to the guide for immediate access online, even if all are not ARIAS members with a printed copy close at hand. Finally, an online user is able to select a link in the text of a chapter and open any referenced form in rich text format, which is immediately functional in any word processing program.

Since there may be circumstances where a more portable format would facilitate the arbitration process, a PDF of the entire guide is also available on the Forms page of the site.

Copies of Practical Guide Available for Purchase

Anyone wishing to purchase extra printed copies of the 2004 Revised Edition of the Practical Guide to Reinsurance Arbitration may do so at a cost of $50 each (including shipping). Corporate libraries, especially, may find the guide a worthwhile reference document to have on hand. Purchase of the Guide is not restricted to ARIAS members. Since it contains valuable information for the entire dispute resolution community, it is being offered to all. Copies can be ordered by fax or email request using a credit card to 914-699-2025 or info@arias-us.org . Through postal mail, requests should be sent to ARIAS at 35 Beechwood Avenue in Mount Vernon, NY 10553.

Tenth Anniversary to Be Observed at 2004 Fall Conference

An announcement brochure was mailed in early September and posted on the website for this year's Fall Conference and Annual Meeting. Entitled "Ten Years After: An Arbitration Check-Up," the event will observe the tenth anniversary of the founding of ARIAS•U.S. and will pause to examine the state of reinsurance arbitration at this milestone in the life of the Society.

Conference sessions will look at and discuss the current state of arbitration issues, including ethical dilemmas and codes of conduct. Also, decision-making alternatives in arbitration will be examined. Of course, the ARIAS•U.S. Annual Meeting and Election will be held.

October 15 is the early registration deadline. The final deadline is October 29. Online registration is available.

Once again, Hilton New York will provide the venue. The Trianon Ballroom will be the location of the general sessions. Room reservations may be made through the ARIAS website link or by calling 800-445-8667. In either case, the Group/Convention code ARI should be used to obtain a room from the ARIAS room block at the group rate of $229. The Hilton deadline is also October 15.

Spring 2005 Conference Glides into Las Vegas – May 4-6

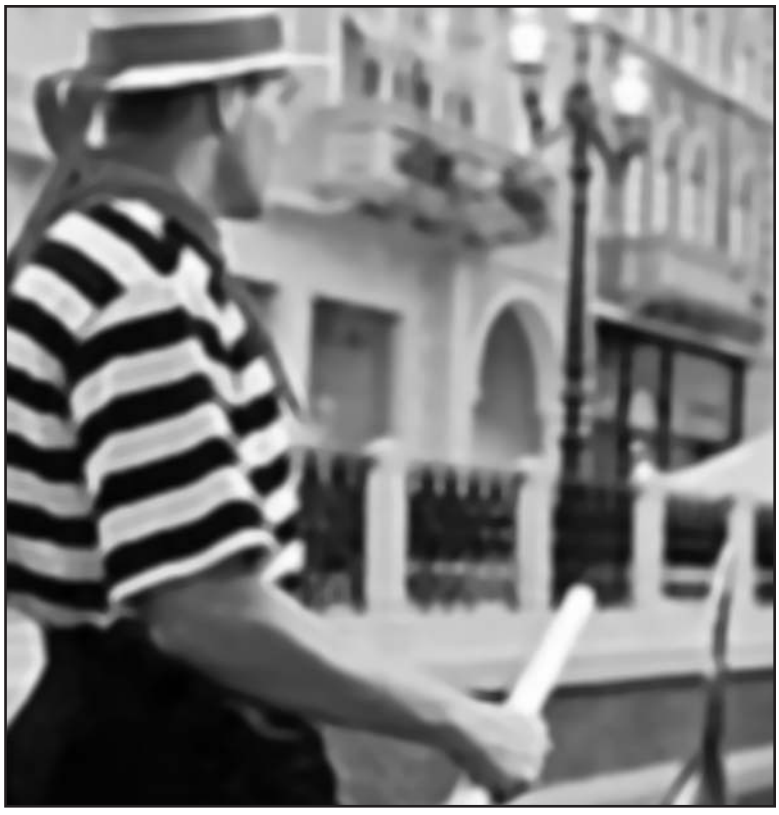
ARIAS•U.S. members will be gliding along "Venice's Grand Canal" in May of 2005. The Spring Conference is headed to The Venetian Hotel, one of the premier attractions of Las Vegas. Save the dates of May 4-6. The conference will run from noon on Wednesday until noon on Friday.

The Venetian offers the largest standard guest rooms in the world (Guinness Book); all are suites, with sunken living rooms. It is the

third largest hotel in the world, with 4,049 suites. With the vast array of restaurants and attractions, it offers plenty of places to go and things to do.

The Venetian is home to the Guggenheim Hermitage Museum, the Canyon Ranch SpaClub, and Madame Tussaud's Wax museum, among many other attractions. It has a mini-Grand Canal (630-feet long) and St. Mark's Square, Campanile and all.

Registration information and details of conference sessions will be sent out in February. A link to the Venetian reservation system is on the website calendar now.



Save November 10-11, 2005 for Next Year's Fall Conference

For those who need to plan far in advance, the tentative dates for the 2005 Fall Conference and Annual Meeting are November 10-11, at the Hilton New York or another New York Hotel.

Current News on Home Page

Whenever there is new information about any aspect of ARIAS•U.S. that members should know about, it is posted on the website. Look for the "Current News" button on the home page.

SPECIAL ANNOUNCEMENT

To All ARIAS•U.S. Members,

At its meeting on March 4th, the ARIAS•U.S. Board of Directors discussed and subsequently adopted an amendment to the Certification Criteria to be effective for arbitrator certification applications received after January 1, 2005. The amendment imposes a three-year window for qualifying conferences (new limitation) and arbitrations (increased from two years).

The amendment to Section 2b of the Certification Criteria is as follows:

b. Arbitration Experience - Have completed, within three years preceding the date the completed application is received by ARIAS•U.S.:

(i) Three ARIAS•U.S. conferences or workshops [or two ARIAS•U.S. conferences or workshops and one conference sponsored by A.R.I.A.S. (UK)]; or

(ii) Two ARIAS•U.S. conferences or workshops and one completed insurance/reinsurance arbitration as arbitrator or umpire; or

(iii) One ARIAS•U.S. conference or workshop and two such arbitrations.

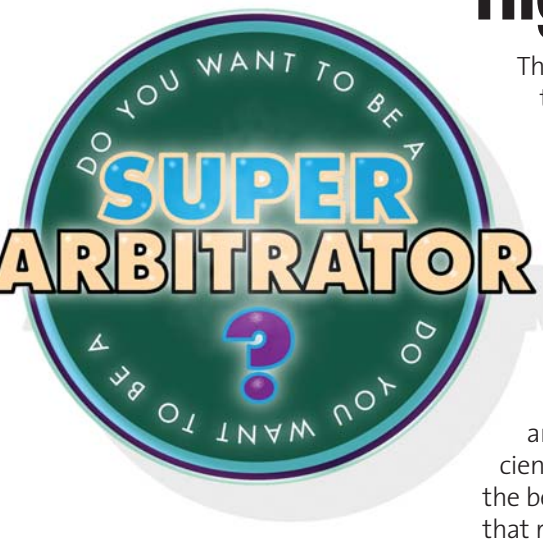
For purposes of this paragraph, an arbitration is "completed" only if there has been a Final Award following an evidentiary hearing or the granting of summary judgment.

This amendment reflects changes in the organization since the Criteria were first adopted, mainly that we are offering more opportunities for members to attend qualifying conferences and the belief that our certified arbitrators should be exposed to the most current views on important arbitration issues.

We are giving substantial advance notice of this change so as not to prejudice imminent certification applications.

CHARLES M. FOSS
Chairman of the Board of Directors
ARIAS•U.S.

Spring Conference at The Breakers: Highly Interactive



The largest ARIAS•U.S. Spring Conference to-date took place at The Breakers in Palm Beach, Florida on June 9-11. The total of 267 attendees (and 45 spouses) was well beyond the previous attendance of 175 attendees reached last year in Bermuda.

This year's conference, entitled *"Do You Want to Be a Super Arbitrator? Interacting on Discovery, Ethics and Case Management,"* focused on balancing technical legal issues with efficient and fair case management to provide the best possible system for the companies that rely on arbitration for dispute resolution.

Discovery

The first afternoon focused on the discovery phase of arbitrations. After a thorough overview discussion by the experienced team of Dan FitzMaurice, Bob Mangino, and George Pratt, attendees were divided into three rooms, where simultaneous mock arbitrations took place. Emotions seemed very real as veteran arbitrators and counsel exchanged arguments across the full range of discovery issues.

Ethics

Thursday morning was devoted to ethics. Vince Vitkowsky moderated a panel with Dave Attisani, Dick Bakka, and Andy Walsh that analyzed some of the very significant ethical dilemmas that arbitrators can face as the stages of an arbitration unfold or change or are cancelled. The audience was surveyed frequently for its opinion on these issues. With that information fresh in their minds, the attendees broke into eight separate groups for a more personal exchange of views on the issues, led by individual discussion leaders. Upon returning to the full assembly, the moderator surveyed the group again to find out whether opinions had changed as a result of the small group sessions.

Electronic Interactivity

In the three mock arbitrations on Wednesday and the two full assemblies on Thursday morning, this conference employed an element of information exchange that ARIAS had never used before. Every person in those sessions had a wireless keypad. At various times

during these discussions, moderators broke out of their on-stage interactions to survey the opinions of the audience about the topics being debated. Questions were asked and projected on the screen, the audience had 10 to 15 seconds on a countdown clock to press buttons representing their answers, and moments later, the combined results were displayed on the screen in bar graphs. It was as if everyone was in the middle of "Who Wants to Be a Millionaire," with graphics reminiscent of that game show.

The degree of involvement and interest that this system introduced gave these sessions a much broader context than they would otherwise have had. Rather than just following a variety of points other people were making, the audience was forced to think what they felt about each topic and then were able to see how the whole room felt about it. Attendees were virtually unanimous in their praise of this technology.

The Case Management Wheel of Fortune

Friday morning added another game show element. Topics for

the case management discussion were selected from 16 that were listed on a large carnival wheel. After each spin of the wheel, the esteemed panel of six, led by Mary Kay Vyskocil, discussed various aspects of the topic. The core question was then projected on the screen with a set of multiple choice answers. The audience voted, and a breakdown of the answers was displayed on the screen. Selecting topics by the spinning of the wheel required panelists to be ready to respond quickly to many different facets of the case management landscape (although there were reports that the wheel made some sudden stops).

The Wrap-up

The Co-Chairs, Tom Forsyth, Tracey Laws, and Mary Kay Vyskocil, closed with a summary that included an analysis of audience answers broken down by their professional roles. The interactive system was able to keep track of each person's first answer of the day, which identified him or her as primarily representing an insurance company, a reinsurance company, a law firm, or an arbitrator/umpire. During the summation, answers were displayed by these sub-groups. While these results were instructive and interesting within the context of the conference training, the potential for their being misinterpreted as representing larger universes strongly suggested that they would best be deleted, which they were.

Golf Tournament Is Not Rained Out!

In a surprising turnaround from last year's wash out in Bermuda, The Sixth Annual ARIAS•U.S. Open Golf Tournament was completed on Thursday afternoon. Seventy-three players executed a shot-gun start at 1:00 p.m., as the course reopened from a one-hour lightning hold. The weather held off after that just

long enough to complete the course. At dinner that night, Paul Walther awarded prizes to the winners, and Eric Kobrick announced winners of the First Annual ARIAS•U.S. Tennis Tournament.

The Breakers

The most frequently heard comment regarding the location went along the lines of "I have been to a lot of conferences in a lot of hotels, but I have never seen anything like this." The staff of The Breakers seemed too good to be true. They were so efficient and helpful at every turn that many wondered how they did it. When rain started falling half-way through lunch on the Ocean Lawn, people suddenly appeared, moving one of the two buffet lines inside, and putting up a new set of tables throughout the South Foyer. It seemed to take only five minutes. Also, over the three days, hotel staff members seemed always to be on hand to direct the flow toward the proper rooms. Topping off the service is the fact that the hotel is spectacularly beautiful. While ARIAS Spring Conferences have tended always to move to new locations each year, this is one that is surely on the horizon for a return trip . . . soon!.

feature

Panel Selection and Grounds for Disqualification of Arbitrators in Reinsurance Arbitration

This article is based on a paper presented at the ARIAS•US 2004 Spring Conference.

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I. Introduction.

A wide array of sources may supply the procedural rules in a reinsurance arbitration, including the Federal Arbitration Act ("FAA"), the American Arbitration Association ("AAA") Commercial Arbitration Rules, state statutes, and foreign rules of law. Regardless of which set of rules governs a particular contract, arbitrator selection is critical to the success and integrity of the arbitration process. The "establishment of a knowledgeable and experienced panel is the single most important factor in ensuring the smooth, fair and efficient resolution of private arbitrated disputes." ARIAS•U.S. Practical Guide to Reinsurance Arbitration (2004) ("Practical Guide"), Ch. 2. Among their other fundamental attributes, arbitrators must be familiar with the arbitration process in order to serve it. ARIAS•U.S. Guidelines for Arbitrator Conduct, Canon III. They must also be fair.

The purpose of this paper is to discuss the selection of panel members, and grounds for challenging their appointments and vacating awards based on their participation. The first section describes the selection criteria that may apply to prospective panel members under the arbitration provision of a reinsurance contract. The ensuing section sets forth the legal standards for disqualifying arbitrators and vacating awards in various circumstances. In the final part, we address the duties of prospective panel members and parties to disclose facts bearing on partiality.1

II. Panel Selection

A. Background

Many arbitration clauses provide for a three-arbitrator panel. Each party selects its own party-appointed arbitrator. The third arbitrator or umpire — who is expected to serve as a neutral — is generally chosen, if possible, by the two party-appointed arbitrators. Some arbitration provisions require or permit deviations from this familiar structure. See Reinsurance Association of America ("RAA") Manual for the Resolution of Reinsurance Disputes (1997) at 22 (suggesting appointment of an umpire as sole arbitrator in order to avoid the mutual cancellation of party-appointed arbitrators and add credibility to the process). The commentary in this article is premised principally upon the conventional, three-arbitrator paradigm.

B. Timing

Most arbitration agreements contain a provision stating that if a party fails to appoint an arbitrator within a specified time following receipt of a written request to designate an arbitrator, the party demanding arbitration may appoint both "party-appointed" arbitrators. This provision gives the petitioner control over the selection of the panel (*i.e.* two arbitrators who then select the neutral), when a respondent fails to appoint its arbitrator in timely fashion.

Courts interpreting such provisions under the FAA and analogous state provisions have reached diverse (and sometimes surprising) results. Section 5 of the FAA requires that the parties follow the contractually specified method for appointing arbitrators.2 Some courts applying Section 5 have refused to overlook even minor violations of the timing provision set forth in the arbitration agreement under scrutiny. *E.g. Universal Reins. Corp. v. Allstate Ins. Co.,* 16 F.3d 125 (7th Cir. 1993).

In *Universal,* the relevant agreement contained an arbitration clause which stated that a party may appoint the entire panel if the opposing party "refuses or neglects" to appoint its arbitrator within thirty days after notice of a demand to appoint. A typographical error created a five-day delay, which resulted in a failure to appoint in timely fash-

"...establishment of a knowledgeable and experienced panel is the single most important factor in ensuring the smooth, fair and efficient resolution of private arbitrated disputes."

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ion. The court held that the error was sufficient to constitute "neglect." Consequently, it allowed the opposing party to appoint both arbitrators. *See also Continental Cas. Co. v. Hartford Steam Boiler Inspection of Ins. Co.,* 2004 WL 725469 (N.D. Ill. Mar. 30, 2004) (confirming right of the party demanding arbitration to select both arbitrators, when the demand was received in the responding party's mailroom, but was never delivered to its decision-makers); *ReliaStar Life Ins. Co. v. Am. Healthcare Indem. Co.*, 2004 U.S. Dist. LEXIS 2649, at *8 (D. Minn. Feb. 18, 2004) (declining to extend contractual thirty-day deadline to appoint over objections that requested appointment would result in an unauthorized arbitration, waste resources, duplicate efforts and risk inconsistent rulings); *Employers Ins. of Wausau v. Jackson*, 527 N.W.2d 681 (Wisc. 1995) (confirming right of party demanding arbitration to select both arbitrators, where the responding party was nearly two months late in designating its arbitrator because its counsel — who had articulated a denial of the claim and conducted a four-year audit — denied that it was authorized to accept notice of the demanding party's arbitral appointment).3

In the interest of promoting the cooperative goals of arbitration, other courts interpreting Section 5 have declined to enforce the timeliness requirements of arbitration clauses in exacting fashion, particularly when the transgression is apparently minor and unintentional, and the contract does not specify that time is of the essence. *E.g. New England Reins. Corp. v. Tennessee Ins. Co.*, 780 F. Supp. 73, 76-78 (D. Mass. 1991) (a reinsurer who was six business days late in appointing its arbitrator did not forfeit its right to appoint, absent bad faith, prejudice to opposing party, and evidence that time was of the essence); *Campania Portorafti Commerciale v. Kaiser Int'l Corp.,* 616 F. Supp. 236 (S.D.N.Y. 1985) (refusing to compel the respondent to proceed with an arbitrator appointed by petitioner, where respondent's delay in selecting its arbitrator was minor — the delay amounted to one business day, the contract did not state that time was of the essence, and there was no bad faith); *Texas Eastern Transmission Corp. v. Barnard*, 285 F.2d 536, 540 (6th Cir. 1960) (selection made one week late did not result in a waiver of the right to appoint, because "[n]othing in this case indicates that it was the intention of the parties that time should be considered of the essence" and the respondent did not "refuse" to designate).4

Although these decisions do not (taken together) articulate any bright line rule, careful drafting of arbitration provisions may be a prudent prophylactic. A provision which states clearly that the respondent must "refuse" to exercise its right to select an arbitrator and specifies that time is not of the essence may prevent waiver of this important right in some cases.

C. Qualifications

Many arbitration clauses also require that panel members meet certain criteria. The following requirements are illustrative:

- active or former officers or executives of a reinsurance or insurance company5
- underwriters at Lloyd's
- attorneys with experience in the field of reinsurance
- professionals with practical experience in the insurance or reinsurance business

See RAA Manual for the Resolution of Reinsurance Disputes at 26; *Nationwide Mutual Ins. Co. v. The Home Ins. Co*, 90 F. Supp.2d 893, 899 (S.D. Ohio 2000) (agreement specified that "[a]ll arbitrators shall be executives of insurance or reinsurance companies or underwriters at Lloyd's, London not under the control of either party to this contract"), aff'd 278 F.3d 621 (6th Cir. 2002).

Disputes concerning the meaning of such seemingly mundane terms do sometimes arise. *E.g. Truck Ins. Exchange v. Certain Underwriters at Lloyd's London,* No. S068479 (Cal. Super. 2001), (rejecting reinsurer's attempt to appoint an arbitrator who was not an "active or retired executive or managerial employee from the insurance or reinsurance industries"); *Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002) (because arbitration agreement required appointment of an executive of a "life insurance company," reinsurance executive was not qualified to serve); *Certain Underwriters at Lloyd's London, et al. v. Continental Casualty Co.*, 1997 U.S. Dist. Lexis 11934 (N.D. Ill. Aug. 7, 1997) (rejecting challenge based on failure to meet "executive officer" requirement).

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The traditional view was (and, in some circles, remains) that each member of an arbitration panel should be completely neutral and impartial.

...This ethos often prevails in London Market and European arbitrations.

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A party-appointed arbitrator — even if predisposed in favor of the party that appointed him or her — still has an obligation to reach an independent judgment through deliberations and is constrained by a duty of fairness.

1. Party-Appointed Arbitrator

It is advisable for a party to select as its party-appointed arbitrator an industry professional who is articulate and persuasive, and possesses significant industry expertise. The candidate should have sufficient standing in the industry to cause other panel members to respect his or her views. *See* RAA Manual for the Resolution of Reinsurance Disputes at 28.

Some arbitration provisions require that a party-appointed arbitrator be "neutral." Where the arbitration clause is silent regarding "neutrality," there is some disagreement concerning the arbitrator's role and orientation — *i.e.* whether the arbitrator should serve as an advocate for the appointing party throughout the proceedings, or whether he or she must render a decision as a neutral trier of the facts. The traditional view was (and, in some circles, remains) that each member of an arbitration panel should be completely neutral and impartial. *E.g. Barcon Assoc., Inc. v. Tri-County Asphalt Corp.*, 430 A.2d 214 (Supr. Ct. N.J. 1980) (a party-appointed arbitrator should not advocate for the appointing party and must be completely impartial). This ethos often prevails in London Market and European arbitrations.

Other authorities subscribe to the view that a party-appointed arbitrator cannot possibly be as neutral as a judge or an umpire. As the Seventh Circuit Court of Appeals recently stated: "[I]n the main, party-appointed arbitrators are supposed to be advocates." *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002), *cert denied*, 538 U.S. 961 (2003). A partisan predisposition is distinguished from a biased treatment of the evidence ultimately presented to the panel.

Proponents of this position base their view in part on the structure of three-arbitrator panels, which allow for a measure of advocacy in the judging function. *E.g. Certain Underwriters at Lloyd's London, et al. v. Continental Casualty Co.*, 1997 U.S. Dist. LEXIS 11934 (N.D. Ill. Aug. 7, 1997) ("By no accident, each agreement provides for three arbitrators: one nominated by each party and a third 'umpire' to decide issues disputed by the party-nominated arbitrators. Like other courts addressing the issue, this court recognizes that party-nominated arbitrators may be more partial than umpire arbitrators."); *Astoria Med. Group v. Health Insur. Plan,* 11 N.Y.2d 128, 134 (1962) ("Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', at least in the sense that the third arbitrator or a judge is."). *See also Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988) (no disqualification, even though plaintiff's designated arbitrator and counsel were investors in the same limited partnership; "[a]n arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial"), *cert denied*, 489 U.S. 1018 (1989); *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249 (S.D.N.Y. 1962) (it is not sufficient ground to disqualify a party-appointed arbitrator merely because he is partisan and predisposed in favor of his appointing party); ARIAS Code of Conduct, Canon II ("party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract)").

Although the relevant arbitration clause may reflect this latter view by requiring that only the umpire be neutral, the entire panel must nonetheless act collectively as a "disinterested" board of arbitrators. *E.g. Florasynth, Inc. v. Pickholz*, 750 F.2d 171 (2d Cir. 1984) (party-appointed members of a tripartite arbitration panel are not to act merely as partisan advocates but as a unified board, and all three members have a responsibility to be disinterested). *See also* ARIAS•U.S. Guidelines for Arbitrator Conduct, Canon II (arbitrators should "avoid reaching a final judgment until . . . the panel has fully deliberated the issues"). A party-appointed arbitrator — even if predisposed in favor of the party that appointed him or her — still has an obligation to reach an independent judgment through deliberations and is constrained by a duty of fairness. *Aetna Casualty and Surety Co. v. Grabbert*, 590 A.2d 88, 93-94 (R.I. 1991) (although party-appointed arbitrators were not expected to be neutral, they were required to abide by their ethical duties and participate in the arbitration process in a fair, honest, and good faith manner).

A "fair" and "disinterested" mindset does not, however, necessarily preclude advocacy of positions. An arbitrator may be predisposed to decide an issue in accordance with closely held personal views on a familiar issue but may nonetheless be considered "disinterest-

ed", if he or she has no personal or financial stake in the outcome. Those decisions that balance advocacy with fairness espouse the most pragmatic view. The proclivity of an arbitrator to support — or, at least, not to reject out of hand — the position of the appointing party is almost inevitable, because parties deliberately (and understandably) choose candidates they know, or have reason to expect, will be receptive to their position. As one court observed:

> The right to appoint one's own arbitrator . . . would be of little moment were it to comprehend solely the choice of a 'neutral.' It becomes a valued right, which parties will bargain for and litigate over, only if it involves a choice of one believed to be sympathetic to his position or favorably disposed to him.

Astoria Medical Group, 277 N.Y.2d at 135. More broadly, most sought-after arbitrators are prominent and experienced members of the insurance and reinsurance community. Because they are selected based on their experience and standing in the field, some degree of professional interest in the disputed issue(s) and the parties seems inevitable. *E.g. Sphere Drake*, 307 F.3d at 620 ("The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile."); *Lloyds v. Continental*, 1997 U.S. Dist LEXIS 11934 at 16-17 ("[B]y requiring the arbitrators to be current 'executive officers' of other insurance companies (which could be expected to have some kind of business relationship as competitors, allies, or adversaries of some or all of the parties to the arbitration), the parties should have reasonably anticipated that a conflict of interest might arise."); *Nationwide*, 90 F. Supp.2d at 902 ("the parties agreed to have the claim submitted to members of a panel who are actively involved in the business of insurance"; rejecting challenge based on personal relationship); *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters,* 748 F.2d 79 (2d Cir. 1984) ("[f]amiliarity with a discipline often comes at the expense of complete impartiality"). *See also AT&T Corp. v. Saudi Cable Co.*, 1 Lloyd's Rep. 22 (Q.B.D. Oct. 13, 1999) ("Another reason for selecting arbitration rather than the Courts is that the parties may actually prefer men of the world . . . It cannot be in the least surprising that an experienced arbitrator will have some interest in business affairs and he may be all the better equipped to arbitrate if he has.").

There are, of course, ways around the seeming conundrum of inherent "professional bias." One way to limit at least the perception of industry-based bias involves bridging the notorious (but sometimes overstated) divide between cedent and reinsurer ideologies. When selecting its party-appointed arbitrator, a reinsurer or retrocessionaire may choose to appoint a representative of a ceding company, and a cedent may select a current or former employee of a reinsurance company. The cross-selection of candidates from the "other side" of the reinsurer-cedent divide can promote the appearance of impartiality and render a party-appointed arbitrator's arguments even more persuasive because they emanate from an unexpected source.

2. Umpire[6]

Many arbitration provisions set forth a procedure for umpire selection, and a default mechanism if the parties cannot agree. A common formulation provides:

> If two arbitrators fail to agree on a third arbitrator within thirty days of their appointment, each of them shall name three individuals, of whom the other two shall decline two, and the choice shall be made by drawing lots.

See ARIAS Practical Guide, Ch. 1 (2004).7 Under this structure, absent agreement on an umpire, each party and its party-appointed arbitrator customarily confer in the selection of a slate (usually, three) of umpire candidates, which will be cross-struck to produce one contender from each list. A random selection is then made between them.8 This process is generally effective, but resort to the courts is occasionally needed. *E.g. Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc.*, 2003 U.S. Dist. LEXIS 21850 (S.D.N.Y. 2003) (refusing to enforce arbitration award where appointment of neutral did not comply with the agreement's provisions); *Continental Cas. Co. v. QBE Ins.*, 2003 WL 22295377 (N.D. Ill. 2003) (where party-appointed arbitrators could not agree on an umpire from either party's list of three candidates, the court appointed the

Because umpires (like party-appointed arbitrators) in reinsurance disputes are typically chosen for their standing in the insurance and reinsurance industry, "neutrality" cannot -- - as a practical matter - - mean in all cases a complete absence of prior views on disputed issues or a lack of prior contact with the issues or parties.

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Rather, even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award.

umpire).

Because umpires (like party-appointed arbitrators) in reinsurance disputes are typically chosen for their standing in the insurance and reinsurance industry, "neutrality" cannot - - as a practical matter - - mean in all cases a complete absence of prior views on disputed issues or a lack of prior contact with the issues or parties. For example, an umpire's employment by a company faced with issues similar to the matters in dispute, and thus with an arguable interest in the outcome of an arbitration, has been rejected as a basis for challenging an appointment. *Northwestern Nat'l Ins. Co. v. Allstate Ins. Co.*, 832 F. Supp. 1280 (E.D. Wisc. 1993) ("That an umpire may have been pre-committed to a particular substantive position . . . or that he knew or had heard of the parties . . . is far from fatal; it actually is to be expected . . . it is also expected that the umpire, as an 'expert' in the industry would have strong views on certain topics and that those strong views and familiarity with the discipline in question would be at the expense of complete partiality."). A "reputational" interest in a ruling by an umpire does not support a challenge to his appointment, "because every award enhances the status of the arbitrator in the estimation of some employer." *Id.* at 1285.

Strong views develop with experience and may indicate a commitment to improving industry practices.9 An arbitration award should not be vacated merely because an umpire's view of what is a good award for the industry may be influenced by personal business experience, and perhaps even a perceived "future benefit to his or her own personal business ventures that may result from the precedent established by the arbitration award." *Sidarma Soc. Italiana v. Holt Marine Indus. Inc.*, 515 F. Supp. 1302, 1306-07 (S.D.N.Y. 1981) (refusing to vacate an award based on arbitrator's letter to umpire during deliberations urging a result that benefited "our industry"), *aff'd*, 681 F.2d 802 (2d Cir. 1981).

Notwithstanding these decisions, many state statutes understandably reflect lower tolerance for the partiality of an umpire. *See* Section III.B.2, *infra*. *See also Sphere Drake*, 307 F.3d at 622 (acknowledging that neutrals may be held to a higher standard than party-appointed arbitrators); *Lloyd's v. Continental*, 1997 U. S. Dist. LEXIS 11934 ("party-appointed arbitrators may be more partial than umpire arbitrators"); *Astoria Medical*, 227 N.Y.2d at 134 (same).

D. Replacement Of Arbitrators

In certain circumstances, including ill health, a party-appointed arbitrator may be compelled to resign after the arbitration process has commenced. A number of questions may arise concerning the procedure by which a substitute appointment (or appointments) can be made. After panel members have been exposed to evidence in the case (i.e. something more than procedural wrangling), it may be necessary, in extreme cases, to select a replacement panel in order to avoid any prejudice resulting from a replacement arbitrator's belated insertion into the dispute.

Although an arbitrator's resignation is unlikely to diminish a party's right to select its own arbitrator - - absent proof of a bad faith motive for such resignation and replacement - - the process by which a replacement arbitrator is appointed may engender disputes. The courts have demonstrated a willingness to intervene in this context. *E.g. National American Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003) (court appointed a replacement arbitrator because the arbitration was in process for over one year and the unrepresented party refused to re-appoint; "to form an entirely new panel of arbitrators and to start the proceeding anew would cause inappropriate delay and waste resources"); *Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 196 (2d Cir. 1991) (Section 5 of the FAA applies to pending arbitrations and confers on the court authority to appoint a replacement; untimely demise of arbitrator did not give appointing party the right to replace the existing neutral arbitrator).

III. Disqualification And Vacatur

A. The Timing Of Challenges

A pre-award challenge, in the form of a motion to disqualify an arbitrator, has two purposes. It is an attempt to eliminate an arbitrator candidate and, if unsuccessful, a means of preserving the right to challenge a future award based on the objectionable panel member's participation in the hearing and deliberations. A post-award challenge seeks vacatur of an award based upon a nominee's conduct, demonstrated bias, or other retrospective ground. It is properly

brought in the form of a motion to vacate. *ANR Coal Co., Inc. v. Cogentrix of North Carolina Inc.*, 173 F.3d 493, 497 n.1 (4th Cir. 1999), *cert denied*, 528 U.S. 877 (1999). Over the years, there has been some confusion concerning the authority of courts to entertain pre-award challenges. *E.g. Aviall, Inc. v. Ryder Sys. Inc.*, 110 F.3d 892, 895 (2d Cir. 1997). The weight of modern authority, however, holds that there is no such right.

1. The FAA Does Not Permit Pre-Award Challenges

Under Section 10(a) of the FAA, courts do not have express authority to hear a pre-award challenge to a nominee. The Fifth Circuit recently addressed this issue in detail:

> [T]here is no authorization under the FAA's express terms for a court's power to remove an arbitrator from service. Rather, even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator from service prior to an award, but only for potential vacatur of any award. Thus, the FAA does not expressly endorse court inquiry into the capacity of any arbitrator to serve prior to issuance of an arbitral award. More importantly, the FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award.

Gulf Guaranty Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476 (5th Cir. 2002) ("a prime objective of arbitration law is to permit a just and expeditious result with a minimum of judicial interference"). *See also Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp.2d 926 (2003) (refusing to disqualify umpire pre-award on evident partiality grounds); *Alexander v. Minnesota Vikings Football Club, LLC,* 649 N.W.2d 464 (Minn. Ct. App. 2002) (a court may vacate an arbitration award for "evident partiality," but the FAA does not permit "pre-award removal of an arbitrator"); *Folse v. Richard Wolf Med. Instrum. Corp.*, 56 F.3d 603, 605 (5th Cir. 1995) ("By its own terms, Section 10 authorizes court action only after a final award is made by the arbitrator."); *Old Republic Ins. Co. v. Meadows Indemnity Co., Ltd.*, 870 F. Supp. 210, 212 (N.D. Ill. 1994) ("Old Republic has a remedy in the event it feels it has been judged unfairly. That remedy, however, is simply not available at this time."). These cases are consistent with the proscription against court involvement in a privately negotiated agreement to expedite the adjudication of a dispute between industry participants. The rule they articulate prevents the objecting party from using its objection as a pretext for delay.

2. "Inherent Power" To Disqualify

Some courts have, however, relied on their "inherent powers" and general contract principles to disqualify arbitrators prior to issuance of an award, in order to save the fruitless expense of re-arbitrating a dispute. *E.g. Evanston Insur. Co. v. Kansa Gen'l Int'l Insur. Co. Ltd.*, No. 94 C 4957 (N.D. Ill. 1994), (court had authority to disqualify arbitrator who was not "disinterested," as required by the contract, prior to hearing in order to conserve resources).

This result is most likely to accrue in one of three narrow circumstances: (1) there is deceit or a material non-disclosure; (2) events unforeseen at the time the contract was drafted frustrated the parties' intent with respect to the operation of the arbitration provision; or (3) there is some other basis for declining to enforce an arbitration agreement "when it would be invalid under general contract principles." *Aviall, Inc. v. Ryder Systems, Inc.*, 110 F.3d 892, 896 (2d Cir. 1997) (observing that it is appropriate in certain circumstances to reform the parties' contract and substitute an arbitrator pre-award). *See also First State Ins. Co. v. Employers Ins. of Wausau*, No. 99-12478-RWZ (D. Mass. 2000) (enforcing contract provision requiring "disinterested" arbitrator prior to award); *Evanston, supra* (exception to the rule against pre-award disqualification invoked in response to circumstances that "will not change between [the time of the objection] and any post-arbitration challenge"); *Aviall, Inc. v. Ryder System, Inc.,* 913 F. Supp. 826, 836 (S.D.N.Y. 1996), *aff'd*, 110 F.3d 892 (2d Cir. 1997) (stating in dicta that it may be appropriate to disqualify a designated arbitrator pre-award where the "unmistakable partiality" of the arbitrator will render the arbitration a "mere prelude to subsequent litigation"); *Lloyd's v. Continental*, 1997 U. S. Dist. LEXIS 11934, *12 (court was empowered to hear pre-award challenge in order to enforce the contract); *Alexander*, 649 N.W.2d at 466-67(pre-award removal of an arbitrator may be appropriate if there is an undisclosed relationship

One court has suggested that an arbitrator may be disqualified prior to issuance of an award if there are credible allegations of overt misconduct or impropriety, rather than claims directed solely to the qualifications of the arbitrator.

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between the arbitrator and a party, or the relevant contract was the product of fraud or duress); *Third Nat'l Bank v. Wedge Group, Inc.*, 749 F. Supp. 851 (M.D. Tenn. 1990) (allowing a pre-award challenge based on the fiduciary relationship between the arbitrator and a party, which essentially required the arbitrator to be partial to the defendant).10

One court has suggested that an arbitrator may be disqualified prior to issuance of an award if there are credible allegations of overt misconduct or impropriety, rather than claims directed solely to the qualifications of the arbitrator. *See Metropolitan Prop. and Cas. v. J.C. Penney Cas. Ins. Co.,* 780 F. Supp. 885, 895 (D.Conn.1991) ("Met does not attack the qualifications of [the challenged arbitrator] nor any potential conflict of interest created by his past institutional relationships with Penney. Nor does Met allege the 'appearance of bias' here. Rather, Met alleges overt arbitrator misconduct and impropriety during the arbitrator selection process . . ."; injunctive relief seeking pre-award disqualification was not precluded as matter of law).11 Although these theoretical grounds for pre-award disqualification may seem expansive at first blush, most courts have declined to hear motions to disqualify pre-award, absent a compelling reason to enforce a neglected term of the parties' contract or reform a contract induced by fraud.

B. Legal Standards For Vacating An Award.

1. Federal Arbitration Act.

As previously noted, the procedural rules governing a reinsurance arbitration may be supplied by federal law or state statute. *Volt Info. Sciences, Inc. v. Leland Stanford Jr. U.*, 489 U.S. 468, 479 (1989) ("Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . .").12 Often, state statutes are imported through choice of law provisions in the parties' contract. Many of these statutes adopt principles adumbrated in the FAA. *See* 9 U.S.C.A., § 1, *et seq*. For this reason, the FAA provides a useful framework for highlighting issues that frequently arise in the context of reinsurance arbitrations conducted under federal or state law.

Section 10(a) of the FAA sets forth the bases upon which an arbitration award may be vacated by a U.S. District Court in the jurisdiction where the award was made.13 They include the following circumstances:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was *evident partiality* or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A., § 10(a) (emphasis supplied). This paper focuses primarily on "evident partiality" — a standard the courts have struggled to define. One formulation that has attained currency requires that the alleged partiality be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Gianelli Money Purchase Plan v. ADM Investor Services Inc.*, 146 F.3d 1309, 1312 (11th Cir.) (citation omitted), *cert denied*, 525 U.S. 1016 (1998).

The trend is for courts interpreting Section 10(a)(2) and like provisions to require more than a perception of bias. Rather, the party alleging bias must establish facts that create an objectively reasonable impression of bias or misconduct.14 *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10 (D. Mass. 2002) ("Evident partiality requires more than just an appearance of bias; there must be some actual evidence of bias."); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator."); *The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328-29 (6th Cir. 1998)("[E]vident partiality will be found only where a reasonable person would have to conclude that an arbitrator was partial to one party . . . . This standard requires a showing greater than an 'appearance of bias' but less than 'actual bias.'"); *Fed'l Vending, Inc. v. Steak & Ale of Florida, Inc.*, 71 F. Supp.2d 1245, 1247 n.1 (S.D. Fla. 1999) (commenting on the distinction between a "mere appearance of bias" and "a reasonable impression of bias or partiality," and the difficulty of drawing this line).15

Despite these attempts to objectify the FAA standard, it remains elusive and highly fact-specific:

> In summary, the 'evident partiality' question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependant on the unique factual settings of each particular case. The black letter rules of law are sparse and analogous case law is difficult to locate. In most cases, the courts have little guidance when confronted with an issue in this area of the law.

Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 435 (11th Cir. 1995). *See also Burlington Northern R. Co. v. TUCO, Inc.*, 960 S.W.2d 629 (Tex. 1997). Nonetheless, several important fact patterns have been considered by the courts, and they are addressed below. *See* Section III. C, infra.

2. State Statutes.

Most states have their own arbitration rules.16 Like the FAA, several of these statutes authorize a trial court to vacate an arbitration award based on "evident partiality" of an arbitrator. *E.g.* Miss. Code Ann. § 11-15-23 (West 2004); N.J. Stat. Ann. § 2A:24-8 (West 2004); LA. Rev. Stat. Ann. § 4210 (West 2003). In many of these jurisdictions, the "evident partiality" standard applies only to umpires. In Massachusetts, for example, an arbi-

tration award may be vacated if, among other things, there was evident partiality by "an arbitrator appointed as a neutral." Mass. Gen. Laws Ch. 251, § 12 (West 2004).17 *See also* Fla. Stat. § 682.13(1)(b) (West 2004); N.Y. CPLR § 7511 (b)(1)(ii) (West 2004); Mich. Comp. Laws Ann. § 600.5081(2)(b)(West 2004); Ind. Code Ann. § 34-57-2-13 (West 2004).

C. Grounds for Vacatur and Disqualification.[18]

The standards set forth above are necessarily broad in scope. They are designed to address an enormous array of facts and circumstances. As a result, they can be difficult to apply to a motion to vacate (or disqualify) involving a particular candidate. Several specific grounds for vacatur (or disqualification), however, can be distilled from the reported authorities.

1. Financial Interest.

Financial interest is present when a panel member stands to gain economically from the outcome of an arbitration proceeding. Possible grounds for vacatur include a panel member's:

- ownership interest in a party company or related company
- service as an employee of, consultant to, or independent contractor for a party
- participation in a personal loan transaction with a party

An arbitrator's participation in a contingent fee arrangement should — but does not always — result in a successful challenge. *See* ARIAS (U.S.) Code of Conduct, Canon X ("Arbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process."); *compare Aetna Cas. & Surety Co. v. Grabbert*, 590 A.2d 88 (Sup. Ct. R.I. 1991). In *Grabbert*, a party-appointed arbitrator obtained a contingent fee interest in the award. Although the Court construed the arrangement as a direct financial interest in the award, it found that the award represented a unanimous decision of three experienced arbitrators. Because the award was supported by a majority of the panel members even absent the allegedly tainted vote, the court declined to disturb the award.19

As a corollary, a prior (*i.e.,* inactive) financial relationship between an arbitrator and a party's attorney does not necessarily require vacatur. *E.g. Montez v. Prudential Sec. Inc.*, 260 F.3d 980, 984 (8th Cir. 2001) (arbitrator's pre-arbitration use of party's law firm in business dealings unrelated to the arbitrated dispute did not necessarily require finding of bias in NASD arbitration).

2. Bias.

Bias may be defined as prejudgment for or against a party, counsel, or position. Bias may be demonstrated when an arbitrator:

- articulates a decision or takes an intractable position on a material issue in the dispute before receiving evidence from both parties
- expresses a racial, religious, or gender preference for or against a party or counsel
- makes strong public statements regarding a party or a matter in dispute.

Notwithstanding the apparent clarity of these principles, bias is a ground for vacatur (or disqualification) that may be more readily understood by negation. Bias warranting vacatur has not been found, for example, where:

- An arbitrator relied on evidence and consistently reached conclusions favorable to one party (*Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp.2d 926 (N.D. Cal. 2003); *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp.2d 10, 18 (D. Mass. 2002) ("A panel's decision to rule against a party, by itself, cannot be evidence of bias").
- The award is issued based on minimal communication between the Panel members following the conclusion of the hearings *(Am. Nat'l Ins. Co. v. Everest Reins. Co.,* 180 F. Supp.2d 884, 887 (S.D. Tex. 2002)).
- The employer of two party arbitrators was involved contemporaneously in reinsurance disputes adverse to parties in the arbitra-

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An arbitrator's participation in a contingent fee arrangement should — but does not always — result in a successful challenge.

tion, the arbitrators were personally involved in negotiating those extra-arbitral disputes, and some of the disputed claims were similar to the claims in arbitration *(Lloyd's v. Continental*, 1997 U.S. Dist. Lexis 11934).20

- An arbitrator has previously decided the same legal issue in a prior, single-arbitrator proceeding involving the same prevailing party *(Fed'l. Vending, Inc. v. Steak & Ale of Florida, Inc.*, 71 F. Supp.2d 1245 (S.D. Fla. 1999)).
- An arbitrator has previously acted as a lawyer with respect to the same legal issue in a prior arbitration involving the same opposing party (*Nationwide*, 213 F. Supp.2d at 18).
- There is actual or perceived disharmony between a lawyer and the opponent's party-appointed arbitrator (*LLT Intern., Inc. v. MCI Telecomm. Corp.*, 18 F. Supp.2d 349 (S.D.N.Y. 1998)).

Notwithstanding the protections apparently afforded by these decisions, parties should avoid appointments that may be subject to credible assertions of bias. In light of the courts' propensity to defer consideration of challenges until after an award is issued, this prudent practice is likely to conserve time and money.

3. Personal Relationships

An award may be vacated, or an arbitrator may be disqualified, based upon a blood or marital relationship, or a close personal friendship, between a party or counsel and an arbitrator. *E.g. Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters,* 748 F.2d 79, 85 (2d Cir. 1984) (a father and son relationship is one which "reasonable people would have to believe . . . provides strong evidence of partiality"). A party may not serve as its own arbitrator. *Astoria Med. Group v. Health Ins. Plan of Greater N.Y.*, 11 N.Y.2d 128 (1962) ("When an agreement authorizes a party to appoint an arbitrator, it is implicit in that very provision that he may not appoint himself" ; entertaining and rejecting pre-award motion to disqualify).

4. Professional Relationship With Party Or Counsel

This objection may include present or prior business affiliations or professional relationships. A special relationship involving an arbitrator and a party — *i.e.,* accountant-client, debtor-creditor, attorney-client — may constitute a sufficient ground to disqualify. *E.g., Continental Cas. Co. v. QBE Ins.*, 2003 WL 22295377 (N.D. Ill. 2003) ("it would be safer" not to select an umpire candidate who had been retained previously as an attorney by one of the parties); *Truck Ins. Exchange v. Certain Underwriters at Lloyd's London*, No. S068479 (Cal. Super. 2001) (refusing to permit London attorney to serve on panel, because he and his firm may have performed legal services for certain respondent reinsurers); *First State Ins. Co. v. Employers Ins. of Wausau*, No. 99-12478-RWZ (D. Mass. 2000) (sustaining pre-award challenge; a lawyer who acts "repeatedly and regularly" as counsel for a party is not "free from interest, neutral, or indifferent" and is, therefore, precluded from acting as an arbitrator in a reinsurance dispute where the parties agreed to appoint "disinterested" arbitrators).

There are, of course, many professional relationships that are unlikely to result in vacatur. Courts have held that the following circumstances do not amount to "evident partiality":

- Selection of opposing party's arbitrator (following its failure to appoint) by party employee who had worked for the same company that employed the arbitrator seven years earlier did not demonstrate evident partiality. *Continental Cas. Co. v. Hartford Steam Boiler Inspection and Insurance Co.*, 2004 WL 725469 (N.D. Ill. 2004).
- Even though insurer's appointed arbitrator was the officer of a different insurer that had a reinsurance contract with an affiliate of the respondent insurer, vacatur was not warranted. *U.S. Care, Inc. v. Pioneer Life Ins. Co.*, 244 F. Supp.2d 1057 (C.D. Cal. 2002).
- There was no evident partiality, where one arbitrator had been an officer of a bank at the time that the prevailing party was a customer of the bank and another arbitrator had been a business associate of a witness for the prevailing party forty years earlier. *Reeves Bros. v. Capital-Mercury Shirt Corp.*, 962 F. Supp. 408 (S.D.N.Y. 1997).
- Simultaneous participation of a neutral in a second arbitration with a party's arbitrator did not demonstrate evident partiality. *Bedsted v. Illinois Farmers Ins. Co.*, 2000 Minn. App. LEXIS 34 (Jan. 11, 2000).
- An umpire's "reputational interest" in an award — rooted in his alleged desire to influence the outcome of the pending arbitration in order to protect a former employer (not a party thereto) from paying losses in a possible, future arbitration — was too "remote, uncertain, and speculative." *Northwestern Nat'l Ins. Co. v. Allstate Ins. Co.,* 832 F. Supp. 1280 (E.D. Wisc. 1993).
- The fact that the umpire will be questioned as a witness in an unrelated arbitration by the same law firm that represents a party in the pending proceeding was not a sufficient ground for disqualification. *Int'l. Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981). *But see Sun Refining & Marketing Co. v. Statheros Shipping Corp.,* 761 F. Supp. 293, 302-303 (S.D.N.Y.) (panel chairman's role as a witness for and representative of a party adverse to the party now seeking vacatur of award, in a separate but contemporaneous arbitration, amounted to "evident partiality"), *aff'd*, 948 F.2d 1277 (1991).
- A neutral arbitrator's prior service on nineteen panels with the president of a party's U. S. agent and his prior selections by the president as umpire did not result in a successful challenge, even though the neutral always voted with the president. *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 701 (2d Cir. 1978).

See also Federal Vending, 71 F. Supp.2d at 1250 (award not vacated based on selection of the same arbitrator in a prior, single-arbitrator proceeding in which the same issue was decided); *Gascor v. Ellicott, supra* (Australian appeals court held that an arbitrator's prior service as an arbitrator and lead counsel in two cases involving similar issues did not create a "reasonable apprehension that the [arbitrator] will not decide the case impartially or without prejudice").

- Social contact between an arbitrator and counsel for the party that appointed him did not amount to evident partiality. *Nationwide,* 90 F. Supp.2d at 901-902 (ex parte lunches did not warrant vacatur, because meetings were disclosed to adverse party in advance, the pending arbitration was not discussed, the arbitrator had no business relationship with the prevailing party, and counsel for the opposing party attempted to engage in similar conduct with the same arbitrator).
- Occasional professional contact is not a sufficient ground. *E.g. Henry Quentzel Plumbing Supply Co. v. Quentzel,* 193 A.D.2d 678 (N.Y. Sup. Ct. 1993) (refusing to vacate award merely because one of three arbitrators had occasional professional contact with respondents' expert witness and his accounting firm, when there had been no personal contact for a period of two to four years immediately prior to the hearing); *Chernuchin v. Liberty Mutual Ins. Co.,* 268 A.D.2d 521 (N.Y. 2000) ("It is well settled that mere occasional associations between an arbitrator and those appearing before him generally will not warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality."); *Nat'l Union Fire Ins. Co. v. Holt Cargo Sys., Inc.,* 2000 U.S. Dist. LEXIS 3956 (S.D.N.Y. March 27, 2000) ("disqualifying an arbitrator because he or she had prior professional dealings with one of the parties would make it difficult at best, to find a qualified arbitrator at all").

5. Appointment In Multiple Arbitrations.

When one party appoints the same arbitrator to different panels involving different adversaries but similar issues, a challenge may be based upon the risk that the arbitrator will be influenced by evidence presented in one or more earlier arbitrations. Because adversaries to the appointing party in the subsequent dispute are not present for the prior hearing, they may elect to argue that the initial proceeding amounts to a series of ex parte communications. This fact alone, however, does not constitute sufficient ground to invalidate the appointment. *E.g. Instituto de Resseguros v. First State Ins. Co.,* 178 A.D.2d 313 (N.Y. 1991) (rejecting pre-award challenge to party-appointed arbitrator in reinsurance dispute because it was the party's bargained for contractual right to select the same arbitrator for each panel considering the same or related issues, but noting that such a challenge may be appropriate as to a prior, single-arbitrator tribunal).21

Such an appointment may be improper, however, if the arbitrator was shown evidence that will not be presented to the sitting panel, giving him an impermissible "informational advantage." *See Employers Insur. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 933 F.2d 1481 (9th Cir. 1991) (appointed arbitrator did not have an "informational advantage," because copies of the documents he reviewed in order to evaluate claims and render advice were provided to the other panel members). *See also Fidelity Security Life Ins. Co. v. John Hancock Life Ins. Co.,* No. 02-11663-WGY (D. Mass. Sept. 27, 2002) (ordering respondent to arbitrate, even though petitioner's umpire nominees were serving as umpires in other proceedings involving the petitioner company, and they might obtain information in those arbitrations which could arguably influence their decisions in the pending proceeding).

Where there is an identity among parties in the various arbitrations, it is even more difficult to make such a challenge. None of the communications is arguably ex parte in nature, and the parties have an equal opportunity to present evidence to the same arbitrator.

Fortunately, there are limits to multiple appointments of the same arbitrator by one party. An arbitrator may be so frequently designated by a particular party that he or she becomes closely associated with (and financially dependant upon) it. An affiliation of this kind requires an appropriate disclosure and, as a practical matter, may also render the arbitrator less effective in deliberations with other panel members. *E.g. Lopez v. 21st Century Ins. Co.,* 2003 Cal App. Unpub. LEXIS 2366 (Cal. App. 2d Dist. Mar. 10, 2003) (appointments in eighteen arbitrations over six years leads to an impression of impartiality); *Nasca v. State Farm Mutual Auto. Ins. Co.,* 12 P.3d 346 (Colo. 2000) (an impartial arbitrator had a duty to disclose the extent of her business relationships with State Farm, because she had previously been appointed by State Farm in thirty-seven claims, she had served as its expert witness, another member of her law firm had also served as State Farm's expert, and State Farm had made significant payments to her firm for these services).

6. Ex Parte Communication

A party may challenge an award (or move to disqualify) based upon ex parte communications, made at various times, between the opposing party and an arbitrator or the umpire. Broadly, these communications may be considered in three relevant time frames.

(a) *Pre-Organizational Meeting*

Early ex parte communications between a party and its party-appointed arbitrator are inevitable and necessary. It is important, among other things, for a party and its counsel to determine that a prospective party-appointed arbitrator's views are not inimical to pivotal positions it expects to present to the panel. Parties and their counsel are generally considered free to communicate with their party-appointed arbitrator until such time as the parties agree otherwise. The decision as to when such communications cease (and the "blackout" period commences) is usually

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made at the organizational meeting. Communications which take place prior to the "blackout" period are presumptively permissible. *E.g. Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp.2d 10 (D. Mass. 2002) (no bias where ex parte communications took place during the period in which the parties expressly agreed to permit them).

Early ex parte communications — or, at least, the *fact* of those communications — should be disclosed to the opposing party. *Infra* at p. 29. Any documents exchanged at that time should also be disclosed. *Id.* There is some risk that if undisclosed, these preliminary communications can be used by an adversary as a basis for challenging the appointment of an arbitrator or (ultimately) the award. In fact, most of these challenges have failed. *E.g. Employers Insur. of Wausau v. Nat'l Union Fire Ins. Co.,* 933 F.2d 1481 (9th Cir. 1991) (affirming district court's rejection of claim that an arbitrator was impermissibly biased because of early ex parte contacts with appointing party, where the relevant meeting lasted a few hours, the entire panel agreed that the challenged arbitrator was impartial, and copies of all documents reviewed were presented to the other party and panel members). *Compare Metropolitan Prop. & Cas. v. J.C. Penney Ins. Co.,* 780 F. Supp. 885, 891-92 (D. Conn 1991) (stating in *dicta* that pre-award disqualification was not precluded as a matter of law, where party-appointed arbitrator discussed the merits of the case ex parte, reviewed documents prior to his selection as a member of the panel, and made efforts to discuss the case with the other party-appointed arbitrator prior to the selection of the third arbitrator).

(b) Organizational Meeting.

At the organizational meeting, the parties may agree to terminate ex parte communications or allow them to continue throughout the discovery period and even the hearing. The parties in many arbitrations agree to eliminate ex parte communications at the time of the organizational meeting, so that the arbitrators' only sources of information are any common contacts made during the discovery process and the evidence presented to the entire panel at the hearing. *See* RAA Manual for the Resolution of Reinsurance Disputes at 37. The key is clarity. A bright-line rule — which either permits or proscribes ex parte communications going forward — is likely to result either in compliance or a well-grounded challenge to impermissible behavior.

(c) Post-Organizational Meeting.

Challenges to awards have also been based on ex parte communications that occur after the organizational meeting takes place. In general, the party alleging misconduct must demonstrate that the relevant communications were directly related to the merits of the dispute and deprived it of a fair hearing. *E.g. Nationwide Mutual Ins. Co. v. The Home Ins. Co.*, 90 F. Supp.2d 893, 902 (S.D. Ohio 2000), (finding, among other things, that ex parte communications did not involve the pending arbitration), *aff'd*, 278 F.3d 621 (6th Cir. 2002). *See also Ash v. Kaiser Foundation Health Plan*, 2003 WL 21751207 (Cal. App. 2d Dist. July 30, 2003) (declining to vacate award based on arbitrator's ex parte communications with opposing counsel, because "such communications did not go to the substance of the matter"); *United House of Prayer v. L.M.A. Int'l, Ltd.*, 107 F. Supp.2d 227 (S.D.N.Y. 2000) (no ex parte communications took place during a conference call between counsel and the panel, which was terminated after the exchange of pleasantries because respondent's counsel failed to join the call); *Spector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994) (rejecting post-award challenge alleging misconduct based upon ex parte communication during the hearing, because the alleged ex parte conversation took place during a break in the hearing with a stenographer present and concerned an issue unrelated to the merits); *M & A Elec. Power Coop. v. Local Union No. 702*, 977 F.2d 1235,1238 (8th Cir. 1992) (denying a post-award challenge based on post-hearing communications concerning a peripheral matter, because it was not demonstrated that they tainted the arbitrators' decision or deprived the challenging party of a fair hearing).

A challenge based upon ex parte communications has also been denied, because the information communicated was otherwise available to the adversary. *E.g. Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991). In *Pacific*, Ohio Re claimed that Pacific Re engaged in ex parte communications with its party-appointed arbitrator and the umpire concerning balances possibly owed to Pacific Re under the relevant treaties. The court found that the facts communicated to the two panel members constituted information common to the parties, which was routinely sent to Ohio Re in a monthly balance statement. Accordingly, the court rejected the challenge.22 In short, the bar for disqualification based upon ex parte communications is a high one.

IV Duty To Disclose

A. Legal Standard

The failure to disclose facts bearing upon an arbitrator's impartiality is one of the few viable bases for challenging an award. The seminal statement concerning the disclosure obligation imposed upon prospective arbitrators was fashioned by the U.S. Supreme Court more than three decades ago. *See Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968). In *Commonwealth Coatings*, the Court considered the "close financial relations" between a neutral and a party under the FAA's "evident partiality" standard. It articulated "the simple requirement that arbitrators disclose to the parties any dealings that might create *an impression of possible bias.*" (Emphasis supplied.) In his concurring opinion, Justice White elaborated on the burden and infused it with a more pragmatic viewpoint:

> Of course, an arbitrator's business relationships may be diverse indeed . . . He cannot be expected to provide the parties with his complete and unexpurgated business biography . . . If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant

vacating an award.

Id. at 151-52. Notwithstanding the breadth of these pronouncements, a recent (and well-publicized) federal court of appeals decision has attempted to limit the holding of *Commonwealth Coatings* to disclosures by a neutral concerning "financial entanglements." *See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.,* 307 F.3d 617, 623 (7th Cir. 2002), *cert denied*, 538 U.S. 961 (2003).

The reinsurance dispute in *Sphere Drake* was arbitrated under the ARIAS rules. Each party appointed an arbitrator, and the arbitrators selected an umpire. After receiving an unfavorable ruling, the cedent sought to set aside the award on the ground that the reinsurer's arbitrator displayed "evident partiality," when he failed to disclose in full his prior relationships with the party that appointed him.

The federal trial court found that the challenged arbitrator was "evidently partial," because he failed to disclose fully his engagement in an unrelated matter as counsel for the party that appointed him. Although the challenged arbitrator provided some information about his prior involvement with the reinsurer, the lower court found that his disclosure was misleading and failed to put the cedent on notice of the true extent of his earlier engagements as counsel. The Court of Appeals reversed. It analogized this challenge to measures of partiality applied to federal judges, and concluded that the challenged arbitrator would have been fit to serve if he were a judge. Specifically, the Court held that "evident partiality for a party-appointed arbitrator must be limited to conduct in transgression of contractual limitations," which had not been established in this case. *Id.* at 622.

The Court next examined whether the arbitrator had an independent obligation to disclose his prior relationship with the appointing party, even if his appointment did not violate the ARIAS rules. Although the arbitrator had acknowledged some prior relationship, he disclosed only that he had given corporate legal advice to a subsidiary of the appointing company, omitting mention of his billings totaling almost four hundred hours in an unrelated arbitration and other remunerative work for related companies. Although the lower court found that the scope of the disclosures was inadequate, the Court of Appeals disagreed, because the undisclosed facts did not present a risk of impartiality. *Id.* at 622. By way of limitation, the Court noted that its holding embraced party-appointed arbitrators, and that differing considerations may apply to neutral candidates.

Notwithstanding the appellate ruling in *Sphere Drake*, it is good practice for panel members to disclose:

- any direct or indirect financial interest in the outcome of the proceeding (AAA, Rule 19; ARIAS Code of Conduct, Canon IV, Comment 1)23
- any past or present relationship with the parties, their representatives, or anticipated witnesses (AAA, Rule 19; ARIAS Code of Conduct, Canon IV, Comment 1)

Some courts have focused more on whether the challenged arbitrator disclosed any potentially impermissible relationship and gave the parties an opportunity to object to the appointment, and less on the question whether an untoward relationship actually existed. *E.g. Burlington Northern R. Co. v. TUCO, Inc.*, 960 S.W.2d. 629 (Tex. 1997) ("We emphasize that this evident partiality is established from the *nondisclosure itself*, regardless of whether the non-disclosed information necessarily establishes partiality or bias."); *Commonwealth Coatings*, 393 U.S. at 147-48 ("neither this arbitrator nor the [party with whom he had an economic relationship] gave to petitioner even an intimation of the" relationship).

Even if "failure to disclose circumstances which present a 'close-call' [is not] enough — in and of itself — to require setting aside an award, such failure at a minimum requires that the court take a hard look at the nature of such undisclosed circumstances." *Federal Vending, Inc. v. Steak & Ale of Florida, Inc.*, 71 F. Supp.2d 1245 (S.D. Fla. 1999).24 In *Federal Vending*, one of the arbitrators had previously served as the sole arbitrator in another case involving the plaintiff. In the course of that arbitration, he received expert testimony from plaintiff's president on the subject of plaintiff's "form-contract" liquidated damages provision, and issued a written opinion upholding its validity. He did not disclose this recent arbitration experience prior to his appointment. The panel issued an award in favor of the plaintiff.

The Court recognized that "both parties had a right to know that one of the arbitrators had reviewed and upheld the validity of this contractual provision in a recent arbitration. Thus, the court [had] little hesitation in saying that . . . the arbitrator should have disclosed his prior arbitration service involving [plaintiff]." Notwithstanding this nondisclosure, however, the Court held that no "actual prejudice" resulted from the arbitrator's failure to disclose. The defendant was not "lulled into inaction" by the non-disclosure. In fact, it vigorously litigated the liquidated damages issue. The Court, therefore, declined to vacate the award. *See also Lifecare Int'l., Inc. v. CD Med. Inc.,* 68 F.3d 429, 434 (11th Cir. 1995) (although party's arbitrator should have disclosed prior scheduling dispute in unrelated case with a lawyer from the firm representing the opposing party, the non-disclosure did not warrant vacatur of award); ANR Coal, 173 F.3d at 501-02 (neutral's failure to disclose representation of party's customer by his law firm was not evident partiality; a "trivial relationship, even if undisclosed, will not justify vacatur"). *Compare Kaiser Foundation Hospitals, Inc. v. Superior Court*, 19 Cal. App. 4th 513, 23 Cal. Rptr.2d 431 (1993) (umpire's failure to disclose prior arbitration service as party's appointed arbitrator warranted vacatur of award under California disclosure rules); *Middlesex Mut. Ins. Co. v. Levine,* 675 F.2d 1197, 1202 (11th Cir. 1982) (affirming order vacating award based on evident partiality of "neutral" third arbitrator, because he failed to disclose "discord" in the relationship between insurance company owned by his family and two of the parties, and kept secret investigation of arbitrator by state bar involving matter implicating the same parties).

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These disclosure principles extend to the selection process itself. It is customary for a party to meet with a prospective party-appointed arbitrator prior to making its nomination, absent a contractual proscription against such communications.25 Ordinarily, the fact of this meeting — but not its content — is subject to disclosure. ARIAS Code of Conduct, Canon V ("Communication With The Parties), Comment 2. Any documents the arbitrator reviews during this consultation should also be disclosed to all parties. *E.g. id.; Employers Ins. of Wausau v. Nat'l. Union Fire Ins. Co.,* 933 F.2d 1481, 1489 (9th Cir. 1991) (affirming rejection of "evident partiality" claim based, among other things, on disclosure of documents reviewed by arbitrator during ex parte consultation, because arbitrator had no "proven informational advantage"). Although some industry participants frown on interviews of umpire candidates, such consultations do sometimes take place, and should also be disclosed.26

The duty to disclose facts which might reasonably affect an arbitrator's impartiality is ongoing and extends through deliberations. *See Burlington Northern R. Co. v. TUCO*, Inc., 960 S.W.2d 629 (Tex. 1997) (neutral's failure to disclose the referral of business to his law firm by party-appointed arbitrator which was made three weeks prior to hearing prompted finding of evident partiality). *See also* ARIAS Code of Conduct, Canon IV, Comment 3.

There are practical advantages to full disclosure, regardless of whether it is legally required. It gives the parties an opportunity to object to an arbitrator, and to make alternative appointments, before significant time and money are invested in the proceedings. It also prevents the losing party from using evidence of possible bias as a basis for challenging an ultimately unfavorable award. *E.g. Nationwide Mut. Ins. Co. v. The Home Ins. Co.*, 90 F. Supp.2d at 903 (As a result of adequate disclosures, "Home knew of the [relevant] relationship involving [the umpire] and took its chances by proceeding .... It is clearly unhappy with the outcome reached by the unanimous panel.").

Because it is unusual for arbitration provisions to mandate disclosures, they may not take place until the organizational meeting occurs, unless the parties have reason to request particular information during the selection process. 27 To be safe, disclosures should be made in writing and acknowledged at the organizational meeting. *See* RAA Manual for the Resolution of Reinsurance Disputes at 32. The parties may also find it beneficial to have a court reporter present at the organizational meeting (which is common) to record any further disclosures made by prospective panel members.

B. Waiver

Disclosure obligations go hand in glove with the concept of waiver. Once a party has information sufficient to put it on notice of an objection to an arbitrator's service, it must object. If a party does not object within a reasonable time after obtaining information concerning potential bias, for example, it risks waiving its right to challenge the award on that ground thereafter. See AAA, Rule 38 ("Any party who proceeds with the arbitration after knowledge that any provision or requirement ... has not been complied with and who fails to state objections thereto ... shall be deemed to have waived the right to object.").

The purpose of the rule is to prevent opportunistic assertion of objections — following the expenditure of time and money in a completed arbitration — in an effort to jettison an undesirable result. Some courts have taken an aggressive position with respect to the quantum of information needed to effect a waiver. *E.g. Nationwide Mutual Ins. Co. v. The Home Ins. Co.*, 90 F. Supp.2d 893, 902-903 (S.D. Ohio 2000), *aff'd* 278 F.3d 621 (6th Cir. 2002).

In *Nationwide*, the umpire disclosed before the organizational meeting that he served as Chairman of the Board for Republic Financial Services ("Republic"), and that one of its subsidiaries had a runoff relationship with Nationwide's reinsurer, The Home. During the organizational meeting, The Home and Nationwide waived "any subsequent objections as to bias or partiality of the three arbitrators." Over eighteen months after the arbitration proceedings commenced, a dispute arose between Republic and The Home over the runoff. The panel later rejected The Home's claim for rescission. Thereafter, The Home mounted an attack directed to, among other things, the partiality of the umpire.

The court found that The Home knew of the runoff relationship involving the umpire and took its chances by proceeding to arbitration. It observed that "the existence of a runoff relationship implies that a dispute could arise during the course of such relationship." *Id.* at 903. The court then held that The Home had waived its right to object to the umpire's appointment, even though the runoff dispute had not actually occurred as of the time of the panel's disclosures. *See also Lincoln Graphic Arts, Inc. v. Rohta/New Century Comm., Inc.*, 160 A.2d 871 (S.D.N.Y. 1990) (party waived claim of bias where arbitrator informed it on day of hearing of his prior relationship with the opponent's attorney; party's attorney was given the opportunity to confer with his superior; and all parties then agreed to permit the arbitrator to serve). *Compare Middlesex*, 675 F.2d at 1202-04 (insurer was not estopped from moving to vacate award for evident partiality, even though a division of insurer had information concerning neutral arbitrator's objectionable activities; "a nationwide insurer is entitled to rely on the representations of a potential arbitrator without investigating all of its files").

In sum, waiver based on antecedent disclosures by panel members is an exercise in line-drawing. The closer the disclosure comes to identifying an actual (or probable future) basis for a challenge, the more likely it is to support a knowing waiver.

V. Conclusion

The selection of appropriate panel members is critical to the success of the arbitration process. In an industry with increasing entanglements among risks, the companies that write them, and industry professionals, the challenge is to appoint a fair-minded panel with highly specialized knowledge. The very nature of the enterprise creates a conundrum: The parties have inten-

tionally elected to place their dispute before persons charged with effecting various commercial outcomes on behalf of (current or former) insurers or reinsurers; they must both leverage that experience and also promise not to be blinded by it. The paradoxes are legion — panel members must be fair but they may be advocates; they can espouse issue-based proclivities but they cannot be biased; they cannot have a direct interest in the outcome of the dispute, but none of them comes without far-reaching personal and business relationships.

The industry and the courts have addressed this tension by embracing it. Arbitrators are supposed to be advocates, and neutrals may (and, sometimes, must) take a side. At the same time, the process includes safeguards adequate to protect vigilant parties, including the obligations of arbitrators to make consistent and material disclosures. Having elected in the first instance to resolve their disputes without resort to judicial intervention, the parties must help to shape and enforce the rules by eliciting essential disclosures and making timely objections. To the extent that these joint obligations are observed, the goal of maintaining an efficient intramural process for adjudicating disputes can be achieved.

1 A prior iteration of our paper is replaced by this May 2004 revision.

2 "If in the agreement provision be made for a method of . . . appointing an arbitrator . . . such method shall be followed. . . ." 9 U.S.C., § 5.

3 The case was decided under Wisconsin's statutory scheme which incorporates language similar to Section 5 of the FAA. *See* Section 788.04, Wisconsin STATS ("If, in the agreement, provision is made for a method of naming or appointing an arbitrator or arbitrators or an umpire that method shall be followed.").

4 *Compare Jackson*, 527 N.W.2d at 681 (lower court properly inferred — based on parties' conduct following demand for arbitration — that time was of the essence).

5 Qualified, "active" arbitrators can be difficult to find. Historically, many companies have observed policies prohibiting their employees from serving on arbitration panels. The recent trend, however, is to permit participation in arbitrations, following an appropriate disclaimer concerning possible inconsistencies between the company's positions and the arbitrator's views.

6 Subtle differences in contract wordings — which often go overlooked — may evince the intent of the parties with respect to the composition and operation of their panel. Where the arbitration clause refers to the third arbitrator as an "umpire," his or her role may be limited to mediating the debate between the two party-appointed arbitrators. According to this view, the parties did not necessarily expect the "umpire" to express his or her views on the issues, or perhaps even vote, unless there is a deadlock between the two party-appointed arbitrators. Conversely, where the arbitration clause merely refers to a "third arbitrator," instead of an "umpire," the third arbitrator is arguably expected to play a more active role in shaping the deliberations. For purposes of this paper, the term "umpire" is used generically to refer to the third member of the arbitration panel, without implying any distinction between an "umpire" and a "third arbitrator."

7 Fine-tuning by the parties may be required where, for example, multiple claims are being arbitrated en masse, under contracts with differing arbitration provisions which may contain inconsistent procedures for umpire selection.

8 There are, of course, several other available methods of appointing an umpire. *E.g.* ARIAS Practical Guide, Ch. 2 § 2.2 (2004) (referencing an identified "appointor", "other official" or "specified court"; or, selection from candidate list identified in the arbitration clause).

9 This fact can also create efficiencies for the parties to a reinsurance arbitration. For example, the parties may (and, often do) agree to acknowledge that the panel members are experts, and therefore decline to engage expert witnesses.

10 A number of courts have rejected the reasoning in Wedge, where an arbitrator was removed (pre-award), absent any relationship between the arbitrator and a party that was undisclosed, or unanticipated and unintended. *E.g. Aviall,* 110 F.3d at 896.

11 Because the court remanded the case based on the lack of diversity jurisdiction, it did not decide the disqualification issue on the facts before it.

12 State rules may be preempted, however, to the extent that they address an issue governed by federal law or are otherwise inconsistent with the policy and goals of the FAA to enforce arbitration agreements.

13 Notice of a motion to vacate, modify, or correct an award must be served "within three months after the award is filed or delivered." 9 U.S.C., § 12.

14 "The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982). *See also ANR Coal,* 173 F.3d at 500.

15 Several foreign arbitration laws contain similar, objective standards of bias. *E.g.* English Arbitration Act of 1996 ("justifiable doubts as to [an arbitrator's] impartiality"); London Court of International Arbitration Rules (1998) (elective rules) ("justifiable doubts as to [an arbitrator's] impartiality or independence"); German Code of Civil Procedure (1998) (same standard); German Institute of Arbitration Rules (1998) (elective rules) (same standard). *See also Gascor v. Ellicott,* No. 2080 (Victoria Sup. App. 1995), reported in 7 No. 3 Mealey's Litig. Rep.: Reinsurance 12 (June 5, 1996) (Australian Appeals Court 1995) (whether "an appropriately informed and fair minded lay observer might entertain a reasonable apprehension" that an arbitrator will not be "impartial and unprejudiced").

16 Forty-nine states have adopted the Uniform Arbitration Act (the "UAA"). The UAA was revised extensively in 2000. To date, eight states have adopted the Year 2000 iteration.

17 An award may also be vacated if, among other things: there was corruption "in any of the arbitrators"; "the award was procured by corruption, fraud or other undue means"; "misconduct [by an arbitrator] prejudic[ed] the rights of any party"; "the arbitrators exceeded their powers"; "the arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear [material] evidence . . . or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party." *Id.* Other state statutes in UAA jurisdictions contain variations on these themes.

18 Most of the decisions set forth in this section relate to vacatur of arbitration awards. A handful of them consider pre-award challenges (in the form of motions to disqualify) in the circumstances previously addressed. *See* Section III. A, *supra*.

19 It also noted that that the challenge to the arbitrator's partiality did not come until six months after the award was issued.

20 The Court relied in part upon the requirement of the parties' contract to appoint "active" executive officers, which put the parties on notice of possible conflicts. It also observed that the agreement did not specify "disinterested" or neutral panel members.

21 *But see Federal Vending,* 71 F. Supp.2d at 1250 (where circumstances did "not in any way suggest partiality," prior decision of the same legal issue in favor of the same party by a *single* arbitrator did not meet "evident partiality" threshold).

22 Challenges based upon ex parte communications may be rejected when the challenging party has also engaged in ex parte communications. *E.g. Nationwide Mutual Ins. Co. v. The Home Ins. Co*, 90 F. Supp.2d at 902 (denying challenge based on ex parte communications, because — among other things — counsel for the challenging party had also discussed possible ex parte meetings with the opposing party's arbitrator); *Employers Insur. of Wausau v. Nat'l Union Fire Ins. Co,* 933 F.2d 1481, 1490 (9th Cir. 1991) ("If National truly considered such conduct beyond the pale, it should have refrained from engaging in its own ex parte contacts and simply preserved its objection for appeal.").

23 Rule 19 requires that any "neutral arbitrator disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result . . . or any past or present relationship with the parties or their representatives." It is worth noting, however, that the AAA Rules do not provide grounds for vacatur other than those set forth in Section 10 of the FAA. *See ANR Coal*, 173 F.3d at 499 ("AAA rules provide [only] significant and helpful regulation of the arbitration process").

24 The materiality of the concealed fact(s) and the existence of any resulting prejudice should ultimately determine the sufficiency of a challenge based on non-disclosure. *See Sphere Drake*, 307 F.3d at 622-623 (failure to disclose was immaterial to vacatur motion, because "the full truth would not have disclosed even a

CONTINUED ON PAGE 32

members on the move

In each issue of the Quarterly, we list significant member accomplishments, employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can adjust their address books and Palm Pilots.

Do not forget to notify us when your address changes. If we missed your change here, please let us know at info@arias-us.org, so we will be sure to catch you next time.

Recent Moves and Announcements

John R. Cashin has left New York for the old world. He has joined Zurich Insurance Company in Zurich, Switzerland, which has also just joined as a new corporate member of ARIAS. John's new address is Zurich Insurance Company, Alfred Escher Str 50, Zurich, #8022, Switzerland. His new phone is 411-625-3428, fax is 411-625-1428, and email is now john.cashin@zurich.com .

Towers Perrin has announced that **Peter A. Gentile** has joined Tillinghast as the National Director of Business Development, Property/Casualty Insurance. He had been President and CEO of Gerling Global Financial Products, Inc. Peter's will be located at 335 Madison Avenue, New York 10017, phone 212-309-3873, fax 212-309-3957, email peter.gentile@towersperrin.com .

Merton E. Marks, PC has opened an additional arbitration and mediation office in Tucson at 850 North Kolb Road, Tucson, Arizona 85710-1333, phone 520-886-6111, fax 520-886-9694. The Scottsdale office is also still fully operational at 8655 East Via de Ventura, Suite G200 (changed from G223), Scottsdale, Arizona 85258-3321. His new email is memarkspc@earthlink.net .

McGuireWoods's New York office has relocated to 1345 Avenue of the Americas, 7th Floor, New York, NY 10105.

John T. Andrews, Jr. has retired from SCOR Re and set up his new consultancy at 56 Farmersville Road, Califon, NJ 07830. His new phone and fax are 908-832-5725 and 908-832-9162; email is jandrews@patmedia.net

John H. Howard has just moved J H Howard Associates, LLC to a new location at 3 Woods Way, Redding, CT 06896. His new phone and fax are 203-544-9848 and 203-544-9006. Email is unchanged.

Raymond L. Prosser has retired from Swiss Re to set up a reinsurance and mediation practice. His office is located at 7724 Inverness Glens Drive, Fort Wayne, Indiana 46804. His new phone and fax numbers are 260-432-2698 and 260-434-1689. His new email address is RaymondLProsser@aol.com

Changes

Michael Pado mike.pado@transamerica.com ▼

Panel Selection and Grounds...

CONTINUED FROM PAGE 31

risk of partiality").

25 The ARIAS materials intimate that a contractual requirement that all arbitrators be "neutral" may prohibit this practice altogether. ARIAS Practical Guide, Ch. 2 (§ 2.3), Comment B.

26 Umpire interviews should be less substantive in nature — these inquiries frequently target a candidate's pre-existing and publicly articulated positions. *Cf.* ARIAS Practical Guide, Ch. 2 ("Disclosure Statements"), Comment A. A balance must be struck between maintaining the neutrality of the umpire and a party's legitimate desire to avoid an unwitting nomination of a candidate whose established views are repugnant to positions it must take in the arbitration.

27 Questionnaires are sometimes used to elicit disclosures and surface potential conflicts or other problems in advance of the organizational meeting. Disclosures by umpire candidates may be particularly important, in light of the parties' more limited access to them throughout the selection process. ▼

* The author wishes to express his thanks for the time and assistance of his colleague, Jennifer Aresco Brennan.

feature

How Reinsurance Arbitrations Can Be Faster, Cheaper and Better

By Robert M. Hall

I. Introduction

There is a good deal of criticism of reinsurance arbitrations. Many observe that they are no longer disputes among gentlemen and gentlewomen. The process has become very expensive, elongated and contentious. Some question whether litigation is now a better alternative.

While many make negative observations about the arbitration process, fewer assign responsibility and even fewer attempt to devise remedies. Responsibility lies with the players in the process. Attorneys are ethically required to be zealous in the representation of their clients and to some this means overturning every rock that has a remote possibility of covering relevant information and making every possible legal argument, no matter how unlikely. Their clients are often engaged in very high stakes disputes, sometimes in a runoff context, where continuing business relationships are not an issue. Therefore, clients may have little incentive to dissuade counsel from exercising their competitive instincts in full. Panels are sometimes reluctant to manage the process aggressively for fear of taking it out of the hands of the parties who agreed to it and their counsel.

Regardless of which group bears more responsibility for problems in the arbitration process, the primary issue is remedies. The purpose of this paper is to explore possible remedies for the very real problems in the arbitration process.

II. Discovery Standards in Arbitrations

A major problem in arbitrations is discovery. While most counsel are responsible in terms of discovery, arbitration panels sometimes field requests for massive deposition and document discovery, some of which is not well targeted or would produce information largely tangential to a resolution of the dispute on the merits. Not only is this burdensome, costly and time consuming, it may be functionally impossible to execute (due in part to limitations on subpoena power) when the discovery is sought from disbanded or disaffected third parties such as agents. When a party is unable to convince such a third party to cooperate, it may be accused of playing hide the ball.

One of the hurdles with placing reasonable boundaries on discovery is acquiescence by panels in the views of counsel as to standards for discovery. The Federal Rules of Civil Procedure allow discovery of documents which may lead to admissible evidence. Since there is no standard for admissible evidence in arbitrations, this rule is not very meaningful in the arbitration context. Moreover, very broad discovery is less necessary for arbitrations than litigation since: (a) arbitration is supposed to be faster and less costly than litigation; (b) arbitrators are expert in the business and require less detail than a court to understand the transaction at issue and what went wrong; and (c) arbitration panels are familiar with the business records of insurance and reinsurance entities and can focus discovery on those locations most likely to contain probative evidence.

In this light, perhaps arbitration panels should adopt a standard for discovery more appropriate for arbitrations: that which is likely to produce evidence probative to the issues in dispute. This would reduce high volume, low result discovery and the time and cost related thereto and provide the panel with the information most useful to resolve the dispute.

III. Panel Involvement in Shaping Issues

In the typical arbitration, the parties define the issues to be placed in front of the panel. Often, the panel first becomes involved in shaping issues when discovery disputes arise. However, such involvement usually deals with the connection between the discovery desired and a line of inquiry thought to be significant by counsel. The panel sometimes makes little effort during the discovery phase to connect the line of inquiry with the issues identified in the dispute.

This relatively passive role is not surprising. Arbitration is the creature of the contract between the parties. The authority of the

Robert M. Hall

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Mr. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator and mediator of insurance and reinsurance disputes.

feature

While it may be hard for the panel, and painful to counsel, the speed and efficiency of the arbitration process may benefit from more panel involvement in shaping and prioritizing the issues in the dispute.

panel is limited to that granted in the arbitration clause. In addition, the partisan aspects of the party arbitrator process makes it difficult to force counsel into an early definition of the issues. However, a relatively passive role for the panel has significant disadvantages in large, complicated and hotly contested arbitrations. Counsel may have very different views of the case leading to a failure to meet squarely on the issues. This can lead to inefficient efforts of counsel and, occasionally, a tragic failure to grasp the panel's priorities and inclinations. This, in turn, can lead to a lopsided result on a matter that could have been settled with more panel intervention.

While it may be hard for the panel, and painful to counsel, the speed and efficiency of the arbitration process may benefit from more panel involvement in shaping and prioritizing the issues in the dispute. This can start at the organizational meeting with counsel being required to reveal the substantive reasons for non-performance on either side. It can continue with a discovery plan that is tied to specific issues plus a conference call prior to filing the briefs to further define the issues. Finally, there should be a conference call after the briefs but before the hearing so as to prioritize testimony to the issues most important to the panel and most in controversy. This would serve to better focus and shorten the hearing.

IV. Saving Time and Money Prior to the Hearing

There are a number of factors which influence the scheduling of an arbitration hearing. Many players must be available: counsel, arbitrators, witnesses and company representatives. They must be available for a block of time (one or more weeks for the hearing and a week before for preparation). Discovery must be completed (eight or more months) and briefs written and issued (one month). Therefore twelve months is often the minimum lead time necessary to schedule a hearing.

Sometimes counsel believe that more lead time is necessary. This can result from their schedules or their view of necessary discovery, i.e., audits can be cumbersome to arrange and time consuming. It can also result from intervening motion practice, i.e., security, dispositive motions and discovery disputes. Some parties and their counsel are in no hurry to bring a dispute to resolution.

Some very active arbitrators are not available for a hearing for over a year. This has led to wry commentary within the arbitration community, sometimes from those who wish they were equally in demand. One side of the debate is the marketplace argument that arbitrators who are viewed as particularly skilled and experienced should not be criticized if the parties accept an attenuated hearing to obtain the services of such individuals. The other side is that such arbitrators may be chosen because of their heavy schedule rather than despite it, i.e., by a party in no hurry for a resolution of the dispute. Very active arbitrators should consider the latter argument in determining the point at which they decline to accept new assignments.

Slippage in the schedule prior to the hearing can have a disastrous result. If the hearing has to be rescheduled, this may add many months to the duration of the arbitration due to the necessity of juggling the schedules of all the relevant parties. Therefore, it is incumbent on the relevant players to achieve interim steps within the designed time periods. This can be done in several ways:

- Arbitrators need to identify issues of relationships with relevant parties early on so as to resolve them without disrupting the proceeding at a later time;
- Telephonic organizational meetings to avoid the scheduling conundrum at the front end;
- Counsel have to identify with some particularity the reason for non-performance early on so as to focus discovery, e.g., general statements of misrepresentation, concealment and breach of contract are not useful;
- Firm dates for the interim discovery and briefing must be established at the organizational meeting with consequences for failure to meet them without good cause;
- Periodic status reports from counsel to detect slippage in the schedule and identify emerging problems;
- Meet and confer requirements for counsel before bringing disputes to the panel in order to avoid piecemeal and confusing presentations of such disputes to the panel;
- Deciding interim issues on written submissions and/or argument by conference call to reduce scheduling problems; and
- Dealing with dispositive issues first (see Section V., *infra*.).

One the best ways in which pre-hearing delays can be avoided is for parties to be very involved in the discovery requested by counsel in order to focus on important witnesses and documents and to be efficient in the way that information is sought. I have received requests (*I am not making this up*) for 90 depositions and copies of each and every one of tens of thousands of policy and claim files plus all documents related to payment and reporting of premiums and losses. Parties who allow their counsel to make such punitive requests are not interested in a quick and efficient resolution of the dispute. Parties know how to focus requests to get maximum result from modest amounts of information. For instance, if the issue is the reason for entering and exiting a line of business, focusing on the business plans for the years in question will reveal more concise and useful information than a vague request for *all documents* related to a company's involvement in a line of business (every piece of paper and electronic file?).

V. Saving Time and Money at the Hearing

Hearings are very expensive. Teams of lawyers and arbitrators are billing by the hour. Executives are taken away from other duties to testify. Hotels charge considerable amounts to provide space, room, board and equipment for the event. To the extent that a hearing cannot be completed within the time allowed, more expenses are incurred. Therefore, a reduction in hearing time is directly responsive to common criticisms of reinsurance arbitrations.

In some disputes, there are threshold issues which might be decided on a summary basis in that they have no or few disputed facts. For instance, a common defense of reinsurers is that the cedent misrepresented the program on placement so as to justify rescission and administered the program so poorly as to violate the duty of utmost good faith. The placement defense involves limited players and documents and if successful, will obviate the rest of the hearing. The administration defense involves many players, many transactions and time-consuming audits. Panels and counsel should consider bifurcating such a dispute to focus on the placement issue first and to allow the administration issue to follow on at its naturally slower pace. If the cedent is found to have misrepresented the business in material fashion, discovery on administration can stop and a time-consuming hearing thereon is avoided. If no material misrepresentation is found, the dispute is in a better posture for settlement.

Another means by which hearing time can be saved is for the panel, after it has reviewed the briefs, to give counsel direction as to the issues and witnesses of most interest to the panel. Counsel are often grateful for this because it helps them prioritize their efforts and decide which witnesses are needed for live testimony. While consensus may be difficult to achieve absent an all-neutral panel (see Section VII., *infra*), it is a worthwhile tactic in an effort to achieve an efficient and focused hearing.

Whatever their familiarity with the arbitration process, it is difficult for counsel to resist giving extensive opening statements. It is their first opportunity to argue the merits of the case live before the panel and their experience with litigation suggests that this is an important opportunity to shape the issues in their favor. However, by the time the hearing has arrived, the panel has spent many hours reviewing the issues and the counsels' disparate view of them. What is more useful to the panel at the outset is a list of the witnesses, their areas of testimony and a time table for counsel's case. This helps the panel understand how the case is to be presented and to keep the hearing on track from a timing standpoint.

For major witnesses at the hearing, considerable time can be saved by the use of British-style direct testimony, i.e., written statements submitted to the panel prior to the hearing. Cross and re-direct is handled live. In this fashion, direct testimony is more organized and concise and does not take up hearing time. The panel has already absorbed the testimony and opposing counsel are better prepared for cross.

For minor witnesses, deposition designations, rather than live testimony, can save considerable hearing time. They can be prepared by counsel and read offline by the panel. This may require somewhat more complete depositions of minor witnesses by both sides as would ordinarily be the case. However, it saves hearing time where the aggregate costs are much higher.

Technology has added a new dimension to the arbitration process, however, technology can add costs without real benefit. Written deposition designations precludes segments of videotaped depositions of minor witness-

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LiveNotes or similar technology provides the panel a live feed to testimony as it is given. This helps the panel to absorb it better and to annotate it so that the panel can more easily find it later and use it in their deliberations.

es. However, demeanor evidence, which is the primary benefit of videotaped depositions, is seldom a significant factor. The businessmen and businesswomen who are the subject of the depositions are used to presenting themselves well so the benefits of viewing them as they give their testimony is often marginal. The panel can read the testimony much faster than it can be given on videotape and they can read it offline, thus saving considerable hearing time.

Certain technology is very helpful to the panel before, during and after the hearing. Exhibits and attachments to the briefs on disk allows the panel to be productive even while traveling. LiveNotes or similar technology provides the panel a live feed to testimony as it is given. This helps the panel to absorb it better and to annotate it so that the panel can more easily find it later and use it in their deliberations.

VI. Awarding Costs in Reinsurance Arbitrations

Absent a contractual provision to the contrary, it is clear that an arbitration panel can award costs (e.g. attorneys' fees and other costs of the arbitration) to the prevailing party. Until recently, there has been considerable reluctance on the part of arbitration panels to do so.

This reluctance may have several sources. One source may be the American rule in litigation that each party must pay its owns costs, absent extraordinary circumstances. The American rule is in contrast to the rule in other jurisdictions (e.g., England) where costs are granted routinely to the prevailing party as a means of deterring marginal litigation.

Traditionally, reinsurance arbitrations were largely good-faith disputes between business partners which could be resolved relatively quickly and cheaply with the aid of some market practitioners. There were few costs to award and the dispute was something the parties wished to put behind them so they could continue trading. This is no longer the case.

Finally, the party arbitrator system creates a certain degree of partisanship which may deter a panel from awarding costs even when deserved. While a panel, or a majority thereof, may be willing to rule on all issues for one party, they know that awarding costs may subject the losing party arbitrator to the considerable disappointment of the party and its counsel who may believe that their arbitrator has failed in his or her partisan responsibility.

Obviously, the arbitration process has changed in recent years. It is no longer a low cost, expeditious resolution of good faith disputes between trading partners. All too often, it has become a scorched-earth proceeding involving parties in runoff or with discontinued operations and no interest in a future trading relationship.

With a low probability of costs being awarded, there is little disincentive to taking novel if not outrageous positions. Sometimes arbitrators encounter highly skilled advocates making earnest arguments in favor of the most unlikely positions in support of totally unacceptable behavior by their clients. Fortunately, a growing number of panels are willing to grant costs under such circumstances. This trend would accelerate with a move to all-neutral panels which will eliminate partisanship in arbitration proceedings. It has become evident that granting costs in appropriate circumstances is a tool that must be wielded to combat legitimate criticisms concerning the length and costliness of the arbitration process.

VII. All-Neutral Panels

Reinsurance arbitrations in the United States traditionally have used two arbitrators appointed by the parties and a neutral umpire. To most, the role of the party arbitrator is to make sure his or her party's position is articulated and fully considered by the panel and then to seek a just result. To a minority, the role of the party arbitrator is simply to advocate the position of the party. Others have a view of their role somewhere in between.

Regardless of where party arbitrators fall within this spectrum, their role is difficult and ambiguous. Only with a struggle can a party arbitrator put behind him or her the appointment process, discussions with counsel prior to the cut off of ex-parte communications and the effort to assure balance to the proceeding. The result often is a partisan element to the proceeding which can impact virtually all phases: (1) umpire selection; (2) timing of the hearing; (3) scope and nature of discovery; (4) length and focus of the hearing; (5) the nature of panel deliberations; and (6) the nature and clarity of panel rulings.

The impact of this partisan element takes several forms. Debate within the panel is

elongated to little purpose. Negotiations tend to be distributive in nature, i.e., working toward the middle from outer parameters determined by the positions of the parties. Unfortunately, this tends to reward the party which takes the most extreme position and tends not to consider that the proper answer may be within entirely different parameters. Hearings may be longer than necessary to assure that each counsel can present their arguments in full, regardless of whether the panel finds all of such arguments useful. The reasoning behind the panel's ruling on the merits may be mushy and poorly articulated. Common denominator approaches to findings and remedies are easier to cobble together than creative ones.

All-neutral panels may increase the efficiency and quality of the arbitration process significantly by eliminating the partisan element. Without party identification, arbitrators can focus on obtaining the right answer rather than positioning themselves with respect to other arbitrators. Panels can act more decisively and efficiently with less lawyering. They can give more effective direction to counsel as to witnesses and the focus of issues at the hearing which can result in a better hearing in less time and with less cost. Finally, they are better able to produce clear and decisive answers which proceed from the evidence rather than an internal negotiation process.

There are several methods of obtaining all-neutral panels. ARIAS•U.S. currently is studying the feasibility of providing a program for all-neutral panels. A cross section of interested parties have produced a set of arbitration procedures which includes a different method for selecting all-neutral panels. This may be accessed at www.arbitrationtaskforce.org. In addition, there is discussion among arbitrators of offering themselves as fixed, three-member panels.

VIII. Reasoned Awards

British arbitrators regularly issue rulings of 20 or more pages, notwithstanding the ability to appeal the arbitration tribunal's decision on the law pursuant to the Arbitration Act of 1996. There is no right to appeal the decision of a US arbitration panel although its ruling may be vacated on very limited grounds focused on conflict of interest and lack of due process. One might conclude that US arbitrators might be more inclined to issue "reasoned awards" as final rulings on the merits but this is not the case. Many have a sincere belief that "reasoned awards" may prolong the dispute, by providing fodder for a motion to vacate, rather than conclude it.

For purposes of this discussion, I will define a "reasoned award" as 2 - 3 pages of findings of fact and conclusions of law. No more is necessary to tell parties and their counsel why they won or lost.

Reasoned awards contribute to better arbitrations for several reasons. First, composing a reasoned opinion requires clarity of thought concerning what the panel decided and why. Mushy reasoning and "split-the-difference" approaches to damages can seldom survive this process. Panels often render awards which do not match the reasoning or damages claimed by either party and there is absolutely nothing wrong with this. It is important, however, for the panel to have a logical reason for doing so and be able to express it in writing. This will provide better rulings by arbitration panels.

The second reason why reasoned awards produce better arbitrations is feedback to the parties and their counsel. Arbitrated disputes are becoming very large in size and considerable legal and other expenses are associated. If the parties choose to have their dispute resolved by experienced senior members of the insurance community, they have a right to know the basis upon which the panel decided. This is not merely an matter of idle curiosity. An adverse decision by a panel may cause a party to re-examine its position on similar disputes with the same party (due to failure to agree on consolidation) or with other parties. The decision may cause the party to re-examine its decision-making process when problems with clients and markets arise so as to make better evaluations as to which matters to compromise and which to pursue to an adversarial conclusion.

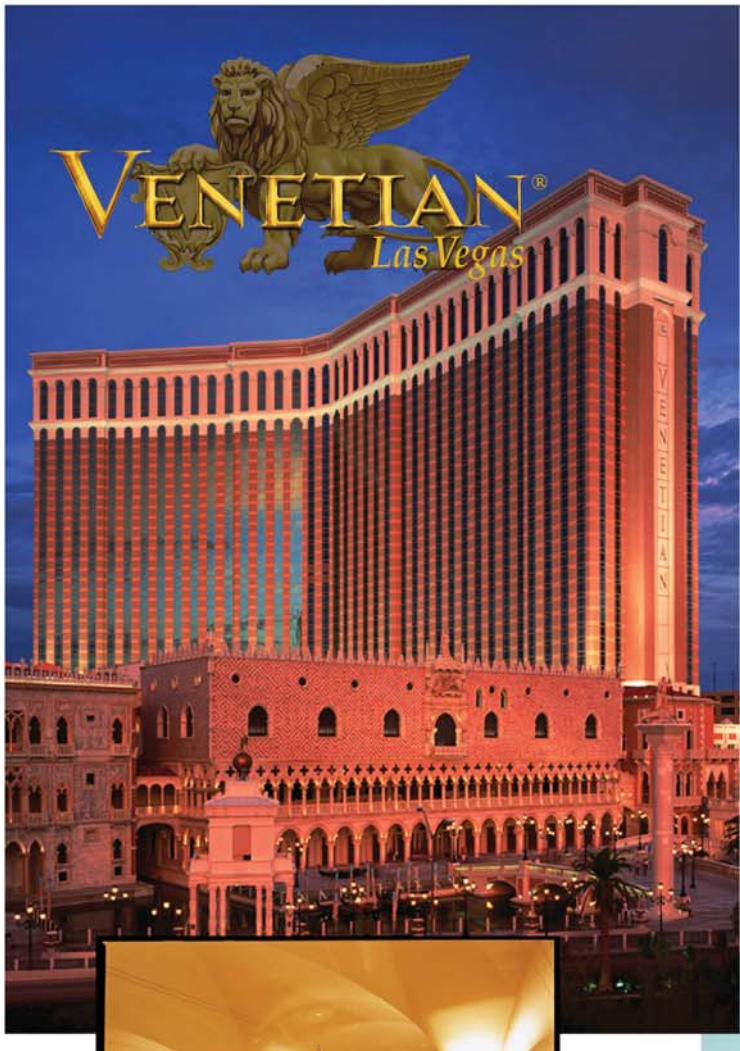
To lose an arbitration and not know why causes parties and their counsel to disrespect the arbitration process itself. When the process is disrespected, parties and their counsel either turn away from it or engage in some of the negative behavior cited in earlier sections. Either is detrimental to the arbitration process.

IX Conclusion

The reinsurance arbitration process is legitimately criticized as having become too long, costly and contentious. In part, this results from marketplace changes i.e. larger disputes between parties with no continuing business relationship. However the relevant players (arbitrators, parties and their counsel) must also accept a share of the responsibility. Such players must be willing to adopt techniques to promote efficiency and clarity, such as those described above, if arbitration is to remain a viable alternative to litigation.

Such players must be willing to adopt techniques to promote efficiency and clarity, such as those described above, if arbitration is to remain a viable alternative to litigation.

2005 Spring Conference Set for The Venetian



Frankly, Las Vegas was not at the top of the list when the Board first considered alternative locations for next spring. While it had a certain attraction because many had never been there, it carried the reputational baggage of being big, glitzy, and not very "sophisticated." Then, we looked at the actual hotels where we might hold the conference, and it quickly became apparent that some of them are truly outstanding.

We only looked at the outstanding ones and requested room rates and meeting room availability. After comparing them on a variety of factors, The Venetian came through as one that offered too much to pass up. While those who have been to Venice will say it is a Disney version of the real thing, this version has a lot to enjoy.

The restaurants, shops, museums, spa, open spaces, and canal make it just plain fun. The Venetian is home to the Guggenheim Hermitage Museum, the Canyon Ranch SpaClub, and Madame Tussaud's Wax museum, among many other attractions. It has a mini-Grand Canal (630-feet long) and St. Mark's Square, Campanile and all.

The guest rooms make it one of the most pleasant and comfortable places you will ever visit. The Venetian offers the largest standard guest rooms in the world (Guinness Book); all are suites, with sunken living rooms. It is the third largest hotel in the world, with 4,049 suites. Each suite has a work desk with fax machine that doubles as a copier and printer, high-speed Internet access, and a safe large enough to hold a laptop computer.

In these pages, you will see some pictures of what is in store for you. Also, you will find it interesting to browse through the website at www.thevenetian.com . Be sure to click on Accommodations, Fine Dining, Attractions, and Canyon Ranch SpaClub to see a broad scope of the facilities.

ARIAS conferences always keep you busy with training sessions, so the time available to enjoy a location is limited. But there should be enough, with the open time for dinner on Wednesday and the free afternoon on Thursday. Of course, there is always the option of staying over Friday and Saturday.

We have reserved a large room block for the nights of May 4th and 5th. We have reserved fewer for Friday and Saturday, since we are not sure how many will plan to stay and we would have to pay for the rooms if we don't use them. If you want to stay Friday and Saturday, it would be best to reserve early. There should be plenty of rooms for those who make early reservations. Even if we use up the block, the basic ARIAS rate of $249 is guaranteed, as long as rooms are available.

Reservations may be made by linking from the ARIAS website calendar or by calling 888-283-6423 by phone. Please be sure to refer to ARIAS, so that you receive the special rate and your room is counted as part of the room block being held for ARIAS members.

in focus

Recently Certified Arbitrators

David L. Beebe

John F. Chaplin

David L. Beebe

David Beebe has over 30 years in the reinsurance industry. He graduated with a B.A. degree from Hillsdale College in 1969 after which he did post graduate work at the American Graduate School of International Management in Phoenix, Arizona, earning a Bachelors degree in International Management. Returning to the east coast, he started his career as a facultative casualty and Direct Excess and Surplus Lines underwriter at North Star Reinsurance Company in 1971.

Two years later, he accepted a position with Pritchard & Baird, Inc. where he learned the subtleties of constructing reinsurance contracts that accurately reflect the intent of the parties involved. He had total responsibility for all contracts on business produced by the North East Division.

In 1974, Mr. Beebe became a manager in the Contracts Department of Prudential Reinsurance Company. His efforts in drafting language for the company's initial retrocession covers and his development and implementation of procedures and guidelines for the approval process of reinsurance intermediaries under the newly promulgated Reg 98 earned him promotion to Director in the Department; he was given full responsibility for its administration. He formulated standardized wordings to be used in the Direct Marketing Division and drafted all financially orientated and alternative market wordings.

Mr. Beebe was recruited by Willcox Intermediaries in 1986 to be Vice President in charge of the contract department. He built the department into one of the preeminent contract departments in the country. His interaction with corresponding London intermediaries took him there frequently and he became familiar with the intricacies of the London Market Place.

In 1989 Mr. Beebe joined American Re-Insurance Company as a Vice President in the Contracts Department, where he held management positions with contract writers reporting to him from the Domestic Insurance Company Operations and Am Re Brokers. His extensive experience in drafting a wide variety of intricate arrangements continued and his assignments included handling drafting for Professional Liability, Brokered Market and Alternative Risk Transfer business. He was one of the individuals instrumental in the early reformulation of their boilerplate language and was responsible for the design and implementation of the Company's electronic Contracts Library Data Base which houses all internally drafted agreements as well as provides accurate data relative to the management of documents with regard to the NAIC Nine Month Rule. Prior to his departure from American Re he was responsible for the documentation for the contracts for the Public Non-Profit division of Munich-American Risk Partners.

Mr. Beebe has been a guest lecturer at Robert Strain Seminars and currently has a paper that appears as part of the course material for those seminars. He is a member of PLUS.

John F. Chaplin

John Chaplin entered the reinsurance business in 1977, starting as a broker in the Special Accounts department of Guy Carpenter in New York. That division handled the most diverse array of treaty and facultative accounts in the organization: Casualty and Property Retrocession programs, Life and Accident treaty and facultative accounts, International Retrocessions, Aviation and Aerospace Reinsurance programs, Excess and Surplus Lines Casualty reinsurance, with a focus on USL&H and Excess and Umbrella business. He was involved in all accounts in that division which later became a part of the Casualty Treaty Department where he worked on the programs of major US insurers of casualty business, gaining special expertise in Workers' Compensation, General Liability and Umbrella business.

In addition to account responsibilities, Mr. Chaplin and two other colleagues devised a curriculum for broker training at Guy Carpenter. He remained one of the primary instructors throughout his career. The curriculum is still used at Guy Carpenter today. Also, Mr. Chaplin was a member of the Guy Carpenter Contract Committee and served as their representative on the Broker Reinsurance Market Association ("BRMA")

Contract Wording Committee.

In 1991, Mr. Chaplin joined North American Re (now Swiss Re US) as the head of Eastern Division Marketing for National and Specialty carriers. It was at NARe that he became involved in a vast array of Property reinsurance programs and structures as well as Finite reinsurance, captive management and reinsurance, Pools and Associations, and Specialty Insurance programs.

He returned to the Guy Carpenter organization in 1993 via their Sellon Associates affiliate in White Plains, New York, a specialty-oriented reinsurance broker.

In 1995, the property law changed in Florida, granting economic incentives to carriers willing to withdraw policies from the burgeoning residual market facilities. Thus began Mr. Chaplin's entry into the world of start-up insurers trying to combine capital, reinsurance, exposure management techniques, Cat Fund and economic incentives to solve the riddle of earning sufficient profits in a catastrophe-prone region. His team helped a dozen start-ups to gain state approval to form carriers.

In early 2003, Mr. Chaplin formed Compass Consulting, LLC, a reinsurance consulting firm. Compass was formed to serve a variety of reinsurance clients: insurers, reinsurers, reinsurance brokers, law firms, etc. The services include reinsurance analysis, training for reinsurance brokers and underwriters, expert testimony and arbitration.

Mr. Chaplin earned a BA in Math and Economics from Columbia University in 1972, holds CPCU and ARe designations, is a licensed New York State Agent/Broker and attended the original Insurance Executive Management Training Session at Wharton College, co-sponsored by the Insurance Institutes and Wharton.

Paul R. Fleischacker

Paul Fleischacker is currently a self-employed consulting actuary. His services include actuarial and strategic planning, expert testimony, and insurance and reinsurance arbitration in the health insurance field.

Mr. Fleischacker has over 35 years of experience working for both consulting firms and health insurance companies. He is an experienced insurance executive with expertise in all areas of group life and health and individual health insurance including managed health care programs, dental, vision care, prescription drug programs, short and long term disability, group life insurance, and related reinsurance programs.

Mr. Fleischacker served as Vice President and Chief Actuary for Highmark Blue Cross & Blue Shield in Pittsburgh, from 1998-2002 and Vice President, Underwriting & Actuarial, for Empire Blue Cross & Blue Shield in New York City from 1994 through 1997. In these positions, he was responsible for managing the technical responsibilities of the departments; strategic planning; financial forecasting; and managing business and professional relationships with external constituencies such as state insurance departments.

Prior to 1994, Mr. Fleischacker spent over 25 years in actuarial and management consulting with Tillinghast, a Towers Perrin Company, and predecessor companies. He provided consulting services primarily to life and health insurance companies, including several Blue Cross Blue and Shield Plans, HMOs, health care provider groups, and insurance regulators. In addition to his consulting practice, he was responsible for managing the local office consulting practice and served as national health care consulting practice leader.

Mr. Fleischacker is a 1965 graduate of Drake University, Des Moines, Iowa, with a major in Actuarial Science. He is a Fellow of the Society of Actuaries and member of the American Academy of Actuaries. He has served on a number of committees for both organizations including serving as a member of the Board of Governors for the Society of Actuaries.

Soren N. S. Laursen

Soren Laursen was active for 40 years in the fidelity and surety business and, since 1998, been active as a consultant and expert witness in court cases and reinsurance arbitrations.

Mr. Laursen started his career in 1958 with Fireman's Fund in Los Angeles, became bond manager in Denver, then Dallas, the company's largest surety branch. In 1972 he joined agency ranks, returning to underwriting two years later in a re-underwriting task for Highlands. He joined AIG in 1975 to open its first domestic bonding branch.

Elected vice president in 1977, he was named

in focus

Paul R. Fleischacker

Soren N.S. Laursen

in focus

Thomas A. Player

manager of AIU's international bonding, then merged it with the domestic side, creating AIG Worldwide Bonding, which he managed until 1981, when he became a consultant to INA's President and was elected vice president. After INA's merger into CIGNA, he joined AFIA as VP/Manager of worldwide bonding operations until CIGNA acquired AFIA in 1984.

Mr. Laursen then joined Integrity, launching a unique countrywide contract surety program featuring agency risk sharing. After assisting Integrity's receiver, he moved the program to MCA in 1987. When it was suddenly forced into liquidation by Hurricane Andrew in 1992, he negotiated for Chubb's acquisition of the business, then named Vigilant Surety. This gave continued surety service to over 500 contractors. As a surety vice president of Chubb, he also launched Chubb SuretyExpress, a centralized surety facility for Chubb commercial insurance clientele.

He was a Board Member of the Surety Association of America from 1978-1981 and member of National Association of Independent Sureties and Pan American Surety Association. He is an Associate Member of the American Bar Association.

Mr. Laursen graduated from University of Southern California (A.B., International Relations and Economics) and took selected courses (31 credits) at U. S. C. School of Law.

Thomas A. Player

Thomas Player is an attorney with more than 35 years experience in insurance and reinsurance, both as an insurance executive and in private practice. He has served in senior positions at Georgia International Life Insurance Company and Commonwealth Life Insurance Company (life & health), as well as Commonwealth Property & Casualty Insurance Company. For many years, he has been engaged in the private practice of law and is currently a partner, and Chairman of the Insurance and Reinsurance Group, at Morris, Manning & Martin, LLP, a law firm offering specialized legal services in insurance and reinsurance, with offices in Atlanta, Charlotte and Washington, DC.

In addition to being a member and certified arbitrator of ARIAS, he is qualified as an arbitrator for complex commercial arbitrations of the American Arbitration Association and is on the panel of the Reinsurance Association of America.

Mr. Player received his B.A. from Furman University and his LL.B. from the University of Virginia. He is past Chairman of the Federation of Regulatory Counsel.

He has written and edited a variety of papers and texts. He has served as contributing editor of several business insurance textbooks, including "Managing for Solvency and Profitability in Life and Health Insurance Companies," "Regulation and Taxation of Annuities," and "Capital Management for Insurance Companies." He also authored "Insurer Insolvency Laws: Comparisons and Observations" for the Organization for Economic Cooperation and Development in Paris.

As a frequent industry speaker, Mr. Player was Co-Chairman of the conference on "Mergers and Acquisitions in the Insurance and Financial Services Industry." He was instrumental in creating the original CyberInsurance Conference in February 2001 and served as Chairman of the Terrorism Risk Assessment & Insurance Coverage Conference held in June 2003 in Washington, D.C. ▼

Consolidation of Related Reinsurance Disputes: Who Decides– Arbitrators or The Courts?

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

The consolidation of reinsurance disputes has become a hot topic lately. For example, it can arise when the same parties are involved in a dispute over a loss that pierces several layers of the same reinsurance program if each layer is governed by a separate reinsurance contract. In the absence of a contractual consolidation clause or the consent of the parties, such disputes generally must be decided by separate panels, raising significant cost and efficiency concerns. Attempts to force consolidation in federal court when the contract is silent on the issue have failed in two important federal circuits, the Second and Ninth Circuits. Also, resolution of the consolidation issue has generally been left to the courts, not the arbitrators, to decide in the first instance.

A July 9th Massachusetts federal district court decision may signal that the law in the First Circuit may be heading in a different direction. In this important case, Employers Insurance of Wausau ("Employers") and Nationwide Mutual Insurance Co. ("Nationwide"), respectively, had four and five separate reinsurance contracts with First State Insurance Group ("First State"). In both cases, First State sought to compel arbitration and consolidation of each series of related disputes so that one panel would hear the Employers case and another the Nationwide dispute rather than nine separate panels. Consistent with the law in the Second and Ninth Circuits, the district court ruled, albeit "reluctantly," to deny First State's motion to consolidate in the absence of contract language despite what the court viewed as potential "economies of effort and expense" single arbitrations offered given the similarities of the underlying disputes.

Subsequent to the district court's initial order, the First Circuit decided Shaw's Supermarkets, Inc. v. UFCW, Local 791, 321 F.3d 251 (1st Cir. 2003), on March 6, 2003. The appellate court held that the consolidation issue was to be decided in the first instance by the arbitrator, not the federal court. This divergence from the rule in other federal circuits arose in the context of a labor dispute arbitration over the same union grievance about a store-wide policy affecting three separate regional collective bargaining agreements. The Shaw's trial court relied on cases permitting the consolidation of labor arbitrations arising from multiple grievances under one contract. However, that distinction, according to the First State court, did not appear to have had any bearing on the Court of Appeals' ultimate holding.

Rather than seek reconsideration of the district court's earlier consolidation denial ruling in light of this subsequent development in the law, First State advised the various arbitration panels, which had been appointed in the interim, that the court's prior ruling was a "nullity" and that each panel possessed the power to correct this "judicial error." When this was brought to the district court's attention by Employers' and Nationwide's emergency motions, the court ruled that private arbitrators may not unilaterally take it upon themselves to overturn a district court's ruling on a matter of law – only the federal appellate court may correct such errors under Article III of the U.S. Constitution. As the "law of the case," the allegedly erroneous consolidation decision may be reexamined only by the court, not arbitration panels, when there are subsequent legal developments. The court ruled that First State must withdraw its pending consolidation motions before all of the arbitration panels.

In an interesting footnote, the district court commented on the "potential for chaos sown" by First State's actions. In considering the binding nature of the court's earlier denial of consolidation in the Employers arbitrations, one panel ruled that it was bound by the ruling, and two "expressed doubt." In the Nationwide proceedings, two panels abided by the court's ruling, and three ordered briefing on the issue.

The court did not address the question of what would happen if one or more of these

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case notes corner

Case Notes Corner is a regular feature on significant court decisions related to arbitration.

Ronald S. Gass

Attempts to force consolidation in federal court when the contract is silent on the issue have failed in two important federal circuits,...

**Mr. Gass is an ARIAS•U.S. Certified Arbitrator and Umpire. He may be reached via email at rgass@gassco.com or through his Web site at www.gassco.com.*

multiple arbitration panels ordered all of the related disputes arising under different contracts to be consolidated or if more than one panel issued such a ruling. Which panel's consolidation order would take precedence? These thorny problems were left for future panels and courts to resolve.

Employers Insurance of Wausau v. First State Insurance Group, Civ. Action Nos. 02-12252-RGS & 02-12012-RGS, 2004 U.S. Dist. LEXIS 12712 (D. Mass. July 9, 2004).

ARBITRATORS, NOT THE COURT, MUST DECIDE SCOPE OF COUNTERCLAIMS TO BE RESOLVED IN AN ARBITRATION

It is not unusual for a party drawn into an arbitration to assert counterclaims that may expand the scope of the proceeding beyond what the petitioner originally envisioned. For example, a cedent may demand arbitration against a reinsurer focusing on one particular unpaid loss, but the reinsurer may file a more expansive counter-demand critical of the cedent's global handling of loss cessions or seeking resolution of other disputed losses ceded under the treaty. This was the scenario confronting a Pennsylvania federal district court in the context of cross-motions to compel arbitration after the parties had reached an impasse over umpire selection.

In this case, the cedent initially demanded arbitration against its reinsurer concerning one specific unpaid loss. In response, the reinsurer filed a counter-demand asserting that the cedent had "mismanaged the operation of the [treaty] and . . . engaged in a pattern of inconsistent reinsurance loss cessions" and that the dispute was not limited to settlement payment to any one insured "but rather involves a systemic breach of [the cedent's] duties and obligations under [the treaty]." Subsequent to its initial demand, the cedent filed an additional four separate arbitration demands seeking payment on four other specific losses.

The parties each appointed their party-arbitrators but reached an impasse over umpire selection because the cedent objected to the arbitration's expanded scope due to the reinsurer's counter-demand. The parties sought court intervention on cross-motions to compel arbitration, and the reinsurer further requested that the four other arbitrations be stayed until the first one was resolved on the theory that resolution of its defenses in that arbitration would likely resolve the remaining ones.

The district court succinctly dispatched both parties' motions on the ground that it lacked authority to stay any of the five pending arbitrations. The treaty's "broad" arbitration clause provided for the arbitration of "any dispute . . . in connection with this agreement" and that New York's arbitration law would control. That arbitration law, according to the court, was analogous to Section 1 of the Federal Arbitration Act, which limits judicial intervention to the determination of whether there is a valid arbitration agreement covering the dispute. That leaves the scope and timing of the arbitration entirely up to the arbitrators to determine. Thus, the arbitrators in the first arbitration are free to decide (1) whether the cedent's claim should be paid; (2) whether the reinsurer's counter-demands provide a defense to that claim; and (3) whether the reinsurer is entitled to affirmative relief which might affect the other claims at issue.

Unless the parties agreed to some other reasonable resolution, the court ruled that the four other arbitrations must proceed and that each panel was free to determine the impact of the first panel's decision. The court also suggested that perhaps the arbitrators in the initial arbitration might "arrive at a sensible arrangement, if the parties are unable to do so."

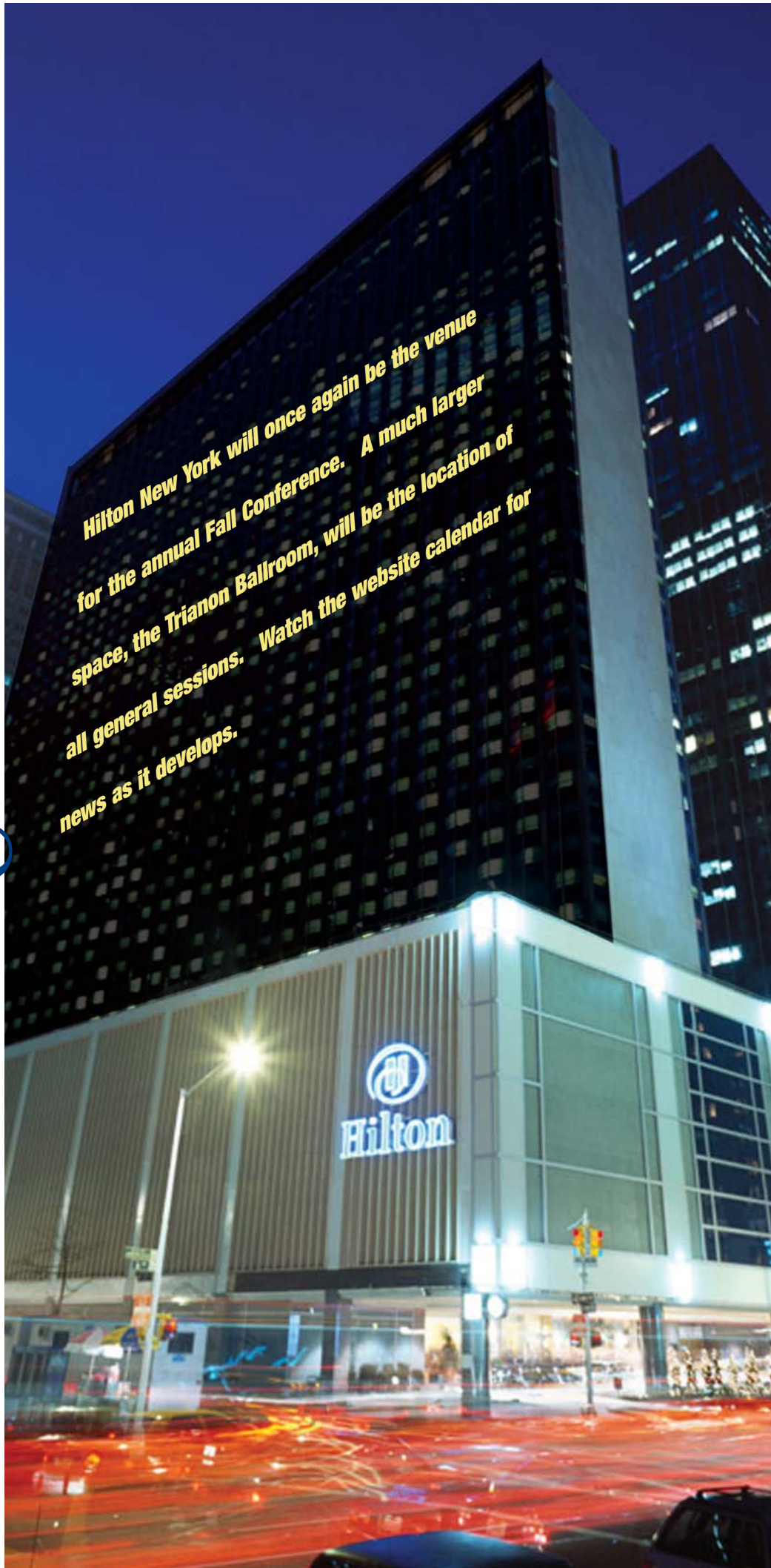
If the first panel was persuaded to issue a confidentiality order shielding its decision from the other four panels, the permissible scope of the reinsurer's counter-demand could be addressed anew by each subsequent panel, potentially leading to diverse results.

Century Indemnity Co. v. New England Reinsurance Corp., Civ. Action No. 04-MC-00089, 2004 U.S. Dist. LEXIS 15404 (E.D. Pa. July 19, 2004). ▼

It is not unusual for a party drawn into an arbitration to assert counterclaims that may expand the scope of the proceeding beyond what the petitioner originally envisioned.

Register Now!

Registration deadline: October 29



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An Invitation...

The growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) gives testimony to the acceptance of the society since its incorporation. Through conferences, seminars and literature, and through its certification process, ARIAS•U.S. is realizing its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of mid September 2004, ARIAS•U.S. was comprised of 375 individual members and 68 corporate memberships, totaling 694 individual members and designated corporate representatives, of which 205 have been certified as arbitrators.

The society offers its *Umpire Appointment Procedure*, based on a unique software program created specifically for ARIAS•U.S., that randomly generates the names of umpire candidates from a list of 58 ARIAS•U.S. certified 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.

New for 2003 was the "Search for Arbitrators" feature on the ARIAS•U.S. website, www.arias-us.org, that searches the detailed experience data of our certified arbitrators. The resulting list is linked to arbitrator profiles, with specifics of experience and current contact information.

In recent years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York City, Puerto Rico, Palm Beach, and Bermuda. The Society has brought together many of the leading professionals in the field to support the educational and training objectives of ARIAS•U.S.

ARIAS•U.S. recently published Volume V of its *Directory and Certified Arbitrators Listing*. The society also publishes the *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the Quarterly review, special member rates for conferences, and access to certified arbitrator training are among the benefits of membership in ARIAS•U.S.

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the membership area of the website; an application form is at the end of this Directory and online. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at info@arias-us.org or 914-699-2020, ext. 116.

Join us, and become an active part of ARIAS•U.S., the industry's preeminent forum for the insurance and reinsurance arbitration process.

Sincerely,

Charles M. Foss
Chairman

Thomas S. Orr
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration 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 current calendar of upcoming events, and online registration for meetings.

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

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