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"Ten Years After . . . Fall Conference Commemoration"

editor's comments

T. Richard Kennedy

Congratulations to Tom Orr and Mary Lopatto on their elections to Chairman of the Board and President of ARIAS•U.S., respectively. Based on the past performance of each of them, we can be confident that our Society will continue to achieve success in its goals under their leadership.

Congratulations also to David Robb and Susan Stone on their election by the membership to be Directors of ARIAS•U.S. We are indeed fortunate to have two such widely respected and talented individuals willing to undertake the substantial commitment required in the work of the Board.

The highlights of our very successful Tenth Anniversary meeting are outlined elsewhere in this issue. Particularly significant was the meeting marked the end of Board terms of two persons, Charlie Foss and Tom Allen, each of whom have made outstanding contributions to the success of the Society over the ten years of our existence.

Charlie Foss was a member of the Founding Board of ARIAS•U.S. While we were still an amorphous, start-up operation, Charlie – acting pretty much as a one-man Law Committee – led the way in getting us organized as a not-for-profit corporation complete with a set of by-laws that have substantially endured to this day. He went on to accomplish numerous other objectives while serving as a Director, most recently effectively leading the Society as President and then Chairman of the Board. I am certain the Board will miss his dedication, but we can rejoice in Charlie's expressed intent to remain active in the work of our organization.

Tom Allen has been active in ARIAS•U.S. since inception and has served on the Board of Directors for the past several years. Among his notable accomplishments has been his leadership in the adoption of the extremely useful *Practical Guide to Reinsurance Arbitration Procedure*. Tom also chaired the highly successful Bermuda program in 1998, developing in the process the hypothetical arbitration format that is still in use today at our arbitrator training workshops. Tom also assures us that he will continue in the important work of the Society.

I am sure many of our members would agree that among the most time consuming and complex issues in arbitrations today are the extent or limits of discovery to be permitted in a particular arbitration. A most helpful review of current issues in arbitral discovery is featured in this issue's article by Daniel L. FitzMaurice and Daniel J. Foster, entitled *Discovery in Reinsurance Arbitration*. It is must reading for arbitrators, counsel and parties involved in such arbitrations.

In December 1994, the very first article appeared in the ARIAS•U.S. Quarterly, written by John M. Nonna. The author suggested in that article that the process in reinsurance arbitrations would be improved by having all neutral panels and reasoned awards. In this issue's article, *Of Cabbages and Kings*, John Nonna returns with further support for his proposals. The article is intended, and likely will, stimulate additional discussion and debate on the merits of neutral arbitration panels and reasoned arbitration awards.

As year end approaches, I want to take this opportunity on behalf of the Editors to wish each of our members a most Happy Holiday Season and Good Health and Success in the New Year!

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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 wyankus@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.

Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

feature

Discovery in Reinsurance Arbitration

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

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Overview

For those who believe that reinsurance arbitration is broken, the expense, delay, and demands of arbitral discovery offer strong support. On the other hand, discovery may be indispensable in those reinsurance arbitrations that raise complicated factual issues.[1] Given that reinsurance agreements often say nothing about discovery, the parties and the arbitrators have the latitude and the need to fashion procedures best-suited to the particular dispute. The options run from no discovery to comprehensive procedures modeled on the rules that govern complex litigation. This paper will explore some of the decision points and topical issues that confront arbitrators and parties in considering discovery in reinsurance arbitration.

When the Parties Agree

In reinsurance, arbitration is purely consensual. The parties' agreement may also prescribe the rules that will govern the course of the arbitral proceedings.[2] The parties can describe the applicable procedures or adopt rules promulgated by others, such as the American Arbitration Association.[3] Most reinsurance agreements, however, are silent about discovery.[4] Of course, the parties can amend their agreement to specify whether and how discovery is to proceed, including the permissible scope and nature of discovery for an individual arbitration. Where the parties agree, the arbitrators should abide by the parties' wishes. More often, the parties cannot agree, and the panel must resolve not only substantive disputes but procedural ones as well.

When the Parties Disagree: The Role of the Arbitrators

Some early cases, evincing a widespread judicial hostility to arbitration, held that arbitrators had no authority to compel discovery. As one court put it, "arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath."[5] Modern cases, however, recognize that inherent in their jurisdiction over the procedural questions, arbitrators generally have authority to allow discovery and to prescribe its contours.[6] As discussed further below, whether the Federal Arbitration Act, in particular 9 U.S.C. § 7,[7] provides statutory authority for arbitrators to order pre-hearing discovery is a matter of significant controversy.[8]

How Much and What Types of Discovery?

Regardless of the source of their authority, panels in reinsurance arbitrations today generally determine how discovery will proceed. Recognizing this reality, ARIAS-US, for example, has identified a streamlined procedure for discovery in reinsurance arbitrations[9] and has included discovery as a topic in the "Checklist For Organizational Meeting." In particular, item 9 on the checklist identifies the following sub-topics regarding discovery:

A. Types
   1. Document production
   2. Interrogatories, bills of particulars, or the like
   3. Audit
   4. Depositions
      a. fact witnesses
      b. experts

B. Privilege issues
   1. Privilege logs
   2. In-camera review

C. Schedule: See ARIAS•U.S. Sample Form 4.1[10]

ARIAS, however, does not suggest that any or all of these options are "right" for any

> The options run from no discovery to comprehensive procedures modeled on the rules that govern complex litigation.

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particular case or that this list is exhaustive.

One option that arbitrators may adopt is to allow for no discovery. It is generally recognized that parties do not have a *right* to discovery in arbitration.[11] Moreover, limited discovery is both a well-recognized characteristic and benefit of arbitration:

> The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectivness—characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995) (advantages of arbitration are that it is "usually cheaper and faster than litigation; . . . can have simpler procedural and evidentiary rules; . . . normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties") (quoting H.R. Rep. No. 97-542, at 13 (1982)).

NBC v. Bear Stearns & Co., 165 F.3d 184, 190-91 (2d Cir. 1999).[12]

Assuming that the arbitrators are amenable to some discovery, they will need to determine the methods and extent of discovery they will allow. Given the pervasive recognition of the discovery rules contained in the Federal Rules of Civil Procedure, these rules provide a logical starting point. It is important, however, first to understand the purposes that these rules serve and the context in which they operate.

The Federal Rules of Civil Procedure

The discovery available to parties in federal courts is extremely broad. Under Rule 26 (b)(1) of the Federal Rules of Civil Procedure, "[i]n [g]eneral . . . [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Nearly every state has adopted rules similar to the pertinent Federal Rules and permit broad, intensive discovery.[13] The availability of extremely broad discovery in litigation is so familiar to American attorneys that it might easily be taken for granted. Historically, however, "discovery was not an integral part of the litigation process," and it did not become so until the adoption of Federal Rules 26-37 in 1938.[14] Before the federal rules, parties were left to their own devices to obtain supporting evidence and to learn the outlines of their opponents' cases.[15] Moreover, "[f]ew, if any, non-American tribunals of any kind, including arbitration panels created by private parties, provide for the kind of discovery that is commonplace in our federal courts and in most, if not all, state courts."[16]

The discovery provisions of the Federal Rules of Civil Procedure serve a number of salutary purposes. These include preserving evidence that might not otherwise be available at the time of a trial or other hearing, determining which issues are actually in controversy, and permitting parties to obtain information that will lead to admissible evidence on the issues that are in dispute.[17] In addition, these rules "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[18] The rules allow for several discovery devices, including depositions, interrogatories, requests for production, requests for admission, inspections of property, and physical and mental examinations of persons. See Fed. R. Civ. P. 26-36. In addition, the rules provide for protective orders to limit or prohibit discovery and for sanctions for failing to provide discovery. *See* Fed. R. Civ. P. 26, 37.

Understandably, the parties to arbitration agreements, their lawyers, and the arbitrators often look to the Federal Rules of Civil Procedure for guidance on issues relating to discovery. The federal rules are comprehensive. Outstanding jurists and scholars created them and have modified them over the years. The goals that they serve exist in most, if not all, forms of dispute resolution, including fairness, notice, gathering information, and narrowing issues. Additionally, these rules are useful because of the wealth of treatises, law review articles, and cases that interpret them. Nevertheless, several considerations caution against blind or wholesale acceptance of the Federal Rules of Civil Procedure in reinsurance arbitration.

The federal rules are not without their problems. In some cases discovery can become inordinately expensive and time-

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Indeed, arbitrators are generally far more permissive than courts on matters of evidence. Thus, arbitrators must be mindful that the discovery they allow will almost certainly be admissible, even if it were inadmissible in court.

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consuming.[19] Critics note that the breadth and liberality of civil discovery may readily lead to abuse.[20] And while discovery may encourage settlements, this may sometimes reflect avoidance of discovery rather than the effect of some information gathered in the process.

The federal rules apply in a quite different context than reinsurance arbitration. The federal discovery rules are premised on a clear separation between the right to gather information and the admissibility of the information gathered.[21] In arbitration, however, the Federal Rules of Evidence do not apply. Indeed, arbitrators are generally far more permissive than courts on matters of evidence. Thus, arbitrators must be mindful that the discovery they allow will almost certainly be admissible, even if it were inadmissible in court. Furthermore, the federal discovery rules operate with other safeguards that do not exist in arbitration. Federal judges, who typically delegate discovery issues to magistrate judges and special masters, are shielded from having to review questionable documents *in camera* as part of a discovery dispute. In the case of reinsurance arbitration, however, it may be less clear whether the arbitrators have authority to delegate this role to another, and, in practice, they may be less likely to do so.[22]

In some respects, arbitrators enjoy advantages over federal judges that may allow for using discovery in different ways. Although the federal rules contemplate pretrial orders, local rules, and other forms of judicial management over discovery,[23] federal judges typically have greater demands on their schedules than private arbitrators who may be able to play a more active role in managing discovery. Thus, a federal judge may be more likely to rely on the parties to resolve all but the most difficult discovery disputes.[24] Arbitrators also enjoy much greater latitude in handling a particular case, where judges are constrained by institutional concerns. Not only are judges subject to greater appellate review, they must follow controlling precedent and worry about consistency in their rulings. Arbitrators, on the other hand, face relatively mild review, most often are freed from following any particular law, and need not worry about consistency. In these ways, arbitrators can more flexibly manage the needs of the proceeding.[25]

The federal discovery rules, which apply to all forms of civil litigation, are also insensitive to the particular needs of the reinsurance industry. For example, unlike courts, arbitrators are often reluctant to allow discovery that will interfere with the parties' relationships with others, including policyholders, reinsurers, and retrocessionaires. Likewise, arbitrators are far more amenable to granting confidentiality orders because they need not weigh the needs for freedom of information and open government.[26] Courts, unlike arbitrators, are also concerned about the precedent that they set and the "teaching value" to non-parties of the decisions that they reach. Arbitrators do not have these concerns and, thus, are able to adopt and interpret discovery procedures that meet the specific needs of the parties and the facts of the case before them.

The fact that there is a substantial difference between the scope of discovery available in litigation and in arbitration gives rise to two issues. First, in some cases, claimants have maintained that an agreement to arbitrate should be unenforceable because the inability to conduct broad discovery prejudices their ability to vindicate substantive rights. The mere fact that discovery is more limited in arbitration than in litigation, however, does not justify refusal to enforce an arbitration agreement.[27] As courts have frequently noted, by agreeing to arbitrate, parties relinquish procedural rights attendant to litigation, including the right to conduct broad discovery.[28] Indeed, as noted above, avoiding the expense and delay associated with litigation in general and extensive discovery in particular are principal benefits of arbitration. Thus, complaints about the discovery available in arbitration seek, in effect, to change the terms implicit in the parties' agreement.[29] Similarly, parties who have taken advantage of the broader discovery available in the judicial system may be found to have waived their right to arbitration.[30]

The many differences between arbitration and federal litigation caution against thoughtless acceptance of the federal rules in reinsurance arbitration. The parties chose to rely on the expertise, efficiency, and flexibility of private arbitrators from the reinsurance industry. Remaking arbitration in the image of civil litigation disserves the parties' agreement to arbitrate. Rather than wholesale adoption, the goal then is to

borrow and adapt what is useful from the federal rules for the needs of the particular dispute before the panel.

Attorney-Client Privilege and "Work Product" Protection

Among the most sensitive issues in discovery is the right of parties to withhold evidence that either is privileged or constitutes "work product." The elements of the attorney-client privilege are well-established.[31] A client, which may be a corporation, holds a privilege to refuse to disclose, or prevent anyone else from disclosing, confidential communications between the client (or the client's representative) and the client's attorney (or the attorney's representative) that were made for the purpose of facilitating the rendition of professional legal services to the client.[32] "Work product" consists of documents or other material "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[33] "The privilege derived from the work-product doctrine is not absolute."[34] It may be overcome by "a showing that the party seeking discovery has *substantial need* of the materials in the preparation of the party's case and that the party is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means."[35] Attorney-client privilege is not dependent on the existence of litigation, and work product protection survives the termination of litigation.[36]

Both attorney-client privilege and work product protection are subject to waiver, which may occur when the party chooses to share confidential information with outsiders[37] or when the party voluntarily places the privileged information at issue in the arbitration.[38] One exception to this rule that has particular significance in reinsurance is the "common interest" doctrine. The concept of "common interest" works to preserve a claim of privilege when confidential information is shared with a third party whose interests are aligned. Once a dispute arises, however, the parties' interests are not in common, and this exception to waiver no longer applies.[39] As one treatise explains:

> [n]ot surprisingly, courts do not recognize the existence of a common interest when the underlying policyholder's claim or coverage dispute has been resolved and a dispute between the ceding insurer and reinsurer remains. In those circumstances, the reinsurer ordinarily will be unable to obtain privileged documents prepared by counsel retained by the ceding insurer regarding the underlying claim.[40]

A few courts have held, nevertheless, that the common interest doctrine applies as long as the privileged or protected material was created before the dispute between the parties arose. *See EDO Corp. v. Newark Ins. Co.*, 145 F.R.D. 18, 22 (D. Conn. 1992) (predicting that the Connecticut Supreme Court would rule that the common interest exception to waiver applies provided the material was prepared when the parties were not in dispute).[41] *But see Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 249 Conn. 36, 62, 730 A.2d 51 (1999) (Connecticut Supreme Court rejects *EDO* and holds that "an insured's and insurer's interests immediately become conflicted as soon as the insurer declines to cover the claims").

Questions regarding the attorney-client privilege and the work product protection are significant to the parties in reinsurance arbitration. The party claiming the privilege may risk losing it not only in the pending arbitration but, as a result of an adverse ruling, in disputes with others. The party seeking disclosure may establish that the protected material is highly relevant to the claims at issue - although relevance is not the determinant of whether the attorney-client privilege applies. In reinsurance disputes, arbitrators are most likely to have to decide issues regarding attorney-client privilege and work product with regard to the parties. As discussed below, non-parties in possession of privileged information are likely to refuse to provide the material, leading to court proceedings over enforcement of a subpoena.

The Federal Arbitration Act and Subpoenaing Non-Parties

The question of arbitral authority to compel discovery usually arises with respect to non-

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Both attorney-client privilege and work product protection are subject to waiver, which may occur when the party chooses to share confidential information with outsiders or when the party voluntarily places the privileged information at issue in the arbitration.

Rather, it provides the arbitrators with the power to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

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parties. As a practical matter, parties are unlikely to challenge the arbitrators' authority. As is the case in litigation, a party faced with an adverse discovery ruling by an arbitrator ordinarily cannot obtain interlocutory review of that ruling, because it is not an "award."[42] A party's two primary choices, then, are to comply or to refuse to comply and risk sanctions and prejudicing the outcome of the arbitration. Indeed, it is more likely for a party to complain about being foreclosed from discovery than to challenge and order allowing discovery.[43]

Whether the Federal Arbitration Act (FAA) authorizes pre-hearing discovery remains an open issue. Section 7 of the FAA does not refer to proceedings before the arbitration hearing on the merits. Rather, it provides the arbitrators with the power to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." Nevertheless, some courts have held that this statute authorizes arbitrators to subpoena documents and to engage in discovery. Courts have not reached a consensus over the existence, forms, and extent of the right of arbitrators to compel discovery.

Three United States Courts of Appeals have addressed the question of whether § 7 of the FAA authorizes arbitrators to issue subpoenas to compel non-parties to participate in pre-hearing discovery.[44] Two courts answered the question in the negative, and the third ruled that subpoenas were permissible insofar as they compelled the production of documents. In the most recent case, *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-07 (3d Cir. 2004), the Third Circuit ruled that "[a]n arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act" and that the language of § 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[45] Similarly, in *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999, the Fourth Circuit held that "a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship." The Eighth Circuit reached a somewhat different result, at least with respect to subpoenas commanding the production of documents from non-parties. In *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc. (In re Sec. Life Ins. Co. of Am.)*, 228 F.3d 865, 870-71 (8th Cir. 2000), the Court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[46]

In recent rulings, district courts agree that arbitrators cannot compel non-parties to testify at discovery depositions and have split over whether arbitrators may compel non-parties to produce documents in discovery. Judge Rakoff of the U.S. District Court for the Southern District of New York concluded that arbitrators have no authority to issue subpoenas compelling depositions or document production from non-parties. *Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) ("[I] inasmuch as arbitration is largely a matter of contract, it would seem particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery. Arbitration, which began as a quick and cheap alternative to litigation, is increasingly becoming slower and more expensive than the system it was designed to displace, and permitting pre-hearing discovery of non-parties would only make it more so."). Judge Magnuson of the United States District Court for the District of Minnesota, following the Eighth Circuit's holding in *Security Life*, concluded that arbitrators may compel non-parties to produce documents in advance of the arbitration hearing. *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. 02-4304 (PAM/JSM), 2004 U.S. Dist. LEXIS 389, 2004 WL 67647 (D. Minn. Jan. 9, 2004) (citing *Sec. Life*, 228 F.3d at 870-71 (8th Cir. 2000), and holding that a discovery subpoena ordering a non-party in an arbitration to testify in a deposition is unenforceable, but it may be enforced insofar as it required the non-party to produce documents because production is a "lesser burden").

Whether during the arbitration hearing or, if permitted, before, § 7 of the FAA permits only by the United States district court for the district in which the arbitrators, or a majority

of them, are sitting to enforce the subpoena.[47] The Federal Rules effectively place substantial geographic limitations on the enforcement of subpoenas, such that a subpoena must be quashed or modified if it "requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person . . . ."[48] This geographic limitation will be significant if the arbitration agreement provides that the arbitration shall take place in a particular location. Conceivably, the panel can conduct a special session of the arbitration hearing within 100 miles of a non-party, but doing so when the arbitration agreement specifies the site for the hearing would require consent of both parties.[49]

A non-party that does not wish to provide allegedly privileged materials to an arbitrator may simply decline to do so. In fact, "once subpoenaed by an arbitrator the recipient is under no obligation to move to quash the subpoena. By failing to do so, the recipient does not waive the right to challenge the subpoena on the merits if faced with a petition to compel."[50] Whether by motion to quash or in opposition to such a petition, the non-party may assert the privilege, and the court will review the claim *de novo*.[51]

Conclusion

Discovery is a potentially useful and dangerous device in arbitration. Some arbitrations can proceed without any discovery. Where appropriate, discovery may help to narrow issues, preserve evidence, and allow both sides a fair opportunity to learn and present the facts. When abused or misused, however, discovery can become and end unto itself, destroying the efficiency, cost-effectiveness, and speed that the parties sought when they agreed to arbitrate. Arbitrators have discretion to use or discard the Federal Rules of Civil Procedure to suit the needs of the individual case. They also have the ability to provide active management over the discovery process. Questions of privilege and work product production merit careful review because of the strong competing interests and complex legal issues that they raise. Lastly, compulsory discovery directed to non-parties will likely be limited to documents or non-existent, depending upon the location of the non-party. Arbitrators do have authority to subpoena non-parties to the arbitration hearing, provided the non-party is located within 100 miles of the hearing site. To the extent distant non-parties are essential to the case, the arbitrators may need to conduct a session of the hearing where the non-party is located.[52]

1 *See Note: Discovering Policy Under the Federal Arbitration Act*, 88 Cornell L. Rev. 779, 805 (2003) (discussing discovery in arbitration and referring to the "the fundamental tension between efficiency and competency interests at play in arbitration.")

2 A choice of law provision may also implicate the procedures that the parties choose. *See Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004) (holding that, through their choice of law, the parties consented to a California procedure for staying arbitration pending court action). Due to its scope, this article does not attempt to evaluate the many state laws that may affect discovery in arbitration.

3 *See, e.g.*, American Arbitration Association: Commercial Arbitration Rules and Mediation Procedures (including Procedures for Large, Complex Commercial Disputes), Rule R-21; (available at http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\commercial\AAA235current.htm#R21):

Exchange of Information

(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct

i) the production of documents and other information, and

ii) the identification of any witnesses to be called.

(b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

It is important to note that, by agreeing to arbitrate under the AAA rules, the parties also agree to authorize the AAA to administer the arbitration. *See* AAA Commercial Arbitration Rules, R-2.

4 *See The ARIAS U.S. Practical Guide to Reinsurance Arbitration Procedure* § 1.1 ("An Illustrative Arbitration Clause") (available at http://www.arias-us.org/index.cfm?a=38).

5 *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845).

6 *See, e.g., CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002) ("If a dispute is arbitrable, responsibility for the conduct of discovery lies with the arbitrators—indeed, for the sake of economy and in contrast to the practice in adjudication, parties to an arbitration do not conduct discovery; the arbitrators do.") (citations omitted).

7 9 U.S.C. § 7 provides as follows:
Witnesses before arbitrators; fees; compelling attendance
The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 et seq.] or otherwise, or a majority of

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Where appropriate, discovery may help to narrow issues, preserve evidence, and allow both sides a fair opportunity to learn and present the facts.

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

8 *See, e.g.*, *Note: Discovering Policy Under the Federal Arbitration Act*, 88 Cornell L. Rev. 779 (2003) (discussing several cases and noting the absence of any unifying construction of 9 U.S.C. § 7).

9 *ARIAS Practical Guide*, § 3.12.2 (available at http://www.arias-us.org/index.cfm?a=40).

10 *ARIAS Practical Guide*, Sample Form 3.1 (available at http://www.arias-us.org/index.cfm?a=40).

11 *See, e.g., Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. . . . One of these accoutrements is the right to pre-trial discovery. While an arbitration panel may subpoena documents or witnesses . . . the litigating parties have no comparable privilege."); *Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 840 F. Supp. 578, 579 (N.D. Ill. 1993). There may be a limit to this principle, however, in that refusal to consider relevant evidence is among the few grounds for vacating an arbitration award. *See, e.g.*, 9 U.S.C. § 10(a)(3); Conn. Gen. Stat. § 52-418(a)(3); N.J. Stat. Ann. § 2A:24-8(c); Ohio Rev. Code Ann. § 2711.10(C); Wash. Rev. Code § 7.04.160(3). Furthermore, in some cases state law may provide a mechanism for discovery in aid arbitration. See N.Y. C.P.L.R. § 3102(c) (Consol. 2004)("Before an action is commenced, disclosure to aid in bringing an action, to preserve information *or to aid in arbitration*, may be obtained, but only by court order." (emphasis added)); *see also Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, 479-81 (4th Cir. 1999) (concluding that, although Fed. R. Civ. P. 27 ordinarily does not apply to discovery in aid of arbitration, where the condition of a ship was "crucial" to an arbitration claim, and the ship was about to leave United States waters, "extraordinary circumstances" justified the District Court's grant of a petition to perpetuate testimony regarding the condition of the ship pursuant to that Rule).

12 *See also Yasuda Fire & Marine Ins. Co.*, 840 F. Supp. 578, 580 n.4 (N.D. Ill. 1993) ("one of the advantages claimed by proponents of arbitration over lawsuits as a vehicle for dispute resolution is that arbitration is not subject to the burdens (and to the time and expense) of the discovery process that has given rise to so much criticism of litigation in the court system from so many quarters.") (citation omitted).

13 Jack H. Friedenthal, et al., *Civil Procedure* § 7.1 (3d ed. 1999).

14 *Id*.

15 *Id*.

16 *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999).

17 Jack H. Friedenthal, et al., *Civil Procedure* § 7.1 (3d ed. 1999)

18 *United States v. Procter & Gamble*, 356 U.S. 677, 682-83 (1958).

19 *See, e.g.*, James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. Rev. 613, 636 (1998) (Study by the Rand Institute for Civil Justice concluding that "[s]ubjective information from our interviews with lawyers also suggests that the median or typical case is not 'the problem.' It is the minority of the cases with very high discovery costs that is the problem, and that generates the anecdotal parade of horribles that dominates much of the debate over discovery rules and discovery case management.")

20 *See* Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform, Public Law Research Inst.*, at http://www.uchastin gs.edu/plri/fal95tex/discov.html.

21 *See* 8 C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2001 at 42-43 (1994) ("The central notion of the discovery practice set out in the rules is that the right to take statements and the right to use them in court must be kept entirely distinct.")

22 *See Lefkovitz v. Wagner*, 291 F. Supp. 2d 764, 771-72 (N.D. Ill. 2003) (noting that "arbitrators may not delegate their duties" to arbitration consultants) (citation omitted).

23 *See* Fed. R. Civ. P. 16, 26(f), and 83(a).

24 *See, e.g., Evans v. Am. Honda Motors Co.*, No. 00-CV-2061, 2003 U.S. Dist. LEXIS 22189, at *4-*5 (E.D. Pa. Nov. 26, 2003) (noting that "the purpose of Local Rule 26.1 is to impose a substantial obligation on the parties to make strong efforts to resolve discovery disputes before rushing to the Court for intervention; that is, there must exist such serious differences between counsel that further efforts of negotiation are pointless.")

25 Federal judges have at least two greater liberties than arbitrators: lifetime tenure and freedom from worry over whether new cases will continue to be referred for disposition.

26 *See Commercial Union Ins. Co. v. Lines*, 239 F. Supp. 2d 351, 358 (S.D.N.Y. 2002) (refusing to seal information from confidential reinsurance arbitration because court records are presumptively open to the public).

27 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (concluding that discovery available in arbitration is sufficient to permit vindication of statutory claims).

28 *See supra* note 11.

29 *See, e.g., Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 72 (S.D.N.Y. 1995) ("Full scale discovery is not automatically available in arbitration, as it is in litigation. Everyone knows that is so; thus the unavailability of the full panoply of discovery devices, with their attendant burdens of time and expense, may fairly be regarded as one of the bargained-for benefits (or burdens, depending on one's subsequent point of view) of arbitration.") (citations omitted).

30 Ordinarily, participating in discovery in litigation will be found to constitute a waiver of the right to arbitration only where prejudice is shown. Although some courts have found prejudice where a party has taken advantage of discovery *procedures* not available in arbitration, others have looked to whether a party has had to provide, or its opponent has been able to obtain, *information* that would not have been available through discovery in arbitration. *Compare, e.g., PPG Indus. v. Webster Auto Parts*, 128 F.3d 103, 109 (2d Cir. 1997) ("sufficient prejudice to sustain a finding of waiver exists when a party takes advantage of pre-trial discovery not available in arbitration") and *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993) ("[s]ufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in discovery procedures not available in arbitration") *with Am. Heart Disease Prevention Found. v. Hughey*, No. 96-1199, 1997 U.S. App. LEXIS 1806, at *11 (4th Cir. Feb. 4, 1997) ("In order to show that pretrial discovery disclosures have caused prejudice, the party seeking to establish waiver must show that the opposing party has obtained information that would not have been available in arbitration."), *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (finding no prejudice, because "[a]lthough [the defendant] did pursue various avenues of discovery . . . . [b]oth parties acknowledge that [the defendant] obtained no facts in discovery that would have been unavailable in arbitration), and *Zwitserse Maatschappij Van Levensverzekering En Lijfrente v. ABN Int'l Capital Mkts. Corp.*, 996 F.2d 1478, 1480 (2d Cir. 1993) ("[Petitioner] suffered prejudice because the deposition-type discovery obtained in the Netherlands would not have been available in . . . arbitration").

31 *See* 1 *McCormick on Evidence* § 87 at 317 & n.18 (John W. Strong et al., eds., 4th ed. 1992).

32 *See id*.

33 Fed. R. Civ. P. 26(c)(3).

34 *United States v. Nobles*, 422 U.S. 225, 239 (1975).

35 Fed. R. Civ. P. 26(c)(3) (emphasis added.) A party may, however, "obtain without the required showing a statement concerning the action or its subject matter previously made by that party." *Id*.

36 *See TIG Ins. Co. v. Yules & Yules*, No. 99 Civ. 3378 (KMW) (MHD), 1999 U.S. Dist. LEXIS 17607 at *3, n.1 (S.D.N.Y. Nov. 9, 1999) ("The attorney-client privilege is not linked to the pendency of a lawsuit, and thus the fact that the communications were made in connection with a different litigation does not undercut the privilege."); *United States ex rel. Wiser v. Geriatric Psychological Servs.*, No. Y-96-2219, 2001 U.S. Dist. LEXIS 12930, at *5 (D. Md. Mar. 22, 2001) (work product survives the close of litigation, just as attorney client privilege does even death).

37 *See, e.g., Employers Reinsurance Corp. v. Clarendon Nat'l Ins. Co.*, 213 F.R.D. 422, 428-31 (D. Kan. 2003) (discussing a five-factor test for determining whether inadvertent disclosure should constitute a waiver of attorney-work

product); *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166 (S.D.N.Y. 2002) (noting that, unlike the attorney-client privilege, disclosure of work product to outsiders does not automatically vitiate the protection, but it does where the materials are used in a manner inconsistent with the protection).

38 *See, e.g., Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) (discussing whether an implied waiver resulted from placing confidential information at issue); *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994) (holding that an insured did not waive attorney-client privilege by placing it at issue in a coverage dispute where the advice was relevant only to the insured's state of mind).

39 *See, e.g., North River Ins. Co. v. Columbia Cas. Co.*, No. 90 Civ. 2518 (MJL), 1995 U.S. Dist. LEXIS 53, at *12 (S.D.N.Y. Jan. 5, 1995); *see also Sawyer v. Southwest Airlines*, No. 01-2386-KHV, 2002 U.S. Dist. LEXIS 25111 (D. Kan. Dec. 23, 2002); *Strougo v. BEA Assoc.*, 199 F.R.D. 515, 525 (S.D.N.Y. 2001); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 348 (N.D. Ohio 1999); *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 581 (N.D. Cal. 1995);

40 Eric Mills Holmes, *Appleman on Insurance* § 107.3 (2d ed. 1996) (footnote omitted).

41 *See also Waste Mgmt., Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991) (insurer may obtained attorney-client privileged material from policyholder due to the common-interest exception to waiver); *Metro Wastewater Reclamation Dist. v. Continental Cas. Co.*, 142 F.R.D. 471, 476 (D. Colo. 1992) (same).

42 *See, e.g., Yasuda Fire & Marine Ins. Co.*, 840 F. Supp. at 579 (rejecting characterization of "a wholly procedural and largely (though not entirely) discovery-oriented ruling as an 'award' by the arbitrators" subject to judicial review).

43 *See Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002) (rejecting arguments that the arbitrators' refusal to reopen discovery demonstrated bias or established that they were "guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy.")

44 In *Am. Fed'n of Television & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 & n. 7 (6th Cir. 1999), the Sixth Circuit held that § 301 of the LMRA authorized a labor arbitrator to issue a subpoena for the production of documents from a non-party. The Court declined to reach the question of whether § 7 of the FAA provided the same authority.

45 *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

46 Earlier district court rulings had also reached mixed results. *See Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) ("[T]his Court concludes that an arbitrator does not have the authority to compel nonparty witnesses to appear for pre-arbitration depositions."); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1993) ("The power of the [arbitration] panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing."); *Stanton v. Paine Webber Jackson & Curtis Inc.*, 685 F. Supp. 1241, 1242-43 (S.D. Fla. 1988) (FAA permits prehearing document production from non-parties).

47 9 U.S.C. § 7. Thus, this provision does not empower courts of the United States to enforce discovery orders issued by foreign arbitrators. Similarly, courts have concluded that no such power is conferred by 28 U.S.C. § 1782, under which "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ." *See, e.g., Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding that "tribunal" does not include non-governmental body); *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188-90 (2d Cir. 1999) (same).

48 Fed. R. Civ. P. 45(c)(3)(A)(ii); *see also id.* 45(a)(2) ("A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made."); Fed. R. Civ. P. 45 (b)(2) ("a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena").

49 Judge Tchertoff of the Third Circuit was sympathetic to the reasons for granting arbitrators the authority to issue subpoenas to non-parties for discovery purposes. He wrote specifically to note that arbitrators were not powerless:

> Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.

Hay Group, 360 F.3d at 413-14 (Tchertoff, J. concurring) (citation omitted).

50 *See COMSAT, Inc.*, 190 F.3d at 276.

51 *See, e.g., Integrity Ins. Co.*, 885 F. Supp. at 72.

52 The FAA applies to arbitrations conducted in the United States and to proceedings in the United States that are ancillary to foreign arbitrations in some other countries. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 I.L.M. 1046 (implemented at 9 U.S.C. §§ 201-08) (the "New York Convention"), and the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (implemented at 9 U.S.C. §§ 301-07). The FAA does not allow parties to arbitrations pending in other countries to subpoena non-parties in the United States. See supra at note 47. Whether an arbitration panel in the United States has any ability to conduct proceedings outside of this country or to compel non-parties located in other countries to testify - a topic beyond the scope of this article - generally will depend upon the terms of treaties and conventions between the countries as well as the law of the foreign country regarding subpoenas and arbitration. See, e.g., Michael Penny, *Letters of Request: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?,* 12 Am. Rev. Int'l Arb. 249 (2001).

news and notices

Tarrytown Workshop Gives Realistic Arbitration Experience to 52 Students and 26 Law Firm "Faculty."

The second expanded arbitrator training workshop at Tarrytown House took place on Friday, September 10. Two last-minute cancellations dropped the total number of students by two and required doubling up of panel responsibilities for Soren Laursen and Joe Pignatore. Otherwise, the event proceeded smoothly, successfully graduating 52 ARIAS members who are now more experienced in handling complex arbitrations.

Six law firms participated by each manning a room to present arguments to the student panelists in mock hearings. The firms were **Budd Larner** of Short Hills, New Jersey; **Hinshaw & Culbertson** of Chicago; **LeBoeuf, Lamb, Greene & MacRae** of New York and Washington; **Lord Bissell Brook** of Chicago; **Morris, Manning & Martin** of Atlanta; and **Pepper Hamilton** of Philadelphia. Both students and faculty were enthusiastic in their praise of the experience.

Five New Umpires Listed

At its meeting on September 16, the ARIAS Board of Directors added four new umpires to the ARIAS Umpire List, bringing the total to 59. New additions were **Nasri H. Barakat, John A. Dore, Robert C. Reinarz, and Elizabeth M. Thompson**.

Then on November 11, the Board approved listing of **Sylvia Kaminsky**.

To be included on the ARIAS list, a certified arbitrator must submit evidence that he/she has completed (not settled) three arbitrations as a panelist. The ARIAS Umpire Selection Procedure (explained on the website) makes random selections from this list.

The complete list of 40 umpires is available on the website, linked to biographical profiles.

Board Certifies Thirty-eight New Arbitrators

At its meeting on September 16, the ARIAS Board of Directors approved certification of a record number of eighteen new arbitrators, bringing the total to 205. The following members were certified; their respective sponsors are indicated in parentheses:

- **Edgar W. Blanch, Jr.** (Ronald Jacks, Robert Huggins, Robert Reinarz)
- **Joseph E. Carney** (David Thompson, Robert Mangino, Paul Dassenko)
- **Charles W. Carrigan** (William Wigmanich, Andrew Maneval, David Robb)
- **Paul Feldsher** (David Thompson, Robert Hall, Herbert Palmberger)
- **Peter A. Gentile** (Robert Mangino, Paul Dassenko, David Thompson)
- **John R. Heath** (Robert Quigley, Paul Dassenko, William Wall)
- **Keith E. Kaplan** (Richard Shaw, Gregg Frederick, Andrew Walsh)
- **Thomas B. Leonardi** (Peter Scarpato, Daniel Hargraves, John Dore)
- **Thomas J. McGeough** (Richard Kennedy, Charles Havens, Jay Wilker)
- **Christian M. Milton** (Richard Waterman, Martin Haber, Eric Kobrick)
- **Michael W. Pado** (Robert Mangino, George Budd, Dale Diamond)
- **Eileen T. Robb** (James Powers, Sylvia Kaminsky, Anthony DiPardo)
- **Frederick M. Simon** (Paul Thomson, James Hazard, Paul Bellone)
- **Richard E. Smith** (Paul Hawksworth, Franklin Haftl, Robert Huggins)
- **David Spiegler** (Charles Widder, David Appel, Robert Hall)
- **Richard E. Stewart** (Richard Kennedy, Daniel Schmidt, James Rubin)
- **Michael H. Studley** (Kevin Tierney, Robert Mangino, Daniel Schmidt)
- **James D. Yulga** (Robert Huggins, Richard Waterman, Robert Reinarz)

Then, at its meeting on November 11, the Board approved certification of a new record number of twenty arbitrators, bringing the total to 225. The following members were certified; their respective sponsors are indicated in parentheses:

- **Malcolm B. Burton** (James Powers, Richard D. Smith, Anthony DiPardo, Thomas Newman)
- **John W. Cowley** (James Phair, Timothy Rivers, Donald DeCarlo)
- **Peter L. Craft** (Jack Scott, Eugene Wilkinson, Michael Elgee)
- **Bina T. Dagar** (Paul Bellone, Janet Burak, Jerome Karter)

CONTINUED FROM PAGE 10

- **John S. Diaconis** (Peter Bickford, Jay Wilker, Michael Zeller)
- **Clement S. Dwyer, Jr.** (Paul Hawksworth, Robert Huggins, Robert Lewin)
- **Steven A. Gaines** (Soren Laursen, Dominic Addesso, Frank Bonner, Gerard Skalka)
- **William H. Huff III** (James Dowd, David Appel, Frank Montemarano)
- **Fritz K. Huszagh** (Robert Huggins, Bakka, John Dore, Marvin Cashion, Dale Crawford)
- **Raymond J. Lester** (Paul Thompson, David Spector, Marvin Cashion)
- **Susan E. Mack** (Richard Bakka, Charles Niles, James Veach)
- **Jennifer Mangino** (Stephen Schwab, David Raim, Lawrence Harr)
- **Fred G. Marziano** (Martin Haber, David Thompson, Peter Gentile)
- **Claudia M. Morehead** (Robert M. Hall, Daniel Schmidt, Diane Nergaard)
- **Patrick J. O'Brien** (Robert Mangino, David Thompson, James Keenan)
- **Raymond L. Prosser** (Michael Studley, Charles Havens, Andrew Walsh)
- **Joseph J. Pingatore** (Hugh Alexander, Douglas Bond, Richard Waterman)
- **John D. Sullivan** (William Wigmanich, Andrew Maneval, Mark Gurevitz)
- **William A. Wilson** (Frank Barrett, Lawrence Harr, Brian Donnelly, John Binning)
- **Michael C. Zeller** (Daniel Schmidt, III, Richard Waterman, Eric Kobrick)

Biographies of most of the arbitrators who were certified in September are in this issue of the Quarterly. The November class will appear in the next issue, except for Fred Marziano, who was fast on his feet and responded quickly with a biography and photo.

Guest Room Reservations Open for Las Vegas Conference

The Venetian has opened its system to begin taking reservations online and on the telephone for the May 4-6, 2005 Spring Conference. The phone number is 888-283-6423. Preliminary conference information and the **online reservation link are located on the website calendar**. Full registration information and conference details will be available in February.

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

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

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.

Fall Conference Celebrates Ten Years of Growth and Arbitration Improvement

On November 11, ARIAS members gathered once again at The Hilton New York for the 2004 Fall Conference. The title of the event was "Ten Years After...An Arbitration Check-up." The training sessions concentrated on (1) analyzing the current state of reinsurance arbitration ("A Feud Within Our Arbitration Family"), (2) discussing major ethics issues, and (3) hearing from veteran members about how panelists go about making key decisions in the process.

However, the overarching theme of the conference was the considerable progress made in improving arbitration over the ten years since ARIAS•U.S. was founded. The Annual Meeting on Thursday afternoon included a review, by retiring Chairman Charles M. Foss, of the dramatic growth in certifications, conference attendance, and membership, which now totals 750 individual members and designated corporate representatives. Mr. Foss then introduced members of the Founding Board. Several commented about the first meetings ten years ago and their recollections of their plans and dreams for what the organization should become. They expressed a high level of satisfaction with the outcome of their dreams after ten years of the Society's existence.

Symbolically marking the Tenth Anniversary, Mr. Foss announced that the Board of Directors had created the ARIAS Award. He also announced that the first recipient was the motivating force behind the formation of the Society. The trophy read as follows:

As always, the opportunity to exchange "war stories" and points of view on the featured topics resulted in animated interaction during breaks.

THE ARIAS AWARD

Presented to

T. Richard Kennedy

In recognition of your significant contributions towards achieving the objectives of ARIAS•U.S. and for your dedication to improving the arbitration process by fostering the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and equitable manner

ARIAS•U.S. Board of Directors

November 11, 2004

Also at the Annual Meeting, the membership elected two new Board members, David R. Robb of The Hartford Financial Services Group and Susan A. Stone of Sidley & Austin Brown & Wood, Chicago. Retiring from the Board, in addition to Charles Foss, was Vice President Thomas A. Allen.

At the Board meeting, held after the Annual Meeting, Thomas S. Orr was elected Chairman and Mary A. Lopatto, President. Also, Thomas L. Forsyth was elected President Elect and Frank A. Lattal joined Eugene Wollan as a Vice President.

At the luncheon earlier that day, Kirk Blalock, a Washington lobbyist who represents the American Insurance Association, spoke to the group, providing his perspective on the "Election's Implications for the Insurance Industry." Mr. Blalock is with Fierce, Isakowitz & Blalock, a government consulting and public relations firm. Mr. Blalock had served for two years coordinating White House outreach to the business community.

This conference was by far the largest ARIAS event ever, with a record attendance of 485, up from 395 last November. Co-Chairs for the event were Charles Foss, Thomas Allen, and Mary Lopatto. ▼

Scenes from the Fall Conference…

Retiring Chairman Charles M. Foss looked back over the ten-year history of ARIAS•U.S.

The dramatic growth of ARIAS was featured in Mr. Foss's presentation (the actual conference attendance increase for 2004 came in at 32%).

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The Founding Board ten years ago (l.) and ten years later (r.), from the left, Robert M. Mangino, Edmond F. Rondepierre, T. Richard Kennedy, Susan E. Mack, Mark S. Gurevitz, Charles W. Havens, III, Ronald A. Jacks, Charles M. Foss (Daniel E. Schmidt, IV could not attend).

Mr. Foss presents the ARIAS Award to T. Richard Kennedy.

The Trianon Ballroom was aglow with the near-capacity attendance.

New Chairman Thomas S. Orr presents Meritorious Service Awards to Charles M. Foss (l) and Thomas A. Allen (r) , both of whom retired from the Board.

Dick Kennedy, whose concept sparked the creation of ARIAS ten years ago, holds the ARIAS Award, a crystal-flame symbol of the organization.

President Mary A. Lopatto, Nominating Committee Chairman Christian M. Milton, and Chairman Thomas S. Orr confirm election results.

The Family Feud brought out strong challenges and spirited defenses of the system as it functions today.

A rare light moment in the otherwise serious coverage of ethical dilemmas brought smiles to Susan E. Grondine, James I. Rubin, and Mary Lopatto.

Tom Allen moderated the Friday morning sessions, as veteran panel members told of the complexities that can make decision-making difficult at many different stages of the arbitration process. Breakouts brought together smaller group discussions on decision-making and ethics.

feature

Of Cabbages and Kings

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

JOHN NONNA
MARC ABRAMS
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John Nonna

Marc Abrams

The time has come to talk of neutral panels and reasoned awards.

*John M. Nonna is a partner in the New York City office of LeBoeuf, Lamb, Greene & MacRae, L.L.P. He practices in the areas of commercial, insurance, and reinsurance litigation, arbitration, and mediation. Marc Abrams is an associate in the New York office.

The time has come, the Walrus said,
To talk of many things:
Of shoes—and ships—and sealing-wax—
Of cabbages—and kings—

Lewis Carroll

Introduction

The time has come to talk of neutral panels and reasoned awards. Ten years ago, one of this article's authors (the older one) submitted an article for one of the first ARIAS conferences, entitled "A Modest Proposal." The first article sought to stimulate discussion and debate in the reinsurance community on the merits of neutral arbitration panels and reasoned arbitration awards. These topics remain pertinent, as evidenced in recent articles addressing both of these topics in the 2003 ARIAS Quarterly Review by Anne Quinn and Jack Whittle ("The Current State of Reinsurance Arbitration: Addressing the Common Areas of Complaint") and Earl Davis ("Reinsurance Arbitration: Some Thoughts for Improvement") and in the 2004 ARIAS Quarterly Review by Robert M. Hall ("How Arbitrations Can Be Faster, Cheaper and Better"). With recent changes in the ABA-AAA Code of Ethics and keen interest in the broader arbitration community concerning the issues of neutral panels and reasoned awards, it makes sense for the ARIAS-US membership, which includes all participants in the arbitral process — arbitrators, counsel and parties, to consider the advantages and disadvantages of neutral arbitration panels and reasoned awards. It is time for all of these constituents of ARIAS to express their views on these subjects.

Neutral Arbitrators

It is a strange trade that of advocacy. Your intellect, your highest heavenly gift is hung up in the shop window like a loaded pistol for sale.

Thomas Carlyle

One of the most basic questions in any arbitration is whether the party appointed arbitrators are neutral or partisan. We survey below current guidelines on arbitrator neutrality and then offer some thoughts on the merits of neutral arbitration panels.

1. CURRENT GUIDELINES

Parties in the United States are free to agree to arbitration clauses requiring either neutral or partisan panelists. Arbitration is a creature of contract. But arbitration clauses are often unclear or ambiguous as to whether arbitrators should be neutral. Up until March, 2004, the default rule for United States arbitrations, or the "American Rule," was for party-appointed arbitrators to serve as advocates for the party that appointed them. The "American Rule" was initially adopted by the American Arbitration Association ("AAA") and the American Bar Association ("ABA") in a 1977 Canon — and it contrasts to the "International Rule" under which arbitrators are usually independent.

In a similar manner, ARIAS guidelines note that "there is a lack of consensus" over whether disinterested arbitrators must be neutral, but that in the absence of specific contractual language, "party appointed

arbitrators can be initially predisposed but must remain open-minded and render decisions in a fair manner."[1] The Reinsurance Association of America ("RAA") manual is no different: "[I]n practice, party-appointed arbitrators in U.S. reinsurance disputes are often, to a greater or lesser extent, advocates of the party appointing them. This is typically attributed to the manner in which the arbitrators are selected."[2]

On March 1, 2004, the AAA/ABA Code changed, bringing it closer to the International Rule on arbitrator neutrality. The revised Code makes this change clear from the outset: "The sponsors of this Code believe that it is preferable for all arbitrators — including any party-appointed arbitrators — to be neutral, that is, independent and impartial, and to comply with the same ethical standards." The framers of the Revised Code went on to add that "[t]his expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects."

These objectives are expressly stated in Canon IX of the AAA/ABA Code, which holds that "in tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator." Once the arbitrators are deemed neutral, they are referred to as "Canon IX Arbitrators" and they are obligated to follow Canons I - VIII of the Code, which discusses the arbitration process, the appointment process, the disclosure process, ex-parte communications, the proceedings, resolution of the arbitration, the relationship between the parties and the arbitrators, compensation, and advertising. Although it is not the goal of this article to summarize all of these canons, they require, in many respects, conduct similar to that of an Umpire in a reinsurance arbitration. For instance, "Canon IX Arbitrators" are typically not allowed to discuss the merits of their case with the party that appointed them, they must exercise independent judgment, and they should not "permit outside pressure to affect the decision."

The revised Code does not foreclose parties from agreeing to partisan party appointed arbitrators. In the event that parties have expressly opted for such arbitrators, then they are deemed "Canon X Arbitrators" and are generally subject to less restrictive guidelines. For instance, "Canon X Arbitrators" may "be predisposed toward the party who appointed them" and they may communicate in most circumstances with the party that appointed them so long as they inform the parties and the other arbitrators.

The new guidelines have two other notable requirements. Arbitrators (whether neutral or partisan) have a duty to ensure that their status is known by all of the parties and the other arbitrators at the earliest possible time, and in no event, later than the first arbitration meeting. In addition, all arbitrators (whether neutral or partisan) must disclose all interests and relationships to the parties and the other arbitrators.

2. COMMENTS

The AAA/ABA Revised Code is a useful step toward creating a more transparent dispute resolution structure. A system with arbitrators who are expressly partisan can have the effect of creating a "race to the bottom." That is, one of the party arbitrators approaches the arbitration in a partisan manner, and rather than "unilaterally disarming," the other side's arbitrator is forced to strike back.[3] The end result is essentially two adversary proceedings: One between counsel for the parties and a second between arbitrators for the parties.

Is there a need to "try" a case twice? Significant incentives already exist for counsel to put forward the best case possible for its client, especially since counsel's performance is ultimately evaluated by its client. There is no need for the party appointed arbitrators to duplicate these efforts. The tradition of party-appointed arbitrators in reinsurance likely stems from the time when parties did not use counsel in arbitrating disputes. A more efficient use of resources would be for all of the panel members to render a decision from a neutral perspective. Evaluating evidence and testimony and then rendering a decision is no easy task. It seems logical to conclude that this responsibility would be better discharged, and a more deliberative result would be achieved, if three heads rather than one were exclusively devoted to an objective evaluation.

But won't neutral arbitrators advocate for

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Our experience is that arbitrators — whether they are neutral or partisan — attempt to "do right" based on the particular facts of each case.

Besides avoiding the appearance of partisanship, a random appointment system would assign various proceedings to arbitrators in a more efficient manner, instead of allocating a large chunk of proceedings to just a few candidates, as is currently the case.

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their party anyway? After all, isn't an arbitrator — whether neutral or partisan — dependent on the party retaining him/her in the first place? This question is difficult to answer. Our experience is that arbitrators — whether they are neutral or partisan — attempt to "do right" based on the particular facts of each case. We have observed a significant disparity among party-appointed arbitrators in their own perceptions of the degree to which they should function as advocates of the appointing party. But a system of party-retained arbitrators certainly exposes itself to the criticism that a party-appointed arbitrator will always be more sympathetic to its party — regardless of neutrality. The persistence of this criticism suggests a different solution: Allowing for the dispute resolution body to appoint all three arbitrators — of its own accord, based on a random selection process. ARIAS-US actually allows for random selection of umpires,[4] although our understanding is that it is seldom utilized. Besides avoiding the appearance of partisanship, a random appointment system would assign various proceedings to arbitrators in a more efficient manner, instead of allocating a large chunk of proceedings to just a few candidates, as is currently the case. The effect of spreading the proceedings among more arbitrators is obvious: Arbitrations would be resolved more quickly — a goal that everyone supports. In order for such a system to work, rigorous training for arbitrators is necessary, so as to ensure the parties satisfaction with the overall process. ARIAS-US has made great strides in fulfilling this goal.

Certainly, more work needs to be done to devise a system that not only chooses neutral arbitrators, but also ensures that the arbitrators are suitable for the particular dispute they will adjudicate. The current system works well in achieving this objective. But it is possible to construct a mechanism for selecting neutral panels based upon expertise in particular areas. Questionnaires, which are commonly used in the umpire selection process, can be circulated to a list of proposed arbitrators. The parties can jointly interview prospective panel members to determine their suitability for a particular dispute if they so desire.

The Reinsurance Association of America's Reinsurance Dispute Resolution's Task Force has recently proposed a methodology for selection of a neutral panel. This methodology takes the form of a "Neutral Panel Version" of the RAA's Procedure for the Resolution of U.S. Insurance and Reinsurance Disputes.[5] The proposed method utilizes questionnaires to enable parties to select from a pool of 20 candidates proposed by the parties from a list maintained by an organization chosen by them, such as ARIAS-US. Neutral is defined as "disinterested, unbiased and impartial." ARIAS-US has also circulated an initial draft of procedures for selection of a neutral panel.

Finally, arbitrators themselves should be more comfortable serving in one capacity only — judges — rather than the somewhat schizophrenic capacity of judges and advocates.

Reasoned Awards

He only employs his passion
who can make no use of his reason.

Cicero

A frequent suggestion for improving the overall satisfaction level of the arbitration process is to require a reasoned award setting forth the basis for the panel's ruling. Why do the parties care about a reason for the decision when they have proceeded to arbitrate simply to obtain a result? There are several answers. Most importantly, the parties invariably wish to know why the result has occurred. It is difficult, after much briefing and argument of serious issues, and the incursion of significant expenses, for parties and their attorneys to receive an award that simply states in one line an amount that is owed. That is particularly so when the parties cannot understand how the amount was derived, even though the panel may have had a logical explanation at hand. Again, the tendency of some panels to achieve a compromise resolution in the form of a forced settlement would lead them not to express the basis for their award. This is not to say that there are not cases where there are gray areas and a panel must fashion relief that essentially turns out to be a compromise. But even in those cases, the panel can explain the reasons why it has reached a particular result. Those reasons should be logical and have some basis in the

evidence that the panel has received.

There are other benefits in favor of a reasoned award. One benefit is that a reasoned award allows counsel — and the parties — to better understand which of their arguments succeeded in convincing the panel or, alternatively, which of their arguments were unpersuasive. A reasoned award may also help guide the parties in their future relations. Finally, as pointed out in a recent article, an award only stating the amount of liability means that "the parties and their counsel are provided no reliable indicia of whether the arbitrator's decision was founded on a full understanding of the material facts and a proper interpretation and application of the relevant provisions of their contract and the applicable law."[6] A reasoned award would solve this problem.

Typically, two objections are asserted against reasoned awards. First, any discussion of the basis for the award might make a motion to vacate the award more likely. The theory here is that having attempted to explain its decision, the panel will expose itself to attack. This logic is self-defeating. It essentially leads to the proposition that the best decision is simply a number between zero and the amount demanded. But that is not what the parties have bargained for. They have bargained for a process which reaches a comprehensible decision.

Further, under the case law, arbitration decisions are almost impossible to set aside, even on the basis of lack of logic or misconstruction of the facts or law. A recent opinion of the Seventh Circuit Court of Appeals drives home this point: "Generally, a court will set aside an arbitration award only in very unusual circumstances. Judicial review of arbitration awards is 'typically limited' and confirmation is 'usually routine' or summary;' With few exceptions, as long as the arbitrator does not exceed her delegated authority, her award will be enforced. This is so even if the arbitrator's award contains a serious error of law or fact." *Hasbro Inc. v. Catalyst USA Inc.*, 2004 U.S. App. Lexis 9075 (7th Cir. 2004) (citations omitted) See also *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003). ("It is well established that courts must grant an arbitration panel's decision great deference. A party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law.") A "barely colorable justification for the outcome is sufficient to support an award." *Banco de Seguros del Estado v. Mutual Marine Office Inc.* 344 F.3d 255 (2d Cir. 2003). In fact, a survey conducted in 1998 found that practically no commercial award has been disturbed on the grounds that it exhibited "manifest disregard of the law." See Binning and Nefsky "Vacating Arbitration Awards" ARIAS Quarterly (Second Quarter 2002). Some have expressed a concern that arbitrators may not be skilled in drafting reasoned awards. If panels are not comfortable preparing a reasoned award, they can request each party to submit a proposed reasoned award with proposed findings. Further, ARIAS-US can offer training in drafting reasoned awards.

On the other hand, the case reporters are replete with examples of decisions where courts have upheld arbitration awards without examining the basis in fact or in law for the arbitration panel's decision. Therefore, there should be little concern that reasoned decisions are more amenable to being vacated or modified. Moreover, many arbitration clauses relieve arbitrators of the need to follow strict rules of law, and instead require awards to be issued based on the custom and practice of the insurance and reinsurance industry. These clauses have the effect of making it even more difficult to challenge reasoned awards. Courts recognize that arbitrators have knowledge of insurance and reinsurance custom and practice that they lack, and will apply an appropriate level of deference. Concerns that courts will be more likely to vacate reasoned awards are thus unfounded.

Another objection raised for not revealing the basis of the award is that parties may try to use awards for precedential value. It is clear, however, that one panel is not bound to follow the decision of another panel, certainly not one which involved completely different parties. Written orders would likely be subject to confidentiality, which would prevent their use in other proceedings.

Another possible concern is that arbitrators may be less likely to reach a correct result because to do so in a reasoned manner might require panels to comment upon the credibility of witnesses to support their reasoning. Panels, however, can certainly

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Moreover, many arbitration clauses relieve arbitrators of the need to follow strict rules of law, and instead require awards to be issued based on the custom and practice of the insurance and reinsurance industry. These clauses have the effect of making it even more difficult to challenge reasoned awards.

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express their reasoning without commenting upon the credibility of a witness in making a finding of fact. If a comment on a witness's credibility is absolutely necessary, then it should be expressed - the goal of transparency should be paramount. Without reasoned awards, counsel and parties are sometimes treated to one-sided explanations of the award from one or more panel members after an award is issued. It is preferable for the integrity of the arbitral process to allow no post-award ex parte discussions about the award. Rather, the award should contain a sufficient explanation of the reasons for the panel's decision.

Finally, a reasoned award requires more effort by the panel, and therefore is a greater expense to the parties and perhaps creates delay in issuing the award. It is, of course, up to the parties to decide whether this increased cost (and delay) is outweighed by the benefits of a reasoned award. In our view, the benefits of a reasoned award outweigh the costs. First, the requirement of a reasoned award helps to focus the panel on each of the issues in the case. Second, it should assure that the issues presented to the panel are in fact addressed. Third, it will also help counsel focus their arguments to enable the panel to analyze those arguments in formulating the award. Finally, it will help the parties accept that they have had their "day in court" and that their claims have been considered by the panel.

If the benefits of a reasoned award outweigh any burdens, how should parties insure that the panelists issue a reasoned award? The best method is for parties to agree on an arbitration clause that requires the arbitrators to draft a reasoned award. In the event that the arbitration clause is silent, then parties may state their preference for a reasoned award early in the process, ideally at the organizational meeting. That said, such an agreement is unnecessary under the law of the United Kingdom, where an award must be supported even if the arbitration clause is silent about the form of the award.

Perhaps another method of encouraging reasoned awards would be for commercial arbitration organizations to endorse them. Currently, ARIAS-US is "agnostic" on the issue of reasoned awards, with Chapter 5 of the Practical Guide listing both the arguments for and against them. The Reinsurance Arbitration Association takes a similar view canvassing the arguments for and against reasoned awards, and recommending that if parties desire a reasoned award, they do so as early on in the process as possible. On the other hand, the arbitration rules of the CPR Institute for Dispute Resolution (Rule 14), which are rarely employed in reinsurance arbitration, require all awards to be reasoned, unless the parties agree otherwise. In sum, a reasoned award creates a more transparent dispute resolution regime.

Ultimately, arbitration and the arbitral process are creatures of agreement. Thus, it will be up to the insurers and reinsurers who rely upon the process to resolve their differences to decide whether changes in the process are in their best interests.

Conclusion

Arbitration has endured as the preferred method of dispute resolution for the reinsurance industry. But, it has also evolved over the last thirty years to be a very different creature than originally contemplated and practiced. As many have observed, the arbitral process has become more like litigation, perhaps because the disputes have grown and become more complex. In light of this evolution, it is important for the participants in the process to reexamine traditional practices to determine whether it makes sense to change them so that the process can work better. What does "better" mean? It simply means that the users of the process — insurers and reinsurers, are more satisfied with how the process works and whether it is meeting their needs. We submit that two important considerations in making those determinations are the fairness of the process and the quality of the work product — the award. In our view, neutral panels and reasoned awards would make the process fairer and more satisfactory. Nevertheless, there are countervailing arguments that should be considered. Ultimately, arbitration and the arbitral process are creatures of agreement. Thus, it will be up to the insurers and reinsurers who rely upon the process to resolve their differences to decide whether changes in the process are in their best interests. But, in considering that question, we should keep in mind the words of George Bernard Shaw: "All progress is initiated by challenging current conceptions, and executed by supplanting existing institutions." ▼

1 ARIAS Practical Guide, Chapter 2.3.
2 RAA Manual for the Resolution of Reinsurance Disputes, § D.4 (1997).
3 See Earl C. Davis, Reinsurance Arbitration: Some Thoughts for Improvement, Arias Quarterly, 4th Quarter 2003.
4 ARIAS, Umpire Selection Procedure, § B.
5 These procedures may be found at www.ArbitrationTaskForce.org
6 Hayford, A New Paradigm for Commercial Arbitration, 66 Geo. Wash. L. Rev. 443 (1998).

members on the move

Listed here are employment changes, relocations, 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.

Many changes are just starting to come in for the new directory as this issue goes to press. We will not report on those changes. The new Directory will be the new starting point.

Recent Moves

Paul Fleischacker can now be found at 7949 Crane's Pointe Way, West Palm Beach, FL 33412

Peter F. Reid has retired from his position as President of European-American, and has set up his own consulting business. He is located at 3979 Liz Circle, Doylestown, PA 18901, phone 215-348-1476, cell 973-903-5704, email PeterFReid@Comcast.net

Anthony I. Pye has moved to a new location. His address now is Law Offices of Anthony I. Pye, 307 Vose Avenue, South Orange, NJ 07079.

Allan E. Taylor's phone numbers remain the same, but he is now located at Taylor, Duane, Barton & Gilman LLP, 160 Federal Street, Boston, MA 02110.

Beverly N. Grant has moved Grant Consulting to 1119 Pacific Highway, Suite 102, San Diego, CA 92101, phone 619-794-0135, fax 619-794-0136, email bgrant@grantconsulting.us, website www.grantconsulting.us

Richard Waterman's office location hasn't moved at all, but the street changed. It is now called "American Boulevard" and has a bike lane other improvements. As a result, his new address is 3800 American Boulevard West, Suite 990. Minneapolis, MN 55431.

Changes

Fred Marziano
fgmarziano@optonline.net

ARIAS·U.S. Umpire List

The ARIAS·U.S. Umpire List is comprised of ARIAS·U.S. Certified Arbitrators who have provided the Board of Directors with satisfactory evidence of having served on at least three completed (i.e., a final award was issued) insurance or reinsurance arbitrations. The ARIAS Umpire Selection Procedure selects at random from this list. Complete information about that procedure is available on the website at www.arias-us.org.

David Appel
Richard S. Bakka
Nasri H. Barakat
Frank J. Barrett
Paul A. Bellone
Peter H. Bickford
John W. Bing
John H. Binning
Mary Ellen Burns
Robert Michael Cass
Peter C. Clemente
Dale C. Crawford
Paul Edward Dassenko
Donald T. DeCarlo
John B. Deiner
A.L. (Tony) DiPardo
John A. Dore
Robert J. Federman
Caleb L. Fowler
Charles M. Foss
James (Jay) H. Frank
Peter Frey
Ronald S. Gass
Dennis C. Gentry
William J. Gilmartin
George M. Gottheimer
Robert B. Green
Thomas A. Greene
Martin D. Haber
Franklin D. Haftl
Robert M. Hall
Robert F. Hall
Charles W. Havens III
Paul D. Hawksworth
Robert M. Huggins
Wendell Oliver Ingraham
Ronald A. Jacks
Sylvia Kaminsky
T. Richard Kennedy
Peter F. Malloy
Robert M. Mangino
Charles L. Niles Jr.
Herbert Palmberger
James J. Phair
James J. Powers
George C. Pratt
Robert C. Reinarz
Edmond F. Rondepierre
Daniel E. Schmidt IV
Richard D. Smith
N. David Thompson
Elizabeth M. Thompson
Paul C. Thomson III
Thomas M. Tobin
Jeremy R. Wallis
Paul Walther
Richard G. Waterman
Richard L. White
W. Mark Wigmore
Eugene T. Wilkinson
Ronald L. Wobbeking
Eugene Wollan

in focus

Recently Certified Arbitrators

Edgar W. Blanch, Jr.

Joseph E. Carney

Edgar W. Blanch, Jr.

Ted Blanch has been in the insurance/reinsurance arena for over 46 years. Following a stint at the St. Paul Companies and training at Continental Casualty, he joined his father at E.W. Blanch Co. in 1958. During 43 years at E.W. Blanch Co., he was involved in every aspect of reinsurance broking both in the U.S. and globally. He became CEO in 1977, a position he held for 25 years.

During his tenure at E.W. Blanch Co., the company grew from a small, largely Midwestern operation to a global power, and became the world's third largest reinsurance broker and the largest independent. In addition to product and process innovation, E.W. Blanch Co. developed and fostered its world-renowned training program.

Mr. Blanch is the recipient of numerous honors and awards, including a 1996 Ernst & Young Entrepreneur of the Year finalist and The Review Worldwide Reinsurance Lifetime Achievement Award in 2000. He also has been involved in numerous industry, business and community activities including; the Board of Trustees of The College of Insurance, the Board of Governors of the Cancer Therapy and Research Center, the Board of Directors of Northwest Airlines, Prevention First and the Fresh Water Foundation; as well as Chairman of the Brokers and Reinsurance Markets Association.

Presently, Mr. Blanch is Chairman of Secured Educational Funding, a college education-funding platform. He also serves as an expert witness in arbitrations and industry regulatory hearings. He is an independent consultant to Benfield Group, the successor company to E.W. Blanch Co. as well as other insurance and reinsurance companies.

Mr. Blanch and his wife, Joy, reside on a horse ranch in Boerne, Texas near San Antonio. He breeds Arabian show horses, has won numerous U.S. and Canadian National Championships, and develops land. He has 8 children and 8 grandchildren.

Joseph E. Carney

Joseph E. Carney has spent 33 years in the reinsurance industry, with the last 3 years focusing on insurance and reinsurance arbitrations.

Mr. Carney is the founder and president of JEC Consultants, LLC which is a company that focuses on providing reinsurance underwriting expertise and technical insight to insurance companies, reinsurance companies and law firms where extensive knowledge of custom and practice in reinsurance underwriting plays a vital role. In addition to his consulting activities, Mr. Carney serves as an arbitrator and expert witness. His extensive knowledge and skills include building underwriting teams, managing large reinsurance portfolios, developing comprehensive underwriting guidelines and procedures and guiding ceding companies in their purchase of reinsurance. He is also quite familiar with the workings of retrocession.

Mr. Carney's resume includes the position of Chief Casualty Underwriting Officer for Treaty and Facultative Operations at Gerling Global Reinsurance. It was his responsibility to oversee a treaty and facultative book of business that had a premium volume of $650 million and a staff of 82 people. His department included four strategic business units that underwrote and managed the professional liability, general casualty, alternative risk and specialty lines of business.

Other senior executive positions held by Mr. Carney were with some of the top reinsurance companies in the industry, including Swiss Re (Chief Casualty Underwriting Officer), North Star Reinsurance (Chief Underwriting Officer), Folksamerica (Casualty Treaty Manager) and Prudential Reinsurance (Director, Casualty Treaty). His responsibilities ranged from building qualified underwriting units to the production of desirable portfolios of business, while assisting in the development of corporate business plans at the board of directors' level. However, underwriting due diligence remained the principal focus in each one of these positions. Mr. Carney began performing underwriting reviews in 1974 and still emphasizes its importance in

Profiles of all certified arbitrators are on our web site at www.arias-us.org

the underwriting process today.

Mr. Carney is a graduate of St. Bonaventure University with a BA Degree in Philosophy. He also attended the Kellogg School's Advanced Executive Program and was a three-time panelist at the Reinsurance and Advanced Reinsurance Reasoning Seminars held at the University of Dallas' Graduate School of Management.

Charles W. Carrigan

Charles Carrigan is the Principal of Carrigan Accounting Associates, LLC, a Certified Public Accounting firm, established in 1971, providing accounting expertise in the evaluation of damages relating to insured commercial losses. He is a CPA who also holds the CPCU and AIC designations.

As Principal of the firm, he has more than 30 years experience auditing casualty and property claims for insurers, excess insurers and reinsurers. Mr. Carrigan has extensive first-hand experience auditing underlying financial data relating to "cash calls." Assignments have spanned the U.S., as well as substantial involvement at Lloyd's, Equitas and the London Market. In addition to evaluating claim submissions relating to facultative and treaty covers, assignments include testing premium and reserve recordings, and assisting in commutations. Casualty assignments primarily emanate from Asbestos, Pollution, Health Hazard and other environmental and product liability claims, involving thousands of claimants, millions of dollars and often include a review and development of various allocation models.

Mr. Carrigan also has substantial experience reviewing, auditing and evaluating property claims for primary and excess carriers. Property experience includes claims involving contents (stock) and time element coverage, particularly Business Interruption and Extra Expense claims, often following a major catastrophe. Assignments have included those resulting from WTC 9/11, the Northridge, California Earthquake and Hurricanes Andrew, Charley, Florence, Georges, Ivan, Lenny and others. Mr. Carrigan continues to actively work closely with adjusters and legal counsel on complex claims, often testifying in legal proceedings or participating in arbitrations and other forms of ADR.

Mr. Carrigan earned a B.S. in Accounting from Northeastern University, Boston, Massachusetts in 1964. He is a member of the American Institute of Certified Public Accountants, the Massachusetts Society of Certified Public Accountants, the Chartered Property Casualty Underwriter Society, the Loss Executives Association, the Defense Research Institute, and the Institute of Directors (London).

Charles W. Carrigan

Paul Feldsher

Paul Feldsher is Managing Director and Principal of Rossfield Advisors, LLC, which provides dispute resolution, litigation support, training and underwriting consulting services to the insurance and reinsurance industries.

Mr. Feldsher has over thirty years of underwriting experience across multiple insurance and reinsurance sectors. He has underwritten primary and excess insurance as a company underwriter and for Managing General Agencies as well as facultative and treaty reinsurance in both the direct and broker segments. He has been actively involved in the United States, Bermuda and London (including Lloyd's) markets.

Mr. Feldsher began his underwriting career with Liberty Mutual Insurance Company in 1972. He went on to underwrite Excess and Surplus Lines business for Cravens, Dargan & Co. (Pacific Coast) and as a principal of MacCready & Gutmann Insurance Services. In 1982, he moved to the reinsurance sector with North American Re (now Swiss Re America), specializing in facultative and program business.

In 1983, Mr. Feldsher joined the Trenwick Group to establish a New York office underwriting for Trenwick America Re and the Apple Syndicate at the New York Insurance Exchange. While at Trenwick, he served as home office referral underwriter, Chairman of Trenwick America Re's Underwriting Committee and on the RAA board. In 1999, he became Executive Vice President and Group Chief Underwriting Officer of Trenwick Group Ltd. with advisory oversight responsibility for underwriting policy at Trenwick's insurance and reinsurance businesses in the U.S., Bermuda and London.

Mr. Feldsher is a Phi Beta Kappa graduate of Franklin & Marshall College and earned an M.A. from Syracuse University's Maxwell

Paul Feldsher

in focus

Peter A. Gentile

John R. Heath

School of Citizenship and Public Affairs. He studied dispute resolution at the Program on Negotiation at Harvard Law School and at the J.L. Kellogg Graduate School of Management at Northwestern University. He has lectured and spoken in numerous industry forums.

Peter A. Gentile

Peter Gentile has served the insurance and reinsurance industries in various senior management roles for the last thirty years. He is currently National Director of Business Development for the Tillinghast Property/Casualty lines of business. In this role he has responsibility for establishing and broadening Tillinghast's client relationships throughout the U.S., Canada and Bermuda. His client focus includes financial consulting to major property and casualty insurance companies in the areas of underwriting, pricing, reinsurance structure, claims management, run off activities and mergers and acquisitions.

Prior to joining Towers Perrin/Tillinghast, Mr. Gentile was with the Gerling Group. As Founder, President and CEO of Gerling Global Financial Products, he was responsible for overseeing the production and underwriting of all alternative risk transfer reinsurance and structured financial products for the Gerling Group worldwide. In addition, Mr. Gentile was a member of the board of Gerling Global Reinsurance with responsibility for many of their important reinsurance relationships worldwide.

Prior to joining the Gerling Group in 1997, Mr. Gentile was with the Swiss Re Group for ten years, where he helped build the firm's reinsurance operations. As executive vice president of Swiss Re Atrium Corporation, his responsibilities included managing, structuring and underwriting Swiss Re's finite risk reinsurance business. He was also Chief Operating Officer of Western Atlantic Reinsurance Corporation, managing Swiss Re's broker market reinsurance operations in the U.S.

From 1974 to 1987, Mr. Gentile headed the Northeast U.S. insurance practice for KPMG. He is a Certified Public Accountant and holds a master's degree in taxation and finance from Pace University.

He is married with two children and lives in New Canaan, Connecticut.

John R. Heath

John Heath started his insurance and reinsurance career in London with the Lloyd's broker J. H. Minet & Company Ltd., where he worked within the American Non-Marine Claims Department, originally as a Claims Broker. He later joined the Lloyd's syndicate S. A. Meacock & Others, as a Claims Examiner, handling medical malpractice and workers compensation claims. He stayed there until the formation of the Lloyd's Non-Marine Claims Office in 1969, at which time he joined the new organization that provided claims management and handling services for a number of Non-Marine syndicates in the Lloyd's market.

In 1977, Mr. Heath moved on to become the Claims Director of H. S. Weavers (Underwriting) Agencies Ltd., which at that time was the largest underwriting agent of its kind in the London market. The agency was a major leader of casualty, umbrella liability and professional indemnity risks emanating from the United States and Canada. While he was there he was involved in numerous market committees involving such matters as asbestos, Agent Orange and other environmental claims.

In 1986 Mr. Heath emigrated to the United States and joined a firm providing third party administration services in Pennsylvania where he worked in and assisted in the development of an insurance audit and review practice. In 1998, Mr. Heath moved to Sarasota, Florida and started his own company, which provides claims management, audit, review, litigation management, and other consulting services to the insurance and reinsurance industries. He later opened an office in Scottsdale, Arizona in 2000 as the requirements of the company's clients expanded.

Mr. Heath is an Associate of the Chartered Insurance Institute and a Chartered Insurance Practitioner, by examination.

in focus

Keith E. Kaplan

Thomas B. Leonardi

Keith E. Kaplan

Keith Kaplan is a senior executive and attorney with over 22 years experience in insurance and reinsurance.

Mr. Kaplan brings a unique perspective to arbitration, as he has seen the insurance business from all sides: both buyer and seller, both direct and reinsurance. He has been both a field and home office underwriting executive. He has served as a Corporate Risk Manager. He has been a Ceded Reinsurance Officer responsible for billions of dollars of purchases across thousands of treaties of all types, sizes and products. He is an experienced auditor. Mr. Kaplan is currently responsible for the multi-billion dollar reinsurance recovery operation for the Reliance estate, and directs the run-off and liquidation of their multi-billion dollar Assumed Reinsurance portfolio.

Mr. Kaplan received his undergraduate education at the Wharton School of the University of Pennsylvania where he majored in Finance. He is an honors graduate of Temple University School of Law, and is admitted to practice in Pennsylvania. He holds the designations Chartered Property & Casualty Underwriter (CPCU), Associate in Risk Management (ARM), Associate in Insurance Accounting and Finance (AIAF), Associate in Underwriting (AU), Associate in Marine Insurance Management (AMIM), and Associate in Reinsurance (ARe).

Mr. Kaplan began his career at Home Insurance Company as a branch underwriter for commercial account business. He rose through the ranks alternating roles in Major Accounts and Commercial Lines culminating with national responsibility for Liability and Automobile lines of business.

In 1987, he moved to Reliance where he helped to form Casualty Risk Services, which later became Reliance's largest Profit Center. Beginning in 1991, Mr. Kaplan's responsibilities shifted to Ceded Reinsurance, and in 1996 he added responsibilities as corporate risk manager for all Reliance Group operations. He also served as co-head of Internal Audit. In 2000, his responsibilities expanded to include all Assumed and Ceded Reinsurance operations, and he served on the Boards of numerous insurance companies within the group.

Mr. Kaplan is a member of the Excess & Surplus Lines Claims Association, the Tort and Insurance Practice section of the American Bar Association, the Pennsylvania Bar Association, and is a founding Board Member of the Association of Insurance and Reinsurance Run-Off Companies. He is perennially listed in Marquis' Who's Who in American Law as well as Marquis' Who's Who in America, and has been a guest speaker at the Wharton School.

Thomas B. Leonardi

Thomas Leonardi is Chairman and Chief Executive Officer of Northington Partners, Inc., an insurance specialty venture capital and investment banking firm headquartered in Avon, Connecticut. During his tenure at Northington, he has provided strategic, investment, capital raising, and financial advisory services to numerous insurance companies and insurance-related specialty firms. He has advised managements and boards of directors of companies specializing in property casualty reinsurance, workers compensation, alternative risk reinsurance, environmental, media, personal lines, energy, long haul trucking, finite risk, medical malpractice insurance, and insurance brokerage. He has substantial expertise and experience in contract negotiation, complex financial transactions, partnership and shareholder issues and contract litigation.

In addition, Mr. Leonardi has raised two venture capital investment funds with total commitments in excess of $100 million. These funds have invested only in insurance or insurance-related businesses. His clients and investors at Northington have included Aetna International, AIG, Allstate, American Bankers Insurance Group, Aon, Centre Re, Discover Re, Equitable Life, The Government Development Bank of Puerto Rico, Phoenix/Home Life, PaineWebber, St. Paul, Transatlantic Re, and Zurich Insurance, among others. He has sat on the board of directors of numerous domestic and international insurance companies.

Prior to founding Northington in 1989, Mr. Leonardi was Senior Vice President of Conning & Company, where he was responsible for overseeing that firm's insurance-related mergers and acquisitions and venture capital activities. The Conning venture funds managed by Mr. Leonardi made early stage investments in a variety of start-up insurance and reinsurance companies, including Trenwick, Re Capital,

in focus

Fred G. Marziano

Thomas J. McGeough

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Mutual Risk, United Capital and Executive Risk.

In 1984, Mr. Leonardi was named President and Vice Chairman of the Beneficial Corporation's insurance subsidiaries. In this role his responsibilities included all of the life insurance operations (including Central National Life and Western National Life), international operations (including businesses in Bermuda, the UK and Australia) and the run-off and disposition of American Centennial, Beneficial's very troubled property casualty reinsurer. American Centennial's litigation and arbitration book, in both volume and dollar amounts, was enormous. He hired talented attorneys and created a new legal division within the company that was dedicated to the management of this significant litigation exposure. In addition, while at Beneficial, Mr. Leonardi was the General Counsel of Beneficial Commercial, the company's leveraged leasing division. In that capacity he was responsible for managing outside litigation counsel while handling commercial litigation matters in excess of $500 million in over thirty states.

Mr. Leonardi started his career in the late 1970s as a litigation attorney in Connecticut. The litigation department's main areas of concentration included commercial litigation and medical malpractice defense. He is a member of the bar of the state and federal courts of both Connecticut and New Jersey. He received a B. A. degree from Boston University with distinction in history, summa cum laude, and Phi Beta Kappa. He also obtained a Juris Doctor with honors from the University Of Connecticut School Of Law.

Fred G. Marziano

Fred Marziano brings many years of leadership and success in the property and casualty insurance and reinsurance business to his role as managing principal of Insurance Perspectives + Solutions, a consulting practice serving insurance and reinsurance companies, managing general agencies, brokers, agents, investors and legal firms representing the industry since 1999.

A career that began in 1966 with technical underwriting and marketing responsibilities at Aetna Casualty and Surety Co., Mr. Marziano expanded his skills and executive expertise while in senior positions at Fireman's Fund Insurance Company (EVP, Commercial Insurance, Chief Underwriting Officer and ceded reinsurance), Continental Insurance Company (President, responsible for agency and brokerage business and its claims TPA subsidiary, Underwriters Adjusting Corporation), Gerling Global Reinsurance Company (President and CEO, structuring, licensing and establishing it as a major reinsurer in the United States), and Liberty Mutual Group (President of its Commercial Insurance Holdings Division, now RAM), where he founded and developed that company's independent agency sector by buying/merging six regional P/C companies into a single, nationwide entity.

Over the course of his career, Mr. Marziano has assessed more than 65 property and casualty insurers while managing, acquiring, merging, building and restructuring companies. Since 1999, his practice has expanded to include expert witness opinions and becoming certified by ARIAS•U.S. as an arbitrator.

Mr. Marziano's areas of expertise include a firm grasp of the major business operations and functions of P&C insurance and reinsurance companies, MGAs, TPAs and independent agents/brokers, with technical emphasis on underwriting, treaties, claims, marketing and distribution.

Fred Marziano has served on the Boards of the Reinsurance Association of America, Association of California Insurance Companies, National Council on Compensation Insurance, Insurance Services Office, AICPCU, Cresta Financial Holdings, Inc, Delphi Systems, Inroads, Inc. and the insurance companies he managed.

Thomas J. McGeough

Thomas McGeough is an attorney with 40 years of experience as both a claim executive and in-house counsel for insurance and reinsurance companies. He is currently the Executive Vice President, General Counsel and Corporate Secretary of Gerling Global Reinsurance Corporation of America, Constitution Insurance Company and Global US Holdings, Inc. He serves on the board, as well as the executive committees of these companies.

Mr. McGeough graduated from St. John's University's College of Business Administration in 1962 and immediately entered the United States Army where he served in West Germany until 1964. He

joined Royal Globe Insurance Company as a trainee liability claim examiner and by 1969 had risen to become one of four national liability claim managers. During this time he completed St. John's University School of Law and graduated in 1968. He was admitted to the New York Bar in 1969. While at Royal, he specialized in high exposure product liability losses for Fortune 500 companies, headed up litigation management, and served as the senior coverage expert on the home office liability claim staff. In 1973, he left the claim department to join Royal's General Counsel's office.

In 1975, he started his long career in reinsurance as Assistant Vice President and Assistant General Counsel at Skandia America Group. From 1984 through 1993, he served as Vice President and Associate General Counsel at Skandia. From 1978 through 1982, he was Associate General Counsel of Prudential Reinsurance Company.

In 1993 and 1994, he was in private practice and counsel to the Deputy Liquidator of eight companies in liquidation. Since 1997, he has been at Gerling, first as Director of Operations of the United States Branch, then Chief Claims Officer, and now General Counsel.

Over the years, Mr. McGeough's areas of specialization have been complex coverage issues, product liability, environmental claims, asbestos matters, and large litigation and arbitration management. He has authored two coverage articles in Defense Research Institute monographs and addressed several bar and industry groups on insurance coverage and reinsurance.

His extensive experience in both insurance and reinsurance, both as a claim executive and in-house lawyer, has involved him in, not only active companies, but also those in run off. He has unique experience managing complex matters in dispute for ongoing entities, as well as those in various stages of retirement.

Christian M. Milton

Christian Milton is Vice President - Reinsurance for American International Group in New York. Mr. Milton is responsible for the management of the oversight and purchasing of reinsurance by all affiliates and subsidiaries of AIG, including the accounting, EDP, dispute resolution, security and reinsurance relationships of the company. He has over 30 years experience in the field of reinsurance.

Mr. Milton is currently an Adjunct Professor of the College of Insurance and is the Director of Rom Reinsurance Management, Inc. in New York. He is a graduate of the City of London Polytechnic.

Richard E. Smith

Richard Smith is President and Principal of NorthPort Advisors, Inc., a consulting firm providing insurance and reinsurance consulting and dispute resolution services. Mr. Smith's services as an arbitrator and expert witness stem from more than thirty years experience in the property casualty insurance and reinsurance business.

More recently, Mr. Smith served as EVP & COO of Zurich Reinsurance Centre (ZRC) during the IPO on the NYSE in 1993. From 1995-2003, Mr. Smith served as the President and CEO of ZRC, Zurich Re (North America), Inc. and Converium Reinsurance (North America) Inc., respectively. At ZRC, he sat on the board since its inception as a public company and subsequently oversaw Zurich's privatization via its merger with Centre Reinsurance Company of NY in 1997. At Converium, Mr. Smith served on the boards of the U.S., German and Swiss reinsurance companies.

Mr. Smith is an experienced reinsurance broker who handled both traditional as well as non-traditional broking services. As Senior Vice President and a member of the board at Guy Carpenter & Company, he created the Market Information Department and Finite Risk brokerage unit.

As Vice President at A.M. Best Company, he had overall responsibility for the Property Casualty Division and created the Best's Casualty Loss Reserve Development Reports.

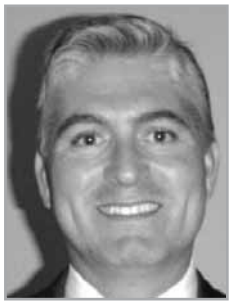
Mr. Smith served on active duty as a fighter pilot and naval officer in the U.S. Navy from 1967-1970, and achieved the rank of LT, USNR. He has a BA from U.S. International University in San Diego, California and is a Trustee and Vice President of the Executive Committee of The Children's Storefront, a private, non-profit, tuition-free school in Harlem.

in focus

Christian M. Milton

Richard E. Smith

in focus



David Spiegler

Richard E. Stewart

Michael H. Studley

David Spiegler

David Spiegler is president of DS A.I.R. Consulting, LLC, a firm he founded in early 2003 to provide actuarial, insurance and reinsurance consulting services. His clients have included insurers, reinsurers, brokers, investment bankers and law firms. Using his 22 years of insurance and reinsurance experience, he advises his clients on a wide range of actuarial and underwriting issues, including due diligence and expert witness assignments.

Prior to embarking on his consulting career, Mr. Spiegler was Senior Vice President & Chief Actuary of American Re-Insurance Company in Princeton, New Jersey. In that role he was the leader of the Risk Evaluation & Management Division, responsible for all pricing and reserving functions, as well as the company's risk management operations. These responsibilities included the auditing of client companies for compliance to contractual terms and conditions, the company's internal underwriting audit function, strategic and operational risk management and the catastrophe management process. Mr. Spiegler was a member of American Re's Senior Management Group and served on their Risk Management Committee, Security Committee, Reserve Committee, Strategic Planning Review Group and the Am-Re University Board of Advisors. Furthermore, he was the leader of the Munich Re Group's global casualty underwriting knowledge management initiative.

During his 151/2 years at American Re, Mr. Spiegler also held the positions of Chief Underwriting Officer of American Re Financial Products and Underwriting Manager of the Western Treaty Region of the Domestic Insurance Company Operations division. In these roles, he was responsible for underwriting operations which included finite risk and financial reinsurance, financial guarantee reinsurance, structured finance transactions, financially related facultative business, and all lines of traditional treaty reinsurance business.

Prior to joining American Re, Mr. Spiegler gained primary insurance experience at the Home Insurance Company, and workers compensation experience at the New York Compensation Insurance Rating Board, both in New York City.

Mr. Spiegler is a Fellow of the Casualty Actuarial Society, a Fellow of the Conference of Consulting Actuaries and a Member of the American Academy of Actuaries. He has a Bachelor of Science degree in Mathematics from the State University of New York at Albany (1982). He also completed the Advanced Executive Education Program at the Wharton School of the University of Pennsylvania. He has served on several committees of the Casualty Actuarial Society and the Insurance Services Office, and has been a frequent speaker at industry events, focusing on both actuarial and underwriting matters.

Richard E. Stewart

Dick Stewart has been arbitrating since the late 1970s, and at one time was a director of the American Arbitration Association. For the last 23 years, he has been with Stewart Economics, Inc., a consulting firm specializing in insurance. Its work is fairly evenly split among insurers, policyholders, and government.

A Rhodes Scholar and honors graduate of Oxford and Harvard Law, he was Superintendent of Insurance of New York (and also President of the NAIC and a member of the Administrative Conference of the US), General Counsel of Citibank (and Director of General Re), and Chief Financial Officer of the Chubb Group (and a founder of the Insurance Statutory Accounting Principles Board, the Risk Theory Seminar, and the New York Insurance Exchange), before forming Stewart Economics in 1981.

Michael H. Studley

Michael Studley has been employed by the John Hancock Group since 1976. More recently he has served as Division Head in charge of all litigation, all life and health products and government relations, as well as reinsurance.

From 1980 until John Hancock exited the property and casualty business, Mr. Studley served as General Counsel and was involved in a number of corporate merger, acquisition and divestiture endeavors. He has served and continues to serve as a director of several of the Hancock companies.

Having worked in both life insurance and property and casualty insurance (direct insurance and both assumed and ceded

reinsurance), Mr. Studley has experience in the life, health, disability, annuity, long term care, captive, and property and casualty fields.

Mr. Studley is a graduate of Amherst College, Boston University School of Law and Columbia Executive Business School.

James D. Yulga

James Yulga has over 36 years experience in insurance and reinsurance casualty underwriting giving him an in-depth knowledge of casualty insurance and reinsurance practices.

Mr. Yulga began his insurance career with Employers Insurance of Wausau as a casualty underwriter in 1968, handling manufacturing and contracting accounts with an emphasis in workmen compensation. In 1972 he moved to the reinsurance division as a treaty underwriter handling property and casualty treaty accounts, starting his 32-year reinsurance career. He attended Robert Strain's first Reinsurance Seminar in 1973 and obtained his CPCU in 1974. In 1978 Mr. Yulga became manager of the Assumed Reinsurance Division with additional responsibility for the ceded reinsurance program.

In August of 1985 Mr. Yulga joined Transatlantic Reinsurance Company in New York as Vice President to develop a portfolio of broker produced treaty reinsurance. During the next 9 years he helped establish Transatlantic as a premier casualty reinsurer with emphasis in excess casualty treaties. In 1994 Mr. Yulga joined St. Paul Re as a Senior Vice President managing a treaty unit underwriting all lines of treaty casualty reinsurance, including Professional Liability, Workers Compensation and General Liability. In November 2002, St. Paul Insurance Company spun-off St. Paul Re via an IPO as Platinum Underwriters Reinsurance Inc. Mr. Yulga currently serves as Platinum's Deputy Casualty Department Head.

in focus

James D. Yulga

"Meet Us in Las Vegas."

May 4-6, 2005 is the date for the ARIAS•U.S. Spring Conference.

Mark your calendar and save the date.

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See website calendar for details.

case notes corner

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

Ronald S. Gass

When An Arbitrator Dies: Federal Court Rules That The Arbitration Must "Begin Fresh"

Ronald S. Gass*
The Gass Company, Inc.

On rare occasions, arbitrations come to an abrupt halt because one of the arbitrators dies or becomes incapacitated. Reinsurance arbitration clauses seldom address this particular contingency. If the arbitration is in its earliest stages (e.g., prior to the panel's organizational meeting), or after the organizational meeting but before any evidentiary hearings have taken place, a party may prefer to appoint a substitute arbitrator to pick up where the prior one left off. This approach works well when both sides agree, but what happens if evidentiary hearings have taken place or panel deliberations have commenced and the other side objects to the replacement arbitrator? This was the issue decided recently by a New York federal district court. Applying Second Circuit precedent, it ruled that an 11-year-old arbitration in its post-hearing briefing phase must "begin afresh" after one of the party-arbitrators died.

On rare occasions, arbitrations come to an abrupt halt because one of the arbitrators dies or becomes incapacitated. Reinsurance arbitration clauses seldom address this particular contingency.

In a protracted non-reinsurance arbitration case, a division of the Mexican state-owned oil company, Pemex-Refinacion ("Pemex"), chartered a tanker from a Georgian shipping company, Tbilisi Shipping Co. Ltd. ("Tbilisi"), in late 1992 to transport certain oil products. During one of the tanker's voyages, parcels of unleaded gasoline and diesel oil became cross-contaminated while being unloaded. Although Pemex was able to salvage the cargo, it incurred over a half million dollars in salvage costs and other losses. Invoking the charter contract's arbitration clause, Tbilisi initiated an arbitration in 1993 to determine the quantum of damages. Shortly thereafter, the parties appointed their arbitrators, who, in turn, appointed an umpire.

Nothing further happening until 1995 when Pemex filed with the panel a brief outline of its claims together with preliminary documentation, and Tbilisi filed an application to dismiss Pemex's claims as time-barred, which the panel unanimously rejected. It was not until 1996 that Pemex filed its Statement of Claim, and between then and 2003, the panel held 16 hearings and completed the evidentiary stage of the arbitration.

In mid-2003, Pemex filed its main post-hearing brief, but before Tbilisi could submit its brief and before panel deliberations had commenced, Pemex's party-arbitrator died. Pemex sought to appoint a replacement unilaterally, but Tbilisi objected. Pemex then filed an action in federal district court to enforce its appointment, and Tbilisi cross-moved for an order compelling Pemex to recommence the arbitration with a newly constituted panel.

The district court cited the "general rule" in the Second Circuit that "the arbitration must commence anew with a fresh panel" when one member of a three-member panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, *Trade and Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 194 (2d Cir. 1991). It then considered whether this case presented any "special circumstances" warranting one of the recognized exceptions to this rule such as when vacancies occur during the very early stages of the arbitration or when a panel has rendered a final decision with respect to only some of the issues raised in the arbitration (e.g., a bifurcated arbitration with separate liability and damages phases).

In rejecting Pemex's "creative" arguments that this arbitration was the sort of bifurcated proceeding that fit one of the exceptions to the general rule, the court observed that arbitrators play a crucial role "from assessing the credibility of witnesses to serving as advocates for their respective appointees;" hence, "it makes sense that it is only in instances where a panel is completely without power to revisit an issue that the Court has approved the

•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.gass-co.com.

appointment of a replacement." While arbitrator replacement under these circumstances, even at such a late stage in the proceedings, is still possible, both parties must waive any objections. Given that the unresolved part of this arbitration concerning damages had progressed nearly to the point of completion (i.e., Tbilisi needed only to file is main post-hearing brief and each party had to file their reply briefs) and in the absence of any waiver by Tbilisi, this case fit squarely into the Second Circuit's general rule that the arbitration must begin afresh.

In denying Pemex's motion to appoint a replacement arbitrator and ordering a new arbitration proceeding, the court acknowledged that Tbilisi was "at liberty" to reappoint its prior arbitrator or to select a new one. Although the court agreed with Pemex's sentiment that this result was a "regrettable loss of time and money" after 11 years of proceedings, its decision was "made easier" in this case because some of the fault for this arbitration's extensive length was attributable to Pemex.

Pemex-Refinacion v. Tbilisi Shipping Co. Ltd. (S.D.N.Y. Sept. 16, 2004) (Baer, J.), *reported in* New York Law Journal (Sept. 16, 2004) [Many thanks to my colleague Peter Bickford for bringing this interesting decision to my attention.]

Federal Magistrate Judge Appoints "Most Qualified" Umpire After Deadlock

Reinsurance arbitration clauses often provide for the selection of the umpire using the "pick 3, strike 2, and draw lots" methodology; however, there are many variations on this theme. In an interesting recent case, the parties in a reinsurance arbitration referred umpire selection to a Connecticut federal district court in accordance with the treaty's arbitration clause. The magistrate judge then applied several key criteria to select the "most qualified" umpire from the parties' list of candidates after the party-arbitrators became deadlocked.

This dispute arose when the reinsurer refused to pay the cedent its share of a settlement of certain Enron Corporation/Mahonia/JPMorgan Chase bond losses on the ground that the Enron bonds were not surety bonds but financial guaranty insurance that could not be properly ceded to the reinsurance treaty under New York insurance law. After the party-arbitrators were appointed and several months had elapsed, they were unable to agree on an umpire.

The arbitration clause anticipated this contingency and provided that the umpire be selected from a list of six candidates (three to be named by each side) in accordance with an unusual three-prong process: (1) by a judge of the federal district court having jurisdiction over the geographical area in which the arbitration was to take place; (2) if the federal court declined to act, by the state court having general jurisdiction in such area; or (3) if the state court declined to act, by the arbitrators who would resort to the more traditional "strike 2 and draw lots" method. Given the deadlock, the parties invoked the first prong of the arbitration clause and submitted their candidate list to the federal district court.

Citing Section 5 of the Federal Arbitration Act (regarding federal court appointments of arbitrators or umpires when parties are deadlocked or one side defaults) as the court's authority for selecting the umpire in this case, the magistrate judge first took stock of "the qualities and characteristics desirable in an umpire for this type of reinsurance arbitration." Given the sparse case law interpreting Section 5, he examined the arbitrator qualification requirements in the treaty for guidance, i.e., they all must be "disinterested active or former officials of insurance or reinsurance companies or underwriters at Lloyd's, London, not under the control and without past employment or directorial relationships to either party to this Agreement." Second, the umpire's familiarity with the custom and practice of the applicable insurance and reinsurance business must be considered. Third, the candidate must be impartial because it was "axiomatic" that the umpire be impartial so that the panel's decisions will be fair and based upon the merits of the dispute and not the personal influence or identity of the disputants. Fourth, the umpire must be able to manage the arbitration process in an organized, efficient, and fair manner, with the judge citing the ARIAS-U.S. *Code of Conduct* and observing that this factor was "especially important" here because the arbitration clause did not provide for the

CONTINUED ON PAGE 32

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CONTINUED FROM PAGE 31

American Arbitration Association or similar entity to serve as administrator.

Applying these criteria to the list of six candidates presented by the parties, the court immediately eliminated two of the reinsurer's candidates because they lacked any experience as arbitrators. The reinsurer's third candidate did have extensive insurance and reinsurance industry experience as a senior officer, director, and counsel to a reinsurer; had served as either an umpire or arbitrator in over 150 arbitrations; had some familiarity with the subject matter based on his prior umpire experience; and was an ARIAS-U.S. certified arbitrator and umpire (although this last factor was not cited by the court).

Despite these qualifications, the judge found that this umpire candidate's prior arbitration experience involving *both* parties and his previous role as an expert for the reinsurer several years before called his "neutrality into question." He had had five prior arbitrations involving the cedent (two as party-arbitrator for a party *adverse* to the cedent; two as umpire; and one as sole arbitrator) and the reinsurer (one as party-arbitrator for the reinsurer; one as umpire; and one as an expert witness for the reinsurer). It was this candidate's prior service as an expert witness for the reinsurer and its counsel that, according to the judge, gave "rise to a business relationship that especially concerns the court." Because of it, "the court is not certain that he could reasonably be expected to be impartial," and "the mere impression of possible bias is enough for the court to pass on his appointment as umpire."

As for the cedent's three candidates, each had served or was serving as an executive of an insurance or reinsurance company, had significant arbitration experience, and was an ARIAS-U.S. certified arbitrator and umpire. However, the court found that one of the three was the "most experienced" having served as a party-arbitrator in about 30 reinsurance disputes and as an umpire or sole arbitrator in about 90. Although that candidate was an actuary and challenged by the reinsurer as lacking the necessary experience in underwriting surety bonds or financial guaranties, the court appointed him as the umpire after finding that his extensive experience in both the insurance and reinsurance industry and as a reinsurance arbitrator "makes up for this alleged shortcoming."

In re Travelers Indemnity Co. v. Everest Reinsurance Co., Ruling on Petition to Appoint Arbitration Umpire, Civil 3:04 MC 196 (TPS) (D. Conn. Oct. __, 2004) (Smith, Magis. J.) [Many thanks to my colleague Charlie Foss for bringing this interesting unpublished ruling to my attention.] ▼

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as of year-end 2004

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Hugh Alexander
John P. Allare
David Appel
Richard S. Bakka
Nasri H. Barakat
Linda Martin Barber
Frank J. Barrett
Clive A. R. Becker-Jones
Bernard R. Beckerlegge
David L. Beebe
Paul A. Bellone
Dennis A. Bentley
Peter H. Bickford
Katherine Lee Billingham
John W. Bing
John H. Binning
Edgar Ward Blanch Jr.
Christian H. Bouckaert
Paul D. Brink
Robert C. Bruno
George A. Budd
Janet J. Burak
Mary Ellen Burns
Malcolm B. Burton
James I. Cameron
Bruce A. Carlson
Joseph E. Carney
Charles W. Carrigan
John R. Cashin
Marvin J. Cashion
Robert Michael Cass
John F. Chaplin
Dewey P. Clark
Peter C. Clemente
John D. Cole
Richard E. Cole
Robert L. Comeau
William P. Condon
James P. Corcoran
Carol K. Correia
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Dale C. Crawford
John J. Cuff
Patrick B. Cummings
Bina T. Dagar
Thomas M. Daly
Paul Edward Dassenko
Michael S. Davis
Donald T. DeCarlo
John B. Deiner
Howard D. Denbin
John S. Diaconis

Theodor Dielmann
A.L. (Tony) DiPardo
Brian J. Donnelly
John A. Dore
Andrew Ian Douglass
James F. Dowd
John H. Drew
Clement S. Dwyer Jr.
Michael W. Elgee
Charles S. Ernst
Robert J. Federman
Paul Feldsher
Paul R. Fleischacker
Charles M. Foss
Caleb L. Fowler
William W. Fox Jr.
James (Jay) H. Frank
Gregg C. Frederick
Peter Frey
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James P. Galasso
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Peter A. Gentile
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Ernest G. Georgi
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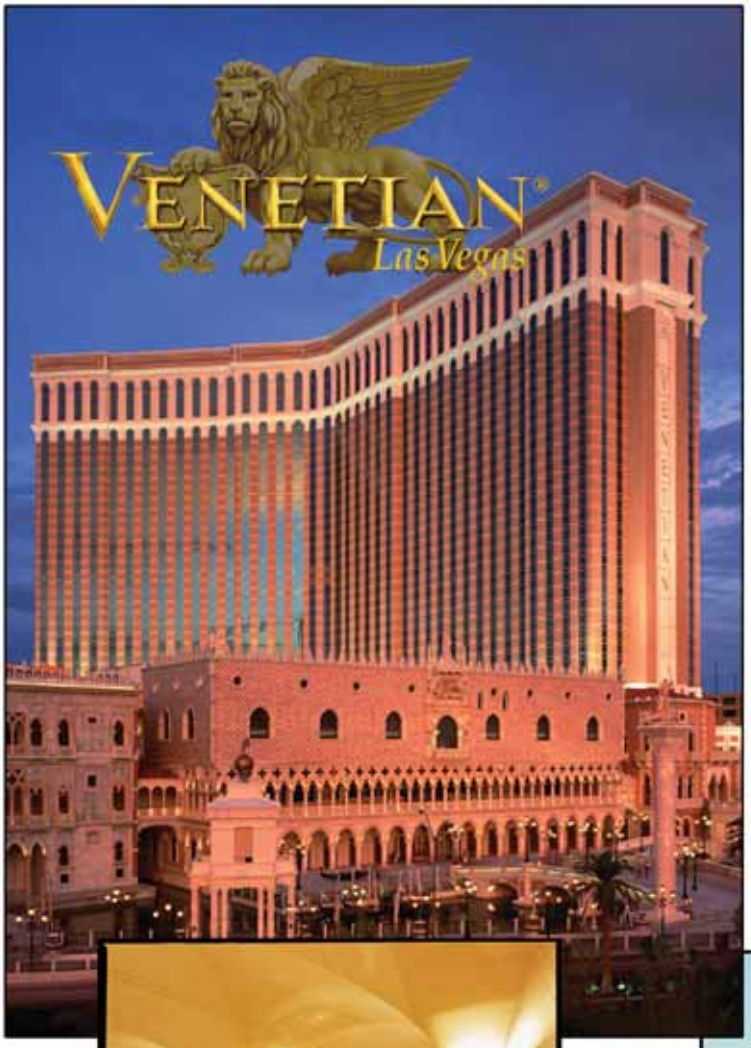
Eugene Wollan
James D. Yulga
Michael C. Zeller

BIOGRAPHICAL PROFILES ARE AVAILABLE AT WWW.ARIAS-US.ORG

The Venetian Prepares for The ARIAS•U.S. 2005 Spring Conference



The closer we get to the 2005 Spring Conference, the better The Venetian looks. This will be a great three days! Sure, we have a lot of work to do (and the preliminary planning suggests these sessions will be some of the best we have ever had). However, there will be enough time outside the meetings to enjoy the experience.

The restaurants, shops, museums, spa, open spaces, and canal are 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, a towering Campanile.

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.

We have reserved a large room block for the nights of May 4th and 5th (the conference runs from Wednesday noon until Friday noon). We have reserved fewer for Friday and Saturday, since we are not sure how many will plan to stay and we will 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. The basic ARIAS rate of $249 is guaranteed, as long as rooms are available in the reserved block.

Reservations may be made by linking from the ARIAS website calendar, which directly enters the ARIAS reservation page, or by calling 888-283-6423. If you call, 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.

Registration information and details of the conference sessions will be on the website and sent to members at the end of February. Online registration will open then, as well. In the meantime, as new information develops, it will be posted on the website calendar.

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

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

An Invitation...

The rapid growth of ARIAS·U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS·U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of December, 2004, ARIAS·U.S. was comprised of 402 individual members and 73 corporate memberships, totaling 750 individual members and designated corporate representatives, of which 227 are 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 62 ARIAS 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 in 2003 was the "Search for Arbitrators" feature on this website that searches the detailed background experience of our certified arbitrators. Results are linked to their biographical 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.

In January of 2005, the society will publish Volume VI of the ARIAS•U.S. Directory, with Profiles of Certified Arbitrators. The organization also publishes the Practical Guide to Reinsurance Arbitration Procedure (2004 Revised Edition) 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.

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 and an online application system are also available there. 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,

Thomas S. Orr
Chairman

Mary A. Lopatto
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
35 BEECHWOOD AVENUE
MOUNT VERNON, NY 10553

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.

FAX: (914) 699-2025

(914) 699-2020, ext. 116

email: wyankus@cinn.com

NAME & POSITION _____

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STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ FAX _____

E-MAIL ADDRESS _____

Fees and Annual Dues: Effective 2/28/2003

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE:	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*:	$250	$750
FIRST-YEAR DUES AS OF APRIL 1:	$167	$500 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1:	$83	$250 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

* Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.

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.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
35 Beechwood Avenue, Mt. Vernon, NY 10553

Payment by credit card (fax or mail): Please charge my credit card:
☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____
Account no. _____Exp. ____/____/____
Cardholder's name (please print) _____
Cardholder's address _____
Signature _____

Online membership application is available with a credit card at www.arias-us.org.

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