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Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties

Results of Our Arbitration Survey

Recently Certified Arbitrators

editor's comments

T. Richard Kennedy

As we approach the 11th Annual Meeting of ARIAS•US, it is appropriate to note that our organization is stronger than ever. Our membership now stands at approximately 450 individual and 85 corporate members. We have 264 individuals certified as arbitrators, with 70 in the umpire candidate list. Most importantly, ARIAS•US continues to provide exceptional programs and articles designed to educate persons involved in the arbitration process.

Having spent nearly 40 years as counsel, a client, and now an arbitrator in the process of resolving insurance and reinsurance disputes, I have no hesitation in stating that arbitration proceedings today generally are conducted with much greater skill and efficiency than in the past. I am equally certain that the dedicated work of those involved in ARIAS•US is the principal reason for the improvement in the process. However, our work is never ended. Disputes among insureds, insurers, and reinsurers are inherent in the very nature of the business. In order to resolve those disputes in the most efficient and expeditious manner, we must constantly strive to improve the skills of each of us and to train people coming into the field in ways to deal with the many complex questions and issues that arise in the dispute-resolution process.

We are grateful to those brokers and other intermediaries who voluntarily respond to requests for information by way of pre-hearing discovery in reinsurance and insurance arbitrations. However, refusal of intermediaries in certain cases to participate in discovery can be a serious problem for parties seeking to resolve their dispute. In the article in this issue entitled *Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties – Updated Caselaw and Commentary*, Attorneys Michele Jacobson, Robert Lewin, Royce Cohen and Andrew Lewner provide an excellent update of the current state of the law as well as suggestions of methods that might be utilized by industry professionals to obtain greater uniformity and certainty than is presently provided by the court decisions.

In *Results of Our Arbitration Survey* Rhonda Rittenberg and David Thirkill discuss the results of a survey of industry professionals recently conducted by the authors. One of the findings of the survey was that a substantial majority of both client and arbitrator respondents felt that arbitrations have become too "legalistic." This is especially interesting in light of a previous observation by Richard E. Stewart (*The History of Arbitration*, Quarterly, Volume 11, Number 3) that reinsurance arbitrations incepted not in the Common Law, but rather in the Law Merchant, which had at its purpose the furthering of commerce by employing informality, speed, low cost and commercial realism. We need to heed the concerns expressed in the Survey article even though respondents to the survey indicated a continuing strong preference for arbitration as a means of resolving reinsurance disputes.

Finally, on behalf of the Editors, I want to congratulate and offer our best wishes to CINN staff on the move to new offices in Yonkers. We look forward to working with you at that location in the years to come. ▼

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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.

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feature

Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties — Updated Caselaw and Commentary


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Introduction

Reinsurance intermediaries play an integral role in the formation of contracts of reinsurance. In that role, intermediaries are responsible, in large measure, for the negotiation and placement of reinsurance agreements, the wordings of the agreements, and the flow of funds under those agreements. Thus, a great deal of information pertinent to various aspects of the reinsurance transaction lies with the reinsurance intermediary.

As has become the custom in the reinsurance industry, many contracts of reinsurance contain an arbitration clause requiring that the parties to the reinsurance contract arbitrate their disputes. Arbitration clauses are governed by the vast body of state and federal law concerning arbitration, most notably, the Federal Arbitration Act ("FAA"). As many practitioners and arbitrators have found, arbitration law can be unfriendly towards pre-hearing discovery of non-parties, especially when it comes to oral examination prior to the arbitration hearing.

Standing on the reluctance of some courts to require non-parties to submit to pre-hearing discovery, and to the frustration of parties to arbitrations and their panelists, intermediaries have increasingly refused to participate in pre-hearing discovery. Oftentimes, the reinsurance dispute at hand involves alleged misrepresentations concerning the risks ceded under a treaty or interpretation of wordings. Arbitration has been chosen by the reinsurance industry as the dispute resolution process of choice primarily because the parties are seeking an expert determination by knowledgeable industry executives. For this to occur, all of the relevant facts and circumstances are needed. The reinsurance intermediary is in a unique position to provide crucial information concerning these matters. However, whether due to concerns relating to their own errors and omissions liability, or the desire not to take positions in disputes between clients, intermediaries have simply refused to produce documents and appear for depositions, even when subpoenaed by arbitration panels.

Obviously, the refusal of intermediaries to participate in pre-hearing discovery is a serious problem for parties to reinsurance disputes. The intermediary is often the person most knowledgeable about the disputed transaction, and often is in possession of the pertinent documents. An intermediary's refusal to appear for a deposition or to produce relevant documents can impede the arbitration process. Moreover, while the rationale espoused by courts for refusing non-party discovery in arbitration surrounds the avoidance of undue hardship for those that do not derive any benefit under the contract, such is not the case for reinsurance intermediaries. Indeed, reinsurance intermediaries are certainly not strangers to the reinsurance contract. To the contrary, reinsurance intermediaries are not only involved in drafting the contract, but receive a financial benefit thereunder in the form of commission. Thus, the concerns underlying the rationale for refusing to subject non-parties to pre-hearing discovery are not present for reinsurance intermediaries.

We addressed this very topic in 2003, at which time there was a considerable split amongst the courts on the issue of pre-hearing discovery from non-parties. At that time, we noted that, depending on the

jurisdiction, pre-hearing discovery from non-parties was often difficult to obtain, but that there was a lack of uniformity amongst the courts on this issue. Over the past two years, the split in authority has only deepened, leaving many practitioners unsure about their options for obtaining this often crucial discovery.[2] The split in the federal circuits is replicated in the United States District Court for the Southern District of New York, with certain courts issuing more permissible rulings than others.[3] Moreover, the most recent Circuit Court ruling, *Hay Group v. E.B.S. Acquisition Corp.*,[4] was especially harsh, holding that arbitration panels are entirely without power to subpoena either documents or deposition testimony from non-parties. While it is too early to tell what effect the *Hay Group* decision will have on this developing landscape, at least one court has cited it in refusing to enforce pre-hearing discovery subpoenas issued to non-parties.[5]

In light of the direction that the courts appear to be moving, parties to reinsurance arbitrations need to develop alternative means by which this important discovery can be obtained. This article picks up where our prior article left off, addressing the current state of the law on obtaining pre-hearing discovery from non-parties in the arbitration context, and suggesting potential avenues for further efforts in that regard.

I. THE INTEGRAL ROLE OF THE REINSURANCE INTERMEDIARY

A reinsurance intermediary plays an integral role in reinsurance transactions, performing such tasks as (1) placing the risk on behalf of a ceding company; (2) participating in the negotiation of the reinsurance contract; and (3) serving as a conduit for communication between the cedent and the reinsurer, transmitting payments, collecting balances due and settling losses.[6] In compensation for these, and other functions, the intermediary usually receives a percentage of the premium ceded to the reinsurer.[7] As a general rule, most cases recognize an agency relationship between the intermediary and the cedent.[8] Depending upon the relationship between the reinsurer and the intermediary, however, it is also possible that an intermediary could be deemed a dual agent.[9]

Many, if not most, reinsurance agreements contain "intermediary clauses" which designate an intermediary, setting out its role in communications between the parties and its agency status as for purposes of collecting amounts due between the parties. The intermediary is generally responsible for drafting the intermediary clause and including it in the reinsurance agreement.[10] The following is a sample intermediary clause:

> (*Intermediary Name*) is hereby recognized as the Intermediary negotiating this Contract for all business hereunder. All communications (including but not limited to notices, statements, premium, return premium, commissions, taxes, losses, loss adjustment expense, salvages and loss settlements) relating thereto shall be transmitted to the Company or the Reinsurer through (*Intermediary Name and Address*). Payments by the Company to the Intermediary shall be deemed to constitute payment to the Reinsurer. Payments by the Reinsurer to the Intermediary shall be deemed to constitute payment to the Company only to the extent that such payments are actually received by the Company.[11]

The intermediary may therefore be said to have consented orally or by conduct to a duty of faithful transmission under the intermediary clause or be estopped to deny it.[12] It has been held that the reinsurance contract is a three-party contract, even though it is only signed by two parties once the intermediary begins performance under the contract or accepts benefits under it.[13] While the intermediary is a beneficiary under the reinsurance contract, the intermediary is generally not a signatory to that contract. Moreover, reinsurance intermediaries are often the architects of the wordings for the reinsurance agreement, utilizing their own forms. Therefore, although the reinsurance intermediary may not be a signatory to a reinsurance contract, having drafted the contract, and having accepted the benefits and responsibilities thereunder, it should be bound to the parties via that contract, and be required to cooperate with the parties as their fiduciary in the dispute resolution mechanisms set out in that contract.

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Within an agreement, parties cannot only agree to arbitrate but they can also impose discovery obligations on the signatories. Parties cannot, however, impose discovery obligations on non-signatories.

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II. THE CURRENT STATE OF THE LAW WITH RESPECT TO PRE-HEARING *DOCUMENTARY AND TESTIMONIAL DISCOVERY FROM NON-PARTIES*

When we first examined this issue, there was a dichotomy between the various federal courts as to the availability of pre-hearing discovery from non-parties. While this is still true, to some extent, the trend appears to be towards the inability to obtain such discovery. Increasingly, reinsurance intermediaries have become less than cooperative when dealing with arbitration panels. As reinsurance intermediaries possess critical information and may, indeed, be the sole source of that information, this issue is especially pertinent in the context of reinsurance arbitrations. Parties may have lost their documents due to the passage of time, personnel changes or document retention policies. And, where rescission on the grounds of misrepresentation of the reinsured risk is at issue, or the wordings are ambiguous, the reinsurance intermediary is the lynchpin. Thus, broad discovery from the intermediary in the arbitration process is essential. The current state of the law, however, appears to be inhospitable towards broad discovery.

A. The Federal Arbitration Act

The FAA[14] defines an arbitration panel's authority to require non-signatories or non-parties to submit to discovery.[15] Within an agreement, parties cannot only agree to arbitrate but they can also impose discovery obligations on the signatories. Parties cannot, however, impose discovery obligations on non-signatories. Section 7 of the FAA states:

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

Federal Arbitration Act, 9 U.S.C. § 7 (emphasis supplied.).[16] While specifically addressing the subpoena power of arbitration panels to require non-parties to appear and produce at the arbitration hearing, the FAA does not address the arbitrators' power to require non-parties to submit to pre-hearing discovery. This "gap" in the FAA has resulted in a split of authority, which can be divided into five categories: (1) no pre-hearing discovery from non-parties permitted unless there is a special need; (2) no pre-hearing discovery of non-parties, even upon a showing of special need; (3) pre-hearing discovery allowed for non-party document requests, but not allowed for non-party depositions; (4) broad pre-hearing discovery permitted; and (5) non-party discovery as set forth in the arbitration agreement.

1. Pre-Hearing Discovery Allowed Only if a *"Special Need" is Shown*

A restrictive approach, embraced by the United States Court of Appeals for the Fourth Circuit, permits pre-hearing discovery from non-parties only in instances of demonstrated "special need." In *Comsat Corp. v. National Science Foundation* (1999),[17] the Fourth Circuit held that, since non-parties are not bound by the underlying arbitration agreement, an arbitrator has no power to compel a non-party to participate in discovery absent authority derived from the FAA. There, an arbitration panel had issued a pre-hearing subpoena to non-party National Science Foundation ("NSF") to produce certain records and employee

testimony related to a construction contract between Comsat Corporation ("Comsat") and Associated Universities, Incorporated ("AUI"). NSF refused to comply with the subpoena and a district court ordered it to do so.[18] The Fourth Circuit reversed the holding, and restricted the arbitrators' power over non-parties to the actual appearance before the arbitration panel at the hearing.[19]

The Court held that the subpoena powers of an arbitrator should be strictly limited to those explicitly provided for in the FAA. Reading Section 7 of the FAA narrowly, the Fourth Circuit held that the phrase "before them" meant attendance before the arbitrator at the actual hearing.[20] The Court explained its rationale as follows: Parties in arbitration have waived their right to rely on the discovery devices available in conventional litigation, opting instead to resolve disputes in a less lengthy, more cost-efficient, manner than litigation.[21] Since both parties have elected to arbitrate, neither may reasonably expect to obtain full-blown discovery from the other or from non-parties.[22] The Fourth Circuit noted, however, that there is no blanket rule prohibiting non-party discovery. The Court acknowledged that there could be cases where "special need" would require an exception to the general rule prohibiting discovery. While not defining "special need," the Court emphasized that a party would have to demonstrate an inability to get the information elsewhere.[23]

Subsequently, the Fourth Circuit affirmed a district court's decision permitting pre-hearing discovery from a party where the lower court had found a "special need." In *Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra* (1999),[24] the petitioner contended that a ship it had chartered had sub-par speed due to engine problems. The petitioner sought to inspect the vessel, arguing that the respondent was making repairs to the ship, including the engine. Thus, absent the taking of pre-hearing evidence, it would have no evidence of the ship's condition. It requested perpetuation of evidence that, if not preserved, was going to disappear and or be materially altered.[25] The Fourth Circuit held that:

> [i]n this narrow set of facts, we agree with the district court's conclusion that Deiulemar faced a "special need" that justified preserving the evidence on the Allegra. . . . We leave for future determination the proper scope of the "special need" exception as it applies to other forms of discovery in aid of arbitration.[26]

Under the Fourth Circuit's approach, parties to an arbitration agreement need to demonstrate that they have a "special need" in order to obtain pre-hearing discovery. This "special need" may be shown in the reinsurance context by arguing, for example, that the intermediary possesses vital information not obtainable from other sources. This is especially true where the issue before the arbitration panel is one of misrepresentation in the placement of the reinsurance agreement. Only the intermediary's placement file and testimony will show what was communicated to the reinsurer, and what was originally communicated to the intermediary by the ceding company. Where the issue is one of intent, the intermediary similarly possesses crucial information. Finally, in instances where the parties' records are unavailable, the intermediary's records and recollections may be the only source of information dispositive of a dispute. Thus, while overly restrictive, there is "wiggle room" within the Fourth Circuit's rubric to obtain pre-hearing discovery from intermediaries and other non-parties.

2. An Even Stricter Interpretation of the FAA: No Pre-Hearing Discovery of Non-parties, Even Upon a Showing of Special Need

The Third Circuit has recently addressed the issue of pre-hearing discovery from non-parties, and has taken an even stricter view than that espoused by the Fourth Circuit. In *Hay Group v. E.B.S. Acquisition Corp.* (2004),[27] the Third Circuit held that the FAA did not confer upon arbitration panels any authority to require non-parties to submit to pre-hearing discovery. *Hay Group* involved a situation where a former employer commenced arbitration against a former employee. In the context of that arbitration, the panel issued a subpoena upon a non-party current employer of the former employee. The Third Circuit reversed the United States District Court for the Eastern District of Pennsylvania's order enforcing the subpoena. Citing the "unambiguous" wording of Section 7 of the FAA, the Court held that "the only power conferred on arbitrators with respect to the production of

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Thus, while overly restrictive, there is "wiggle room" within the Fourth Circuit's rubric to obtain pre-hearing discovery from intermediaries and other non-parties.

While noting its general agreement with the holding in Comsat, the Court rejected the "special need" exception, holding that "there is simply no textual basis for allowing any 'special need' exception.

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documents by a non-party is the power to summon a non-party 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.'"[28] The Court, thus, concluded that an arbitration panel's subpoena power is limited to "situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over documents at that time."[29]

In reaching its holding, the Third Circuit rejected the approach taken by several other courts that had previously held that arbitrators have "power by implication" under Section 7 to issue pre-hearing subpoenas.[30] To the contrary, the Court reasoned that "[b]y conferring the power to compel a non-party witness to bring items to an arbitration proceeding, while saying nothing about the power simply to compel the production of items without summoning the custodian to testify, the FAA implicitly withholds the latter power. If the FAA had meant to confer the latter, broader power, we believe that the drafters would have said so, and they would have then had no need to spell out the more limited power to compel a non-party witness to bring items with him to an arbitration proceeding."[31]

Further, the Court analyzed the "special need" exception discussed in the *Comsat* decision of the Fourth Circuit. While noting its general agreement with the holding in *Comsat*, the Court rejected the "special need" exception, holding that "there is simply no textual basis for allowing any 'special need' exception."[32] Thus, this recent decision represents the harshest possible interpretation of the FAA with respect to obtaining pre-hearing discovery.

More recently, in *Odfjell ASA v. Celanese AG* (2004),[33] one of the courts of the United States District Court for the Southern District of New York followed the reasoning set forth in *Hay Group*, and refused to permit pre-hearing discovery.[34] There, the chief arbitrator issued a subpoena directing a non-party who was incarcerated at the time to appear for a pre-hearing deposition and produce (at that time) various documents. When the non-party failed to comply with the subpoena, the party seeking discovery brought an action seeking to compel the non-party to comply. The district court refused the requested discovery, holding that "[this] Court agrees with the Third Circuit, and adds only that, 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."[35] While the holdings in the United States District Court for the Southern District of New York vary, this is the most restrictive approach.

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

In contrast to the Third Circuit's restrictive approach, the Eighth Circuit has taken a more expansive tack. In *In re Security Life Insurance Company of America* (2000),[36] the Eighth Circuit upheld an arbitration panel's exercise of its implicit power to order the pre-hearing production of documents. There, Security Life Insurance ("Security") purchased reinsurance from a pool of reinsurers managed by Duncanson & Holt ("D & H").[37] When the reinsurance pool refused to reimburse Security for a loss, Security demanded arbitration against D & H. Security then served a subpoena issued by the arbitration panel on Transamerica Occidental Life Insurance Company ("Transamerica"), one of the reinsurers, to produce documents and testimony of one of its employees. Security petitioned for an order compelling either the reinsurer's compliance with the subpoena or its participation in the arbitration proceedings.[38] Transamerica refused to respond to subpoena. The district court ordered Transamerica to do so, and Transamerica appealed.[39] The Eighth Circuit held that

> [a]lthough the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.[40]

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

Likewise, one of the courts of the United States District Court for the Southern District of New York came to a similar conclusion. In *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.* (2004),[41] the district court directed a non-party, pursuant to its authority under Section 7 of the FAA, to comply with the arbitrator's subpoena. There, a party obtained a subpoena from an arbitrator for certain documents from a third-party, Laser Tech Color Corporation ("LTC").[42] American Color Graphics, Inc. ("ACG") asserted a counterclaim in which ACG alleged, *inter alia*, that Brazell had breached the noncompetition, confidentiality and nonsolicitiation clauses in the Employment Agreement; specifically, that Brazell violated these clauses in dealings with LTC. The court noted that, while LTC was not a participant in the arbitration, it had an established history with the parties and was not a mere third-party drawn into the matter capriciously. After analyzing the case law in both the district and outside, the district court upheld the arbitrator's authority to order the pre-hearing production of documents from the non-party.

a. Courts Distinguishing Between Subpoenas for the Production of Documents and Subpoenas for Pre-Hearing Depositions

In *SchlumbergerSema v. Xcel Energy, Inc.* (2004),[43] the United States District Court for the District of Minnesota, following the reasoning set forth in *In re Security Life Insurance Company of America*, which ordered pre-hearing documentary discovery from a non-party, without analyzing whether an arbitration panel could enforce a subpoena compelling a pre-hearing deposition. In *SchlumbergerSema*, the defendant petitioned for an order enforcing the arbitration panel's subpoena duces tecum to a non-party compelling the production of documents and deposition testimony.[44] The court distinguished between the production of witnesses and the production of documents, holding that "[a]s the Eighth Circuit and other courts have found, the production of documents is less onerous and imposes a lesser burden than does a witness deposition."[45] This court went further than In *re Security Life Insurance Company of America*, and found that the arbitration panel could not compel pre-hearing depositions. The court held that, "the Court does not have the power to enforce the panel's subpoena purporting to compel the pre-hearing deposition of a non-party witness."[46]

Similarly, in *Integrity Insurance Co. v. American Centennial Insurance Co.* (1995),[47] then a case of first impression for the Southern District of New York, a district court upheld the power to compel pre-hearing documentary discovery, but found that they lacked the authority under the FAA to require nonparties to submit to pre-hearing depositions. In that case, a dispute arose out of a number of reinsurance agreements. The liquidator of Integrity instituted arbitration proceedings against American Centennial Insurance Co. ("ACIC") pursuant to those agreements.[48] Subpoenas were issued by an arbitrator at the request of ACIC, compelling non-parties[49] to appear for deposition and produce documents relating to the reinsurance agreements at issue between ACIC and Integrity, as well as a related director's and officer's action involving Integrity.[50] The district court held that an arbitrator may compel the production of documents prior to the arbitration hearing, but may not compel attendance of a non-party to a pre-hearing deposition.

The district court reasoned that,

> [a]rbitration is, however, a creation of contract, bargained for and voluntarily agreed to by the parties. The petitioners, who are not parties to the arbitration agreement, never bargained for or voluntarily agreed to participate in arbitration. After weighing the policy favoring arbitration against the rights and privileges of nonparties, this Court concludes that an arbitrator does not have the authority to compel nonparty witnesses to appear for pre-arbitration depositions.51

The *Integrity* court found a significant distinction between testimonial evidence and documentary evidence. Since the FAA specifically states that documentary evidence is required at the hearing from parties and non-parties alike, the *Integrity*

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In *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.* (2004),41 the district court directed a non-party, pursuant to its authority under Section 7 of the FAA, to comply with the arbitrator's subpoena.

In a case that is particularly on point for our discussion here, the United States District Court for the Southern District of New York held in *Hawaiian Electric Industries, Inc. et. al v. Marsh USA, Inc.* (2004),[57] that it was beyond the scope of Section 7 to issue subpoenas for pre-hearing testimony.

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court explained that documents are only produced once, whether it is at the arbitration hearing or prior to it.[52] However, the court was unwilling to burden non-parties with, potentially, two appearances. The court found that

> [c]ommon sense encourages the production of documents prior to the hearing so that the parties can familiarize themselves with the content of the documents. Depositions, however, are quite different. The nonparty may be required to appear twice—once for deposition and again at the hearing. That a nonparty might suffer this burden in litigation is irrelevant; arbitration is not litigation, and the nonparty never consented to be a part of it. Furthermore, as the deposition is not held before the arbitrator, there is nothing to protect the nonparty from harassing or abusive discovery.[53]

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

The Second Circuit has yet to rule on whether Section 7 of the FAA authorizes pre-hearing discovery and has, in fact, declared it an open question.[54] Recently, however, in *Amtel Corp. v. LM Ericsson* (2005),[55] the Southern District of New York followed the reasoning set forth in Integrity, and held that arbitrators do not have the authority to subpoena non-parties for pre-hearing depositions. There, AB-Sony Ericsson Mobile Communications, Inc. moved to quash a subpoena issued to it by the arbitrators on behalf of Amtel Corporation. Amtel Corporation attempted to circumvent the *Integrity* decision by stating that AB-Sony Ericsson would not be called at the hearing, and, therefore, would not be inconvenienced twice. The district court rejected that argument as specious, holding that one could never guarantee what witnesses would be required to testify at a hearing. Adopting the thought process in the *Integrity* decision, the court distinguished between an arbitrator's authority to subpoena the production of documents from a non-party prior to the hearing and the arbitrator's authority to subpoena a non-party for a pre-hearing deposition:

> [T]he power to compel the production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing. (citation omitted) With respect to depositions, however, the power to require pre-hearing appearances by witnesses in effect would increase the burden on non-parties, by creating the potential to require them to appear twice, both for discovery depositions and then for testimony at the hearing itself.[56]

Therefore, the *Amtel* Court held that it is beyond the power of the arbitrators to order a non-party to appear for a deposition.

In a case that is particularly on point for our discussion here, the United States District Court for the Southern District of New York held in *Hawaiian Electric Industries, Inc. et. al v. Marsh USA, Inc.* (2004),[57] that it was beyond the scope of Section 7 to issue subpoenas for pre-hearing testimony. There an arbitration panel in an insurance arbitration between policyholders and their insurers issued a deposition subpoena to Marsh USA, Inc., the broker who had negotiated the policy. The district court found:

> Petitioners make as good a case as can be made for the issuance in this particular case of subpoenas for deposition testimony: Marsh and its subpoenaed employees were involved as compensated agents of claimants in negotiating the terms of the insurance at issue, and the experienced arbitrators have severely limited pre-hearing discovery to what is appropriate in this complex matter.
>
> If the question of the issuance of the subpoenas were one of discretion, the Court would not hesitate to enforce them. But the Court is convinced that the language of 9 U.S.C. § 7 does not authorize, and was not intended to authorize, the issuance of subpoenas for pre-hearing testimony.[58]

The district court further explained that this situation did not fall under the "special need" category because the information must be otherwise unavailable for the exception to

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apply. Finding that Marsh had already voluntarily produced its relevant files, and the Marsh employees could be subpoenaed to testify at the hearing, the court declined to find a "special need."

An intermediary non-party in the reinsurance context is unique and should be treated as such. As a drafter and beneficiary of the reinsurance contract, the intermediary is no stranger to the reinsurance contract, and should not be treated as one. Generally speaking, the intermediary has an established history with the parties and is not a mere third-party drawn into arbitration impulsively. Given the intermediary's role in drafting the reinsurance agreement, it is well familiar with the terms, including those requiring arbitration. Thus, the intermediary should anticipate that it may be drawn into arbitration proceedings at some point should a dispute arise between the parties. While the district court in *Hawaiian Electric* recognized the importance of the broker's role, it felt that its hands were tied by the language contained in the FAA.

4. Broad Arbitration Panel Discretion Permitted

In *Meadows Indemnity Co., Ltd. v. Nutmeg Ins. Co.* (1994),[59] the United States District Court for the Middle District of Tennessee perceived value in broad pre-hearing discovery. There, Meadows Indemnity Company, Ltd. ("Meadows") had commenced a lawsuit against several insurance companies and their pool managers relating to the operation of a casualty insurance/reinsurance pool. The district court compelled arbitration, and stayed litigation vis-à-vis the pool managers, including Willis Corroon. The arbitration panel issued a subpoena requiring the production of documents from Baccala & Shoop Insurance Services ("BSIS"), a company wholly owned by Willis Corroon. Willis Corroon moved for a protective order, arguing that, as a non-party to the arbitration proceedings, the arbitration panel lacked statutory authority to require it to produce numerous documents, not for the panel's review at the hearing, but for inspection and copying by Meadows prior to the hearing.[60] The district court rejected Willis Corroon's contention, finding that non-party discovery was vital for the arbitrator to make a "full and fair" determination of the issues in dispute. The court also found that since the arbitrator has the authority to require non-parties to produce documents at the hearing, the arbitration panel implicitly has the power to do the same before the hearing.[61] The *Meadows* Court deferred to the arbitrator's judgment to establish the potential burdens and benefits of pre-hearing discovery. Of interest to our discussion, the *Meadows* court drew further support for its conclusion from the fact that Willis Corroon was not a stranger to the parties to the arbitration:

> While Willis Corroon and BSIS are not parties to the arbitration, they are intricately related to the parties involved in the arbitration and are not mere third parties who have been pulled into this matter arbitrarily.[62]

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

In a more recent decision, the United States District Court for the Northern District of Illinois further expanded the possibilities for obtaining pre-hearing discovery from non-parties. In *Scandinavian Reinsurance Co. Ltd. v. Continental Casualty Co.* (2004),[63] the arbitration panel in a reinsurance dispute between Scandinavian Reinsurance Company Limited and Continental Casualty Company, issued subpoenas to four employees of Aon Re Inc., the intermediary that negotiated the contract at issue, to appear for pre-hearing depositions.[64] Aon Re moved to quash the subpoenas.[65] The court held that

> [w]hile there may be some authority to the contrary . . . I note that the non-parties may be summoned to attend hearings, and that here Scan Re seeks to depose Witnesses and use the transcripts of their depositions at the final hearings in lieu of summoning non-parties to attend the hearings. I also note that . . . other courts have enforced subpoenas issued to non-parties for depositions in

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As a drafter and beneficiary of the reinsurance contract, the intermediary is no stranger to the reinsurance contract, and should not be treated as one. Generally speaking, the intermediary has an established history with the parties and is not a mere third-party drawn into arbitration impulsively.

The United States District Court for the Southern District of Florida rejected, without explanation, the contention that the FAA only permits the arbitrators to compel witnesses at the hearing and prohibits pre-hearing appearances.

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> arbitration proceedings when the witness's attendance was compelled in connection with requests for document production. I do not find that document production is a necessary concomitant to the summoning of a witness to testify in the pre-hearing stage of an arbitration.[66]

Therefore, the motion to quash was denied.

The Southern District of Florida has also recognized the need for broad arbitration panel discretion. In *Stanton v. Paine Webber Jackson & Curtis, Inc.* (1988),67 investors brought an action alleging violations of the Commodity Exchange Act, Florida security law and common law. The United States District Court for the Southern District of Florida granted the defendants' motion to compel arbitration pursuant to the FAA. The various defendants then sought documents from non-parties before the hearing.[68] In response, plaintiffs sought an order enjoining the defendants from requesting the issuance of and serving subpoenas for the attendance of witnesses and/or production of documents before the hearing.[69] The court observed that the plaintiffs were trying to impose judicial control over the arbitration proceedings, and gave strong consideration to the overall purpose of the FAA.[70] The court acknowledged that:

> Such action by the court would vitiate the purposes of the Federal Arbitration Act: "to facilitate and expedite the resolution of disputes, ease court congestion, and provide disputants with a less costly alternative to litigation." (Citation omitted) . . . Furthermore, the court finds that under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary.[71]

The United States District Court for the Southern District of Florida rejected, without explanation, the contention that the FAA only permits the arbitrators to compel witnesses at the hearing and prohibits pre-hearing appearances.[72]

5. Non-Party Discovery Agreed to in Arbitration Agreement

Another example of broad pre-hearing non-party discovery comes from the United States District Court for the Northern District of Illinois. In *Amgen, Inc. v. Kidney Center of Delaware County, Ltd.* (1995),[73] the arbitrator of the dispute between two corporations issued a subpoena to a non-party to produce documents and send a representative to testify at a deposition.[74] The subpoenaed party argued that there were territorial restrictions in the FAA, which prevented the court from enforcing the subpoena. At the outset, the district court held that the arbitrator was within his right to issue a pre-hearing documentary and testimonial subpoena to a non-party to an arbitration proceeding. Citing the *Stanton* and *Meadows* decisions with approval, the district court held that "implicit in the power to compel testimony and documents for purpose of a hearing is the lessor (sic) power to compel such testimony and documents for purposes prior to hearing."[75] Turning to the jurisdictional issue, the court concluded that the parties' agreement in their contract that the Federal Rules of Civil Procedure would govern the arbitral discovery process permitted the courts to enforce a subpoena issued by an attorney pursuant to Rule 45 of the Federal Rules of Civil Procedure. The district court noted that the parties' agreement to incorporate the Federal Rules of Civil Procedure meant that the Federal Rules, which "contemplate and provide both for a mechanism for nationwide discovery, and preserving the testimony of witnesses unavailable at trial because they are outside the district, by use of evidence depositions," would govern.[76]

6. Summary

As discussed above, there is no uniform rule on the availability of pre-hearing discovery from non-parties. The issue has only been addressed by three Circuit Courts - the Third Circuit, the Fourth Circuit and the Eighth Circuit - and each has reached a different conclusion. Indeed, the Fourth Circuit has held that there is no entitlement to pre-hearing discovery from non-parties, absent a showing of special need. In an even stricter holding, the Third Circuit has held that pre-hearing discovery from non-parties is simply unavailable in the arbitration context. The Eighth Circuit, on the other hand, has held that document discovery is, in fact, available from non-parties, but has not ruled on the issue of non-party depositions. In addition to the three Circuit Court holdings addressed above, numerous district courts have addressed this issue as well. As previously

discussed, the Circuit Courts are not in agreement on the issue, with holdings from the various courts ranging from allowing full discovery to those allowing no discovery from non-parties.

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

In *Hawaiian Electric*, the court, despite recognizing the importance of the reinsurance intermediary to the arbitration, felt that the FAA did not, under any circumstances, authorize the issuance of subpoenas for pre-hearing testimony. Evidently, the courts are in a state of confusion as to whether the FAA provides arbitration panels with the authority to order pre-hearing discovery of non-parties. Obviously, this issue will continue to develop, with no sign of immediate resolution. Until such point that the issue is resolved, practitioners need to focus on alternative methods of obtaining non-party discovery in the arbitration context.

III. Obtaining Discovery From Intermediaries Through Principles of Contract Interpretation and Agency

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

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

Where parties to a contract intend that a third-party should benefit from that contract, the third-party is an intended beneficiary who has enforceable rights under the contract.77 The Restatement (Second) of Contracts defines an intended beneficiary as:

> § 302. Intended and Incidental Beneficiary
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary as appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[78]

* * * * * *

In order for third-party beneficiaries to benefit from the terms of the contract, the third-party beneficiary must also abide by the terms of the contract. A third-party beneficiary is bound by the terms and conditions of the contract that it attempts to invoke.[79] The beneficiary cannot accept the benefits and avoid the burdens or limitations of a contract.[80]

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Since Section 7 of the FAA gives the arbitrators the power to order both documentary and testimonial evidence at the arbitration hearing, it is illogical that they would not have the power to issue pre-hearing subpoenas if they deem them to be necessary and relevant.

Many courts have held that where a principal is bound under the terms of a valid arbitration clause, its agents, employees and representatives are also covered under the terms of such agreements.

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Third-party beneficiary law is determined by state contract law, rather than the FAA. In fact, case law is split from jurisdiction to jurisdiction as to whether there needs to be an intention to bind the third-party beneficiary to the arbitration clause under the contract in which it is a beneficiary.[81] Thus, it is unclear whether merely being a third-party beneficiary under a contract containing an arbitration clause sufficiently binds a third-party beneficiary to those arbitration provisions.

We believe, however, that a strong argument can be made that an intermediary is a third-party beneficiary under a reinsurance agreement, which contains an intermediary clause.[82] Intermediaries benefit from the terms of the reinsurance agreement, and receive fees from the operation of that agreement. Thus, by accepting the benefits from the reinsurance agreement, intermediaries should be bound thereunder. Accordingly, as a third-party beneficiary, the reinsurance intermediary should be bound by the arbitration clause of the contract, and should be required to participate in the arbitration proceedings commenced by the parties to the contract.

B. Binding Non-Signatories to the Agreement to Arbitrate

The United States Supreme Court has held that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[83] Nevertheless, in cases arising under the FAA, courts have consistently held that "a nonsignatory party may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency."[84] Expanding upon that theme, the Second Circuit stated in *Thomson-CSF, S.A. v. Prudential Bache Securities, Inc.*:[85]

> This Court has recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.[86]

The United States District Court for the Southern District of New York has recently taken a more restrictive approach. In *Masefield AG v. Colonial Oil Industries Inc.*, Masefield America, a company affiliated with plaintiffs, entered into a contract with the defendant to purchase fuel oil monthly for one year.[87] The contract directed that all inquiries be sent to Masefield Ltd., and plaintiffs described themselves, along with Masefield America, as the "Masefield Group."[88] The contract also contained an arbitration provision.[89] In 2004, the defendant filed an arbitration demand with the ICC alleging that Masefield America, along with plaintiffs, failed to deliver fuel for two of the twelve months.[90] Plaintiffs were not signatories to the contract. While plaintiffs were affiliated with Masefield America, neither was a parent or subsidiary of Masefield America.[91] Masefield AG and Masefield Ltd. sought injunctive relief enjoining the defendant from pursuing arbitration against them. Following the line of thinking in *Thomson-CSF*, defendant asserted that plaintiffs were bound to arbitrate even though they were not signatories to the contract. Specifically, the defendant argued that plaintiffs' participation in the performance of the contract amounted to estoppel, plaintiffs were agents of Masefield America and Masefield America was no more than plaintiffs' alter ego. The court disagreed. The court held that the plaintiffs did not derive any direct benefit from the contract, may not have been aware of the agreement, did not invoke any particular aspects of the contract, did not act at the direction of Masefield America and did not exercise complete domination over Masefield America.[92] Accordingly, the court held that the defendants could not demonstrate that plaintiffs, as nonsignatories, were bound to arbitrate along with Masefield America.[93]

A reinsurance intermediary, although a nonsignatory, is an agent of the parties under the reinsurance agreement, having accepted the fees thereunder, and the responsibilities associated with communications and payment. Many courts have held that where a principal is bound under the terms of a valid arbitration clause, its agents, employees and representatives are also covered under the terms of such agreements.[94] Notably, the United States District Court for the Southern District of New York has held that an intermediary who

was not a party to a reinsurance arbitration was collaterally estopped from relitigating the issues decided by the arbitration panel.[95] Even though reinsurance intermediaries are nonsignatory non-parties, as agents under the reinsurance contract, they ought to be bound to the arbitration clause of the reinsurance agreement and participate in pre-hearing discovery.

IV. Proposals for Obtaining Broad Discovery from Reinsurance Intermediaries

Although, as discussed above, there are opportunities for practitioners and arbitration panels to obtain broad discovery from reinsurance intermediaries, this area is not free from doubt under existing caselaw. Certain jurisdictions are plainly more favorable than others. Even courts permitting discovery from non-parties will often undergo a fact-specific analysis with respect to the case at hand. Uniformity and certainty, therefore, do not exist in this area. It is unlikely, moreover, that evolving caselaw will give arbitration panels and practitioners any comfort that they will be able to secure the pre-hearing discovery that they require from reinsurance intermediaries. This industry, however, should agree that access to a reinsurance intermediary's information in a pre-hearing context is critical to the success of the arbitration process. Reform, whether contractual or regulatory, is therefore in order.

One commentator[96] has suggested three options for reform and the fourth is suggested by the reasoning of the concurring opinion in the *Hay Group*[97] case: (1) amending the FAA; (2) making the intermediary a party to the reinsurance agreement; (3) amending intermediary laws and regulations; and (4) a single arbitrator can appear to receive documents and deposition testimony.

A. Amending the Federal Arbitration Act

As noted above, in *Hawaiian Electric Industries, Inc.*,[98] the Southern District of New York found that it was beyond the scope of Section 7 of the FAA to issue subpoenas for pre-hearing testimony. The Court recognized that "Petitioners make as good a case as can be made for the issuance in this particular case of subpoenas for deposition testimony."[99] But, the Court's hands were tied. Thus, an amendment of the statute to expressly permit the taking of pre-hearing discovery from non-parties and provide for the enforceability of an arbitration panel's subpoenas in that regard would, plainly, be the best solution. As the Third Circuit in Hay Group recognized, "if it is desirable for arbitrators to possess that power, the way to give it to them is by amending Section 7 of the FAA, just as Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to confer such a power on district courts."[100] However, an amendment of the FAA would have broad applicability, and would not affect this industry alone. With the required lobbying effort, potential political opposition and bureaucratic red tape, what appears to be the best solution may also be an impractical one.

B. Contractual Methods of Binding Reinsurance Intermediaries to Pre-Hearing Discovery

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

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This industry, however, should agree that access to a reinsurance intermediary's information in a pre-hearing context is critical to the success of the arbitration process. Reform, whether contractual or regulatory, is therefore in order.

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

C. Amending Reinsurance Intermediary Laws and Regulations

Almost all states have laws and regulations governing the activities of intermediaries. It is possible, through the amendment of these laws and regulations, to impose pre-hearing discovery requirements upon intermediaries, and to provide for penalties in the absence of compliance with pre-hearing subpoenas served in arbitration proceedings. In his article, Robert M. Hall has suggested the following should be sanctionable:

> Failure to comply with the order of a reinsurance arbitration panel to produce documents or testimony with respect to a dispute being considered by the panel unless the intermediary obtains an order of a court of competent jurisdiction quashing the panel's order on non-jurisdictional grounds.[101]

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

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

D. A Single Arbitrator Can Appear to Receive Documents and Testimony from Non-Parties

The concurring opinion in the *Hay Group* decision suggested an additional option in order to give the arbitrators some power over non-parties. Circuit Judge Chertoff explained that:

> 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.[102]

This option can be incorporated to include pre-hearing deposition testimony by examining the language of Section 7 of the FAA. 9 U.S.C. § 7 states:

> **The arbitrators selected** either as prescribed in this title or otherwise, or a majority of them, **may summon in writing any person to attend before** them or **any of them as a witness** and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.[103]

The "itinerant arbitrator" option creatively gives the arbitration panel the ability to issue pre-hearing subpoenas for documentary or testimonial evidence. A witness could be compelled to appear before any of the arbitrators as a witness. Thus, pre-hearing depositions could be before one arbitrator, however, an arbitrator would need to attend the deposition.

This option was given vitality by the Southern District of New York in its December 2004 Order in *Odfjell ASA v. Celeanese AG*.[104] In its August, 2004 Order, the court denied a motion for an order compelling the non-parties to comply with an arbitration subpoena directing the non-party to appear at a pre-hearing deposition.[105] In response to the court's Order, the panel amended the subpoenas to command appearance in an arbitration proceeding.[106] The non-party argued that the "subpoenas are just a thinly-disguised attempt to obtain the pre-hearing discovery that the August 4 Memorandum forbade."[107] The court found the difference dispositive, and held that the FAA "contemplates that not every appearance before an arbitrator will consist of a full-blown trial-like hearing. . . ."[108] The court relied upon the claimants' representation that it would not call the non-party at any other time before the panel in rendering its decision.109 This alleviated the potential problem of the non-party being called twice before the panel. Until the laws are amended, this appears to be the most feasible solution for pre-hearing testimony of an unwilling non-party.

V. Conclusion

Reinsurance intermediaries, as nonsignatory third-party beneficiaries to the reinsurance agreements that they negotiate and provide services under for a fee, should be bound to the agreement to arbitrate and to pre-hearing discovery requirements. They are in a unique position to provide vital documents and testimony to the parties and to the arbitrators. The reinsurance intermediary must be held to the same standard as a party to the reinsurance contract and should be compelled to produce documentary and testimonial evidence in advance of the arbitration hearing. Pre-hearing discovery fosters settlement, reduces surprise at the arbitration proceeding,

and will work to shorten the arbitration hearing itself. Given the current uncertain state of the law, participants in the arbitration process must look toward different approaches in obtaining pre-hearing discovery from recalcitrant intermediaries, including the taking of pre-hearing discovery before one or more arbitrators. The most efficient and prompt option (other than working within the boundaries of the current law) is to add a provision to the reinsurance contract or letter of authority between the ceding company and the intermediary that requires the intermediary to participate in the arbitration process should disputes arise under the reinsurance agreements it places. This approach may also be combined with an industry effort to amend the Federal Arbitration Act or existing intermediary laws and regulations to provide for sanctions in the absence of intermediary cooperation with orders of arbitration panels. ▼

1 Copyright 2005 by the authors.

2 *Hay Group v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (held that arbitration panels are entirely without power to subpoena either documents or deposition testimony from non-parties); *In re Security Life Ins. Co. of America*, 228 F.3d 865 (8th Cir. 2000) (upheld an arbitration panel's exercise of its implicit power to order the pre-hearing production of documents); *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) (permitted pre-hearing discovery from non-parties only in instances of demonstrated "special need").

3 *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 504 (S.D.N.Y. 2004) (refused to permit pre-hearing documentary or testimonial discovery); *Hawaiian Electric Industries, Inc. et al. v. Marsh USA, Inc.*, No. M-82, 2004 WL 1542254 (S.D.N.Y. July 9, 2004) (held that it was beyond the scope of Section 7 to issue subpoenas for pre-hearing testimony); *In re Arbitration Between Douglas Brazell v. American Color Graphics, Inc.,* No. M-82 AGS, 2000 WL 364997 (S.D.N.Y. April 7, 2000) (upheld the arbitrator's authority to order the pre-hearing production of documents from non-parties); *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995) (upheld the power to compel pre-hearing documentary discovery, but found that they lacked the authority under the FAA to require non-parties to submit to pre- hearing depositions).

4 360 F.3d 404 (3d Cir. 2004).

5 328 F. Supp. 2d 504 (S.D.N.Y. 2004).

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

7 *Id.* § 4.03[a].

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

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

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

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

12 Staring at § 7:4.

13 *U.S. International Reinsurance Co. v. Saturn Intermediaries, Ltd.*, No. 91 C 3739, 1992 WL 51694 at *4 (N.D. Ill. March 9, 1992).

14 9 U.S.C. § 1, *et seq.*

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

16 Unlike the FAA, the Uniform Arbitration Act ("UAA"), does have a provision for pre-hearing discovery. As of July 8, 2005, the UAA of 1956 has been adopted in 49 jurisdictions and the UAA of 2000 has been adopted in 12 jurisdictions (and has been "introduced" in eight jurisdictions). As noted above, however, to the extent that a state has adopted the UAA, or a modified version thereof, the UAA would not apply where the matter at hand involved interstate commerce. Section 7 of the UAA, which is the same in both the 1956 Act and the 2000 Act, provides:

> a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.
>
> b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

The Uniform Arbitration Act is available at http://www.lectlaw.com/files/adro6.htm.

17 190 F.3d 269 (4th Cir. 1999).

18 *Id.* at 274.

19 *Id.* at 275.

20 *Id.*

21 *Id.* at 276.

22 *Id.*

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

24 198 F.3d 473, 481 (4th Cir. 1999)

25 *Id.*

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

27 360 F.3d 404 (3d Cir. 2004)

28 *Id.* at 407.

29 *Id.*

30 *Id.* at 408 (declining to follow the holdings of *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000) and *Meadows Indemnity Co., Ltd. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994)).

31 *Id.* at 408 - 409

32 *Id.* at 410.

33 328 F. Supp. 2d 505 (S.D.N.Y. 2004).

34 In further proceedings, Judge Rakoff enforced subpoenas compelling a non-party to appear before the arbitrators to testify and produce documents. *Odfjell ASA v. Celeanese AG*, 348 F. Supp. 2d 283 (S.D.N.Y. 2004). The Court explained that "the FAA plainly contemplates that not every appearance before an arbitrator will consist of a full-blown trial-like hearing . . ." *Id.* at 287. The claimants had also represented to the court that they did not intend to call the non-party at any other time before the panel. The Court, in enforcing the subpoena, expressly relied upon this representation, noting that "[a]ny failure to comply with this representation may therefore give rise to the imposition of sanctions, and this Court retains jurisdiction for that limited purpose." *Id.*

35 *Id.* at *2.

36 228 F.3d 865 (8th Cir. 2000).

37 *Id.* at 867.

38 *Id.* at 867-8.

39 *Id.* at 868-9.

40 *Id.* at 870-1.

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

42 *Id.*

43 No. Civ. 02-4304PAMJSM, 2004 WL 67647 (D.Minn. January 9, 2004).

44 *Id.* at *1.

45 *Id.* at *2.

46 *Id.*

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47 885 F. Supp. 69 (S.D.N.Y. 1995).
48 See id. at 69-70.
49 Although non-parties, one of the subpoenaed individuals was not a "stranger" to Integrity, being a former officer and/or director of the company. The other subpoenaed individual was his attorney. Id. at 70.
50 *Id*.
51 *Id*. at 71.
52 *Id*. at 73.
53 *Id*.
54 *National Broadcasting Co., Inc. v. Bear Sterns & Co., Inc*., 165 F.3d 184, 188 (2d Cir.1999) (in dicta stating that "open questions remain as to whether § 7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing document discovery, especially where such evidence is sought from non-parties).
55 371 F. Supp. 2d 402 (S.D.N.Y. 2005); *see also In the Matter of Meridian Bulk Carriers, Ltd*., No. 03-2011, 2003 WL 23181011 (E.D. La. July 14, 2003).
56 *Id*. at *1.
57 No. M-82, 2004 WL 1542254, at *2-3 (S.D.N.Y. July 9, 2004).
58 *Id*.
59 157 F.R.D. 42 (M.D. Tenn. 1994)
60 *Id*. at 44.
61 *Id*. at 45.
62 *Id*.
63 Order Denying the Motion to Quash, No. 04 C 7020 (N.D. Ill. December 12, 2004)
64 *Id*.
65 *Id*.
66 *Id*.
67 685 F. Supp. 1241 (S.D. Fla. 1988)
68 *Id*.
69 *Id*.
70 *Id* at 1242.
71 *Id*.
72 The *Integrity* court attempted to distinguish *Stanton* on the grounds that (1) the objection to the subpoenas was made by a party as opposed to the subpoenaed non-party; and (2) the subpoenas issued by the arbitration panel were for documents only. *See Integrity Ins. Co. v. American Centennial Insurance Co*., 885 F. Supp. at 72. These attempted distinctions, however, fall flat. Although the subpoenas directly at issue were *duces tecum* only, the plaintiffs in *Stanton* sought an order enjoining the defendants from "requesting the issuance of and serving subpoenas for the attendance of witnesses or production of documents, other than for attendance or production before the arbitration panel." 685 F. Supp. at 1241. Thus, the *Stanton* court, in rejecting the plaintiffs' application, directly considered whether the arbitration panel was authorized to issue subpoenas compelling testimony before the hearing.
73 879 F. Supp. 878 (N.D. Ill. 1995)
74 *Id*.
75 *Id*. at 880.
76 *Id*. at 883.
77 *Gomez v. Huntington Trust Co*., No. 3:98CV7436, 2001 WL 1110350 at *11 (N.D. Ohio August 28, 2001).
78 Restatement (Second) of Contracts: Chapter 14 Contract Beneficiaries § 302 Intended and Incidental Beneficiaries (American Law Institute Publishers, 1982).
79 *Interpool Ltd. v. Through Transport Mutual Ins. Ass'n*, 635 F. Supp. 1503, 1505 (S.D. Fla. 1985).
80 *Id*.
81 *Compare In re Prudential Ins. Co. of America Sales Practice Litigation*, 133 F.3d 225, 229 (3d Cir. 1998) (requiring that there be "an expression of the requisite intent between the third party and the plaintiff to arbitrate their claims"); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc*., 795 F.2d 1111, 1117 (1st Cir. 1986) *with Nesslage v. York Securities, Inc*., 823 F.2d 231, 233-34 (8th Cir. 1987) (holding that third-party beneficiaries could enforce terms of arbitration clause without a discussion of intention to bind those beneficiaries to arbitration clause).
82 It should be noted that, in at least one instance, a court has held, under the facts before it, that intermediaries were not third-party beneficiaries of a reinsurance pool management agreement for purposes of standing to compel arbitration under that agreement. *Mutual Benefit Life Ins. Co. v. Zimmerman*, 783 F. Supp. 853, 866-67 (D.N.J. 1992). There, the management agreement at issue authorized a line slip manager to obtain insurance risks on behalf of pool members. The agreement made no explicit reference to the intermediaries. The only "hook" that the intermediaries had under the management agreement was the implicit possibility that the line slip might employ other intermediary brokers to obtain risks for the line slip. The court concluded that this "indirect reference to third parties" could not establish that the intermediaries were third-party beneficiaries under the contract. *Id*. This case is readily distinguishable from reinsurance agreements which contain intermediary clauses identifying the intermediary, and requiring it to perform tasks under the agreement.
83 *United Steelworkers of America v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 582 (1960).
84 *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); see also Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185, 1187 (9th Cir. 1986) (stating that a variety of nonsignatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles); Interbras Cayman Co. v. Orient Victory Shipping Co., 663 F.2d 4, 7 (2d Cir. 1981) (granting trial on whether alleged principal-agent relationship bound nonsignatory party to arbitration agreement).
85 64 F.3d 773 (2d Cir. 1995)
86 *Id*. at 776; *see also Wells Fargo Bank v. London Steam-Ship Owners' Mutual Ins. Ass'n*, 408 F. Supp. 626, 628-30 (S.D.N.Y. 1976) (in determining who is bound to arbitration agreement, federal courts look to state law contract principles).
87 *Masefield AG v. Colonial Oil Industries, Inc*., No. 05 Civ. 2231(PKL), 2005 WL 911770 (S.D.N.Y. April 18, 2005)
88 *Id*.
89 *Id*.
90 *Id*.
91 *Id*.
92 *Id*.
93 *Id*.
94 *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110 (3d Cir. 1993) (holding that arbitration agreement applied to consultant and sister corporation, even though they had not signed it); *Arnold v. Arnold Corp.—Printed Communications for Business,* 920 F.2d 1269 (6th Cir. 1990) (holding that officers of corporation were entitled to arbitration as agents of corporation even though they had not signed the arbitration agreement); *The North River Ins. Co. v. Transamerica Occidental Life Ins. Co*., No. Civ.A. 399-CV-0682-L, 2002 WL 1315786 at *6 (N.D. Tex. June 12, 2002).
95 *Commonwealth Ins. Co. v. Thomas A. Greene & Co., Inc*., 709 F. Supp. 86 (S.D.N.Y. 1989) (holding the reinsurance intermediary was bound by the arbitration because: 1) it was in privity with the ceding company; and 2) the ceding company's theory, previously rejected by the arbitrators, was identical to that of the intermediary).
96 Hall, Robert M., *Intermediaries and Discovery in Reinsurance Arbitrations*, Mealey's Litigation Report: Reinsurance, December 2, 2002 at 30-1.
97 360 F.3d 404 (3d Cir. 2004).
98 No. M-82, 2004 WL 1542254 (S.D.N.Y. July 9, 2004).
99 *Id*. at *2.
100 360 F.3d 404, 409 (3d Cir. 2004).
101 Hall, Robert M. *Intermediaries and Discovery in Reinsurance Arbitrations*, Mealey's Litigation Report: Reinsurance, December 2, 2002 at 31.
102 360 F.3d 404, 413 (3d Cir. 2004).
103 9 U.S.C. § 7. (emphasis supplied.)
104 348 F. Supp. 2d 283 (S.D.N.Y. 2004).
105 *Id*. at 285.
106 *Id*. at 286.
107 *Id*.
108 *Id*.
109 *Id*.

feature

Results of Our Arbitration Survey

Rhonda L. Rittenberg
David A. Thirkill

Rhonda L. Rittenberg

David A, Thirkill

Is the reinsurance arbitration system in the U.S. "broken"? Should the industry consider going back to the U.S. federal and state courts to resolve disputes? The answers to these and other currently hotly debated questions were revealed in a 2004 reinsurance arbitration survey conducted by the authors.

The idea of a survey came about in late 2003 when the authors contemplated the notion of getting unabashed views on the most salient arbitration issues repeatedly showcased at industry conferences, not through indirect, anecdotal means, but rather, directly from the players themselves: clients who foot the bill, and outside counsel and arbitrators who, through their talents and application of their experiences, earn the fees.

The results of the survey were disclosed as part of a panel debate at the November 2004 ARIAS•U.S. Fall Conference in New York. This article outlines in greater detail, with commentary from the surveyors, the survey questions and responses.

I. The Birth of the Survey

In early 2004, the survey was sent to approximately 1,000 reinsurance executives, outside counsel and ARIAS•U.S. certified arbitrators. Presumably because of the promise of anonymity, the response rate was surprisingly high. A total of 378 survey questionnaires were completed — 205 from clients; 45 from outside counsel and 128 from arbitrators, indicating a response rate approaching 40 percent.

Wikipedia, the free on-line encyclopedia, in a section concerning statistical surveys, indicates that usual response ratios for mail surveys such as this are more usually in the 5 percent to 30 percent range, indicating perhaps that the survey "hit a chord" in the reinsurance arena and among ARIAS•U.S. members.

The survey was divided into three sections, one for each of the groups mentioned above. Each section contained approximately 20 questions with multiple choice answers.[2] What did the survey reveal? The results (and even the questions) may surprise you.

II. Preferences of Solving Disputes, Arbitration Language, "Legalistic" Process

A series of questions related to preferences of means of solving disputes (arbitration, litigation or mediation), whether clients were considering modifying language in arbitration clauses or eliminating them altogether, and whether counsel were recommending such changes.

A large majority of clients, 80 percent, indicated they prefer arbitration with only 7 percent in favor of litigation; the remaining 13 percent favored mediation. A majority of outside counsel, 68 percent, also favored arbitration over litigation 27 percent, with the only a few, 5 percent, supporting mediation. Another question indicated few clients, 9 percent, are considering eliminating arbitration clauses from their contracts altogether, albeit a somewhat larger group, 36 percent, of outside counsel are recommending this to their clients. Only 18 percent of clients are planning on modifying their arbitration clauses.

Despite the marked preference on the part of clients for arbitration versus litigation, a large majority, 82 percent, of clients and, 75 percent, of arbitrators felt that the arbitration process itself has become too "legalistic." Perhaps not surprisingly, outside counsel, 39 percent, did not feel the same way. After all, lawyers are schooled and trained in the rules of civil procedure and evidence, with depositions, dispositive motions and privilege issues becoming second nature.

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The results of the survey were disclosed as part of a panel debate at the November 2004 ARIAS•U.S. Fall Conference in New York.

Rhonda L. Rittenberg was most recently a partner with Prince, Lobel, Glovsky & Tye LLP in Boston. She will be joining Lexington Insurance Company as Vice-President and Associate General Counsel in October. David Thirkill is President of The Thirkill Group and is a professional arbitrator. His background includes property & casualty and finite underwriting, ART and run-off management.

Perhaps with limited exceptions, the reinsurance arbitration system has, in fact, served the industry well. Notwithstanding rumblings inherent with any maturing system, there is no imminent mass exodus to the courts.

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III. Neutrality

The question of whether the panel should be "neutral" continues to be a heavily and sometimes heatedly debated issue, apparently because at least a few arbitrators in the United States still espouse only the position of the party appointing them—irrespective of the facts or even their own beliefs. In responding to the survey, 65 percent of arbitrators were in favor of being completely neutral, that is to be relieved of any real or perceived obligation of loyalty to the party that appointed them, so that they would be allowed to focus on the issues without the constraints or pressures of being, or perceived to be, a "partisan" advocate.

In contrast, the majority of clients, 68 percent, and outside counsel, 56 percent, wanted their party appointed arbitrator to "be an advocate but willing to make concessions for unanimity," which would suggest the party appointed arbitrator be willing to "compromise," which is somewhat surprising given the complaints that appear to be made by clients and counsel when that happens. Perhaps it would have been instructive to have asked if clients and counsel agree with the sentiment expressed in Canon II of the ARIAS•U.S. Code of Conduct[3]" — which states, in part, that:

> although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a final judgment until after both parties have had a full and fair opportunity to present their respective cases and the panel has fully deliberated the issues.

One significant problem often overlooked when conceptualizing "neutrality" is that everyone in the industry has contacts, views, and "inclinations" on most subjects that come before a panel. It may be impossible for an arbitrator to be "neutral" if neutral means that s/he brings a blank slate to the issue. Nonetheless, it is possible to move towards "neutrality" if being neutral contemplates arbitrators bringing their knowledge and experience to the table but serving impartially and independently from the parties, potential witnesses and the other arbitrators. As noted in the 2004 revisions to the AAA/ABA Code of Ethics ("2004 Code"), which includes a presumption of neutrality for all arbitrators:

> arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by...fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party (Canon I).

Furthering the goal of neutrality, the 2004 Code also provides that:

> an arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except to determine the identity of the parties, counsel, witnesses and general nature of the case and to respond to inquiries from a party of its counsel to determine his/her suitability and availability for the appointment. The merits of the case should not be discussed. (Canon III)

Whether the reinsurance industry is ready to move closer to the 2004 Code's vision of "neutrality" remains to be seen. What is clear from the survey, however, is that almost no one—one percent of clients and arbitrators and 2 percent of outside counsel—is in favor of "unrelenting advocates." Perhaps arbitrators, in particular, will take comfort from this. Of course arbitrators can be guided by the ARIAS•U.S. Code of Conduct (Canon II as referred to above), and/or, where appropriate, by the 2004 Code which requires impartial and independent decision making by party-appointed arbitrators.

IV. Blind Selection Process, Background of Arbitrators and Ex Parte Communications

Another series of questions in the survey related to the background of party-appointed arbitrators and umpires, the question of a blind selection procedure for arbitrator appointment, and ex parte communications.

Clients, 86 percent, counsel, 78 percent, and arbitrators, 83 percent, appeared almost unanimous in having no opinion whether

arbitrators are currently active or retired (or "consulting"). This could be of help in resolving (i.e. by an agreement to mutually ignore) the requirement in those few remaining older arbitration clauses for "active" arbitrators. However, there was disagreement when it came to the "background" of arbitrators. Clients appeared to prefer that panels consist of industry professionals, 49 percent, or a mix of industry professionals and general counsel or outside counsel, 49 percent, but very few, 2 percent, wanted a panel comprised only of lawyers. Counsel, on the other hand, appeared to favor a mixed panel, 78 percent, and only 7 percent desired a panel consisting of industry professionals. Arbitrators also favored a mixed panel, 68 percent.

Few clients, 34 percent, would use "inexperienced" arbitrators, although a majority of outside counsel, 52 percent, appeared willing to try. A vast majority of all three sections—95 percent, 92 percent and 100 percent of clients, counsel and arbitrators, respectively—believed that an alternative arbitrator should be selected if the first choice cannot act in a reasonable time frame.

As far as a "blind selection process" is concerned, the overwhelming majority of clients, 79 percent, and lawyers, 82 percent, answered negatively. This may reflect reluctance by clients and outside counsel to lose the control over the selection process which they currently enjoy. The ability to select an arbitrator may reasonably be viewed as a significant right that was bargained for when the contract was entered into. In having control over the selection process, parties are comforted, at least to some degree, that their story will be understood and explained by at least one member of the panel. While there may be a question whether more "neutral" party-appointed arbitrators, however selected, would equally master the case, any arbitrators not pulling their weight do so at their peril and risk being marginalized.

Although the majority of arbitrators, 64 percent, were also opposed to blind selection, the proportion was much smaller, perhaps reflecting the scenario that some arbitrators are not getting sufficient appointments, and that those who are not so familiar as others to or with the arbitration community might benefit from being selected blindly.[4]

Whether clients and outside counsel want "control" beyond the arbitrator appointment phase can be gleaned from the response on when ex parte communications with a party-appointed arbitrator should cease. Ex parte communications with arbitrators is not a feature in a U.K. reinsurance arbitration setting, perhaps because arbitrators' views are routinely expressed in reasoned awards. In contrast, reasoned decisions are not the norm in the U.S. and, perhaps not coincidentally, ex parte communications are common. The question is just how far the participants are willing to go with these discussions. Contrary to the position in the U.K., most clients and counsel wish to, at least, "sound out" the arbitrator candidate's view of the basic case before he or she is appointed.

Clients significantly prefer, 77 percent, that ex parte communications end after the organizational meeting, while outside counsel, 53 percent, prefer ex parte communications continue until the start of the main hearing. Typically, ex parte communications cease at the time the pre-hearing briefs are filed. The majority of arbitrators seem to prefer the dialogue but to a more limited degree, with 70 percent in favor of these communications continuing only until the organizational meeting. This appears consistent with the notion that a majority of arbitrators strive to achieve some level of neutrality. Less than 5 percent of these groups believed that there should be no ex parte communications.

V. Summary Dispositions and Discovery

Despite differences of opinion on the legalistic nature of arbitrations today, the overwhelming majority of respondents, 83 percent clients and 76 percent outside counsel and arbitrators, were in favor of summary dispositions in which panels rule on an issue(s) without conducting a full hearing. Whether summary dispositions, which typically involve a ruling "as a matter of law," are appropriate when the panel is relieved from applying the strict rule of law and encouraged to apply industry custom and practice especially of it diverges from case law, is subject to debate. Moreover, there may be some apprehension in a panel ruling without the benefit of all the evidence being presented at a full hearing, especially given that arbitration awards are not subject to the same kind of rigorous appellate review as court judgments. Nonetheless, the survey results suggest that the users of the process desire the ability to dispose of issues expeditiously. Moreover, there may be circumstances where all necessary evidence can be presented short of a full hearing. In those instances, summary dispositions are a useful tool to streamline, if not resolve, a case. Given that panels generally are granted broad powers and discretion under arbitration clauses, arbitrators are encouraged to give meaningful consideration to requests for summary disposition.

With respect to the scope and breadth of discovery, one might be tempted categorically to conclude that cedents and reinsurers are on opposite ends of the spectrum — cedents want no discovery and reinsurers want full discovery. However, 58 percent of clients, 64 percent of outside counsel and 71 percent of arbitrators wanted discovery to be restricted to the contract(s) at issue, suggesting a desire for stronger case management by panels. Whether a neutral and independent panel relieved from the "bondages of partisanship loyalty" is better suited to streamline the issues for hearing and corresponding discovery, is worthy of further debate given the opinions expressed by the players in the survey.

VI. Reasoned Decisions

One of the more surprising responses was to the question of whether a panel should issue reasoned decisions. Although required by law in the U.K., reasoned decisions are the exception rather than the rule in the U.S. Nonetheless, clients, 86 percent, outside counsel, 58 percent, and arbitrators, 73 percent, indicated a preference for reasoned decisions. That being the

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case, one must query why clients, in practice, have been reluctant to ask for a reasoned decision and why arbitrators, in practice, have been hesitant to issue a reasoned decision. Arbitrators may be reluctant to issue a reasoned award either because they do not know how or they fear providing grounds for appeal.

The implications of having routine reasoned decisions are not entirely clear. Certainly, reasoned decisions will provide transparency of the panel's thought process. This, in turn, may reduce the resistance by parties and their counsel to more "neutral" panels. Reasoned decisions may also deter a panel's desire to "split the baby" or otherwise reach an award based on ill-defined grounds. Whether or not these are desirous results, individuals who responded to the survey have expressed a willingness to take that risk.

VII. Confidentiality of Awards

On the issue of confidentiality, 83 percent of clients, 73 percent of outside counsel and 91 percent of arbitrators want awards to be kept confidential. It could be argued that confidentiality is one of the cornerstones and an intrinsic element of the arbitration process, the result being that, unlike the court system, there is an absence of precedence.

Despite the argument that absent contractual reference a panel should not impose confidentiality on an unwilling party, "confidentiality" appears to have become as deeply accepted in the reinsurance arbitration process as "utmost good faith" is expected in the reinsurance relationship.

VIII. Attorneys' Fees and Punitive Damages

A majority of clients, 66 percent, and arbitrators, 54 percent, were in favor of awarding attorneys' fees to the prevailing party although only a small minority, 29 percent, of outside counsel agreed with that approach. Interestingly, few clients or arbitrators, 28 percent respectively, and fewer counsel, 20 percent, were inclined to allow panels to impose punitive damages. Where arbitration clauses specifically address such matters, they should be controlling unless both parties agree to modify the terms of the contract.

IX. Res Judicata & Collateral Estoppel

A final set of questions related to whether or not a panel should give weight to a prior reasoned decision on similar issues. When those issues are between the same parties involved in the current dispute, clients and counsel agreed that the panel should give weight to such a decision, 83 percent and 80 percent, respectively. Arbitrators felt the same way, although not so strongly, 66 percent.

However, when the issues involved only one of the parties to the dispute, the opinions changed dramatically. Clients, counsel and arbitrators all appeared to agree that weight should not be given to a prior decision.

X. Conclusion

What did the survey accomplish? The surveyors believe it credibly established that while we should strive for an arbitration system that is more efficient and free of the real or perceived "unrelenting advocates" that potentially threaten to undermine the integrity of the system, the participants will continue current practices, at least for the foreseeable future.

Let us not forget that when reinsurance contracts did not routinely contain arbitration clauses, parties had little option but to litigate their disputes in the truly impartial and independent forum of a courtroom. The increasing dissatisfaction in the industry with inconsistent and unpredictable decisions rendered by judges and juries on unfamiliar turf led to a more widespread use of arbitration as the means of resolving disputes. Arbitration clauses promised the industry a means of avoiding a court system unsophisticated in the world of reinsurance custom and practice and bound by legal precedent and evidentiary rules. With industry professionals serving as the jury of "reinsurance peers," disputes would be resolved without such constraints.

By having a jury of "reinsurance peers" resolve disputes, the industry presumably anticipated that a panel would actually know the parties, be familiar with the issues, know the market and how it operates, and be able to render a decision based on fairness and commonsense, none of which are virtues that necessarily can be obtained by strict adherence to the law.

Perhaps with limited exceptions, the reinsurance arbitration system has, in fact, served the industry well. Notwithstanding rumblings inherent with any maturing system, there is no imminent mass exodus to the courts. In the surveyors' humble opinion, the arbitration system is not broken. It is simply evolving. ▼

1 An abbreviated copy of the survey is appended to this article.

2 One criticism of the survey was that it was binary or "closed ended" in nature and, therefore, did not give the opportunity of a "what happens in this versus that situation" answer. Another criticism was that by virtue of being anonymous, it was not possible to tell who had responded and whether the respondents actually had personal experience with reinsurance arbitrations. Nonetheless, a significant part of the audience at the ARIAS•U.S. Fall Conference in 2004 appeared to have seen and/or responded to the survey.

3 Canon II provides as follows:

> Fairness: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

4 ARIAS•U.S.. has had a random selection procedure for umpires for some time and has more recently developed a neutral selection procedure for panels.

Abbreviated Version of 2004 Survey of Issue Relating to Arbitrations in the U.S.

Please check off appropriate category(ies) in which you fall and complete applicable survey section(s). For example, if you are both an arbitrator and a client, you may fill in Parts I and III as your viewpoint may differ.

- ☐ **Client/Industry Professional – Proceed to Part I**
- ☐ **Outside Counsel – Proceed to Part II**
- ☐ **Arbitrator/Umpire – Proceed to Part III**

Part I - Client / Industry Professional Survey

1	Which do you prefer as a means of solving reinsurance disputes?	Arbitration ☐	Litigation ☐	Mediation ☐	
2	Is your company thinking of modifying current language in Arbitration Clauses?	Yes ☐	No ☐	Do not know ☐	
3	Is your company thinking of eliminating arbitration clauses altogether?	Yes ☐	No ☐	Do not know ☐	
4	Would you prefer Arbitrators to be	Active in Industry ☐	Active in Industry and Certified by ARIAS or similar body ☐	Active or Retired from Industry and Certified by ARIAS or similar body ☐	Have no view ☐
5	Would you prefer Arbitrators to be	Non Lawyer Industry Professionals ☐	General Counsel or Lawyer by Training ☐	Mix of Both ☐	Have no view ☐
6	Would you consider using an inexperienced arbitrator to help increase the number of experienced arbitrators	Yes ☐	No ☐		
7	Would you prefer Umpires to be	Non Lawyer Industry Professionals ☐	General Counsel or Lawyer by Training ☐	Have no View ☐	
8	Do you think Arbitrators should	Strive for complete neutrality ☐	Be an advocate to a point, but be willing to make concessions for unanmity ☐	Be an unrelenting advocate for the appointing party ☐	
9	Would you prefer that party appointed arbitrators be selected by means of a blind procedure (i.e. similar to ARIAS umpire slection process)	Yes ☐	No ☐	Have no view ☐	
10	Generally, do you think the result of the Arbitration should be	Confidential ☐	Published ☐	Have no view ☐	

11	Do you think Arbitration Process has become too "legalistic"?	Yes ☐	No ☐	Have no View ☐	
12	Are you generally in favor of "Reasoned Judgements"?	Yes ☐	No ☐	Have no View ☐	
13	Do you believe a subsequent Panel being asked to rule on similar issues between the same parties should give weight to a prior reasoned decision (i.e., collateral estoppel)?	Yes ☐	No ☐	Have no View ☐	
14	Do you believe a subsequent Panel being asked to rule on similar issues between one of the same parties should give weight to a prior reasoned decision?	Yes ☐	No ☐	Have no View ☐	
15	Would you agree to pick an alternate arbitrator if your first choice cannot act in a reasonable time frame?	Yes ☐	No ☐	Have no view ☐	
16	Do you believe that discovery should be limited to the contracts at issue?	Yes ☐	No ☐	Have no view ☐	
17	Do you believe that discovery should be kept to a reasonable minimum?	Yes ☐	No ☐	Have no view ☐	
18	Do you think attorney's fees should be charged to losing party, even absent contractual authority?	Yes ☐	No ☐	Have no view ☐	
19	Are you in favor of Punitive Damages being awarded against a losing party, even absent contractual authority?	Yes ☐	No ☐	Have no view ☐	
20	Do you believe "ex parte" communications with party appointed arbitrators should	Never End ☐	End at Orginizational Meeting ☐	End at start of main hearing ☐	Have no view ☐
21	Should arbitration panels entertain dispositive motions, thereby potentially ruling based on the papers submitted and oral argument, in place of a full hearing?	Yes ☐	No ☐	Have no view ☐	

Comments: _____

_____

_____

_____

_____

_____

Name: (optional)

Company: (optional)

(**Part II – Outside Counsel Survey** and **Part III** – Arbitrator Survey followed a similar format. If you wish to receive the complete six-page survey form, send an email request to info@arias-us.org .)

members on the move

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

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

Recent Moves and Announcements

Klaus Kunze has moved from New York to DEPFA Bank's Dublin headquarters. He will be continuing with his arbitration work and expects to be travelling frequently. Email is unchanged, but his new contact information is as follows:

DEPFA BANK plc
3 Harbourmaster Place
IFSC
Dublin 1, Ireland

His various numbers are phone +353 1 792 2289, fax +353 1 605 4919, cell +353 (0)86 601 1912.

Paul Dassenko has relocated his office closer to midtown Manhattan. Email is unchanged, but here is his new address:

Apartment 32-D
One Beacon Court
151 East 58th Street
New York, New York 10022

New numbers are phone 212-223-1606, fax 212-223-1607.

Howard Denbin has left Resolute Management, Inc. to join Legion Insurance Company as Reinsurance Team Leader and Associate General Counsel. His new contact information is as follows:

Legion Insurance Company
(In Liquidation)
1 Logan Square, Suite 1400
Philadelphia, PA 19103
215-963-1607
hdenbin@legioninsurance.com

Tim Rivers is now located at Rivers Re Resolutions LLC, 14 Hopkinson Court, Basking Ridge, NJ 07920, phone 908-306-1412, fax 908-306-1413. His new email address is Timothy726@aol.com.

David Thirkill has launched a new compnay named The Thirkill Group of which de is President. It is located at 24 Powder Hill Road, Bedford, NH 03110, phone 603-714-4743 or 603-471-9336. His new email address is coomac@comcast.net .

Dewey Clark has a new home at 253 Nassau St., #203, Princeton NJ 08540, new fax 609-945-1119, phone and email remain the same.

in focus

Recently Certified Arbitrators

David L. Cargile

Susan Stonehill Claflin

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

David L. Cargile

David Cargile began his insurance career in 1968, in the property and casualty underwriting division of the Great American Insurance Company. Mr. Cargile joined International Facultative Company in 1972 as a facultative reinsurance underwriter. In 1974, he joined Reinsurance Facilities Corporation (RFC) as a reinsurance broker. He remained with that organization for 17 years with responsibilities for treaty and facultative reinsurance, underwriting management, structured settlements, and managing the company's London, Bermuda and Caribbean operations. Mr. Cargile served the final seven years as President and CEO of RFC.

Mr. Cargile joined US Facilities Corporation, Inc. in 1991. He was promoted to the positions of Chairman, President, and CEO. Under his guidance, the company was listed on the New York Stock Exchange and the name was changed to The Centris Group, (NYSE). Centris was an insurance holding company comprised of an RAA member reinsurance company, insurance companies writing property and casualty, life and A&H, and excess and surplus lines business, a reinsurance intermediary, a risk management company, a medical bill review company, and the largest medical stop loss underwriter in the United States. He held those positions until the company was sold in December of 1999.

Mr. Cargile is currently the President of Cargile Consulting, Inc., a company that provides turn-around, arbitration, and expert witness services. His 30 plus years of experience in the reinsurance and insurance fields include underwriting, accounting, claims, reserves, commutations, treaty and facultative broking, reinsurance contracts, risk management, medical stop loss, life insurance and accident and health. He has extensive experience in the London, Bermuda, and international markets and with managing general agents (MGAs) and managing general underwriters (MGUs). Mr. Cargile's tenure as the CEO of a publicly traded company gives him significant experience in corporate governance and public company operations.

David Cargile is a graduate of Southern California College. He served in the United States Air Force, receiving the Air Force Commendation Medal while serving in Viet Nam. He has served on the boards of The Centris Group, Reinsurance Facilities Corporation, Minet North America (The St. Paul Companies Lloyds broker), InterRe Intermediaries, and The Reinsurance Association of America (RAA). ▼

Susan Stonehill Claflin

Susan Claflin is an attorney with over 24 years of experience in litigation, including 18 years in the insurance industry with Travelers Property Casualty and its successor companies. She has extensive experience with asbestos, cumulative injury and major claims litigation. Her expertise provides an excellent background for her work as an arbitrator, mediator, expert witness and consultant.

Ms. Claflin most recently served as General Counsel - Claim Services at St.

Paul Travelers. She was responsible for over 1300 attorneys and claim

professionals in the Company's staff counsel, coverage and coverage litigation, reinsurance coverage and litigation, claim regulatory and compliance legal areas. Prior to the merger of St. Paul and Travelers, Ms. Claflin was an Executive Vice President at Travelers Property Casualty and the head of the Special Liability Group, responsible for all of the Company's asbestos, environmental and cumulative injury claims, and all coverage disputes arising out of such claims. This group had over 400 claim professionals. She was a key player in the 2002 asbestos reserve study in which the Company added significantly to its asbestos reserve in response to the changing claim and legal environment. At the same time, she was also responsible for the Company's Liability, Property and Workers Compensation Major Case Units located throughout the country.

In 2001, while Travelers was a subsidiary of Citigroup, Ms. Claflin served as the Company's General Counsel, reporting directly to the Chief Executive Officer at Travelers, as well as the Citigroup General

Counsel, responsible for all of the Company's legal affairs. Prior to that, Ms. Claflin was General Counsel of the Special Liability Group, the group she later headed. Because of her involvement in negotiating resolution of some of the Company's biggest asbestos and environmental exposures, Ms. Claflin has also served as a witness in reinsurance arbitrations and trials.

Prior to joining Travelers in 1987, Ms. Claflin was an attorney in private practice with Morrison, Mahoney & Miller in Boston, Massachusetts where she specialized in product liability litigation. She also opened the firm's first branch office in Springfield, Massachusetts. She is a 1981 graduate of Western New England School of Law and a 1978 graduate of the George Washington University. ▼

Kenneth H. French

Kenneth French started his reinsurance career at General Reinsurance Corporation in 1961 as a reinsurance accountant processing all types of accounts including International. He also reviewed new reinsurance contracts for the accounting provisions.

In 1968 he joined Interocean Agency, Inc. (Reinsurance Broker) working on treaty placements of Latin American business into the U.S. and London markets. He also did troubleshooting on accounting and contract problems.

Mr. French moved to Constellation Reinsurance Company in 1970 as a treaty accounting supervisor. He later moved into corporate accounting and became Assistant Controller before joining the underwriting department as a treaty underwriter.

In 1977, Mr. French joined Paul Napolitan Inc. as a treaty broker, placing all types of property and casualty reinsurance. Notable accounts included the Catastrophe Excess program for AIG, along with other catastrophe programs including retrocessional programs. He was also responsible for drafting the contract wordings on the accounts he handled. While there, he assisted the EDP department in developing its system. He was given increasing responsibility for broking A&H business, eventually heading the A&H Department in 1984.

In 1987, Mr. French joined Sullivan Payne Company. At Sullivan Payne, he placed Property and Casualty reinsurance and was responsible for developing the firm's Accident & Health business.

He left Sullivan Payne in 1991 to found WinterBrook Re Intermediaries, LLC., a full service Reinsurance Brokerage firm. He produced and placed various types of business, but specialized in Medical Stop Loss. He developed the accounting system and oversaw accounting and claims handling.

WinterBrook Re is currently in run-off; he is semi-retired.

Mr. French has a Degree and a Certificate in Insurance Accounting from the College of Insurance. ▼

Kenneth H. French

Stanley Hassan

Stanley Hassan

Before beginning his legal career in 1979, Stanley Hassan was already a fifteen-year insurance veteran, having served as an adjuster, investigator and claims manager for two large life, health and disability insurers.

While continuing employment as a claims manager, he enrolled in law school in 1974, where he excelled in the studies of contracts and torts, receiving American Jurisprudence Awards in each. Upon graduation, he accepted a position as Vice President and Administrative Counsel of BEST Plans, Inc. where his primary responsibilities included claims, contracts and litigation.

In 1982, Mr. Hassan entered private practice where he continued to focus on insurance, reinsurance and health care. During the ensuing seventeen years, he represented insurers, reinsurers, TPAs and physicians with regard to contracting, claims, coverage issues, and general business matters.

From 1996-2000, Mr. Hassan was a legal advisor and consultant to a selected group of insurance and health care clients. During this time, he re-negotiated vendor and PPO contracts, drafted insurance policies, formed IPAs and PPOs, and worked with doctors and hospitals on capitation agreements. He also organized and managed a life and medical underwriting department as well as a litigation department for an insurer client.

In 2000, Mr. Hassan closed his law practice to accept the position of Chief Operating

CONTINUED ON PAGE 26

Alan R. Hayes

Bernard A. Kesselman

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

CONTINUED FROM PAGE 25

Officer, General Counsel, and Secretary/Treasurer for BEST LIFE and Health Insurance Company. In this capacity, he was responsible for directing all operational activities, human resources, strategic planning, contracting, compliance and litigation. He actively participated in the negotiation and/or drafting of all network agreements, reinsurance agreements, insurance policies, facility and equipment leases, licensing agreements, marketing materials and agreements, and strategic relationships/joint ventures. He managed all of the Company's litigation and claims and was actively involved in the negotiation/resolution of all disputes, including those arising under various reinsurance treaties.

Mr. Hassan is currently self employed as an attorney, arbitrator, mediator and consultant focusing on the needs of the insurance/reinsurance community. He was admitted to the State Bar of California in 1979 and currently serves as a member of the Orange County Bar Association and its Insurance Law section. ▼

Alan R. Hayes

Alan Hayes began his over-25-year insurance career immediately after graduation from Indiana University, as an actuarial student with a Canadian Life Insurer. After a career change to Management Accounting, he assumed the CFO role for the Canadian branches of Kemper and Home of New York before starting his own business, Baleth Limited, which provided chief agent services to branches of foreign insurance companies doing business in Canada.

In the course of providing services managing the operations of over 15 separate companies, Mr. Hayes began to expand the experience gained from predominately direct writers to include companies that primarily wrote reinsurance. This experience included property, casualty, life, and health books of business. Involvement in arbitration proceedings began in 1988 providing expert witness testimony and forensic accounting support to the arbitration process for various clients.

Gradually the emphasis shifted over time from chief agency to forensic accounting and in 1998, Mr. Hayes moved from Canada to the United States focusing entirely on the forensic accounting and expert witness aspects of his career.

Over the years, Alan Hayes has been active in various industry organizations (Canadian Insurance Accountants Association and the Society of Management Accountants) and has acquired a generalist's approach to the insurance industry and arbitration issues through both management of the activities of insurance companies and involvement in arbitration activity. This approach includes a familiarity with claims and underwriting issues, as well as extensive expertise in finance and accounting matters as it relates to the insurance and reinsurance industry. ▼

Bernard A. Kesselman

Bernard Kesselman is an attorney with over twenty years of broad experience in the insurance industry. He has extensive litigation, claims and arbitration experience spanning his legal career of thirty-five years. He is currently in private practice as an arbitrator and mediator.

From 1993 to 2003, Mr. Kesselman was employed at AON Financial Services Group as a Senior Insurance Claims Counsel and Assistant Director. He oversaw large commercial litigations for AON "Fortune 500" clients and advised them with respect to claims and insurance ramifications. He was actively involved in negotiations of multi-million dollar settlements with large insurance carriers relating to these litigations which were often complex and contentious disputes among insurers, reinsurers, plaintiffs, defendants and their respective counsel.

Mr. Kesselman negotiated and drafted insurance policy terms and conditions on behalf of AON clients. He analyzed and provided legal advice on insurance matters, contract interpretation, and claims with respect to various professional liability coverages, including directors and officers ("D&O"), employment, fidelity and errors and omissions. Additionally, he was licensed as an insurance broker and as such negotiated and managed the placement of large insurance policies for AON clients.

From 1977 to 1993 Mr. Kesselman was a Senior Vice President and Associate General Counsel for Shearson Lehman Brothers, Inc. He was promoted to Senior Vice President in

1985 and became the Director of Risk Management. He established and managed a new department of Risk Management and Insurance and became responsible for Shearson's worldwide insurance program which included risk identification and evaluation, insurance claims and resolution, negotiation of policy terms, conditions and premiums, as well as the selection of all forms of corporate insurance programs. Mr. Kesselman formed and managed a captive insurance company owned by Shearson, and negotiated the terms of the re-insurance agreements with London insurers.

As Associate General Counsel for Shearson as well as Associate General Counsel for prior employers, Mr. Kesselman was responsible for supervising litigation, personally handling arbitrations, appearing before Federal and other regulatory and self-regulatory agencies in investigations and administrative proceedings as well as oversight of a broad range of legal issues including federal and state securities laws.

Mr. Kesselman received his Juris Doctor degree from Brooklyn Law School and is admitted to practice in the State of New York, the United States District Court for the Southern and Eastern Districts of New York, the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States. He is a member of the New York State Bar Association and is a certified arbitrator for the New York Stock Exchange and the NASD Dispute Resolution. Additionally, he is included on the Register of Mediators for the United States Bankruptcy Court for the Southern District of New York and the register of mediators for the New York Stock Exchange. ▼

Y. John Lee

John Lee has over twenty years of broad senior executive, operating officer and general management experience with insurance companies, brokers and risk management. His activities and responsibilities have involved all insurance related functions including reinsurance, claims, legal, actuarial, underwriting, marketing and product design. He has negotiated reinsurance coverage and contracts, legacy reinsurance disputes and structured reinsurance recovery initiatives.

Currently, Mr. Lee is Executive Vice President for Hewitt Coleman, a risk management company established in 1923. Previously, he was Senior Vice President in Risk Division for Royal Sun Alliance, hired by CEO to ultimately lead significant profit center. RSA withdrawal of U.S. operations preempted this assignment. In the mid 1980's, his executive responsibilities included reinsurance, national accounts, international and MGAs. He chaired officer project on reinsurance recoverables.

Prior to rejoining RSA, Mr. Lee was Vice President, General Manager of Commercial Insurance at MSI Insurance Companies in St. Paul, serving on executive management and investment committees. He was accountable for all commercial insurance functions including reinsurance, actuarial, claims and underwriting. He also led an owned broker conducting retail and wholesale brokerage, TPA activities for self-insurance fund, underwriting and claims authority for Lloyds syndicates and companies.

From 1977 to 1985, Mr. Lee was with Wausau Insurance, serving on senior management committee as President of certain subsidiaries and Corporate Vice President of Broker Operations. Subsidiary responsibilities included all functions and reporting to outside boards. He initiated and developed successful demutualization plans for managed reciprocals.

Early in his career Mr. Lee was a Branch Underwriting Manager for Atlantic and later President of Davis, Young, and Lee Inc., a retail broker.

He has an economics degree from Belmont Abbey and studied at Clemson University and College of Insurance in NYC. His credentials include CPCU designation and serving as committee member for SC Captive Association and Self Insurance Institute. ▼

Glenn R. Partridge

Glenn Partridge began his career in 1978 in the Dallas, TX Facultative underwriting office of the General Reinsurance Corporation. After a year of underwriting excess of loss casualty reinsurance, he moved to the newly opened facultative Philadelphia, PA branch office of General Re and began underwriting Excess Workers' Compensation for self-insured's and reinsurance of captive insurance companies through the broker

CONTINUED ON PAGE 28

in focus

Y. John Lee

Glenn R. Partridge

in focus

Jonathan Rosen

CONTINUED FROM PAGE 27

market. This division of General Re ultimately became Genesis Underwriting Management Company.

Mr. Partridge joined Commonwealth Risk Services (after a brief period of being a reinsurance broker), which was a newly formed subsidiary of ANECO Reinsurance Company, and which would ultimately become Mutual Risk Management (MRM.) While there, he was responsible for finding policy issuing carriers and specific and aggregate reinsurance to support the ANECO Mutual Ltd. (became Mutual Indemnity Ltd.) rent-a-captive marketing effort.

In 1987 when MRM purchased Legion Insurance Company, Mr. Partridge moved over to Legion as a member of the board of directors and as Senior Vice President in charge of purchasing reinsurance and structuring programs. In 1991 he joined the Board of MRM and became Executive Vice President of both MRM and Legion. MRM underwent an IPO in 1991 and he was part of the roadshow process.

During the late 1990's, Mr. Partridge was responsible for placing close to one billion dollars of reinsurance per year, structuring over one thousand individual account and program business accounts, and underwriting on behalf of specific and aggregate reinsurance treaties provided by both the traditional and Life/A and H carve-out markets.

Following his departure from MRM in April 2002, he formed GRP LLC to act as an Alternative Risk consultant and an expert witness for many of the issues currently at hand in reinsurance disputes.

Currently, Mr. Partridge is Vice President for sales with Keane Business Risk Management Solutions, selling an ASP model platform called Keane SCORE. Keane SCORE is an Enterprise Risk Management application that provides process management to help companies "Measure, Manage, and Monitor" their exposure to any and all types of risk.

After graduating from the University of Pennsylvania in 1976 with a degree in American history, Glenn Partridge played two seasons of Class A minor league baseball in the Milwaukee Brewers farm system. ▼

Jonathan Rosen

Jonathan Rosen has dedicated a professional career spanning more than 25 years to servicing the insurance and reinsurance industries. In addition to broad ranging corporate and regulatory representation, he has been involved as counsel, arbitrator and expert witness in scores of insurance and reinsurance related disputes, giving him depth of experience in all aspects of property/casualty insurance and reinsurance arrangements. Mr. Rosen has also served on NAIC advisory committees and working groups involved in the preparation of model legislation and regulation and has written and spoken extensively on insurance and reinsurance related subjects in various industry publications and at numerous conferences.

Mr. Rosen is a native South African and is the holder of Bachelor of Commerce and Bachelor of Laws degrees and a Higher Diploma in Taxlaw from the University of Witwatersrand in Johannesburg. He emigrated to the United States in 1984 and was admitted to the New York bar in 1985. He is also admitted to the bars of Massachusetts and South Africa, as well as being admitted to practice before a number of federal courts.

Mr. Rosen is currently Chief Operating Officer of The Home Insurance Company In Liquidation, a position he has held since August 2003, where he serves as operational head of the Claims, Reinsurance, Actuarial and Legal Departments, responsible for all aspects of the endeavors of these operating units. He is also a member of the Board of Directors of the Association of Insurance and Reinsurance Run-Off Companies and presently serves as President and a director of Cityvest International Limited and Cityvest Reinsurance Limited, both Bermuda corporations.

Prior to his present position, Mr. Rosen was Executive Vice President of Risk Enterprise Management, Limited and Executive Vice President and Reinsurance Counsel of The Home Insurance Company, in which capacities he was a member of the Executive Management team and operational head of a multi-disciplined Reinsurance Department with responsibility over a multi-billion dollar highly complex reinsurance portfolio encompassing legal, claims, finance, accounting, underwriting and actuarial disciplines. He also served as lead counsel in

a captive legal resource servicing the multiple reinsurance needs of The Home Insurance Company and its affiliates and various affiliated entities of Zurich Financial Services.

Mr. Rosen was previously a partner of Peabody & Arnold in Boston and Ober, Kaler, Grimes & Shriver in New York, where his legal representation covered a wide spectrum of the activities of both domestic and foreign insurance and reinsurance entities. As a practitioner, he was also a Senior Associate in the New York offices of Carter, Ledyard & Milburn and Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey.

Mr. Rosen resides with his wife, an architect, in New York City and they maintain a weekend residence in Natick, Massachusetts. ▼

George G. Zimmerman

George Zimmerman commenced his career in reinsurance in 1969 as an intermediary, working for Guy Carpenter & Company in the Life, Accident, and Aviation department. Simultaneously, he was in their executive training program, which term ran for one year. In 1973, he joined the firm of Pritchard & Baird in Morristown, New Jersey as an Assistant Vice President and commenced their Life, Accident, & Health department. In January of 1975, he was made a vice president of his department. Upon the break up of Pritchard & Baird in 1976, Mr. Zimmerman worked as a Vice President of Paul Napolitan Inc., a reinsurance Intermediary owned by AIG. In 1978, Mr. Zimmerman constructed an Accident & Health underwriting syndicate for the Emmet & Chandler Group assigned to their reinsurance brokerage firm, PRI, Inc., in Parsippany, New Jersey.

In November of 1980, Mr. Zimmerman founded Zimmerman / Green, a reinsurance intermediary located in Morristown, New Jersey. During 1983, he orchestrated the purchase of an off-shore captive insurance company, U.S. CAP, Ltd. from Benjamin Nelson, who was then appointed by President Jimmy Carter to head up the National Association of Insurance Commissioners, and who is now a United States Senator (D) from Nebraska. ▼

Also in 1983, Mr. Zimmerman constructed an underwriting syndicate comprised of five "A" rated Insurance companies to underwrite all forms of Accident & Heath Reinsurance. During the first five years of operation, he was the President and Chief Underwriter of this facility.

In addition, Mr. Zimmerman has held the following licenses: Life & Health (New Jersey 1970), Reinsurance Intermediary (New York 1978), Mediation (American Arbitration Association 1993). He has served as a Mediator and Arbitrator in Insurance & Reinsurance disputes, and as an expert witness.

He has also written industry articles that were published in Global Reinsurance International Magazine, and the Businessmen's Monitor. He has also guest lectured at the College of Insurance, Mid-Western Home Office Underwriters Annual Meeting, and the BMA's bi-annual corporate meetings in the Cayman Islands and Scottsdale, Arizona.

He also wrote a fictional business novel that was published by Rutledge Books, titled The Class of "88". In May of 2002, he released a CD that he wrote titled, "Patriots Day Anthem." In August 2004, Mr. Zimmerman wrote and published an educational and entertaining children's book titled, "Dougie and the Dane".

He was inducted in "Who's Who in Business" in 1994.

Mr. Zimmerman has served on the Board of several companies, both insurance / reinsurance and non-insurance related. ▼

in focus

George G. Zimmerman

case notes corner

Arbitration Clause Does Not Require "All-American" Umpire Slates

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

RONALD S. GASS*
The Gass Company, Inc.

Ronald S. Gass

...an American arbitrator was appointed in that case because the reinsurance agreement required the arbitrators to consider "the custom and practice of the applicable insurance and reinsurance business..."

For arbitrations with U.S. venues, domestic insurers are generally more comfortable appointing American arbitrators, but when the adverse party is a foreign reinsurer, they may be confronted with an umpire slate comprised entirely of arbitrators from the United Kingdom or European countries, for example. Such a scenario was recently litigated in a New York federal district court case in which the manager of a U.S.-domiciled group of insurers tried, but failed, to compel a foreign reinsurer to propose an umpire slate solely of American arbitrators because a "U.S.-based" arbitration was allegedly consistent with the parties' contractual intent.

In this action to compel arbitration, the manager and agent for eight insurers, the Mutual Marine Office, Inc. ("MMO"), ceded certain risks to an Irish reinsurer, Insurance Corporation of Ireland ("ICI"), under a number of reinsurance agreements. When the reinsurer failed to pay its share of the ceded claims, MMO petitioned the federal district court for an order appointing an arbitrator from a list of American candidates it offered and directing ICI to proceed with the arbitration.

The arbitration clauses in the disputed contracts provided, in pertinent part, that "the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen." Each side duly appointed their own arbitrator, but when the party-arbitrators conferred to select the third, MMO's slate included only American arbitrators and ICI's only candidates from the U.K. Because the parties' intent under the reinsurance agreements, according to MMO, was that any disputes be governed by American law and resolved by American courts (e.g., the contracts involved U.S. insurance companies and were negotiated by a U.S. intermediary; required the reinsurers to submit to U.S. jurisdiction and service of process; and provided for U.S. venue for the arbitration), MMO alleged that ICI's all-U.K. arbitrator slate was contrary to that intent. When ICI failed to provide the demanded list of "U.S.-based" candidates, MMO filed this motion to compel arbitration in federal court.

The district court, applying Sections 4 (petitions to compel arbitration) and 5 (applications to compel the appointment of arbitrators) of the Federal Arbitration Act, initially focused on the plain language of the arbitration clause and found no explicit requirement that the parties nominate only "U.S.-based" arbitrators.

Arguing that the parties intended otherwise, MMO emphasized the American origins of the contracts and further contended that an American arbitrator should be appointed "because an English arbitrator would be more costly and less familiar with American arbitration procedures and American law." Unpersuaded, the court distinguished the lone 2003 Illinois federal district court decision MMO cited in support of its position that an American umpire must be selected, *Continental Casualty Co. v. QBE Insurance*, No. 03 C 2222, 2003 U.S. Dist. LEXIS 17826 (N.D. Ill. Oct. 6, 2003), and observed that an American arbitrator was appointed in that case because the reinsurance agreement required the arbitrators to consider "the custom and practice of the applicable insurance and reinsurance business" – language absent in the instant arbitration clause. Consequently, the court rejected MMO's argument that the third panel member had to be a U.S.-based arbitrator and declined to direct ICI to proceed with the arbitration on that basis.

Mutual Marine Office, Inc. v. Insurance Corp. of Ireland, 04 Civ. 8952 (PKL), 2005 U.S. Dist. LEXIS 11584 (S.D.N.Y. June 13, 2005).

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

Reference to "Arbitration Clause" in Binding Placement Slip Sufficient to Compel Arbitration

When parties fail to execute final reinsurance wordings, they must generally look to the placement slips for guidance regarding the terms of their agreement. These slips will oftentimes include as the general condition "Arbitration Clause" or similar language without elaboration, leaving the parties to sort out exactly what arbitration procedures were intended when disputes arise. In an interesting variation on this theme, an Illinois federal district court was requested by a U.S.-cedent to compel arbitration based on such an abbreviated arbitration provision in a slip which the U.K. reinsurer contended was not binding because certain conditions precedent to its acceptance of the cession had not been satisfied by the fronting cedent's managing general agent. Under the facts of this case, the court found that the reinsurer's conditions had been met and that there was a binding agreement to arbitrate and ordered the parties to proceed with arbitration.

This case arose in the context of a Bond Quota Share Reinsurance Agreement. The reinsurer, a Lloyd's Syndicate, signed a slip with a fronting insurer for a share of certain bail bond business produced and underwritten by an MGA contingent upon (1) its receipt of letters of indemnification from the MGA for $2 million that the Syndicate had advanced to it to remedy cash flow problems arising from bail bond business underwritten by the MGA in prior years through another fronting carrier, and (2) written confirmation of the length of the bonds to be issued by the MGA. On February 19, 2004, the Syndicate's managing underwriter drew a line in pencil through the Syndicate's stamp and wrote these two conditions in abbreviated form on the slip. In a court affidavit, the underwriter stated that "under common practice in London, the Syndicate was not bound by the placement slip until the insurer removed the pencil line from its stamp."

In an e-mail exchange on February 25, 2004, the Syndicate underwriter agreed to remove his conditions having received a satisfactory response regarding bond length and a representation from the MGA through the cedent's broker that the requested indemnifications would be received that night. On that same date, the underwriter erased his penciled conditions in front of the broker but noted on the slip that a copy of the MGA indemnifications were to be provided to him by March 1, 2004. No such indemnifications were subsequently received by the Syndicate.

The cedent claimed that it forwarded its share of the premiums to the Syndicate and that the Syndicate subsequently refused to pay the ceded losses. The Syndicate denied that it was ever bound by the slip because it had not received the MGA indemnifications or any of the cedent's premium payments. The Syndicate sued the cedent in a London court to avoid the contract. Subsequently, the cedent filed an arbitration demand against the Syndicate and, simultaneously, an action to compel arbitration in Illinois federal district court.

In the Illinois litigation, the Syndicate argued that there was no binding agreement to arbitrate because the condition precedent of receipt of the MGA indemnification letters had not been met. Rejecting this position, the district court found that the Syndicate underwriter's February 25, 2004 e-mail to the broker evidenced his "clear intent" to lift the conditions immediately. Consequently, the court granted the cedent's petition to compel arbitration ruling that a binding contract existed and that the phrase "arbitration clause" was "sufficient to establish the parties' agreement to arbitrate disputes," albeit without any guidance as to any of the important arbitral details such as venue and arbitrator selection. The court urged the parties to agree on these procedural details, but failing that, it would "fill the gaps" in the agreement pursuant to the Federal Arbitration Act.

Harco National Insurance Co. v. Millenium Insurance Underwriting Ltd., No. 05 C 2397, 2005 U.S. Dist. LEXIS 15960 (Aug. 3, 2005). ▼

When parties fail to execute final reinsurance wordings, they must generally look to the placement slips for guidance regarding the terms of their agreement.

news and notices

Board Certifies Five New Arbitrators; Thirkill, Burak, and Maneval Named Umpires

At its meeting on June 16, the ARIAS Board of Directors approved certification of five new arbitrators, bringing the total to 256. The following members were certified; their respective sponsors are indicated in parentheses:

- **David L. Cargile** (Paul McGee, John Deiner, Jeremy Wallis)
- **Kenneth H. French** (Jeremy Wallis, James Hazard, John Howard)
- **Stanley Hassan** (Eugene Wilkinson, David Friedly, John Vanderschraaf)
- **Y. John Lee** (Joseph Pingatore, James Yulga, Paul Steinlage)
- **George G. Zimmerman** (James Hazard, Eugene Wilkinson, Andrew Walsh)

Their biographies appear in this issue of the Quarterly.

At the same meeting, **David A. Thirkill**, **Janet J. Burak**, and **Andrew Maneval** were approved for the ARIAS Umpire List. ▼

ARIAS Website Now Offers Keyword Search for Quarterly Feature Articles

On June 15, a new function was added to the ARIAS website. Searching by keyword has been added to the other indices available for searching the electronic archives of ARIAS Quarterly back issues. With this new index, a user can scan a list of 62 keywords or phrases representing major topic areas. Clicking on a word brings up a list of all feature articles in which that keyword was substantially discussed. Clicking on the respective issue name opens a PDF of the issue.

Executive Director, Bill Yankus, commented that reseachers and ARIAS members who have needed to review the available literature from earlier Quarterlies have had trouble determining where relevant content is located. He expressed the hope that this new feature would significantly facilitate these searches, making the valuable content of earlier papers far more accessible.

PDFs of Quarterlies are available for all issues of the past eight years. ▼

ARIAS Office Moves a Little West

The ARIAS administrative office has migrated from Mount Vernon to the Park Hill section of Yonkers, six miles to the west. The new location provides improved facilities and a more pleasant environment. Some of us even have a nice view of the Hudson River and the New Jersey Palisades. While the old phone numbers will be forwarded for some time, the new numbers are throughout the website and Quarterly, including here: phone 914-966-3180 x116, fax 914-966-3264. ▼

Courier Shipments to ARIAS Need New Address.

With the recent relocation of the ARIAS administrative office, **the 35 Beechwood address is no longer valid**. The new postal address for ARIAS is PO Box 9001, Mt. Vernon, NY 10552. However, UPS, FedEx, DHL, and Airborne are not able to deliver to a post office box address. Therefore, any materials being sent by overnight courier service should be addressed as follows:

ARIAS•U.S.
131 Alta Avenue
Yonkers, NY 10705-1414

The phone number to show on the shipping label is 914-966-3180. ▼

Board Reaffirms Certification Criterion Relating to Sponsorship

(Due to the importance of this news item, it is being repeated again.)

Last year, the Board of Directors clarified the requirement for sponsoring a member for certification. In commenting on the content of sponsor letters, the Board specified the following: "These comments must be based on the writer's personal acquaintance with the candidate over a significant period of time, at least five years." This clarification has been included in the criteria on the website since last September and is in the new Annual Directory. At its January meeting, the Board confirmed that sponsor letters were not acceptable if they indicated a period of time less than five years. ▼

Board Emphasizes Sponsor Letter Content

(Due to the importance of this news item, it is being repeated again.)

At its March meeting, the Board asked that members who are writing sponsor letters be reminded that letters must contain comments about the candidate's trustworthiness, moral character, and reputation. Letters that lack such information will not be accepted. ▼

Member Services Committee Established

At its meeting on June 16, the ARIAS-US Board of Directors approved creation of the Member Services Committee. Recognizing the increasing number of newly Certified Arbitrators who are starting solo practices, the Board concluded that there was a need for a mechanism by which experienced-arbitrator members could share their knowledge on subjects such as, handling time commitments, tracking conflicts, computer software, and billing. Andy Walsh is Chair of the committee. Volunteers are asked to contact Andy at andywalsh@comcast.net . ▼

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

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.

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

NAME & POSITION _____

COMPANY or FIRM _____

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.
PO Box 9001, Mt. Vernon, NY 10552

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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