VOLUME 12 NUMBER 1

ARIAS U.S. QUARTERLY

FIRST QUARTER 2005

Ten years of *putting the pieces together...*

Evolution *of* Reinsurance Arbitration *in* France

Court Intervention in Selecting the Arbitration Panel

The Evolving Standard of Arbitrator Neutrality

editor's comments

T. Richard Kennedy

With this first issue of 2005, we are pleased to welcome Charles M. Foss as Associate Editor of the Quarterly. Charlie has been an *Ex-Officio* member of the Board of Editors for several years while he was serving as President and then Chairman of the ARIAS•US Board of Directors. He has offered valuable insights to our work and we are most happy to have him continue with us.

We owe sincere gratitude to Paul Walther, who is going off the Editorial Board after having served as Business Articles Editor from the beginning. Paul has been active in the solicitation and editing of articles, and most recently was a moving force in bringing into being the index of previously published Quarterly articles.

As you may wish to note, we no longer have "Legal" and "Business" Articles editors. The reason is that we came to realize that the distinction is meaningless in the actual editorial work. We now have just "Articles Editors" with Jim Rubin and Jay Wilker capably filling those positions. Please contact either of them if you have an idea for an article you would like to see in the Quarterly.

The first issue provides a good opportunity to pay tribute to the people at CINN who do such splendid work in putting our publication together. Before Bill Yankus, we seldom achieved our quarterly deadlines or came close to the quality to which we aspired. Bill does just a tremendous job in keeping after us to get things done on a timely basis and then pulling things together for each issue. He also writes the many reports regarding recent or upcoming activities of ARIAS•US. Diane Weinreb was the graphic artist who created the "new look" of the Quarterly over the past three years. Gina Balog, Production Manager, took over the design work from her last October and now develops the current look and layout. Their work is responsible for the visual impact that presents the Quarterly as a first-rate journal.

Of course, we can never be satisfied with where we are. Like any other human endeavor, there is always room for improvement. I hope you will let us know your thoughts on how we could do better, either by a letter to the Editor or simply by conversation with one of the Editorial Board members.

The cover and lead article in this issue again have an international focus. I think you will find Mikael Hagopian's *Evolution of Reinsurance Arbitration in France* to be a wonderful account of that subject. Many of the approaches that have been taken by our French counterpart are very similar to what we have done in ARIAS•US. At the same time, CEFAREA offers some unique features, such as offering parties two types of arbitration proceedings, that could well provide us with food for thought.

We are indebted to our International Editor, Christian Bouckaert of Paris, for both arranging and translating from French to English the article by Chairman Hagopian. With Christian as an Editor and now Ernest G. Georgi as U.S. Correspondent for CEFAREA (see separate report in this issue), we are now in excellent position to promote cooperation of our U.S. and French organizations in seeking to provide effective and efficient arbitration service to the international insurance and reinsurance community.

The feature article in this issue by Vincent Vitkowsky and Jeanne Kohler, entitled *Evolving Standards of Neutrality*, is particularly timely in view of the Board of Directors' recent adoption of a procedure for appointing a panel through a neutral selection process. A very helpful review of court decisions considering such terms as "disinterested," "partial" and "neutral" is set forth. The authors' discussion of the implications of the revised AAA and ABA Code of Ethics for Arbitrators in Commercial Disputes should be reviewed carefully by every company subject to arbitrations, every drafter of arbitration clauses, and every arbitrator.

Court Intervention in Selecting the Arbitration Panel, by Larry Schiffer and Mark Noferi, is a thoughtful and comprehensive review of cases where courts are called upon to intervene in the panel selection process. It is interesting to see how the courts oftentimes struggle to stay out of arbitration, while at the same time intervening where deemed necessary to maintain the integrity of the arbitration process.

Our next Quarterly will be published in June. In the interim, see you in Las Vegas!

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Editorial Policy

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

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

Manuscripts should be submitted as email attachments to trk@trichardkennedy.com .

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

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feature

Evolution of Reinsurance Arbitration in France

Mikaël Hagopian
Chairman, CEFAREA

Mikaël Hagopian

...dialogue had to be established with insurers, brokers, law firms, and also, of course, risk managers of large companies. That is why the initial organizational meeting of the Center was not held until January 10, 1995.

Mikaël Hagopian

Mikaël Hagopian is the Chairman of CEFAREA. After twenty years with UAP Assurances (now merged into AXA), he became General Manager of UAP Réassurances and five years later of the French reinsurance subsidiary of Lincoln National Life.

For a long time London was the leading insurance and reinsurance market. It was to London that insureds and ceding and retroceding companies rushed with an ever-growing and ever-new demand, because they knew they would find there an abundant supply of cover by solvent firms open to innovation. Brokers played a major role in matching that demand and that supply.

London's virtual monopoly gradually transformed into supremacy. Though that supremacy is now far from being as pronounced as it once was, London still remains dominant. It continues, in particular, to play a pioneering role. It was there, quite naturally one might say, that ARIAS UK was formed at the beginning of the 1990s.

The creation of ARIAS UK was a welcome initiative. It is only right and proper that an international insurance and reinsurance market should provide market practitioners with means of resolving their disputes without the need to have recourse to litigation in the courts, which, incidentally, constantly complain of the excessive burden such litigation creates. And when conciliation and mediation procedures are unsuccessful, arbitration determines the dispute quickly, at less expense, without formalities or publicity, and with the possibility of giving significant consideration to industry practices.

Also at the beginning of the 1990s, the French federation of insurance companies FFSA conducted a survey to determine the measures to be taken to make Paris a truly international center of insurance and reinsurance.

ARIAS UK was formed on the initiative of the UK Section of the International Association for Insurance Law (known by its French acronym "AIDA"), mainly at the instigation of John Butler, the then president of the UK Section, whose expertise in insurance law is recognized worldwide.

John Butler, with whom I had developed a friendly relationship, was working closely with Professor Jean Bigot, the then president of the French Section of AIDA. Jean Bigot is a leading authority in insurance and reinsurance law.

Jean Bigot and I embarked upon the task of setting up in Paris an arbitration center specific to the industry, like the one in England. We had the good fortune to receive from the outset the valuable assistance of Gérard Honing, an attorney of international repute who became a member of the Paris law firm HPMBC after his firm merged with a major English firm of solicitors.

FFSA showed itself to be wholly in favor of the project, and at a meeting held in one of its auditoria the plan to create an arbitration center was presented to the principal associations and organizations in the industry. The exchanges of views that followed the presentation of the plan brought to light the need to secure the assistance of market practitioners rather than organizations.

Consequently, dialogue had to be established with insurers, brokers, law firms, and also, of course, risk managers of large companies. That is why the initial organizational meeting of the Center was not held until January 10, 1995. One month later, the Board of Directors held its first meeting, at which I was appointed president of the Center.

As a careful reader, you may be wondering why I am using the term "Center" rather than "CEFAREA." You will, I hope, find the explanation amusing.

The name originally chosen for the newly formed institution was Centre d'Arbitrage de Réassurance et d'Assurance - CAREA, and its head office was established at 25 rue du Général Foy in the 8th arrondissement of Paris.

CAREA had been in existence for just nine months when I received a letter from a lawyer requesting that the Center change its

name because there was an insurance brokerage firm called CAREA located at 21 rue du Général Foy and the homonymy and close proximity were liable to create confusion in the minds of the firm's existing or potential clients. As we were unable to convince the brokerage firm that the Center's activities were in no way liable to compete with the firm's, we had to change our name.

Twenty-five corporate members were the founding members of CEFAREA. The past ten years have obviously seen changes in CEFAREA's membership, with the arrival of new members, individuals in particular, and mergers and changes of status of some corporate members. Like any living organism, CEFAREA has evolved and will continue to do so.

Presently, CEFAREA's membership comprises 26 firms, 4 associations, and 38 individuals.

CEFAREA's two governing bodies are a 15-member board of directors, of which I am the chairman, and the officers of the Center, who consist of a president (myself), a vice president (Georges Durry), a secretary, and a treasurer (both of the latter offices are held by Gérard François).

Georges Durry, an honorary professor at the University Panthéon-Assas, Paris, is a leading authority on civil law. He is a regular contributor to the journal *Risques*, one of the most highly regarded publications in the industry, for which he writes articles on current issues in insurance and reinsurance law. He is the mediator for several mutual insurance companies that have joined together in a grouping called GEMA.

Gérard François is a lawyer who has pursued a career in insurance and reinsurance. Besides his duties as secretary, he manages the day-to-day affairs of CEFAREA, keeping watch, in particular, over the indispensable balancing of expenditure and revenue.

CEFAREA has as its object to become a true arbitration center as soon as possible. Its specificity is already recognized both in France and abroad. But as matters now stand, parties that apply the CEFAREA Rules of Arbitration are not obliged to keep CEFAREA informed of the proceedings, and there is no obligation for arbitrators, even those appointed by CEFAREA at the request of the parties, to provide CEFAREA with a draft award.

The reason for this is that French insurers hardly gave a thought to persuading policyholders to use arbitration as a means of resolving disputes arising from insurance contracts, all the more so that policyholders were for a long time convinced that the courts to which such disputes were referred would be anxious to protect the weaker party and, therefore, be more inclined to find in favor of the insured than the insurer.

But things have changed, and the change has become increasingly distinct, as will be shown by the following developments.

An initial working group swiftly completed two essential tasks that had been assigned to it. The first was to finalize the wording of two types of agreement whereby contracting parties freely choose arbitration as the means of settling disputes between them, a free choice that may be revoked only by the mutual consent of the parties.

The two types of agreement to arbitrate are referred to in Continental parlance as a clause compromissoire (arbitration clause) and a compromis d'arbitrage (arbitration agreement).

An arbitration clause records the parties' agreement to submit any future disputes to arbitration and is almost always contained in the contract to which it relates. CEFAREA has drafted two standard-form arbitration clauses. One of them provides that the arbitral tribunal shall be composed of three arbitrators acting as *amiables compositeurs*[1] and that the decision of the arbitral tribunal shall be final. The other standard-form arbitration clause gives the wording to be used in cases where the parties prefer that that their dispute be settled by a sole arbitrator, or that the arbitrator(s) decide in accordance with law, or that the award may be appealed.

An arbitration agreement records the parties' agreement to submit to arbitration a dispute that has already arisen. The working group drafted a standard-form arbitration agreement with optional variations similar to those applying to the arbitration clause.

It should be mentioned that even if the parties have waived, by an arbitration clause or an arbitration agreement, their rights of appeal, they may still bring an action to set aside the award notwithstanding any stipulation to the contrary. But such an action is available only in the five instances

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CEFAREA has drawn up and maintains a slate of persons it considers qualified to act as arbitrators. The slate is not published. CEFAREA provides names on request, giving due consideration to the nature of the dispute.

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defined in Article 1484 of the French Code of Civil Procedure.

CEFAREA arbitration clauses and arbitration agreements refer to the CEFAREA Rules of Arbitration. The second essential task completed by the working group was to frame those Rules.

The Rules of Arbitration relate to:

- the request for arbitration and the defendant's answer;
- the composition of the arbitral tribunal;
- the procedure applying to requests for CEFAREA to appoint arbitrators;
- the actual arbitration procedure; and
- the arbitral award.

The two standard-form arbitration clauses, the standard-form arbitration agreement, and the Rules of Arbitration together with an appendix thereto are set forth in an introductory brochure. The above-mentioned appendix contains the schedule of arbitrators' fees. The principle adopted is to compute such fees on the basis of the combined amount of the parties' claims. If such amount exceeds g15m, the fees to be paid in addition to those resulting from application of the schedule are determined by CEFAREA.

CEFAREA has drawn up and maintains a slate of persons it considers qualified to act as arbitrators. The slate is not published. CEFAREA provides names on request, giving due consideration to the nature of the dispute. It should be specified that even when the CEFAREA Rules of Arbitration are applied, the parties are free to choose arbitrators not listed on the CEFAREA slate.

The CEFAREA slate currently contains the names of 69 arbitrators, 39 of whom are insurance or reinsurance practitioners. Nine nationalities are represented, including, of course, the United States. The number of working persons and retirees is roughly equal: 33 working persons and 36 retirees, most of whom have retired recently.

CEFAREA has an international orientation. A growing number of foreign practitioners—insurers, reinsurers, brokers—are operating, and making commitments, in France. CEFAREA therefore needs to be aware of everything, within its sphere of action, that is happening outside its home country and to be able at all times to pass on what it knows to its members. Hence the need for a network of information sources and a data bank. Gérard François has established both and is in charge of their day-to-day management.

We presently have 22 correspondents and intend to widen the scope of our network. Our contacts enable us to have—if not systematically, at least on request—the necessary information concerning an event (e.g., a judgment, law or regulation), whatever the country of origin.

The information in our data bank relates primarily to everything concerning arbitration. But we are currently considering the advisability and possibility of compiling documentation on important insurance, reinsurance and brokerage issues in order to make it available to our members.

At the end of each year, CEFAREA publishes and sends to each of its members a journal in which theoretical and practical questions are dealt with by French and foreign authorities. Our ninth issue, due to be published in December 2004, will feature, inter alia, an article by an eminent British Justice whose name is attached to important decisions in matters relating to international insurance and reinsurance law.

Since 1997, CEFAREA has been organizing a meeting at the end of each year, which all members of the Center as well as recognized players in the industry are invited to attend. The 1998 meeting was devoted to an exchange of views on two essential insurance and reinsurance matters: the duties and liability of brokers and the notion of occurrence. The other six meetings all followed the same format, namely, the determination of a fictitious dispute by a three-member arbitral tribunal. The hearing was supposed to be the last one held by the tribunal. Counsel would present their oral arguments before the spectators. The tribunal would retire to deliberate and the audience would exchange views. The tribunal would then return and deliver its award, on which different opinions, dissenting or approbatory, would be expressed. The mock arbitration hearing held at the 1999 meeting was presided over by the British Justice referred to above in connection with the CEFAREA journal. Given the great interest these arbitration proceedings elicit, the meeting to be held at

the end of this year will again be devoted to resolving a dispute, this time between an insurer and a firm specialized in run-off business.

A third working group finalized the above-mentioned CEFAREA brochure. In addition to the texts already enumerated, the brochure contains extracts from the Association's by-laws (the most important provisions). The brochure also shows the membership of the Board of Directors and the amount of the annual dues. A revision of the brochure has just been initiated and the new edition is due to be published at the beginning of next year.

For many decades, merchants could validly stipulate arbitration clauses in their contracts; Article 631 of the French Commercial Code stated that such clauses were valid. Insurers and policyholders, even though they were acting in their capacity as merchants, did not, however, avail themselves of the possibility thus given to them of including an arbitration clause in their contracts.

In any event, mutual insurance companies would have been unable to do so because they are not deemed to act as merchants.

Taking account of a gradual and increasingly pronounced trend, the legislature considerably broadened the scope of validity of arbitration clauses. The wording of Article 2061 of the French Civil Code was amended by Law No. 2001-420 of May 15, 2001, and now reads as follows: "Subject to particular statutory provisions, an arbitration clause is valid in contracts concluded by reason of a professional activity." What previously was void unless otherwise provided by law is now valid unless otherwise provided by law. The number of insurance contracts containing an arbitration clause is gradually increasing.

Contrary to insurance contracts, every reinsurance treaty contains an arbitration clause. For a very long time, disputes between ceding companies and reinsurers would be settled amicably: the continuing nature of the relationships between the parties, the constant positive results for the reinsurers, and a certain technical stability formed the basis of a frank and close collaboration. Things have changed. It is therefore important to insure that the arbitration clause is well drafted. The CEFAREA arbitration clause appears frequently in reinsurance treaties, even when one of the contracting parties is foreign.

CEFAREA recommends that its members provide for the arbitration clause in facultative reinsurance by writing "CEFAREA arbitration clause" on the document recording the reinsurer's commitment.

One of CEFAREA's main aims is to promote arbitration for the resolution of insurance disputes. Industrial, commercial and service companies need to be persuaded that it is in their interest to include the CEFAREA arbitration clause in their contracts, and a similar effort needs to be made with respect to professional-liability insurance policyholders.

That aim is far from being achieved. Although the CEFAREA arbitration clause already appears in a certain number of corporate insurance policies, especially those for multinational corporations - since any preliminary conflict-of-laws issue is more easily resolved by arbitration than it could be by a court, insureds as a whole continue to have reservations about arbitration, as do most corporate risk or insurance managers for that matter. Yet AMRAE, an association for the management of corporate risks or insurance, has always given us precious assistance and continues to do so. We therefore have every reason to believe that the reservations still being observed will gradually disappear. We have seen that arbitration has become in France an institution whose merits are recognized and whose few disadvantages can be overcome by competent arbitrators. France's liberal case-law facilitates the conduct of arbitration proceedings and encourages compliance with awards by giving the parties the protection they are entitled to expect when they choose arbitration.

Because of its international orientation, especially in matters relating to insurance and reinsurance, arbitration reduces the wide differences between Anglo-Saxon and French law.

I believe it would be in ARIAS•U.S.'s and CEFAREA's mutual interest to keep each other informed of important events pertaining to arbitration in their respective markets, whether such events be new laws or regulations, decisions rendered by courts or arbitral tribunals, or major occurrences. That would unquestionably provide a useful supplement to the information available from existing sources.

1 I.e. with the power to disregard strict rules of law and decide in accordance with equity (note from translator).

Although the CEFAREA arbitration clause already appears in a certain number of corporate insurance policies, especially those for multinational corporations - since any preliminary conflict-of-laws issue is more easily resolved by arbitration than it could be by a court, insureds as a whole continue to have reservations about arbitration, as do most corporate risk or insurance managers for that matter.

news and notices

CEFAREA, Paris appoints Ernest Georgi as Correspondent in U.S.A.

Centre Francais d'Arbitrage de Reassurance et d'Assurance, domiciled in Paris, recently appointed Ernest G. Georgi as their Correspondent in the U.S. Mr. Georgi is an ARIAS Certified Arbitrator and experienced member of the global reinsurance community. CEFAREA, essentially, the French equivalent to ARIAS•U.S. , is featured on page 2 of this issue of the Quarterly.

In commenting on his appointment, Mr. Georgi said, "I trust my appointment will be useful to ARIAS•U.S. members who may be involved in arbitration issues emanating from the French market and vice-versa." Mr. Georgi is fluent in French and worked with French reinsurers for many years, including his last assignment as Senior Consultant to Guy Carpenter, Paris.

Information about CEFAREA is available, in English and French, on its website at www.cefarea.com .

ARIAS Website Archive Index Links to Twenty-one Quarterly Issues

Electronic versions of older Quarterly issues have been recovered from stored files and are now available on the website through a multi-function index and search system. Articles are listed alphabetically by title and author's name, as well as, chronologically by issue. These listings link to a portable document format (PDF) file of the selected issue, where the article can be read or printed. A content or keyword search system is being developed.

ARIAS Neutral Selection Procedure Explained on Website

On March 1, a new procedure was unveiled on the ARIAS•U.S. website. In support of the ARIAS objective of fostering "development of arbitration practices that resolve disputes in an efficient, economical and just manner," the Society has introduced a method for appointing a panel through a neutral selection process. The steps of this procedure are detailed there. Parties entering an arbitration dispute are invited to join together to implement it, using the facilities of ARIAS, where indicated. Essentially, ARIAS provides random selection from the database of certified arbitrators, but is not involved in directing or monitoring the process.

ARIAS Growth Numbers Revised Upward

At the Fall Conference last November, retiring-Chairman Charlie Foss showed a chart with growth estimates for 2004. The actual numbers, by the end of 2004, showed an even faster growth rate. Of course, workshop attendance at a 100% increase was fixed by the fact that the capacity was doubled. However, other increases were as follows: Membership +31% (vs. estimated 22%), Conference Attendance +32% (vs. estimated 27%), Certifications +49% (vs. estimated 30%). Executive Director, Bill Yankus, commented that these rates of increase are not sustainable and that there should be some slowing of growth in 2005. He could be accused of wishful thinking.

Tarrytown Workshop Fills Up Quickly, then, Weathers a Snowstorm

After two expanded arbitrator training workshops at Tarrytown House last year, with 54 student panelists in each, it was clear that the excess demand had been satisfied. In fact, the September workshop barely filled up, even after registrations were opened to previous attendees. As a result, the scale was brought back to the previous level of 27 for this year's March workshop.

Registrations flowed in quickly on January 19. After ten minutes, the workshop was fully subscribed. Over the next hour, a waiting list of eight names was developed. Openings would have been filled from this list, but no cancellations occurred.

The general sessions, at the beginning and end of the day-long event, featured new senior faculty members. During these sessions, experienced arbitrators provide guidance on what to do when first contacted for an arbitration, how to deal with conflicts, disclosure, and discovery issues, as well as the preparation of a final award. New faculty members consisted of Andrew Maneval, Peter Scarpato, and Andrew Walsh. PowerPoint slides were employed for the first time at the workshop. The presentations were well received.

As usual, the mock arbitration sessions were very lively events, as the two sides in the dispute put forth their points with great energy and conviction. The three law firms that presented arguments during the mock hearings were Butler Rubin Saltarelli & Boyd LLP; Cozen O'Connor; and Sedwick, Detert, Moran & Arnold, LLP.

Both students and faculty were enthusiastic in their praise of the experience. A distinguished service award was presented to Amy Kelley of Butler Rubin, who shifted hearing rooms to fill in on all three segments of the mock sessions when a Sedwick attorney was trapped in Dallas by the New York snowstorm. Everyone else made it through.

The next workshop is planned for September.

Board Certifies Nineteen New Arbitrators

At its meeting on January 12, the ARIAS Board of Directors approved certification of eight new arbitrators,

bringing the total to 235. The following members were certified; their respective sponsors are indicated in parentheses:

- Martin B. Cohen (Richard Bakka, Robert F. Hall, James Powers)
- Cathryn A. Curia (James Yulga, James Hazard, Coby Van de Graf)
- Joseph J. DeVito (Peter Gentile, Richard White, R. Michael Cass, John Deiner)
- Louis Iacovelli (Martin Haber, Fred Marziano, Richard Franklin)
- Cecelia Kempler (Martin Haber, Robert M. Hall, Ronald Gass)
- Douglas R. Maag (Jack Scott, Michael Knoerzer, Howard D. Denbin)
- Reinhard W. Obermueller (Eugene Wilkinson, Ronald Wobbeking, Bruce Carlson)
- William J. Trutt (Peter Malloy, John Howard, Thomas Greene)

Then, at its meeting on March 10, the Board approved certification of eleven new arbitrators, bringing the total to 248. The following members were certified; their respective sponsors are indicated in parentheses:

- Charles G. Ehrlich (David Thirkill, Thomas Newman, Clive Becker-Jones)
- Rodney D. Moore (Emory White, Robert M. Hall, Daniel Schmidt)
- James M. Oskandy (Robert O'Hare, Nick DiGiovanni, Ronald Jacks)
- Glenn R. Partridge (Andrew Walsh, Gregg Frederick, Caleb Fowler)
- Kevin T. Riley (Peter Malloy, Michael Toman, Paul Hawksworth)
- Paul M. Skrtich (James Phair, Peter Craft, Eugene Wilkinson)
- David W. Smith (John Cashin, William Wall, Barry Weissman)
- Timothy W. Stalker (Fred Marziano, John Drew, Lawrence Monin)
- Paul N. Steinlage (Frank Haftl, James Phair, Richard Shusterman)
- Harry Tipper, III (James Phair, Alfred Weller, Donald DeCarlo)
- Michael T. Walsh (Robert Mangino, Robert F. Hall, Jay Wilker).

Biographies of most of the arbitrators who were certified in November and January are in this issue of the Quarterly. The March contingent will appear in the next issue.

Board Reaffirms Five-Year Certification Criterion Relating to Sponsorship

Last year, the Board of Directors clarified the requirement for sponsoring a member for certification. In clarifying 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 list of criteria on the website since last September and will be 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

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.

Las Vegas Conference Deadlines

The Venetian will continue until April 15th to accept guest reservations for the May 4-6, 2005 Spring Conference. The easiest way to reserve is through the Internet. The reservation link is located on the ARIAS website calendar; it connects to the "Welcome ARIAS" page of The Venetian's system. If you prefer to call, the phone number is 888-283-6423. Be sure to mention ARIAS. There is no assurance that rooms will be offered at the group price once the room block is sold out. After April 15, rooms will be at the market rate.

Full registration information and conference details were mailed to members at the end of February and will be available on the ARIAS website www.arias-us.org until the conference concludes. Online registration from the home page of the website opened on February 15. The early deadline for registrations is April 15. The final deadline is April 29.

Save Nov. 10-11, 2005 for This Year's Fall Conference

Mark your calendar now! The dates for the 2005 Fall Conference and Annual Meeting are November 10-11, at the Hilton New York Hotel. As is standard for the ARIAS•U.S. Fall Conferences, meetings will begin first thing in the morning on Thursday. You should plan to stay on the nights of November 9 and 10. Full details will be announced in early September. General sessions will be held in the Grand Ballroom.

The Breakers Prepares to Welcome ARIAS Back on May 18-20, 2006

The enthusiasm of members last June has resulted in a decision to return to The Breakers for the 2006 Spring Conference. The days of the week are slightly different from the past two years. The event will run from Thursday noon to Saturday noon, with golf, tennis, and free time planned for Friday afternoon. Save the dates May 18-20 on your 2006 calendar, now!

feature

The Evolving Standard of Arbitrator Neutrality

Vincent J. Vitkowsky
Jeanne M. Kohler
Edwards & Angell, LLP

Vincent J. Vitkowsky

Jeanne M. Kohler

To vacate an arbitration award for "evident partiality", a court must find that the arbitrator has a real and direct financial interest in the result...

Vincent J. Vitkowsky is a senior partner of Edwards & Angell, LLP, resident in its New York Office. Jeanne M. Kohler is a partner of Edwards & Angell, LLP, also resident in its New York office.

Various terms are relevant in assessing an arbitrator's relationship to the parties and his or her suitability to serve in a particular case. The terms most commonly used are *partial*, *disinterested* and *neutral*, and the term *bias* is occasionally added to the mix. Case law and other authorities tend to use these terms loosely or interchangeably, so their meanings are not always clear. But some attempt at precision is nonetheless useful.

PARTIAL

The term "partiality" is most important because it appears in the Federal Arbitration Act ("FAA"). Under the FAA, one ground for vacating an arbitration award is "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C.A. § 10(a)(2). To vacate an arbitration award for "evident partiality", a court must find that the arbitrator has a real and direct financial interest in the result of the arbitration or a direct relationship, particularly a business relationship, with one of the parties. For example, in *Commonwealth Coatings Corp. v. Continental Cas. Co.,1,* the Supreme Court reversed the lower court's refusal to set aside an arbitration award where the neutral arbitrator or umpire failed to disclose that one of the parties was a regular customer of the neutral arbitrator. This received elaboration in *Hobet Mining, Inc. v. International Union, United Mine Workers,*[2] which specifies four factors relevant to the issue of an arbitrator's partiality: "(1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor, keeping in mind that the relationship must be 'substantial,' rather than 'trivial,'... (3) the relationship's connection to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding."[3]

Courts will often discuss partiality by reference to the term "bias". Although "evident partiality" involves more than just an appearance of bias, there must be some actual evidence of bias.[4]

DISINTERESTED

When a contract calls for a "disinterested" arbitrator, that term has been held to mean "free from interest, neutral, or indifferent."5 The standard is less than "bias". For example, in *Bole v. Nationwide Ins. Co.,*[6] in vacating an award and remanding for appointment of new arbitrators, the court held that when a contract calls for disinterested arbitrators, "prior representation of a party by an arbitrator should require disqualification of that arbitrator upon objection by the opposing party, with no showing of actual bias required."[7] The *Bole* court further noted that it "believe[d] it best to avoid even a hint of impropriety when a contract calls for a 'disinterested' arbitrator".[8]

According to the ARIAS U.S. Practical Guide, "disinterested" is commonly understood to mean that the panel members "have no financial interest in the outcome of the arbitration and should not be under the control of either party."[9] *The Manual for the Resolution of Reinsurance Disputes* (Reinsurance Association of America 1997) defines "disinterested" in the same way.

NEUTRAL

The concept of neutrality is sometimes used interchangeably with "impartiality", but it has a distinct meaning, and is best understood as lack of a predisposition. It most often arises in the context of the conduct of a party-appointed arbitrator. Courts have held that a party-appointed arbitrator, as opposed to a neutral arbitrator, may be predisposed in favor of the party who appointed him or her, but still has an obligation to make independent judgments and act fairly.[10] An individual selected as an umpire or a neutral should not serve "where a reasonable person would have to conclude that [the] arbitrator was partial to one party to the arbitration."[11] Here, "partial" seems to be used as a synonym for "predisposed". This

is reflected in *Sunkist Soft Drinks, Inc. v. Sunkist Growers*,[12] which held that a party-appointed arbitrator was not disqualified for having published, before appointment, an article in an industry newsletter rejecting the theory of the opposing party, and noting that "...a party-appointed arbitrator...may be predisposed or sympathetic toward [the] position" of the party that appointed him or her.[13]

CONSEQUENCES OF NEUTRALITY

In practice, the concept of neutrality plays itself out in the context of *ex parte* communications, especially with respect to pre-appointment communications. In the U.S., it has been common practice for the parties' counsel to have discussions with prospective party-appointed arbitrator candidates to review the merits of the issue in dispute. It is generally accepted that a prospective arbitrator (or an arbitrator who has already been appointed) should not be shown documents which will not ultimately be shown to the entire panel.[14]

IMPORTANT RECENT DEVELOPMENT RELATING TO THESE CONCEPTS

A recent development may have an effect on the traditional use of non-neutral party-appointed arbitrators in reinsurance disputes. The American Arbitration Association ("AAA") and the American Bar Association ("ABA") House of Delegates adopted a newly revised Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004 (the "Revised Code"). It replaces the original Code of Ethics drafted jointly by those entities in 1977 (the "1977 Code").

Although much of the 1977 Code is preserved in the Revised Code, the most fundamental change is that there is now a presumption of neutrality applied to all arbitrators, including party-appointed arbitrators. The 1977 Code presumed that the party-appointed arbitrators on a tripartite panel would be non-neutral "unless both parties inform the arbitrators that all three arbitrators are to be neutral or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators be neutral."[15] The Revised Code reverses the presumption of non-neutrality and establishes a presumption of neutrality for all arbitrators, stating that "[t]he Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitral rules agreed by the parties or applicable laws provide otherwise."[16] The Revised Code also provides that an arbitrator should accept appointment only if he or she is fully satisfied that he or she can serve "impartially" or "independently" from the parties, potential witnesses and the other arbitrators.[17] Thus, the Revised Code makes U.S. arbitrations more like international arbitrations, in which all arbitrators are presumed to be independent and impartial.

A. Canon X Arbitrators

The Revised Code acknowledges that some parties prefer that party-appointed arbitrators be non-neutral, and therefore recognizes non-neutral arbitrators, designating them as "Canon X arbitrators." In this regard, Canon IX (B) states:

> Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as 'Canon X arbitrators,' are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

Although the Revised Code demonstrates a preference for neutral arbitrators, it provides ethical rules to accommodate parties who have specifically agreed otherwise. Under the Revised Code, the party-appointed arbitrators are obligated to ascertain and disclose whether he or she will be acting as a neutral or non-neutral arbitrator as early in the arbitration as possible.[18] In the event of doubt or uncertainty, party-appointed arbitrators will serve in a neutral capacity until such doubt or uncertainty is resolved.[19]

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by the Code, except those from which they are expressly excused by Canon X. Canon X (A) permits Canon X arbitrators to be "predisposed" toward the party who appointed them.[20] Under Canon X (B)(2),

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Although much of the 1977 Code is preserved in the Revised Code, the most fundamental change is that there is now a presumption of neutrality applied to all arbitrators, including party-appointed arbitrators.

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Canon X arbitrators are not obligated to withdraw because of the alleged partiality when requested to do so by the non-appointing party. Canon X (C) allows Canon X arbitrators to generally engage in *ex parte* communications with their appointing party. Although they are subject to specific limitations under Canon X on the scope of these *ex parte* communications, they are permitted far more freedom to engage in such communications than are neutral arbitrators under Canon III.

B. Drafting Implications

Although the AAA and ABA cannot promulgate rules having the force of law, various courts have looked to the 1977 Code for guidance. For example, in *Valrose Maui, Inc. v. Maclyn Morris, Inc.*,[21] the court discussed the 1977 Code as the "ethical code governing arbitrators' conduct" and vacated an arbitration award because of a "reasonable impression of partiality" under Hawaii law.[22] In *Metropolitan Prop. and Cas. Ins. Co. v. J.C. Penney Cas. Ins Co.*,[23] the United States District Court for the District of Connecticut, stating that the 1977 Code "provides additional guidance on the issue of arbitrator neutrality in the tripartite context," found that the arbitrator's conduct "could be interpreted as inconsistent with the Code of Ethics" and remanded to state court for determination of whether an arbitrator should be disqualified.[24] The court in *Aetna Cas & Surety Co. v. Grabbert*[25] noted that "we acknowledge that the appropriate standard for assessing the conduct of party-appointed arbitrators is not given to precise formulations. Nevertheless, we think the Code of Ethics . . . offers sound guidance in this area" that a party-appointed arbitrator is obligated to follow.[26] Although the Grabbert court found that an arbitrator violated Canons I and II, it reversed a lower court's decision to vacate an award because the insurer failed to "demonstrate the required causal nexus between the party-appointed arbitrator's improper conduct and the award that was ultimately decided upon".[27] Going even further, the court in *Safeco Ins. Co. of America v. Stariha*[28] expressly adopted the standards of Canon II, regarding disclosure, and affirmed a denial of an insurer's motion to vacate an arbitration award since there was "no evidence of undue means or evident partiality" under Minnesota law.[29]

On the other hand, several other courts have given little or no weight to the 1977 Code. In *Delta Mine Holding Co. v. AFC Coal Prop., Inc.*,[30] the Court of Appeals for the Eighth Circuit reversed a decision vacating an award based on arbitrator neutrality, stating that the FAA provides the only statutory grounds for vacating an award. In *Jenkins v. Sterlacci*,[31] the Court of Appeals for the District of Columbia Circuit affirmed the denial of a motion to qualify a special master, citing the 1977 Code and stating that "[t]he ethical obligations found in the Code of Ethics for Arbitrators are not enforced through judicial review, as noted therein."[32] Moreover, in *Merit Ins. Co. v. Leatherby Ins. Co.*,[33] the Court of Appeals for the Seventh Circuit reversed a decision to set aside an award because there was no violation of the FAA, stating that "[a]lthough we have great respect for the . . . Code of Ethics for Arbitrators, . . . [it] do[es] not have the force of law".[34]

Thus, although the courts are not consistent, it is reasonable to expect that at least some courts may look to the Revised Code for guidance, as they looked to its predecessor. Therefore, drafters should give consideration to specifying, in the arbitration provision, the parties' understanding regarding whether the party-appointed arbitrators are to act as neutrals or Canon X arbitrators.

1 393 U.S. 145, 89 S. Ct. 337 (1968).
2 877 F. Supp. 1011 (S.D. W. Va. 1994).
3 *Id.* at 1021 (citations omitted).
4 *See Nationwide Mut. Ins. Co. v. Home Ins. Co.,* 278 F.3d 621, 626 (6th Cir. 2002) (finding that the facts did not support the claims of five instances of alleged "evident partiality" by the umpire, one of the party-appointed arbitrators and/or the entire arbitration panel, the Sixth Circuit noted that "[t]he alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish improper motives on the part of the arbitrator."); *Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (reversing a district court's order vacating an award based on "evident partiality" of a sole arbitrator, the Eleventh Circuit found that there cannot be "evident partiality" absent actual knowledge of a real or potential conflict and noted that "[t]he alleged partiality must be direct, definite and capable of demonstration rather than remote, uncertain and speculative."); *Employers Ins. of Wausau v. Nat'l Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir. 1991) (affirming a district court's decision that a panel was not biased when a party-appointed arbitrator had reviewed the case for a "couple of hours" prior to his appointment, the Ninth Circuit noted that a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator").
5 *See First State Ins. Co. v. Employers Ins. of Wausau*, No. 99-12478 (RWZ) (D. Mass. Feb. 23, 2000), reported in 10 *Mealey's Litigation Reports: Reinsurance* Vol. 21 (March 9, 2000) (disqualifying a party-appointed arbitrator who acted as counsel for the party who appointed him). *See also Compania Portorafti Commerciale S.A. v. Kaiser Internat'l Corp.*, 616 F. Supp. 236, 240 n.1 (S.D.N.Y.1985) ("I construe 'disinterested person' to mean an arbitrator free of such relationships or conflicts of interest which would disqualify him from acting as an arbitrator.").
6 475 Pa. 187, 190, 379 A.2d 1346 (1977).
7 *Id.* at 1347-48.
8 *Id.*
9 ARIAS•U.S. Practical Guide, Chapter II, 2.3.
10 *See Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125, 129 n.2 (7th Cir. 1994); Metropolitan Property & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885 (D. Conn. 1991); Astoria Medical Group v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962).
11 *Morelite Constr. Corp. v. New York City Dist.* Council Carpenters Ben. Funds, 748 F.2d 79, 84 (2d Cir. 1984).
12 10 F.3d 753 (11th Cir. 1993)
13 *Id.* at 759.
14 *See, e.g., Metropolitan Property & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991) (in which a party sought pre-award injunctive relief against an arbitrator on the grounds that the arbitrator met with his appointing party prior to arbitration proceedings, discussed the merits of the claim, evaluated documentary evidence, and accepted "hospitality", and did not disclose such contacts; the issue was not decided by the court as it lacked jurisdiction, but it noted the relief sought was permissible).
15 1977 Code, Canon VII, Introductory Note.
16 Revised Code Canon IX(A) ("In tri-partite arbitration . . ., all three arbitrators are presumed to be neutral . . . .").
17 *Id.* at Canon I (B)(1) and (2).
18 *Id.* at Canon IX (C).
19 *Id.*
20 The Revised Code also subjects all arbitrators, whether serving as neutral arbitrators or non-neutral arbitrators, to the same obligation to disclose interests or relationships likely to affect impartiality or which might create an appearance of partiality. *Id.* at Canon II.
21 105 F. Supp. 2d 1118 (D. Haw. 2000).
22 *Id.* at 1124 n.10.
23 780 F. Supp. 885 (D. Conn. 1991).
24 *Id.* at 891-93.
25 590 A.2d 88 (R.I. 1991).
26 *Id.* at 93.
27 *Id.* at 97.
28 346 N.W.2d 663 (Minn. Ct. App. 1984).
29 *Id.* at 667 (emphasis in original).
30 280 F.3d 815, 820 (8th Cir. 2001).
31 849 F.2d 627 (D.C. Cir. 1988).
32 *Id.* at 633 n.3.
33 714 F.2d 673 (7th Cir. 1983).
34 . at 680-81.

feature

Court Intervention in Selecting the Arbitration Panel

This article is based on a presentation to the American Conference Institute in September 2004.

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I. INTRODUCTION

Selecting an arbitration panel is not unlike selecting a jury, except that in traditional reinsurance arbitration you can speak to a party-appointed arbitrator candidate privately about your case before making a selection. What to look for in an arbitrator candidate and how to select the appropriate arbitrator for a dispute will depend on the particular circumstances of the dispute and the client.

Rather than focus on the practical aspects of selecting an arbitrator in a reinsurance dispute, this article will survey and analyze the recent case law discussing the selection of arbitrators. While courts traditionally avoid inserting themselves into the arbitration process, parties have asked the courts to intervene in the arbitrator selection process in limited instances. This article will detail the recent case law on raising a challenge to an arbitrator, replacing an arbitrator who resigns, and situations where a party defaults in naming an arbitrator.

II. OVERVIEW

Generally, courts are extremely wary of inserting themselves into the arbitration process before it ends. They rarely do so because, simply put, the whole point of arbitration is to avoid court. The "purpose of the [Federal Arbitration Act] is to 'move the parties . . . out of court and into arbitration as quickly and easily as possible.'"[1] Given this, courts typically interpret the powers granted to them by the Federal Arbitration Act ("FAA") strictly and refrain from exercising powers not explicitly granted. Although courts are explicitly authorized to vacate an arbitration award after its issuance due to an arbitrator's failings, few courts find the implicit authorization to step in and replace an arbitrator before an award is issued. Yet the factual circumstance surrounding the request often makes a difference.

Courts are also wary of intervening because they generally analyze arbitration agreements under contract principles. Thus, in the context of reinsurance agreements with arbitration clauses, courts presume that the parties have contractually agreed to stay out of court until the process has completed. Interestingly, however, the notion that contracts are analyzed according to their terms occasionally results in anomalous decisions, particularly where a "bad actor" seems to be subverting the intention of the parties to arbitrate fairly. A few courts reason that if unfairness is present, it makes more sense to replace an arbitrator sooner, rather than after the award is issued. Most, however, hold that the spirit of the arbitration contract - to stay out of court - trumps the early enforcement of the letter of the contract, i.e., the specified qualifications of the arbitrators.

Courts have generally addressed challenges to arbitrators for three reasons: (1) bias, (2) qualifications, and (3) conflicts of interest. Bias is typically alleged where arbitrators have issued an opinion in prior arbitrations on an issue similar to the one arising in the current arbitration, or have ruled against one of the parties in the past. Qualifications are typically challenged where a party alleges an arbitrator does not meet a contractual specification, such as "officer of a reinsurance company." Conflicts of interest are typically challenged where an arbitrator has a current or prior relationship with one of the parties, particularly if the contract specifies arbitrators shall be "disinterested."

Complicating matters, because parties often allege bias, conflicts, and lack of qualifications in challenging an arbitrator, it is difficult at times to determine whether a court is rejecting a party's claim on one or all three issues. For example, a challenge that an arbitrator is not "disinterested" could also be construed as a challenge for bias or a challenge on contractual qualifications. Courts often use the terms "bias," "qualifications," or "disinterested"

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interchangeably and frequently reject claims for all three. Practically, it may matter little because all three historically have little chance of succeeding before an award is issued. Still, one should be careful when evaluating case law so as not to take dicta out of context.

Courts have allowed for the possibility that an arbitrator could be challenged before an award for overt misconduct, such as engaging in inappropriate *ex parte* meetings with a party. Courts, however, have clearly distinguished overt misconduct from bias or conflicts of interest. Moreover, courts have set a high bar for a claim to succeed, generally requiring specific, actual misconduct, rather than potential misconduct.

In situations where an arbitrator dies or resigns and must be replaced, circuit courts are split as to whether an entirely new panel should be appointed. Where one party defaults by neglecting to appoint their arbitrator, however, recent court decisions have been uniformly clear. The party who defaults is subject to the mercy of the terms of the reinsurance contract.

III. DISQUALIFYING AN ARBITRATOR

1. Bias

a. Challenging for Bias Before an Award

Recent circuit court decisions have established that, as a general rule, parties cannot challenge an arbitrator for bias before an award is issued. In *Gulf Guaranty*, the Fifth Circuit called it "well-established" that "a court may not make inquiry" into bias.[2]

The policy reasons cited by the Fifth Circuit guide most decisions concerning challenges to arbitrators before an award is issued. The *Gulf Guaranty* court noted the congressional purpose of the FAA to "move the parties . . . out of court and into arbitration as quickly and easily as possible."[3] The court also noted that although the FAA gives parties an avenue to vacate awards under 9 U.S.C. § 10, it does not provide for removal of an arbitrator before an award is issued.[4] Thus, the court concluded that "the FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award."[5] To hold otherwise, the court stated, could "spawn endless applications [to the courts] and indefinite delay."[6]

The *Gulf Guaranty* court quoted heavily from the Second Circuit's opinion in *Aviall*.[7] *Aviall* involved a spun-off company invoking its contractually agreed-upon right to arbitrate against its corporate parent. The *Aviall* court held that under the FAA, an agreement to arbitrate before a particular arbitrator may not be disturbed unless the agreement is subject to attack under general contract principles "as exist at law or in equity."[8] For example, the court cited situations where nondisclosure of a relationship amounted to fraud in the inducement as examples of an attack under "general contract principles."[9] But generally, under *Gulf Guaranty* and *Aviall*, unless the bias calls into question the validity of the contract itself, the agreement to arbitrate stands and the arbitrator cannot be challenged pre-award.

The Seventh Circuit, outside the reinsurance context, also recently articulated the general rule that parties cannot challenge an arbitrator for bias before an award is issued.[10] Judge Posner wrote: "[t]he time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered."[11] Judge Posner called a pre-award challenge "inconsistent with fundamental procedural principles." "If during jury voir dire a Batson objection to the exercise of a peremptory challenge is rejected by the trial judge, the disappointed litigant cannot bring a suit to enjoin the litigation."[12] Moreover, these principles apply even more strongly to arbitration. "The choice of arbitration is a choice to trade off certain procedural safeguards, such as appellate review, against hoped-for savings in time and expense . . . [citations omitted]. That choice would be disrupted by allowing a party to arbitration to obtain an interlocutory appeal to a federal district court . . ."[13]

Federal district courts have generally followed the rule that arbitrators cannot be challenged for bias pre-award. The Northern District of Illinois followed Judge Posner's reasoning in the context of a reinsurance arbitration, holding that a party could not challenge the other party-appointed arbitrator for bias until after the award.14 The Southern District of New York, *citing Aviall,* also held that parties could not challenge a party-appointed arbitrator for bias or qualifications until after the award.[15] The Middle District of North Carolina, citing *Aviall*, agreed as well.[16]

The Northern District of California, *citing Gulf Guaranty* and *Aviall*, extended this

reasoning to hold that an umpire of a tripartite panel in a reinsurance dispute could not be challenged for bias before the award.[17] "[T]here are . . . no federal cases in which a court has issued an order disqualifying a neutral arbitrator once arbitration had commenced but prior to a final arbitration award."[18] The party moving for disqualification presented the novel argument that because an interim award can be reviewed by a court in some situations, the court had the power to disqualify an umpire just as it could after a final award. The court rejected this claim. "While judicial review and enforcement of an interim award is not an 'undue intrusion upon the arbitral process [citation omitted],' judicial disqualification of an arbitrator during the pendency of arbitration is."[19] The court cited the *Gulf Guaranty* court's concerns of "endless applications and indefinite delay."[20]

Before the *Gulf Guaranty*, *Aviall*, and *Smith* decisions, the Northern District of Illinois had ruled in an unpublished decision that courts could disqualify an arbitrator for bias as part of their ability to enforce arbitration agreements.[21] "[T]he ability of a court to consider arbitrator bias after the arbitration process is concluded suggests that a court might make a similar inquiry before the process begins... Arbitrations are long and expensive; courts should try to insure that the results will withstand scrutiny."[22] *Evanston* involved a party-appointed arbitrator for one side who had underwritten policies for the other side and refused to pay under those contracts, arguing they were invalid. The arbitrator was now ruling on the validity of the very same contracts. The arbitrator was also challenged as not meeting the contractual requirement that he be "disinterested," rendering it unclear whether the arbitrator was challenged for bias or for failing to meet the contractual requirement prohibiting conflict of interests.

A different judge in the same court later distinguished Evanston in Certain *Underwriters at Lloyd's v. Continental Cas. Co.*[23] In *Continental Casualty*, the court held that the *Evanston* court's "suggestion" of inquiring pre-award was dicta. Rather, the court interpreted *Evanston* as the court exercising its power to enforce contract terms, following *Aviall*, not its power to require impartiality under the FAA.[24] Although the *Continental Casualty* court did find it had authority to review the challenge to determine if the arbitrator's bias broke the terms of the contract, it rejected the challenge. It held that the contract, which provided for a standard tripartite panel, "implicitly concedes" that some bias may exist.[25] The court also noted that on the same day as the Evanston decision, a different judge in the same court ruled exactly the opposite, holding that the FAA does not provide a pre-arbitration remedy for arbitrator bias or partiality.[26]

In any case, the court's reasoning in *Evanston* seems to have been superseded and clarified by the more detailed examinations of the issues in *Gulf Guaranty*, *Aviall*, and *Smith*.

b. Moving to Vacate for Bias After an Award

It is instructive, in considering how courts address challenges for bias before an award, to consider how courts address bias after an award is issued.

The Seventh Circuit, at least regarding party-appointed arbitrators, held that parties have a difficult standard to meet to vacate an award for bias.[27] In *Sphere Drake*, the parties had contracted for a tripartite arbitration panel. Sphere Drake's party-appointed arbitrator had represented a Sphere Drake subsidiary as counsel four years prior to the arbitration. The arbitrator somewhat ambiguously disclosed this before the arbitration started; he said that his law firm had represented Sphere Drake, but did not disclose that he personally spent 380 hours on the project. After losing the arbitration, All American moved to vacate the award on the ground that Sphere Drake's arbitrator showed "evident partiality" under 9 U.S.C. § 10(a)(2). The district court vacated the award.[28]

The Seventh Circuit, overturning the lower court, held that the award should stand. The court first looked to the terms of the contract. "The Federal Arbitration Act makes arbitration agreements enforceable to the same extent as other contracts, so courts must "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[29] Because the contract provided for party-appointed arbitrators, and "in the main, party-appointed arbitrators are *supposed* to be advocates," the court did not find grounds to vacate the award. The court noted that the lower court's decision would have represented the "first time since the Federal Arbitration Act was enacted in 1925 that a federal court has

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The court noted that the lower court's decision would have represented the "first time since the Federal Arbitration Act was enacted in 1925 that a federal court has set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed "evident partiality."

The *Gulf Guaranty* court noted that *Aviall* held open the possibility of striking an arbitrator pre-award if the arbitrator's presence would render the agreement invalid under "general contract principles."

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set aside an award because a party-appointed arbitrator on a tripartite panel, as opposed to a neutral, displayed "evident partiality."[30]

The Seventh Circuit explained that "[a]rbitration differs from adjudication... only *evident* partiality, not appearances or risks, spoils an award."[31] Even still, Sphere Drake's party-appointed arbitrator could have met a federal judge's standards of partiality, which are considerably stricter than an arbitrator's.[32] The Seventh Circuit noted that the Supreme Court had held that being on one side's payroll constitutes "evident partiality" under § 10(a)(2).[33] But, "although disclosure at the outset often avoids later controversies," "*Commonwealth Coatings* did not hold... that disclosure is compulsory for its own sake, and its absence fatal even if the arbitrator meets judicial standards of impartiality."[34] The Seventh Circuit did note that a neutral arbitrator may have contractual obligations of disclosure.[35] This decision shows that while courts interpreting reinsurance disputes look to general contract principles, typically courts find the overriding intent of the parties who contracted for arbitration was to keep courts out of the arbitration process.

Other federal courts have followed the reasoning in *Sphere Drake* that essentially, when it comes to party-appointed arbitrators, you get what you bargain for. For example, in Massachusetts, the court rejected an attempt to vacate an award because the other party-appointed arbitrator had served as a reinsurance underwriter on a similar dispute with the same company 18 years prior. "When parties choose to use two party arbitrators and one neutral arbitrator, they 'can ask no more impartiality than inheres in the method they have chosen.'"[36] Moreover, "an arbitration often represents a 'tradeoff between impartiality and expertise.'"[37]

The Northern District of Illinois followed *Sphere Drake* in holding that a party must show "evident partiality," not just "appearances or risks," to disqualify an arbitrator.[38] Interestingly, the party challenging the arbitrator had alleged he was selected in "bad faith," perhaps trying to attack the selection under "general contract principles" as *Aviall* had referenced. The court dismissed the claim of "bad faith" by simply analyzing the claim under *Sphere Drake* and finding no "evident partiality."[39]

2. Challenging for Qualifications Before an Award

Courts have looked occasionally more favorably on claims to disqualify an arbitrator for not meeting contractual qualifications, rather than for alleged bias. Because courts analyze arbitration agreements according to contract principles, failure to meet a specified qualification such as "officer of a reinsurance company" could be construed as frustrating the intent of the parties, thus throwing the validity of the contract into question. Still, courts are extremely wary of inserting themselves into the arbitration process before an award is issued.

The *Gulf Guaranty* court distinguished the ability to challenge an arbitrator on qualifications from the ability to challenge on bias - and found that neither was possible pre-award. In *Gulf Guaranty*, the contract provided that the party-appointed arbitrators were to be "officers of other life insurance companies."[40] Because the party-appointed arbitrator was an executive of a "reinsurance" company, not a "life insurance" company, the district court concluded that his "qualifications" failed to satisfy a "condition precedent" in the arbitration agreement and struck him.[41] The Fifth Circuit overruled the district court, holding that the district court did not have the power to strike the arbitrator pre-award.

The *Gulf Guaranty* court cited *Aviall*, which held that the FAA's prohibition of removing arbitrators pre-award extends to "judicial scrutiny of [an] arbitrator's qualifications to serve."[42] The *Gulf Guaranty* court noted that *Aviall* held open the possibility of striking an arbitrator pre-award if the arbitrator's presence would render the agreement invalid under "general contract principles."[43] This would only apply in situations where "fraud in the inducement" or some other "infirmity in the contracting process" was present.[44] Following *Aviall*, the *Gulf Guaranty* court held that the claims at issue here - whether a reinsurance company counted as a life insurance company - did not rise to the level of claims where the "very validity of the agreement is at issue."[45]

The *Gulf Guaranty* court explicitly criticized two prior decisions by the Northern District of Illinois allowing for the possibility of challenging an arbitrator's qualifications pre-award as "conflict[ing] with the purpose of the [Federal Arbitration Act]."[46]

In the first of these decisions, *Jefferson-Pilot Life Insurance Co. v. Leafre Reinsurance Co.*,[47] the contract provided for a panel of three neutral arbitrators, rather than two party-appointed arbitrators and an umpire, who were "active or retired officers of a life or health insurance company." The American Arbitration Association ("AAA") distributed lists of arbitrators to both sides. Both sides struck names. If three arbitrators remained, those three were selected; if the parties could not agree on three, the AAA could unilaterally appoint the remaining arbitrators.[48] As it turned out, Jefferson-Pilot objected to every arbitrator on the list, and the AAA unilaterally appointed three arbitrators, none of whom were "active or retired officers of a life or health insurance company." Jefferson-Pilot filed a motion to enjoin the arbitration under 9 U.S.C. §§ 4 and 5 until arbitrators meeting the contractual specifications were found. [49]

The court distinguished challenges for qualifications from challenges for bias, and held that it could review challenges for qualifications pre-award. "The question here is whether a party who challenges an arbitrator's qualifications - just like a party who challenges bias - must wait until the post-award stage to complain. I do not think this is necessary."[50] The court distinguished enforcement of qualifications from the "difficult task" of an inquiry into bias. The court saw itself as merely enforcing agreed-upon contractual provisions. "Plaintiff merely asks that he be entitled to a benefit explicitly conferred by a provision of an agreement negotiated in an arm's length transaction between two sophisticated parties."[51]

Essentially, the *Gulf Guaranty* court found that although the letter of the contract may call for certain qualifications, the spirit calls for courts to stay out of disputes. For the *Gulf Guaranty* court, the purpose of the FAA in keeping parties out of court, and the potential for "endless applications and indefinite delay," outweighed the benefits of enforcing a contract by its terms. "We conclude . . . that the dispute regarding . . . qualification to serve, although framed as a request to the court to enforce the arbitration agreement by its terms, is not the type of challenge that the district court was authorized to adjudicate pursuant to the FAA prior to issuance of an arbitral award."[52]

The second decision criticized by the *Gulf Guaranty* court, *Continental Casualty*,[53] involved a contract clause that required arbitrators to be "executive officers of insurance companies not under the control or management of either party pursuant to this agreement."[54] Although the party challenged the arbitrator primarily for bias and conflict of interest, the court essentially found it had authority to review the arbitrator for not meeting her "qualifications," i.e., not meeting the terms of the agreement requiring impartiality. (The case is typical of the kind of overlap common in reinsurance arbitration case law.)

The court rejected the claims of bias and conflict of interest, noting that the bias on display fell short of actual misconduct; that the contractual terms requiring "executive officers" within the insurance industry anticipated that some conflict of interest might arise; and that the contract did not specify "disinterested" arbitrators.[55] Lastly, the court addressed the challenge to the arbitrator's actual qualifications as an executive officer. The court noted that the challenge to her qualifications offered no evidence in support, and held that "without more," it rejected the challenge.[56] Presumably, the court allowed for the possibility that "more" might have supported the challenge. The *Gulf Guaranty* court described this reasoning as "arguably misconstruing *Aviall* . . ." and, as with *Jefferson-Pilot*, held that the policy behind the FAA precluded early court intervention.[57]

Other federal courts have agreed with *Gulf Guaranty's* interpretation of *Aviall* as precluding a challenge on qualifications before an award. In *Insurance Co. of North America v. Pennant Insurance Co., Ltd.* ("*Pennant*"),[58] the contract called for " . . . active or retired disinterested officials of insurance or reinsurance companies." One party alleged that the arbitrator had only been a broker/agent/intermediary and a consultant/expert witness (albeit for 50 years).[59] The court outlined the issues succinctly: "Such a determination could have the advantage of preventing a needless expenditure of time and money if the arbitrator is indeed unqualified. Nevertheless, such a determination could have the disadvantage of enmeshing district courts in endless peripheral litigation and ultimately vitiate the very purpose for which

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Although the party challenged the arbitrator primarily for bias and conflict of interest, the court essentially found it had authority to review the arbitrator for not meeting her "qualifications," i.e., not meeting the terms of the agreement requiring impartiality.

Courts have been somewhat more willing to step into the arbitration process where conflicts of interest are present – for example, an arbitrator's prior or current legal representation of a party involved in the arbitration.

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arbitration was created."[60] Relying exclusively on Aviall, the court rejected the challenge.[61]

The *Pennant* court did note that the challenge rested solely on 9 U.S.C. § 4, and not the contract at issue in the case.[62] It thus left open the possibility that a court might review qualifications pre-award for failure to meet the terms of a contract, as the Northern District of Illinois did in *Continental Casualty*. As noted before, the *Gulf Guaranty* court likely would find that the FAA does not even authorize such a review.

Additionally, the broad language embraced by the Northern District of California in Certain Underwriters at *Lloyd's v. Argonaut Ins. Co.*[63] implies that courts do not have power under the FAA to disqualify an arbitrator pre-award for any reason, including bias and qualifications. "[T]he FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award."[64]

One state court did imply under state law that an arbitrator could be challenged for qualifications pre-award.[65] Notably, the arbitrator was challenged both for a conflict of interest and qualifications, and it is unclear upon which ground the court ruled. "Justifiable doubts arise as to [the arbitrator's] ability to be impartial and his qualifications. It appears that [he] does not satisfy the requirement that he be an active or retired disinterested officer of insurance/reinsurance companies . . . "[66] Additionally, the judge granted the challenge under California state law, which explicitly allows for challenge to contractual qualifications, unlike the FAA.[67]

3. Conflicts of Interest

Courts have been somewhat more willing to step into the arbitration process where conflicts of interest are present - for example, an arbitrator's prior or current legal representation of a party involved in the arbitration. It is difficult to distinguish conflicts of interest from bias. For example, the arbitrator in *Sphere Drake* was challenged for bias owing to his prior representation of one of the parties. Courts may be more willing to review a challenge if the contract contains a clause specifying that the arbitrator must be "disinterested," as opposed to a general challenge for "evident partiality" under 9 U.S.C. § 10 of the FAA.

For example, in *First State Insurance Co. v. Employers Insurance of Wausau,*[68] a party nominated its current counsel as its arbitrator. The opposing party moved to disqualify the arbitrator under the contractual provision that "all members of the arbitration panel be disinterested." The court noted that the FAA does not allow for challenge to an arbitrator's qualifications or partiality pre-award. "But the court is not reviewing [his] qualifications. The issue is whether the [contract] requires the appointment of a 'disinterested' arbitrator, and under § 2 of the Act, the court has the authority to enforce that provision of the agreement."[69]

Other federal courts have reached the opposite conclusion. In *Old Republic Insurance Co. v. Meadows Indemnity Co. Ltd.*,[70] the court found no difference between a challenge for bias and a challenge for not meeting a "disinterested" clause in the contract. Old Republic challenged the other side's party-appointed arbitrator as not "disinterested" because he was an opponent in two prior lawsuits. The court found that " . . . Old Republic has a remedy in the event it feels it has been judged unfairly. That remedy, however, is simply not available at this time."[71]

Additionally, a different judge in Massachusetts recently denied a challenge on "disinterest."[72] The contract contained a clause that all arbitrators must be "disinterested." John Hancock refused to proceed, objecting to the other's nominees for umpire because they were participating as neutral umpires in other arbitrations involving John Hancock. The court called John Hancock's motions "utterly frivolous" and ordered arbitration.[73] It is unclear, however, whether the court ruled on the facts or the law in this case.

Practically speaking, following *Gulf Guaranty*, there may be little difference in challenging an arbitrator for contractual "qualifications" or contractual "disinterest." The result in *First State* might be best attributed to the court's distaste for the bad faith evidenced by a party simply appointing its counsel to serve as its arbitrator. The *First State* court did not cite case law. Its underlying reasoning might well be common sense based on the specific facts of that case. Or, put another way, if such an arrangement does not violate the Supreme Court's holding in *Commonwealth Coatings* that an arbitrator cannot be on one side's payroll, then perhaps no arrangement would.

a. Disclosure

Aviall does allow for the possibility that in cases involving an arbitrator's conflict of interest, nondisclosure of the conflict at the time of contracting might constitute "fraud in the inducement," or render the contract invalid under general contract principles, and allow for the arbitrator to be replaced pre-award.[74] For example, *Aviall* cites *Erving v. Virginia Squires Basketball Club*,[75] where basketball star Julius Erving signed a contract providing for arbitration by the Commissioner of the American Basketball Association. By the time of arbitration a new Commissioner, who was a partner of the law firm representing the defendant, had been appointed. The court held that the new Commissioner frustrated the intent of the parties to submit their dispute to a neutral arbitrator and substituted a new arbitrator.[76]

Aviall explicitly disapproved, however, the reasoning of *Third National Bank in Nashville v. Wedge Group Inc.*[77] In that case, the court removed an arbitrator pre-award even though the bias had been disclosed at the outset. The Aviall court stated that Third National Bank misconstrued Erving by neglecting to focus on the issue of disclosure.[78] The Northern District of Illinois, following Aviall, also explicitly found Third National Bank unpersuasive in Continental Casualty.[79]

The court in *Old Republic Insurance Co.* also distinguished *Third National Bank* in rejecting a challenge for "disinterest" before award.[80] Strangely, though, the *Old Republic* court distinguished more on the facts than the law. The court noted the existence of a fiduciary duty of the arbitrator to the party in Third National Bank that was not present in Old Republic. Additionally, in *Third National Bank*, the court appointed a substitute under 9 U.S.C. § 5, whereas the *Old Republic* court noted that in its case, the other side would presumably appoint a replacement, and challenges would begin anew.[81] *The Old Republic* court ignored that it, too, could interpret 9 U.S.C. § 5 to appoint a substitute, as *Third National Bank* did. More fundamentally, one would have thought the *Old Republic* court, rather than inquiring into whether a fiduciary duty was present, would have focused on the court's power to make an inquiry at all. Perhaps this shows the occasional tendency, in the reinsurance arbitration context, for courts to adjust the law to the facts rather than vice versa.

In *Gulf Guaranty*, the court noted that the possibility is still there that nondisclosure of conflicts at the outset might constitute "fraud in the inducement" or some other "infirmity in the contracting process" that might invalidate an agreement to arbitrate.[82] But after *Sphere Drake*, it is hard to envision what kinds of nondisclosure in the reinsurance context might constitute such an "infirmity in the contracting process." *Sphere Drake* implies that when reinsurance parties contract, they expect to use panels composed of industry insiders, and they find the "expertise-impartiality tradeoff" worthwhile.[83] Presumably, these are sophisticated parties who understand the nature of the panel they are agreeing to.

Later in the process, when arbitration begins, *Sphere Drake* finds disclosure to be "prudent," but not "compulsory."[84] *Sphere Drake* does imply that neutral arbitrators might be held to a higher standard than party-appointed arbitrators. Additionally, the Sphere Drake court noted that "failure to comply with a contractual requirement designed to facilitate the search for an acceptable neutral" might be grounds for vacating an award under 9 U.S.C. § 10(a)(4).[85] The Northern District of California addressed a similar issue in *Fireman's Fund Insurance Co. v. Sorema North America Reinsurance Co.*[86] There, Fireman's Fund's party-appointed arbitrator refused to fill out a standard disclosure form, and all neutral arbitrators nominated by Fireman's Fund filled out only truncated disclosure forms. The contract did not address disclosure directly, merely requiring that each arbitrator be "impartial."[87]

The court, drawing heavily on *Commonwealth Coatings*, found that "parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed."[88] "General arbitration procedure demonstrates that disclosure requirements are routine." "If Fireman's Fund was adamantly against disclosure statements, it could have bargained to have the agreement explicitly prohibit their use." "The court finds, however, that requiring disclosure statements based on an agreement that explicitly requires impartial arbitrators does not result in courts diving too far into the sea of prearbitration."[89]

4. Early Misconduct

The FAA provides that a district court may vacate an arbitration decision where "the

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"The court finds, however, that requiring disclosure statements based on an agreement that explicitly requires impartial arbitrators does not result in courts diving too far into the sea of prearbitration."

What happens when an arbitrator dies, resigns for health reasons, or retires before an award is issued? Does the court appoint a new arbitrator or does the process start over with a new panel? The answer is muddled.

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arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[90] *Sphere Drake* suggested one type of possible misconduct. "Party-appointed arbitrators are entitled under the ARIAS•U.S. rules to engage in *ex parte* discussions with their principals until the case is taken under advisement, but they are supposed thereafter to be impartial adjudicators."91 Still, the Eighth Circuit held that *ex parte* contacts do not necessarily justify vacatur of an award under 9 U.S.C. § 10.[92]

At least one federal court has held that arbitrator misconduct before an award could justify a court intervening to disqualify him. In *Metropolitan Property & Casualty Insurance Co. v. J.C. Penney Casualty Insurance Co.* ("J.C. Penney"),[93] the court noted that the party-appointed arbitrator engaged in *ex parte* meetings with his party about their claims' merits prior to his formal selection to the panel - unlike the situation envisioned by *Sphere Drake*, in which a party-appointed arbitrator could discuss issues with his party before his selection, but not after. The *J.C. Penney* arbitrator also accepted "hospitality" during those meetings, evaluated documentary evidence prior to his selection as an arbitrator, attempted to discuss the merits with the other appointed arbitrator before the third arbitrator had been selected, and failed to reveal his ex parte activities to the other side.[94]

The court explicitly distinguished disputes over bias and qualifications from disputes involving overt misconduct.[95] Additionally, the court found that overt misconduct was grounds for challenge under Delaware state law.[96] The court held that "[t]he fact that party selected arbitrators are not expected to be "neutral" . . . does not . . . excuse [them] from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good-faith manner."[97] Following reasoning directly opposite to the *Gulf Guaranty* court's, the court noted that the party "will litigate the propriety of [the arbitrator's] conduct after the arbitration even if it is precluded from disqualifying him prior to the process. In light of this reality, it simply does not follow that the policy objective of an expeditious and just arbitration with minimal judicial interference is furthered by categorically prohibiting a court from disqualifying an arbitrator prior to arbitration."[98]

Courts since *J.C. Penney* have generally criticized its reasoning. "While such an approach may indeed save resources, it is supported by neither the text of the FAA . . . nor federal case law."[99] Courts have also made clear that *J.C. Penney* addresses overt misconduct rather than bias, qualifications, or conflicts. For example, the court in *Vestax Securities Corp. v. Desmond*[100] made clear that any allegation must be based on specific instances of actual misconduct.[101]

One state court did cite *J.C. Penney* in allowing a pre-award hearing on issues of bias, rather than misconduct.[102] Later, however, after litigation had dragged on for another two years, it seemed to reconsider the wisdom of its decision.[103]

IV. REPLACING AN ARBITRATOR

What happens when an arbitrator dies, resigns for health reasons, or retires before an award is issued? Does the court appoint a new arbitrator or does the process start over with a new panel? The answer is muddled.

The Eighth Circuit considered the issue in *National American Insurance Co. v. Transamerica Occidental Life Insurance Co*.[104] Transamerica's party-appointed arbitrator withdrew for health reasons a year into the process, after discovery had started. NAICO requested that Transamerica appoint another arbitrator. Transamerica demanded that a new panel be appointed and that the process start over. NAICO asked the district court to appoint a new arbitrator under 9 U.S.C. § 5 for the rest of the term. The district court granted their motion.[105]

The Eighth Circuit upheld the ruling to appoint the arbitrator, citing that a new panel would cause "inappropriate delay and waste resources."[106] Furthermore, it held that NAICO was not required to bring a motion to compel arbitration under 9 U.S.C. § 4 before the district court could appoint a new arbitrator under 9 U.S.C. § 5.[107] Effectively, Transamerica had already consented to arbitration by agreeing to the original panel and taking part in discovery for a year. The Eighth Circuit distinguished a previous case where a party was required to first bring a motion to compel, noting that in that case, the party had breached good faith by moving unilaterally to appoint an arbitrator, and the opposing party had refused to participate in the process.[108] In doing so, the Eighth Circuit

appeared to signal its intention to force "bad actors" trying to subvert the process back to the arbitration table. Where a party plows ahead with arbitration without making a good faith effort to reach agreement with the other side, the courts will force them to bring a motion to compel before a new arbitrator is appointed. But, where a party has consented to arbitration and the process is underway, they "cannot now use the resignation of its chosen arbitrator to abort the arbitration process."[109]

The Eighth Circuit's decision to appoint a new arbitrator ran directly counter to the general rule established by the Second Circuit that "where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel."[110] In *Trade & Transport*, however, the party-appointed arbitrator died after a "partial final award" on liability was issued, but before a final award on damages. The Second Circuit deviated from its general rule and appointed an arbitrator, reasoning that the parties had asked for and received a legitimate ruling on liability, and there was no reason to disturb that ruling.[111] The court noted that the losing party did not challenge the liability ruling at the time, implicitly accusing them of using the death of their arbitrator to subvert the process.112 The court also did not allow the new party-appointed arbitrator to replace the original neutral arbitrator.[113]

The Eighth Circuit noted that it declined to adopt the general Second Circuit rule without clearly explaining why it was unsound. It noted that in *Marine Products*, the party moved to vacate an award granted by the court's new panel, while in *National American Insurance Co.*, Transamerica challenged the arbitrator before the award.[114] But presumably, if the court had authority to consider granting a new panel, it might save one appeal by granting the new panel sooner rather than later. The cases involved similar fact patterns; in *Marine Products*, discovery had also begun, and the arbitration had gone on for over a year, with the panel issuing two interlocutory orders.[115]

The Eighth Circuit rested its reasoning on its authority under 9 U.S.C. § 5 to appoint a new arbitrator when lapses in naming occurred, and citing Trade & Transport, that "to force the parties to name an entirely new panel would vitiate Section 5."[116] *Trade & Transport* noted that the reference to "filling a vacancy" in 9 U.S.C. § 5 would "make no sense" if the FAA was construed to automatically require a new panel whenever an arbitrator died.[117] But, *Trade & Transport* held that a new panel made no sense where a partial final award had already been issued. The Eighth Circuit did not rule in that context in *National American Insurance Co.*, nor did it consider that 9 U.S.C. § 5 might well give them the discretion to appoint a new panel, even if it did not automatically require it. Again, the Eighth Circuit may well have decided to adjust the law to the facts of the case to punish the "bad actor" attempting to subvert the process.

Other federal courts considering slightly different issues have similarly disallowed the use of retirements or resignations to subvert the arbitral process. In *Argonaut Midwest Insurance Co. v. General Reinsurance Corp.*,[118] General Re's party-appointed arbitrator retired from service at his insurance company. Argonaut then argued he no longer technically qualified under the contract requiring an "official of an insurance or reinsurance company" and demanded a new arbitrator. General Re refused the request. Argonaut then purported to appoint a new arbitrator in his place.119 The court rejected the attempt to install a new arbitrator, holding that General Re complied with its contractual requirements, and that retirement from active service does not automatically mean that arbitration should start anew.[120]

Similarly, an arbitrator's resignation from the panel does not automatically render his seat vacant and allow the other side to unilaterally appoint a new arbitrator.[121]

V. DEFAULT IN NAMING AN ARBITRATOR

Typically, reinsurance contracts contain a clause where if one party neglects to appoint their arbitrator within a certain time period, they default. The other side then appoints the arbitrator for them. Recent court decisions have strictly construed these clauses so that even a day's tardiness can mean that party loses its voice in the arbitrator selection process.

In *Universal Reinsurance Corp. v. Allstate Insurance Co.* ("Universal Re"),[122] the Seventh Circuit considered a case where due to a secretary's clerical error, one party appointed their arbitrator three business days after the deadline. The other party appointed an

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Courts assume that parties choosing arbitration over court have done so intelligently and willingly. Thus, courts reviewing disputes over arbitrators before an award take every opportunity to clear their docket and send those parties back to arbitration.

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arbitrator for them. The Seventh Circuit upheld the appointment and ordered the parties back to arbitration. "As with any other contract," the court looked to the intent of the parties at contracting.[123] Even though the contract did not contain an explicit "time is of the essence" clause, the parties had anticipated and contracted for this situation.[124] "[T]he agreement is crystal clear . . . [W]e think it inaccurate to suggest that 'no one in his right mind would agree to have a matter decided by umpires selected entirely by one's adversary.' (citations omitted) That is *exactly* what Universal agreed to when it signed off on the language . . ." (emphasis included)[125] These were "sophisticated part[ies] well versed in the language and ramifications of arbitration agreements."[126] "By honoring the letter of the contract, we remain true to the Arbitration Act as well as the parties' intent."[127]

Courts ruling on reinsurance arbitrations since *Universal Re* have generally followed its reasoning to the letter.[128] Even a delay of one day caused a party to forfeit its right to name its arbitrator.[129] One court, however, after finding a default, used its authority under 9 U.S.C. § 5 to appoint an arbitrator sua sponte.[130]

The Seventh Circuit in *Universal Re* explicitly disapproved an older line of cases holding that without a "time is of the essence clause," a delay of a few days in naming an arbitrator was not grounds for default.[131] It is conceivable that a split might still exist outside the Seventh Circuit.

When it is unclear which party has caused the impasse, courts generally will order the parties back to arbitration according to the court's interpretation of the terms of the contract. For example, in *Travelers Indemnity Co. v. Gerling Global Reinsurance Corp.*,[132] the different reinsurance contracts under dispute contained different methods for appointing an umpire. The parties could not agree on a process. Although one party, alleging a "lapse" in naming the umpire, asked the court to appoint an umpire under its authority pursuant to 9 U.S.C. § 5, the court declined. "[T]he parties had amicably attempted to resolve the[ir] discrepancies . . ."[133] Instead, the court ordered arbitration to proceed under its interpretation of the contracts, in effect "restarting the clock" on default.[134]

VI. CONCLUSION

The case law on arbitrator selection might best be summed up by *Gulf Guaranty*, where the court said, "[The] purpose of the [Federal Arbitration Act] is to 'move the parties . . . out of court and into arbitration as quickly and easily as possible.'"[135] Courts assume that parties choosing arbitration over court have done so intelligently and willingly. Thus, courts reviewing disputes over arbitrators before an award take every opportunity to clear their docket and send those parties back to arbitration. Nevertheless, egregious facts may result in courts taking a practical view and issuing orders protecting the arbitration process.

1 *Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 489 (5th Cir. 2002) ("*Gulf Guaranty*"), citing Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1982).

2 *Gulf Guaranty*, 304 F.3d at 490, *citing Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997) ("Aviall").

3 Gulf Guaranty at 489, citing Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. at 22.

4 9 U.S.C. § 10(a) reads in full:
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

5 *Gulf Guaranty* at 490.

6 *Id*. at 492, *citing Marc Rich & Co. v. Transmarine Seaways Corp.*, 443 F. Supp. 386, 387-88 (S.D.N.Y. 1995).

7 110 F.3d 892

8 *Aviall*, 110 F.3d at 895, citing 9 U.S.C. § 2.

9 *Aviall*, 110 F.3d at 895-97, *citing Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716 (E.D.N.Y. 1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); *Masthead Mac Drilling Corp. v. Fleck, 549 F. Supp.* 854 (S.D.N.Y. 1982); *Cristina Blouse Corp. v. International Ladies Garment Workers' Union, Local 162*, 492 F. Supp. 508 (S.D.N.Y. 1980). Outside the reinsurance context, courts have also cited *Aviall* in concluding under general contract principles that a biased arbitrator selected as a result of unequal bargaining power might render the agreement to arbitrate invalid. *See Mintze v. American Gen. Fin., Inc.*, 288 B.R. 95 (Bank. E.D. Pa. 2003). It is doubtful, though, that an argument based on unequal bargaining power could succeed in the reinsurance context. Courts generally assume that parties to a reinsurance arbitration are "sophisticated parties," *Jefferson-Pilot Life Ins. Co. v. Leafre Reins. Co.*, 2000 WL 1724661 at *2, who "'can ask no more impartiality than inheres in the method they have chosen.'" *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp.2d 10, 17 (D. Ma. 2002), *quoting Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

10 *Smith v. American Arbitration Assoc.*, 233 F.3d 502, 506 (7th Cir. 2000) ("Smith").

11 *Id*. at 506, citing Dean v. Sullivan, 118 F.3d 1170 (7th Cir. 1997).

12 *Id*. at 506.

13 Id.

14 *Continental Cas. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 03 C 1441, 2004 U.S. Dist. LEXIS 5283 at *11-12 (N.D. Ill. 2004).

15 *National Union Fire Ins. Co. v. Holt Cargo Sys., Inc.*, 99 Civ. 3699, 2000 U.S. Dist. LEXIS 3956 (S.D.N.Y. Mar. 28, 2000).

16 *Burlington Ins. Co. v. Trygg-Hansa Ins. Co.* AB, No. 1:99CV00334, 2002 U.S. Dist. LEXIS 19526 (M.D.N.C. Apr. 19, 2002).

17 *Certain Underwriters at Lloyd's v. Argonaut Ins. Co.*, 264 F. Supp.2d 926, 935 (N.D.Ca. 2003).

18 *Id*.

19 *Id*. at 936, *citing Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp*, 935 F.2d 1019, 1023 (9th Cir. 1991).

20 *Id. See also Travelers Indem. Co. v. Gerling Global Reins. Corp.*, 99 Civ. 4413, 2001 U.S. Dist. LEXIS 6684 at *7 (S.D.N.Y. May 23, 2001).

21 *In re Arbitration between Evanston Ins. Co. and Kansa Gen. Int'l Ins. Co. Ltd.*, No. 94 C 4957, slip op. (N.D. Ill. Oct. 17, 1994); 5-14 Mealey's Litig. Rep. Reinsurance 1 (1994).

22 *Id*. at *5.

23 No. 97 C 3638, No. 97 C 3640, No. 97 C 3643, 1997 U.S. Dist. LEXIS 11934 (N.D. Ill. Aug. 7, 1997).

24 *Id*. at *11-12.

25 *Id*. at *14.

26 *Certain Underwriters at Lloyd's v. Continental Cas. Co.* at *11, *citing Old Republic Ins. Co. v. Meadows Indem. Co., Ltd.*, 870 F. Supp 210, 211 (N.D. Ill. 1994).

27 *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002).

28 *See Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 2002 U.S. Dist. LEXIS 8876 at *3-17 (N.D. Ill. 2002).

29 *Sphere Drake*, 307 F.3d at 620, *citing Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468, 478 (1989).

30 *Sphere Drake* at 620.

31 *Sphere Drake* at 621.

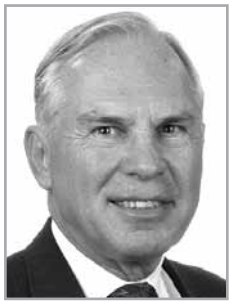
32 *Id*., citing 28 U.S.C. § 455(b). 28 U.S.C. § 455(b) reads in full:
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness

concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

33 *Sphere Drake* at 622-23, *citing Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145, 146 (1968).
34 *Sphere Drake* at 622-23.
35 *Id.* at 623.
36 *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp.2d 10, 17 (D. Ma. 2002), quoting *Merit Ins. Co. v. Leatherby Ins. Co.,* 714 F.2d 673, 679 (7th Cir. 1983).
37 *Id.*
38 *Continental Cas. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 2004 U.S. Dist. LEXIS 5283 at *12-13 (N.D. Ill. 2004).
39 *Id.*
40 *Gulf Guaranty*, 304 F.3d at 480 n.1.
41 *Gulf Guaranty*, 304 F.3d at 489.
42 *Gulf Guaranty*, 304 F.3d at 490-91, citing *Aviall*, 110 F.3d at 895 [citations omitted].
43 *Gulf Guaranty* at 491, citing Aviall, 110 F.3d at 895.
44 *Id.*, *citing Aviall*, 110 F.3d at 896.
45 *Id.*
46 *Gulf Guaranty* at 491 n.15.
47 No. 00 C 5257, 2000 WL 1724661 (N.D. Ill. Nov. 20, 2000).
48 *Jefferson-Pilot Life Ins. Co.*, 2000 WL 1724661 at *1.
49 *Id.* 9 U.S.C. § 4 and 5 read in relevant part:
§ 4 : "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28... for an order directing that such arbitration proceed in the manner provided for in such agreement."
§ 5: "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein..."
50 *Id.* at *2.
51 *Id.* at *2.
52 *Gulf Guaranty* at 492.
53 1997 U.S. Dist. LEXIS at 11934.
54 *Id.* at *5-6.
55 *Id.* at *16-17.
56 *Id.* at 17.
57 *Gulf Guaranty* at 491 n.15.
58 No. 97-MC-154, 1998 U.S. Dist. LEXIS 2466 (E.D. Pa. Feb. 18, 1998).
59 *Pennant*, 1998 U.S. Dist. LEXIS 2466 at *2.
60 *Id.* at *5.
61 *Id.* at *6-7.
62 *Id.* at *5.
63 264 F. Supp.2d 926, 935.
64 *Id.* at 935, citing Gulf Guaranty, 304 F.3d at 490.
65 *Truck Ins. Exchange v. Certain Underwriters at Lloyd's, London*, No. S068479 (Cal. Super. Ct. 2001); 12-1 Mealey's Litig. Rep. Reinsurance 1 (2001).
66 *Id.*
67 California Code of Civil Procedure § 1297.124 reads in full: "Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed."
68 No. 99-12478-RWZ (D. Mass. Feb. 23, 2000), 10-21 Mealey's Litig. Rep. Reinsurance 3 (2000).
69 *Id.*
70 870 F. Supp. 210 (N.D. Ill. 1994).
71 *Old Republic Ins. Co.*, 870 F. Supp. at 212.
72 Fidelity Sec. Life Ins. Co. v. John Hancock Life Ins. Co., No. 02-11663 (D. Mass. Sept. 17, 2002); 13-12 Mealey's Litig. Rep. Reinsurance 3 (October 17, 2002).
73 *Id.*
74 *Aviall*, 110 F.3d at 895-96; see *also Gulf Guaranty*, 304 F.3d at 491.
75 349 F. Supp. at 716.
76 *Erving*, 349 F. Supp. at 719.
77 749 F. Supp. 851 (M.D.Tenn. 1990).
78 *Aviall* at 896.
79 *See also Black v. National Football League Players Assoc.*, 87 F. Supp.2d 1, 5-6 (D.D.C. 2000).
80 *Old Republic Ins. Co.*, 870 F. Supp. at 212-13.
81 *Id.*
82 *Gulf Guaranty* at 491.
83 *Sphere Drake*, 30 F.3d at 620.
84 *Id.* at 622-23.
85 *Id.* at 623.
86 No. C 94-3617 SC, 1995 U.S. Dist. LEXIS 22236 (N.D. Ca. Jan. 11, 1995).
87 *Fireman's Fund Ins. Co. v. Sorema N. Am. Reins. Co.*, 1995 U.S. Dist. LEXIS 22236 at *3-5.
88 *Id.* at *9 (citations omitted).
89 *Id.* at *11.
90 9 U.S.C. § 10(a)(3); *see also Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 624 (6th Cir. 2002).
91 *Sphere Drake* at 620.
92 *Dow Corning Corp. v. Safety Nat. Cas. Corp.*, 335 F.3d 742, 751 (8th Cir. 2003).
93 780 F. Supp. 885 (D. Conn. 1991).
94 *J.C. Penney*, 780 F. Supp. at 887-88.
95 *J.C. Penney* at 895.
96 *Id.* at 892 n.3, *citing* DEL. CODE. ANN. 10 § 5714.
97 *J.C. Penney* at 892.
98 *Id.* at 894.
99 *Burlington Ins. Co. v. Trygg-Hansa Ins. Co.* AB, 2002 U.S. Dist. LEXIS 19526 at *6 n.2.
100 919 F. Supp 1061, 1075-76 (E.D. Mich. 1995).
101 *See also Continental Cas. Co.*, 1997 U.S. Dist. LEXIS 11934 at *10-11; *Old Republic Ins. Co. v. Meadows Indem. Co., Ltd.*, 870 F. Supp at 212.
102 *Hartford Steam Boiler Inspection & Ins. Co. v. Industrial Risk Ins.*, No. CV 94-705105, 1994 Conn. Super. LEXIS 2395 (Conn. Super. Ct. Sept. 21, 1994).
103 *Hartford Steam Boiler Inspection & Ins. Co. v. Industrial Risk Ins.*, PJR CV-96-0560722 S, 1996 Conn. Super. LEXIS 3149 at *13 (Conn. Super. Ct. Nov. 27, 1996).
104 328 F.3d 462 (8th Cir. 2003).
105 *National Am. Ins. Co.*, 328 F.3d at 463-64.
106 *Id.* at 464.
107 *Id.* at 465.
108 *Id.*, *citing Hugs & Kisses, Inc. v Aguirre*, 220 F.3d 890 (8th Cir. 2000).
109 *National Am. Ins. Co.* at 465.
110 Marine Products Export Corp. v. M.T. Globe Galaxy, 977 F.2d 66, 68 (2d Cir. 1992), *citing Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 194 (2d Cir. 1991).
111 *Trade & Transport*, 931 F.2d at 195-96; see *also Home Ins. Co. v. Banco de Seguros del Estado*, No. 98 Civ. 6022 (KMW), 1999 U.S. Dist. LEXIS 22478 (S.D.N.Y. Feb. 26, 1999).
112 *Trade & Transport* at 195.
113 *Id.* at 196.
114 *National Am. Ins. Co.* at 465-66.
115 *Marine Products*, 977 F.2d at 67.
116 *National Am. Ins. Co.* at 466, *citing Trade & Transport* at 196.
117 *Trade & Transport* at 196.
118 No. 96 C 6437, 1998 U.S. Dist. LEXIS 12497 (N.D. Ill. Aug. 6, 1998).
119 *Argonaut Midwest Ins. Co. v. General Reins. Co.*, 1998 U.S. Dist. LEXIS 12497 at *3-5.
120 *Id.* at *11.
121 *Evanston Ins. Co. v. Kansa Gen. Int'l Ins. Co. Ltd.*, No. 94 C 4957, 1994 U.S. Dist. LEXIS 19219 (N.D. Ill. Jan. 13, 1995).
122 16 F.3d 125 (7th Cir. 1994).
123 *Id.* at 129.
124 *Id.* at 129 n.1, citing Evanston Ins. Co. v. Gerling Global Reins. Corp., No. 90 C 3919, 1990 U.S. Dist. LEXIS 12521 (N.D.Ill. Sept. 24, 1990).
125 *Id.*
126 *Id.*
127 *Id.*
128 *See, e.g., Employers Ins. of Wausau v. Jackson*, 178 505 N.W.2d 147 (Wis. Ct. App. 1993), aff'd, 527 N.W.2d 681 (Wis. 1995); *Continental Cas. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 2004 U.S. Dist. LEXIS 5283 (N.D.Ill. 2004); *Everest Reins. Co. v. ROM Reins. Mgmt. Co., Inc.*, 756 N.Y.S.2d 739 (N.Y. App. Div. 2003).
129 *City of Aurora, Colorado v. Classic Syndicate, Inc.*, 946 F. Supp. 601 (N.D.Ill. 1996).
130 *Cravens, Dargan & Co. v. General Ins. Co. of Trieste & Venice*, 95 Civ. 1850, 1996 U.S. Dist. LEXIS 1051 (S.D.N.Y. Feb. 2, 1996).
131 *See, e.g., New England Reins. Corp. v. Tennessee Ins. Co.*, 780 F. Supp 73 (D. Mass. 1991); *Compania Portorafti Commerciale v. Kaiser Int'l Corp.*, 616 F. Supp. 236, 238 (S.D.N.Y. 1985); *Texas Eastern Transmission Corp. v. Barnard*, 285 F.2d 536 (6th Cir. 1960); *Lobo & Co. v. Plymouth Navigation Co.*, 187 F. Supp. 859 (S.D.N.Y. 1960); *see also* Jason Binimow & Michael D. Osteen, Annotation, *Validity and Effect Under Federal Arbitration Act of Arbitration Agreement Provision For Alternative Method of Appointment of Arbitrator Where One Party Fails or Refuses to Follow Appointment Procedure Specified in Agreement*, 159 A.L.R. FED. 1 (2004).
132 99 Civ. 4413, 2001 U.S. Dist. LEXIS 6684 (S.D.N.Y. May 23, 2001).
133 *Id.* at *5-6.
134 *Id.* at *6-7; see also *Northwestern Nat'l Ins. Co. v. Kansa Gen. Ins. Co.*, 92 Civ. 7433, 1992 U.S. Dist. LEXIS 17841 (S.D.N.Y. Nov. 25, 1992); *RLI Ins. Co. v. Kansa Reins. Co.*, No. 91 Civ. 4319, 1991 U.S. Dist. LEXIS 16388 (S.D.N.Y. Nov. 14, 1991).
135 *Gulf Guaranty*, 304 F.3d at 489.

in focus

Recently Certified Arbitrators



Malcolm B. Burton

Martin B. Cohen

Malcolm B. Burton

Malcolm Burton spent his entire forty-year business career in Home Office Claims at Chubb & Son. He joined that firm as a trainee out of law school in 1963 and held several positions in liability claims over the next few years. He was appointed Casualty Claims Manager for the company in 1973, a position he held until 1982. His responsibilities included general liability, automobile, workers' compensation, medical malpractice, and professional liability claims world-wide. In addition he was responsible for litigation against the company seeking extra-contractual damages arising from claims department activities in those areas.

In 1982 he assumed responsibility for bond claims (both fidelity and surety), and specialty claims, which included directors' and officers' liability, fiduciary liability, employment practices liability, and related disciplines. At that time he also took on responsibility for litigation seeking extra-contractual damages arising from claim department activities for the entire company, a responsibility he retained until his retirement.

In 1992 Mr. Burton was named Senior Claims Counsel for the company and was responsible for the most serious claims facing the company in every claims discipline. In addition, he was frequently the principal negotiator for the company in resolving those cases. He was also active assisting the company in resolving disputes with its reinsurers on various treaties.

When Mr. Burton retired from Chubb in 2003, he was a Managing Director and Senior Vice President of the company. Since his retirement he was worked as a consultant to Chubb on a major reinsurance dispute in the London market, and as a consultant to lawyers on various insurance issues.

Mr. Burton holds a B.A. degree (1960) and J.D. degree (1963) from Washington & Lee University. He was admitted to the practice of law in Virginia in 1963, in Maryland in 1963, and in New Jersey in 1969. He is a member of the American Bar Association and several of its sections, as well as the Defense Research Institute, the Federation of Defense and Corporate Counsel, the International Association of Defense Counsel, and the Excess/Surplus Lines Claims Association.

Martin B. Cohen

Martin Cohen is self-employed, providing insurance/reinsurance consulting services, arbitration services, and surety bond claim consulting services. He retired in January 2002 from OneBeacon Insurance (formerly CGU/Commercial Union Insurance), where he served in various capacities, including Reinsurance Counsel (1990-2002). As reinsurance counsel, he managed and served as party representative on both ceded and assumed reinsurance arbitrations and litigations. At the same time, he was responsible for counseling direct, ceded and assumed operations in the resolution of disputes which were driven by both underlying environmental and non-environmental issues. He is a former Director and Secretary of Potomac Insurance Company, and former Assistant Vice President of National Liability & Fire Insurance Company, having been appointed to both positions during this period.

During the latter part of 2001 and for a period of time during 2002, Mr. Cohen served in a similar capacity for National Indemnity Company/Randall America, which managed certain environmental and reinsurance business for OneBeacon Insurance.

Mr. Cohen has approximately thirty-five years experience in direct claims handling, which encompassed liability, environmental and over twenty-five years handling and managing surety bond claims. In the positions he has held at CGU/Commercial Union Insurance Company and subsequently OneBeacon Insurance, he handled all phases of bond claims, spending an appreciable amount of time in the field. As the Senior Bond Claim Counsel/Manager of the New England Bond Claim Department, he supervised a staff of technicians wherein he was responsible for the resolution and disposition of approximately fifty percent (50%) of the claims which arose on a countrywide basis.

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

John W. Cowley

Peter L. Craft

As Commercial Union ceased writing bonds in 1990, Mr. Cohen assumed the position of Reinsurance Claims Counsel, while at the same time in his position as Home Office Bond Claim Manager, he managed the administration and run-off of hundreds of bond claims. He also became heavily involved in environmental and liability claims on a daily basis.

Mr. Cohen holds a BS degree in business management from Northeastern University and a JD degree from Suffolk University Law School. He is admitted in both the Massachusetts state and federal courts. He is a member of the American Bar Association, the Massachusetts Bar Association, Reinsurance Association of America, as well as the American Arbitration Association.

Mr. Cohen, as a member of the National Education Association and the Massachusetts Teachers Association, is an adjunct instructor at both Newbury College (since 1975), and North Shore Community College (since 1987), teaching courses in insurance, business law, constitutional law, and criminal law.

John W. Cowley

John Cowley entered the insurance business with Aetna Casualty and Surety in 1968 in its Fidelity / Surety Bond Department. After managing a small surety company in Ohio, he joined Employers of Wausau in its Home Office to oversee the underwriting of 60% of its contract surety writings from its regional offices.

In 1978 Fireman's Fund recruited him to redirect the surety operations of its Walnut Creek office. Upon completion of that assignment, he joined the property / casualty side of the company to continue to perform turnarounds in offices like Chicago. Mr. Cowley joined Teledyne in late 1984 as President & CEO of Great Central Insurance Company, Peoria, Illinois to turn around its operations or put it into run-off. He was directly involved in the placement and structure of the company's reinsurance program in both the U.S. and London. While in Illinois he was a Board Member of the Illinois Insurance Information Service (Chairman in 1992).

Joining Willcox Reinsurance Intermediaries in 1994, he developed both traditional and alternative revenue sources. One segment involved group self-insurance funds. He was approached by NCCI in 1998 to oversee, as President, the turnaround of its Residual Market Division —- the contracted administrator for the National WC Pool.

Upon completion of that assignment, Mr. Cowley joined Highlands Insurance Group to assist its new Chairman in redirecting its various operating entities as President & COO. When it became evident that a turnaround was impossible, he then oversaw the design and initial implementation of the run-off plans. Since then, he has served as a consultant to self-insurance funds, primary carriers and start-up insurance entities, and as an expert witness.

A graduate of Pennsylvania State University in 1968, he earned an MBA from St. Mary's in 1980. He has served as a guest lecturer at the Insurance Marketing Institute at Purdue University.

Peter L. Craft

Peter Craft was hired as D.W. Van Dyke and Company of Connecticut, Inc.'s ("Company") General Counsel in 1994. Mr. Craft was promoted to Senior Vice President in January 1998 and was elected as a member of the Board of Directors in May 2001. He is a member of the Executive Committee and the Reinsurance Market Committee. He has also been responsible for the Legal Department and developing international reinsurance business primarily in Latin America.

From 1988 to 1994, prior to joining the Company, Mr. Craft served as outside counsel to the Company while a partner of Rucci, Gleason, Craft & Burnham. Mr. Craft has experience in the areas of self insured medical expense, critical illness, run-off, arbitration, claim disputes, provider excess, disability, coverage disputes, special risk, accident, travel and credit reinsurance. He is licensed as a reinsurance intermediary and life, accident and health producer. In addition, he has been involved in the incorporation and management of various managing general underwriting companies, reinsurance managers, insurance marketing companies and reinsurance joint ventures.

Mr. Craft graduated from Connecticut College with honors with a B.A. in Economics. He received his Juris Doctor from

Bina T. Dagar

Western New England College School of Law; and a Master of Laws in Taxation from Boston University. Mr. Craft is also admitted to the Connecticut Bar, the New York Bar and the Massachusetts Bar; and the United States Tax Court. He is a member of ARIAS UK.

Cathryn A. Curia

Cathryn Curia has more than 34 years of experience in insurance and reinsurance property underwriting, giving her an in-depth knowledge of ceded reinsurance operations, as well as assumed reinsurance practices.

Ms. Curia began her insurance career with Atlantic Mutual Insurance Company as a trainee in 1969. After an intensive training program, she was assigned to the New York Personal Lines Underwriting operation. In 1971, she moved to the Ceded Reinsurance Department as a supervisor and assistant to the head of Ceded Reinsurance. While at Atlantic, she developed through levels of management, ultimately handling the planning, negotiation, purchase and implementation of reinsurance for the organization for property, casualty and marine lines of business. She attended Robert Strain's first Reinsurance Seminar in 1973 and obtained her CPCU in 1978 and her ARM in 1981.

In July 1983, Ms. Curia joined St. Paul Re as Assistant Vice-President in the North American Property Treaty Department. During the next 19 years, she took on increasing underwriting, management, client relationship and leadership responsibilities, resulting in her being appointed Executive Vice-President North American Treaty in November 2001. Ms. Curia has extensive experience in property underwriting audits, as well as cross-functional team involvement. She led the company's education programs for its employees for 15 years.

In November 2002, St. Paul Companies spun-off St. Paul Re via an IPO as Platinum Underwriters Reinsurance Inc. Ms. Curia served as Executive Vice-President North American Treaty in the new company until September 2003.

Ms. Curia is a graduate of The College of Notre Dame of Maryland and has taken multiple courses at The College of Insurance. She has participated in several AMA Management courses, as well as a St. Paul Companies advanced leadership program. She is a member of the Society of CPCU and is a member and past president of the Association of Professional Insurance Women.

Bina T. Dagar

Bina Dagar is a reinsurance consultant. She offers her services through Ameya Consulting, LLC, a reinsurance consulting firm she founded in July 2004. Her services include reinsurance analysis and strategic planning, expert testimony, and insurance and reinsurance arbitration/mediation in the property and casualty field.

Ms. Dagar has over 20 years of experience working in management, technical and consulting capacities for insurance and reinsurance companies. She is an experienced reinsurance executive with expertise in underwriting, claims and marketing, including specialized areas such as Political Risk and Export Credit, Kidnap and Extortion and Professional Liability.

Ms. Dagar served as Vice President - International Division for Everest Reinsurance Company in New Jersey, from 1996 to 2001, and Director - Domestic and Multi-Line Underwriting, from 1994 to 1996. In these positions, she managed the technical responsibilities, strategic planning, and budgeting of various geographic regions; managed business and professional relationships with clients and reinsurance brokers; and marketed prospective clients and regions.

Prior to 1994, Ms. Dagar managed a varied portfolio of brokered and direct business - both domestic and international - at SCOR. She maintained responsibility for underwriting, planning, developing and auditing ceding companies and retrocedants in addition to overseeing SCOR's Political Risk MGA.

Prior to that, Ms. Dagar served variously as Manager of Ceded Reinsurance at CIGNA International and Management Consultant at CIGNA Systems from 1984 to 1989. As Manager, she designed and priced reinsurance structures for affiliated companies worldwide and oversaw $13 million in reinsurance recoveries on Casualty, Political Risk and Export Credit runoff

business. As Consultant, she provided staffing, management and production consulting services to CIGNA's worldwide subsidiaries. She was also chosen to participate on a blue ribbon committee assigned to cost and price business produced worldwide.

Ms. Dagar is a magna cum laude graduate of the University of Pennsylvania with a double major in Liberal Arts and South Asian Studies. She is a member of the Association of Professional Insurance Women (APIW) and is serving on a number of committees for that organization. She has authored articles on reinsurance and has served as a speaker at panel discussions on reinsurance arbitrations.

Joseph J. DeVito

Joseph DeVito is the President of DeVito Consulting, Inc., a consulting firm he established in 1989, dedicated to providing expert services to the insurance industry. He focuses his expertise in regulatory and litigation support, rehabilitations and liquidations, insurance and reinsurance run-offs, accounting and financial matters, operations, and taxation. Mr. DeVito is presently assisting various State Insurance Departments in support of litigation and expert witness matters and/or forensic accounting assistance.

Throughout his thirty-six year career, Mr. DeVito has been involved in many facets of the insurance industry. Prior to establishing DeVito Consulting, Inc., he was President and Chief Executive Officer of GFN Corporation and its subsidiaries. GFN's primary asset was a property and casualty insurer writing specialty products in the southeast. While at GFN, Mr. DeVito established a variety of service entities to assist in the daily operations, as well as to provide expert services to third parties. These entities included a reinsurance intermediary, an insurance agency, a claims management firm, a judicial investigative company, and a consulting firm.

Mr. DeVito was a partner at KPMG Peat Marwick Insurance Practice in New York, specializing in insurance and reinsurance companies and acting as liaison with the firm's mergers and acquisitions department. Following completion of an acquisition for a foreign financial conglomerate, he became President and Chief Executive Officer of GFN. He was actively involved in developing and conducting KPMG's insurance training seminars, was responsible for all KPMG professional staff training, and enjoyed many years as an instructor of a major CPA review course, an adjunct professor at the College of Insurance, and as an instructor of seminars conducted for state regulators.

Mr. DeVito is a Certified Public Accountant and holds a Master's Degree in Executive Management, a Bachelor's Degree in Accounting, and is recognized as a qualified actuary in the State of New York. He is a member of the Board of Directors of IAIR since 2003 and currently holds the position of 1st Vice President, Treasurer, and President Elect.

Grandsons Liam Joseph and Brendan join their proud parents Joy (nee DeVito) and Liam Sargent, Uncle [and Dr.] Marc DeVito, and Uncle Keith DeVito and his new wife Lisa. Mr. DeVito's wife, Susan, and he are thrilled with the new additions to the family and look forward to a growing family tree.

Joseph J. DeVito

John S.. Diaconis

John S. Diaconis

As both in-house and outside counsel, Mr. Diaconis has over twenty-four years of insurance and reinsurance claims experience in commercial crime, financial institution bonds, insurance company errors and omissions, directors and officers, and professional liability Claims. He has been involved as counsel, arbitrator and mediator in numerous commercial, insurance and reinsurance arbitrations and disputes, involving both facultative and treaty reinsurance contracts as well as primary and excess insurance policies. Currently, he focuses on serving as party-appointed arbitrator and mediator in insurance and reinsurance arbitrations.

In addition to his arbitration and mediation practice, Mr. Diaconis serves as Special Counsel to the Firm of Rutherford & Christie, LLP in New York. Before joining that Firm, he was Vice-President and Claims Counsel of Hartford Financial Services Group, Inc., with responsibility for insurance company errors and omissions, commercial crime and reinsurance matters emanating from Hartford Financial Products. Prior to that, he was a partner in Peterson & Ross (1996-1999) and Wilson, Elser, Moskowitz, Edelman & Dicker (1981-1995), counseling clients in the same areas of practice. From 1980 to 1981, he

in focus

Clement S. Dwyer, Jr.

served as Law Clerk to Hon. Joel J. Tyler in the United States District Court for the Southern District of New York. He was Chairman of Practising Law Institute's Annual Program on Reinsurance Law and Practice from 1994 to 2000. Since 2001, Mr. Diaconis has also served on the Board of the Town of New Castle, which includes the hamlets of Chappaqua and Millwood in Westchester County, New York.

Mr. Diaconis has acted as lead counsel in the following reported insurance and reinsurance cases: Brennan v. City of White Plains, 1998 WL 75692 (S.D.N.Y.); Albert T. Chandler v. H.E. Yerkes and Associates, Inc., 784 F. Supp. 119 (S.D.N.Y. 1992); W.A. Knight v. H.E. Yerkes and Associates, Inc., 135 F.R.D. 67 (S.D.N.Y. 1991); Travelers Insurance v. Buffalo Reinsurance Company, 739 F. Supp. 209 (S.D.N.Y. 1990); American Marine Insurance Group v. Price Forbes, et al., 560 N.Y.S.2d 638 (1st Dep't 1990); Corcoran v. AIG Multi-Line Syndicate, 143 Misc. 2d 62, 539 N.Y.S. 6 (Sup. Ct. N.Y. 1989).

Mr. Diaconis completed the Program of Instruction for Lawyers on Mediation Training at Harvard Law School, and serves on the Panel of Mediators and Neutrals for the Supreme Court, New York County, Commercial Division. He has handled over twenty-five mediations as either mediator or party-appointed counsel.

Mr. Diaconis received his J.D. from Drake University Law School where he was a member of Law Review, and his LL.M. from New York University, School of Law. He is admitted to practice in the State of New York. He is also admitted to the United States District Court for the Eastern and Southern Districts of New York, and the United States Court of Appeals for the Second Circuit.

Clement S. Dwyer, Jr.

Clement Dwyer has over 34 years experience in the insurance and reinsurance industry as a reinsurance broker, a reinsurance company chief executive and as a self-employed consultant. Mr. Dwyer began his career in reinsurance in 1970 with Guy Carpenter & Company, Inc., where he was employed for over 25 years. During his career at Guy Carpenter, Mr. Dwyer was involved with all aspects of reinsurance brokerage of property and casualty business for a diverse set of clients ranging from industry grants to small mutual companies. The major areas in which Mr. Dwyer worked included

- property/casualty treaty reinsurance including domestic and multinational companies
- facultative property/casualty
- finite risk reinsurance
- market security and client solicitation
- management of actuarial services and catastrophe models for natural perils
- securitization of insurance risk and access to capital markets
- retrocessions

After holding various executive positions at Guy Carpenter, in 1987 Mr. Dwyer was named Senior Vice President and Director. In 1991, he assumed the position of Executive Vice President and was responsible for all reinsurance brokerage operations for North American clients, which included responsibility for property casualty, life, health, and ocean marine business, including the London-market wholesale placements. Mr. Dwyer actively participated in the creation of Center Reinsurance Company, Ltd. (1988) and Mid Ocean Reinsurance Company Ltd. (1992).

In 1996, he joined Signet Star Holdings, Inc., the reinsurance subsidiary of W.R. Berkley Corporation as President and Chief Executive Officer.

In 1997, Mr. Dwyer formed URSA Advisors, LLC as its Managing Member. The services of URSA Advisors include advisory work on capital raising and mergers and acquisitions transactions, commissioned research, participation on various boards of directors and advisory boards, as well as expert witness in various litigations and arbitrations. To date, he has provided fifteen expert opinions in various cases. The subject areas include terrorism, material non-disclosure, brokers' errors and omissions, fronting agreements, and extra contractual obligations and losses in excess of original policy limits. He has twice been accepted as an expert in matters before a U.S. District Court.

Mr. Dwyer serves on the Board of Directors of Old American Insurance Investors and Holborn Corporation, as an advisor to Century Capital Management and The Beekman Group (private equity firms), and is a member of the Executive Advisory Council

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of St. John's University, School of Risk Management, Insurance & Actuarial Science.

Mr. Dwyer graduated from Tuft's University in 1970 with a BA in Biology. He completed the Executive Program at Stanford University Graduate School of Business in 1989, and attended various courses at St. John's University, School of Risk Management, Insurance & Actuarial Science. He holds a CPCU designation and is a Licensed Insurance Broker in New York and New Jersey, in addition to being as ARIAS-US Certified Arbitrator.

Steven A. Gaines

Steven Gaines is recently retired from Contractors Bonding and Insurance Company ("CBIC"), where he was employed for over 20 years. He was the President and COO of both CBIC and its parent company. He is now the Principal of GainesADR LLC.

Prior to CBIC, Mr. Gaines was an attorney in private practice. He incorporated CBIC in 1979, and subsequently handled or oversaw all aspects of both its surety and P&C business, including underwriting, claims, accounting, IT, compliance, and reinsurance.

Because a very large percentage of CBIC's business comes from contractors, Mr. Gaines has gained a special expertise in contracting matters, both in surety and P&C. He was very active in shaping underwriting, policy provisions and claims procedures to help counteract defective construction exposures.

Mr. Gaines had personal responsibility for all reinsurance structuring, negotiation and drafting, including excess of loss and quota share treaties and facultative arrangements.

Mr. Gaines graduated from UCLA in 1968 with a B.S. in accounting. He graduated from UCLA's School of Law in 1972, where he was a member of the Law Review, and was published. He has been a member of the State Bar of California since 1972 (now inactive), and Washington since 1973 (active). He was a past President of the Surety Association of Washington. He was a frequent surety industry speaker. He has trial experience, and has been active in lobbying for surety and P&C issues.

William H. Huff III

William Huff, an attorney, began his insurance career serving as Insurance Commissioner of the State of Iowa during the period July 1, 1971 to June 30, 1976. He served as President of the NAIC for calendar year 1975. During his five years as Commissioner, he chaired committees which revised the Unfair Trade Practices Act, developed the model Unfair Claims Settlement Act, developed the first Market Conduct Surveillance Handbook, and developed the initial Life Insurance Cost Disclosure methodology and form.

Mr. Huff resigned as Insurance Commissioner in June 1976 to accept a position as Senior Vice President, General Counsel and Public Affairs with Texas Employers Insurance Association, Employers Casualty Company and Employers National Life Insurance Company in Dallas, Texas. During his time with Employers, in addition to his General Counsel duties, he handled all regulatory matters for the various companies, as well as lobbying in Austin and Washington, D.C. He was promoted to Executive Vice President and took on the claims responsibility in addition to his other duties.

When Employers Casualty Company was placed into conservatorship, Mr. Huff was asked to take over as Chairman, President and Chief Executive Officer under a contract with the Texas Department of Insurance. He left ECC in late 1993 when the state decided to place the Company into receivership.

Mr. Huff joined TIG Insurance Group as Senior Vice President, General Counsel and Secretary in January 1994. In addition to his normal general counsel activities, he was responsible for all regulatory, holding company and secretarial functions for TIG and all of the subsidiaries including fifteen insurance companies domiciled in seven different jurisdictions. His activities also included responsibility for all non-claims and extra contractual litigation for all of the TIG companies. During the period of time he was with TIG, he was involved with the sale of companies, sale of books of business, the establishment of several new entities and the development of generic general agent, TPA, claims and profit sharing contracts to support the program business which was TIG's primary method of doing business.

Mr. Huff retired from TIG December 31, 2002 as Executive Vice President, Secretary and

Steven A. Gaines

William H. Huff, III

in focus

Frtiz K. Huszagh

Louis F. Iacovelli

General Counsel and joined Thompson, Coe, Cousins & Irons, L.L.P. as Of Counsel on July 1, 2003.

He has written numerous articles, mainly dealing with various aspects of insurance regulation.

Fritz K. Huszagh

Fritz Huszagh began his career in the insurance business in 1975 as a claims trainee for GATX Insurance Company/GATX Underwriters, Inc. GATX acted as both a managing general agent and insurer of directors, officers, trustees and fiduciaries, as well as actuaries, accountants, lawyers, real estate/insurance agents, and architects and engineers under E&O policies. He eventually became Claims Manager, as well as Assistant Vice President in charge of claims. While working full-time, he enrolled in law school for evening classes at Chicago-Kent College of Law in 1977, and graduated with honors in 1981.

In 1979, Mr. Huszagh moved to Thomas F. Sheehan, Inc., a managing general agent that handled all aspects of underwriting, claims management and reinsurance for two insurers writing various errors and omissions coverages on both an admitted and surplus lines basis. In addition to his responsibilities as Claims Manager/Assistant Vice President for Claims, he was involved in underwriting and policy review, as well as submission and negotiation of claims to reinsurers.

After receiving his law degree in 1981, Mr. Huszagh joined the firm of McKenna, Storer, Rowe, White & Farrug as an associate, where he litigated personal injury and property damage claims, as well as first and third party coverage disputes.

He joined Hinshaw, Culbertson, Moelmann, Hoban & Fuller (now Hinshaw & Culbertson LLP in 1983 as an associate in its coverage group. There, he concentrated his practice on commercial insurance coverage disputes, both first and third party, as well as reinsurance arbitrations and litigation. He has extensive litigation experience with errors and omissions coverages; general liability, umbrella and excess liability matters involving premises, operations, and completed operations (e.g., transportation, restaurant, labor arrangements, sexual assault, drug ingestion/abuse, pollution/environmental) and products coverage (medical, metallurgical, pharmaceutical, construction material, food, machinery, paper, sanitation, electronic) as well as other risks and exposures.

Mr. Huszagh has been involved as a lawyer in over two dozen arbitrations, involving insurance coverage and/or reinsurance, and has also acted as an arbitrator in several such disputes. He is currently acting as an arbitrator and also as an umpire in several pending matters. Mr. Huszagh has also been involved in numerous mediations involving insurance of reinsurance disputes.

He has written extensively in Illinois Institute for Continuing Legal Education publications, having authored chapters on interpleader, products liability insurance, general liability insurance, professional liability insurance, and reinsurance. Mr. Huszagh has also spoken numerous times to various legal and insurance groups, including presentations at DRI conferences, various Bar Associations, and at Practising Law Institute seminars.

Louis F. Iacovelli

Louis Iacovelli has held a variety of senior management positions over his 30-year career in the insurance business.

He is currently President of EnterpriseRiskPartners LLC, a company he started in 2004. Clients include insurers, surplus line carriers, banks, trade groups and MGA's. The consulting practice's expertise is in marketing / sales strategies, business process reviews, and new product development.

Prior to starting his own business, Mr. Iacovelli was Senior Vice President at ACE USA. His responsibilities over a four-year period included starting and managing a national MGA that specializing in the healthcare professional liability market, developing a product line for High Net Worth families, and leading a specialty commercial lines unit.

In 1997, Mr. Iacovelli joined CIGNA P&C as the Vice President of Business Development. In that position, he was responsible for the formation of a national federally chartered savings & loan trust company. In 1998, he was promoted to Senior Vice President of the Agri-Business operations that included Crop Farm and Commercial Ag businesses. He was responsible for all aspects of the business

including underwriting, reinsurance, financial planning, marketing and distribution.

Previously, Mr. Iacovelli had spent 16 years with Continental Insurance Company in a variety of national marketing and sales positions. Key responsibilities included head of marketing for the National Accounts Division and Vice President of Marketing for the Domestic P&C operation departments. This position included product development, market research, strategic market planning and specialty markets.

Mr. Iacovelli is a graduate of Seton Hall University and has done graduate work at St. Johns School of Risk Management (formally the College of Insurance). He is currently on the Board of Directors of the Philadelphia Insurance Society. He has also served on other boards including a venture capital fund focused on insurance distribution.

He is married, has three children and lives in Medford Lakes, New Jersey.

Cecelia Kempler

Cecelia ("Sue") Kempler devoted her entire 25 year legal career at LeBoeuf, Lamb, Greene & MacRae to serving the insurance industry. She represented insurers, reinsurers, brokers and agents in property/casualty and life insurance matters. Ms. Kempler's reinsurance experience includes interpretations of reinsurance agreements in coverage disputes, insurance and reinsurance regulations and complex reinsurance transactions. During her legal career, she developed knowledge of the business of insurance and reinsurance, in addition to her insurance legal expertise.

Ms. Kempler has extensive experience in insurer impairments and insolvencies involving property/casualty and life insurers. Most of her matters involved creditors of such companies, although she did also represent the New York Liquidation Bureau. Representations included General American Mutual Holding Company in pursuing voluntary supervision and later rehabilitation to negotiate and complete the sale of General American Life Insurance Company to MetLife; American Express and Shearson Lehman in connection with rehabilitation proceedings involving First Capital Life Insurance Company; Clarendon Insurance Company in its dispute with the receiver of Transit Casualty Company, the New York Liquidation Bureau in connection with the rehabilitations of Nassau Insurance Company and Union Indemnity Insurance Company, and many others.

Ms. Kempler also has considerable experience representing life insurers in market conduct/sales practice matters.

She served as Chair of LeBoeuf's Life Insurance Practice from 1997 through 2003 and Co-Chair of the Global Insurance Practice from 2001 through 2003, when she retired from the practice at LeBoeuf.

Ms. Kempler is admitted to practice before the United States Supreme Court; the U.S.C.A. (2d Cir.); U.S.D.C. (SDNY and EDNY); New York State Court of Appeals; and New York State Supreme Court (1st Dept.).

In 2004, Ms. Kempler formed Cecelia Kempler Consulting, Inc. to advise insurers and law firms on legal risk management. She has spoken and published articles on this issue.

Currently, she serves on the Board and Audit Committee of Aegon US.

Ms. Kempler resides in St. Michaels, Md. and Palm Beach, Fla. She enjoys golf and boating.

Cecelia Kempler

Raymond J. Lester

Raymond J. Lester

Raymond Lester is Vice President and Associate General Counsel of Trustmark Insurance Company in Lake Forest, Illinois. Mr. Lester has twenty years of insurance and reinsurance experience, including acquisitions, regulatory matters, reinsurance facilities, litigation management, reinsurance settlements and commutations.

Mr. Lester earned a Bachelor of Science Degree in Finance (Dean's List) from the College of Commerce at the University of Illinois, Urbana where he studied insurance under the tutelage of Dean Emerson Cammack. While attending the University of Illinois, Mr. Lester became a licensed Illinois Insurance Broker. He attended John Marshall Law School in Chicago and graduated with High Distinction in 1984. He is also a Fellow of the Life Management Institute (FLMI) and a Chartered Life Underwriter (CLU). He has completed the Executive Development Program of the Kellogg School of Management at Northwestern University in Evanston, Illinois.

Mr. Lester currently representing Trustmark in

the run off of its workers compensation carve-out and personal accident assumed and ceded reinsurance business.

Douglas R. Maag

Douglas R. Maag

Douglas Maag is an attorney with 20 years of experience in the insurance and reinsurance industry. He has served as outside and in-house counsel, and since early 2004 he has been in private practice as an industry arbitrator, mediator and consultant.

From 1999 to 2004, Mr. Maag was Senior Vice President and General Counsel of ACE International, a division of ACE Limited with insurance operations in approximately 40 countries. In that role, he led the ACE International Law Department, managed high-impact litigation, executed strategic initiatives and provided counsel on a broad array of legal issues affecting ACE's international property and casualty, life, and accident and health businesses. He also served as a director of insurance and holding companies.

Mr. Maag spent the previous eight years with the CIGNA Group. From 1997 to 1999, he was Vice President and Senior Counsel to CIGNA's International Division, with responsibility for counseling its global property and casualty operations. From 1991 to 1997, he was counsel to CIGNA's domestic and international reinsurance businesses, handling complex reinsurance disputes and providing counsel on contract wordings, captives, insolvencies, commutations and diverse other reinsurance matters.

From 1985 to 1991 Mr. Maag was an attorney in New York with the law firms of Owen & Davis (since merged with Fulbright & Jaworski) and Werner & Kennedy (since merged with LeBoeuf, Lamb, Greene & MacRae). As outside counsel, Mr. Maag worked as a litigator on insurance, reinsurance and commercial disputes, and handled various insurance regulatory matters.

Mr. Maag received his J.D., cum laude, in 1985 from Whittier Law School, where he was editor-in-chief of the Whittier Law Review, and his B.A. in political science in 1981 from the University of California, Riverside. Mr. Maag is admitted to the bars of New York and Pennsylvania, and is a member of the American Bar Association. Mr. Maag served in the United States Army from 1976 to 1979.

Susan E. Mack

Susan E. Mack

Susan Mack is an active executive in the reinsurance industry, currently fulfilling dual roles at Transamerica Reinsurance as Senior Vice President and General Counsel, as well as Senior Vice President in charge of the discontinued Accident and Health business line. Described by friends as "one of the few switch-hitters in the reinsurance industry," she has experience as a senior business executive and senior lawyer in both the life/health reinsurance sector and the property/casualty sector.

An honors graduate of Dartmouth College, Ms. Mack received her law degree from Boston College School of Law in 1982. Until 1988, she was a lawyer in private practice, specializing in property and casualty insurance defense and coverage issues. Following her tenure at Aetna Life and Casualty as a senior trial lawyer, she was promoted to Head Reinsurance Counsel for ceded reinsurance in 1990. Over the next six years, she resolved over $65 million in reinsurance disputes, via in-person negotiation or strategizing litigations and arbitrations. Prior to the formation of Equitas, Ms. Mack was Aetna's principal negotiator with Lloyd's concerning such issues as asbestos, environmental and latent injury/damage claims.

In 1996, Ms. Mack moved from being a prominent ceding company executive to acting as an executive for the reinsurer side of the industry. At St. Paul Re, then one of the largest broker market property/casualty reinsurers, she was both General Counsel and the Vice President responsible for the multi-line Claims Department (including property, casualty, marine and surety lines). Additional accountabilities include responsibility for the Treaty Department.

She attained her current position in 1998 with Transamerica Reinsurance, the world's fourth largest life, health and annuity reinsurer. Since that time, she has become extremely active in improving the regulatory climate for life reinsurers with the active participation of the industry trade associations. Ms. Mack was the founding chairwoman of the Reinsurance Association of America's Life Affiliate Committee from 2000-2002. She is currently fulfilling a two-year term as chairwoman of the American

Counsel of Life Insurance's Reinsurance Committee. In addition, she is a member of the Board of Directors of ALIC (American Life Insurance Counsel).

Susan Mack has a keen interest in reinsurance industry self-improvement efforts. Most notable is her status as a Founding Director of ARIAS•U.S. She is also a frequent lecturer on reinsurance at industry seminars and conferences. Among these is her continuing status, from 1991 to the present, as guest instructor at the Strain Contract Wording Seminars and appearances at the Practising Law Institute, the Mealey's Reinsurance and Insolvency Roundtable and the American Bar Association's Annual Meetings.

Jennifer Mangino

Jennifer Mangino began her career in 1991 as a litigator with Lord Day & Lord, Barrett Smith in New York City. In 1994, she joined Morgan, Lewis & Bockius LLP, a large national firm, where she developed a focus in reinsurance matters. In early 1997, Ms. Mangino went in-house — joining St. Paul Re, Inc. as Assistant General Counsel.

After a brief return to Morgan, Lewis as reinsurance corporate counsel in 1998, Ms. Mangino was asked to return to St. Paul Re as General Counsel. In that capacity, she headed up the legal and contract wording functions of the sixth largest U.S. property/casualty reinsurer becoming a Senior Vice President in 1999. Ms. Mangino advised underwriters, claims staff and executive management in St. Paul Re's New York City home office and in Chicago, Sydney, Singapore and Hong Kong branch offices. She devoted significant time to advising the non-traditional/finite underwriting unit located in Morristown, New Jersey.

In 2002, Ms. Mangino joined the "start-up" reinsurers Arch Reinsurance Company (U.S.) and Arch Reinsurance Ltd. (Bermuda). She currently serves as General Counsel Reinsurance and Senior Vice President of Arch Capital Services Inc., an ACGL subsidiary that provides services to the insurance and reinsurance companies in the corporate group. Her current responsibilities include counseling property, casualty, surety, accident and health and non-traditional underwriting teams; advising executive management of both reinsurance companies on legal issues and claims and reinsurance contract wording matters; managing all disputes, arbitrations and litigations and drafting and reviewing all varieties of corporate contracts.

Ms. Mangino received her B.A. from Villanova University and her J.D. from Fordham University School of Law. She is admitted to the New York Bar as well as to the U.S. District Courts for the Southern and Eastern Districts of New York.

Jennifer Mangino

Claudia B. Morehead

Claudia Backlund Morehead is an attorney with over 20 years of experience in the insurance and reinsurance industry. She is currently Senior Counsel with the international law firm of Fulbright & Jaworski L.L.P., working in the Firm's Los Angeles and New York offices.

Ms. Morehead specializes in representation of insurance related entities in a broad spectrum of regulatory and transactional matters, including: (1) counsel to reinsurers, insurers, brokers and insureds regarding reinsurance agreement and insurance policy drafting and interpretation, legislative matters, privacy issues, structuring reinsurance programs and producer, managing general agent and reinsurance intermediary relationships and disputes; (2) insurance liquidation, receivership and rehabilitation proceedings, reinsurance arbitrations, insurance and reinsurance coverage issues, market conduct examinations and commutations; (3) formation and licensing of insurance and reinsurance companies, captive insurance companies and various alternative risk structures; and (4) multi-state licensing of brokers, agents and other intermediaries, and insurance and reinsurance companies.

Prior to her move to the west coast, Ms. Morehead served as a General Counsel to the CORE Group in Stamford, Connecticut, five domestic start-up insurance and reinsurance companies, jointly owned by Employees Reinsurance Company and GE Capital Corporation. The companies' focus was providing alternative risk transfer products to the property and casualty insurance and reinsurance markets. In this position, she oversaw all aspects of the companies' business including underwriting, marketing and claims.

From 1989 to 1996, she was Vice President

Claudia B. Morehead

in focus

Reinhard W. Obermueller

and Associate General Counsel at Munich America Reinsurance Company in New York City, where she was responsible for legal compliance for the underwriting, claims, marketing and human resources departments. She also supervised reinsurance arbitrations and litigation and served as general counsel to the investment and consulting subsidiaries of the company.

Prior to joining Munich, Ms. Morehead was Associate General Counsel at SCOR Reinsurance in New York City.

She began practicing law in Seattle, Washington in 1980, with a two year judicial clerkship at the Washington State Court of Appeals. She then entered private practice where she specialized in insurance and commercial law for four years before relocating to the east coast in 1987.

Ms. Morehead is a member of the Bar of the States of California, Washington and New York. She is a 1976 graduate of the University of the Pacific in Stockton, California and a 1980 graduate of McGeorge School of Law in Sacramento, California.

David J. Nichols

David Nichols is CEO of Interboro Mutual, a New York domiciled Mutual Insurance company in rehabilitation. Mr. Nichols was appointed as CEO by the New York State Liquidation Bureau.

Mr. Nichols has over 15 years of experience as an attorney in the insurance industry. He began his corporate legal career as a Corporate Counsel to a New Hampshire-based insurer, moving on to become Assistant Commissioner for that state's Insurance Department. As Assistant Commissioner, he participated in the creation and implementation of legislation and regulations that reformed major insurance markets in the state, such as automobile, workers' compensation and health insurance. Reporting directly to the State Commissioner, he worked on all aspects of property, casualty, life and health insurance regulation. His responsibilities included representing the Insurance Department before the legislature, rulemaking authorities, and industry associations.

He was subsequently tapped to oversee the operations of the Home Insurance Company, and in 1997 moved to New York City as the State-Appointed Supervisor for the Home. In that capacity, he served on the company's Board of Directors and had final authority over the $9-billion company's major expenditures, contracts, budgets and capital investments. He supervised all legal and financial aspects of the Home's run-off, as well as all key decisions relating to the Home's various non-insurance subsidiaries, including their sale. He assisted in restructuring the Home's debt and guided the resolution of environmental, asbestos, mass tort and other claims.

In addition to providing arbitration services, Mr. Nichols acts as a consultant to the financial services industry on investments in insurance companies.

Mr. Nichols graduated from the University of Maine Law School and is admitted to the Bar in New Hampshire and Maine.

Reinhard W. Obermueller

Reinhard Obermueller brings with him 29 years of insurance and reinsurance experience on a true international basis.

After graduating in Law in Munich, he joined the Munich Re in 1976 and became involved in marketing and underwriting property reinsurance in Europe and Developing Nations. He was transferred to New York in 1979 and contributed over the years in many functions that included marketing, underwriting, and administration to the successful buildup of the US Branch of the Munich Reinsurance.

From 1992 until its transfer into American Reinsurance in 1996, he was responsible for all aspects of managing this operation which gave him exposure to a wealth of experience and knowledge of the many facets and problems of the US and worldwide insurance markets.

Mr. Obermueller completed his career as Senior Vice President for National Accounts with American Re and retired from there last year. His areas of expertise include a firm understanding of business operations in general and all aspects of reinsurance transactions. He is looking forward to apply this expertise as an ARIAS•U.S. Certified Arbitrator.

Mr. Obermueller serves as Director on the Board of Allianz Life of New York and is a member of The American Council on Germany. He lives in New York and is about to be granted U.S. citizenship.

in focus

Patrick J. O'Brien

Joseph J. Pingatore

Raymond L. Prosser

Patrick J. O'Brien

Patrick O'Brien has been a member of the Swiss Re U.S. Group Law Department for the past 18 years, with responsibility for the oversight of a wide range of legal matters affecting Swiss Re's property & casualty and life & health reinsurance operations. His principal focus has been in the area of reinsurance litigation, arbitration and mediation, approval and supervision of general contracts, group corporate secretarial functions, and regulatory compliance for antitrust, investment advisory and insurance operations. He currently serves as Vice President & Assistant General Counsel for Swiss Re Life & Health America Inc., where he is responsible for the management of reinsurance dispute resolution in Swiss Re's Life & Health Division in North America.

Prior to joining Swiss Re, Mr. O'Brien served as Senior Counsel for the American Insurance Association, where he worked with member companies to develop insurance industry policy positions on property and casualty insurance regulatory issues. He developed the Association's litigation monitoring program and an amicus curiae program to address general liability and insurance regulatory issues in key state and federal appellate courts. He was instrumental in organizing a separate advocacy group of property and casualty insurers to focus on environmental insurance coverage issues as they emerged in appellate courts.

Mr. O'Brien began his legal career with an insurance defense firm in New York City, where he handled all facets of civil litigation and insurance defense practice. He has tried to conclusion numerous jury and non-jury civil cases in state and federal courts. He holds a B.A. from Syracuse University and a J.D. from St. John's University, and has been a member of the New York State Bar since 1975. He is married, with three children, and currently resides in Teaneck, New Jersey.

Joseph J. Pingatore

Joseph Pingatore, who has over 20 years experience in the insurance industry, joined Western National Mutual Insurance Company as General Counsel in January 2005. Western National is one of Minnesota's largest independently represented mutual insurance companies, licensed to operate in 20 states in the Midwest and Northwest.

Before joining Western National, Mr. Pingatore spent 17 years with the MSI Insurance Companies. MSI's core businesses included all lines of personal insurance offered by an exclusive agency force, specialized property/casualty insurance products for agribusiness organizations throughout the U.S., and full service retirement plans. He joined MSI in 1987 as an in-house litigation attorney. He was promoted to senior counsel in the Corporate Law department, then to assistant general counsel, and finally to Vice President, General Counsel and Secretary in 1997.

Mr. Pingatore represented the MSI Companies in concluding Alliance agreements with COUNTRY Insurance & Financial Services, including a pooled reinsurance arrangement. Upon closing of the Alliance and the change in control, Mr. Pingatore continued as Vice President and Senior Counsel through year-end 2004. He managed the legal issues arising from the run-off of MSI's program business and any resulting reinsurance disputes, and had responsibility for winding up the affairs of several of the MSI business units, including closing on the asset sales of two of the group's companies.

Mr. Pingatore received his undergraduate education at the University of Minnesota, obtaining his degree in 1975, and received his Juris doctor degree, *cum laude*, from William Mitchell College of Law in 1981. He began his legal career in Rochester, Minnesota, and conducted a general practice, concentrating on litigation and appellate practice at the law firm of Klampe, Pingatore & Nordstrom. He is licensed to practice before the state and federal courts in Minnesota and the U.S. Circuit Court of Appeals for the eighth circuit, and is a member of the Minnesota Bar Association. Mr. Pingatore also is the Secretary-Treasurer of the Insurance Federation of Minnesota.

Raymond L. Prosser

Raymond Prosser has 30 years in the insurance and reinsurance industries. Following graduation from the Indiana University Law School in 1974, *cum Laude*, he practiced with an Indianapolis law firm concentrating on insurance defense and coverage issues. His experience includes first

in focus

Frederick M. Simon

John D. Sullivan

chair court and jury trial experience.

In 1981, Mr. Prosser accepted a position with the Law Division of Lincoln National Corporation. Over the next 21 years, his practice included claims, underwriting, and coverage issues with individual and group life, health and disability products on both the direct and reinsurance sides of the business. He also was responsible for a general corporate practice involving corporate licensing, company redomestication, and corporate governance. In addition, he was Second Vice President and Director of the Individual Life and Disability Income Claim Department for The Lincoln National Life Insurance Company.

In 1995, Mr. Prosser became Vice President and General Counsel for Lincoln Re, the reinsurance operations of the Lincoln National group of companies. During this time, he served as a member of Lincoln Re's senior staff and was co-chair of its Risk Management Committee. He continued to practice in individual and group life, accident and health, and disability income matters. He was also Vice Chair of the Reinsurance Association of America's Life Affiliate Committee.

Mr. Prosser has extensive litigation and arbitration experience, including workers compensation carve out and accident and health issues arbitrated in the United States, Bermuda and England. When Lincoln Re was purchased by Swiss Re in December 2001, Mr. Prosser accepted a position as Senior Vice President and Associate General Counsel of Swiss Re Life & Health America, to manage a book of significant litigation and arbitration risks. He retired from Swiss Re in August 2004 to devote full time to private arbitration and mediation practice.

In addition to being an ARIAS•U.S. certified arbitrator, Mr. Prosser is a registered civil mediator in Indiana.

Frederick M. Simon

Frederick Simon is a claims professional with over 35 years of experience in the insurance/reinsurance industry. During this time he has acquired an in-depth knowledge of systems, customs and practices and the business dynamics between cedents and reinsurers.

After a comprehensive four-year claims tenure at Liberty Mutual Insurance Co., Mr. Simon started his reinsurance career at Guy Carpenter then moved on to Wilcox as Assistant Secretary - Claims.

The following twelve years were spent at St. Paul Reinsurance Co. in NYC as Assistant Vice President - Claims. His duties included supervision of the claim accounting area and training/supervision of claim assistants. His technical duties included claim handling and auditing of all lines of coverage in both the Treaty and Facultative areas of reinsurance. This included domestic and international cedents and reinsurers. He was instrumental in establishing various claim reporting and audit formats for new lines of business, such as, extended homeowner and auto warranty contracts, Accident and Health, and residual value GAP/VSI insurance contracts. Mr. Simon also initiated the Company's claim expertise participation in various Captive Insurance Association conferences including Vermont and Colorado.

Since 1996, Mr. Simon has been an independent reinsurance claim consultant providing auditing, systems assessment, reinsurance claim collection and expert witness services to clients in both the private and public insurance/reinsurance sectors. He has also provided consulting services to brokers and TPA's/MGA's in both the US and London markets.

Mr. Simon has worked with various state insurance departments including California, Ohio and New York providing run-off claim expertise and reinsurance treaty collections for liquidated companies such as Western Employers, Superior National and The Physicians Insurance Exchange.

Mr. Simon continues to expand his auditing and consulting services to include various alliances with other professional insurance consultants in the areas of underwriting, accounting, contract wording and actuarial reporting.

John D. Sullivan

John Sullivan has over 32 years experience in the insurance/reinsurance business with an extensive treaty underwriting background.

Mr. Sullivan began his career in 1972 as an underwriting trainee with the Commercial Union Insurance Company. During this period, he handled various property and casualty assignments including commercial casualty and personal auto with his last

position being Senior Multi-Peril Underwriter. In 1977, he joined the First State Insurance Company as an Excess and Surplus Property Underwriter servicing the New York and Baltimore territories.

Starting as a Treaty Underwriter at New England Reinsurance Corporation in 1978, Mr. Sullivan progressed through various underwriting positions and in 1989 was elected President and Chief Operating Officer. In 1993, when The Hartford merged all reinsurance operations into HartRe, Mr. Sullivan joined the newly formed organization as President and Chief Operating Officer. His duties included the oversight of property and casualty underwriting operations worldwide, including responsibility for the claims operations. He was involved in most aspects of treaty and facultative operations, including the setting of underwriting policy and the creation of detailed underwriting guidelines. HartRe wrote a diversified treaty and facultative portfolio with premium volume of $850 million.

Mr. Sullivan is very experienced in most lines of property, casualty, and professional liability including property catastrophe, D&O, program business, Excess & Surplus lines, and non-standard auto, as well as their customs and practices. He has also had extensive experience working in the reinsurance broker market and is acutely familiar with many issues attendant to working in that environment.

With the sale of the HartRe book in 2003, the in-force Treaty Operations were placed in Run-Off. Since that time, Mr. Sullivan has worked in the dispute resolution process with Horizon Management Group, LLC, managing the transitional underwriting issues, creating a process for resolving complex issues, and assisting in contract wording analysis and commutations. The general types of disputes with which he has familiarity include Loss Allocation, Definition of Occurrence, coverage and premium issues.

Mr. Sullivan is a graduate of The University of Massachusetts at Amherst with a B.A. degree in Economics. He also attended the Executive Education Program at The Fuqua School of Business at Duke University and earned his CPCU in 1980.

William J. Trutt

William Trutt is an Insurance/Reinsurance professional with over 35 years of experience in the industry.

He is currently self-employed and focusing on insurance and reinsurance arbitrations. He began his insurance career with the Safeco Insurance Company as a claims trainee in 1963. In 1972 he was named Safeco's New York Metro Claims Manager. That same year, Mr. Trutt joined the American Reinsurance Company as a casualty claims examiner handling a number of Midwest reinsurance accounts for the company. In 1974 he accepted an underwriting/marketing position with American Re and was named an Assistant Vice President.

Mr. Trutt joined T. A. Greene & Co. as a reinsurance broker in 1980. His area of responsibility was treaty production on the East Coast. Working with both domestic and London market underwriters he was successful in producing treaty business for the company and was promoted to Vice President.

In 1986 Mr. Trutt joined Swiss Re America in the marketing/underwriting department. He remained at Swiss Re for over ten years, attaining the rank of Senior Vice President and Manager of their National Accounts Department. His department was responsible for producing over $250,000,000 in reinsurance income for the Swiss Re. His responsibilities included building qualified underwriting and marketing teams for the production of desirable business, overseeing the performance of underwriting and claims reviews and working closely with pricing actuaries and underwriters.

In October of 1996 Employers Reinsurance Corporation approached him with the offer of joining the firm with the goal of building a National Account Division for ERC. Mr. Trutt and many of his team joined ERC and over a period of five years built the division into a $350,000,000 department with specific focus on E & S business written in the National Account arena. As with Swiss Re America, the responsibilities involved the production and underwriting of business on a national basis with additional European exposure as well.

He attended New York University and resides with his family in Fairfield, Connecticut.

in focus

William J. Trutt

in focus

William A. Wilson

Michael C. Zeller

William A. Wilson

William Wilson is an experienced financial services executive whose career in the life and health insurance industry spans more than 35 years. The diversity of his employment opportunities has provided him with the broadest base of knowledge, and has also resulted in his serving in a number of industry leadership positions. He is the principal of Wilson Advocacy and Consulting..

He has served as General Counsel of four major life and health insurers whose product offerings and operations reflect the entire industry. In a major career diversion, he served as Chief Marketing Officer for a large California insurer. The predominance of his employment has been with American General Corporation, now a part of the American International Group.

Throughout his career, Mr. Wilson has been an integral part of the relationship between insurer and reinsurer. In addition to being responsible for the review and approval of treaties with all contracting reinsurers, he has independently participated as a panelist in some 15 arbitrations involving not only reinsurance, but also marketing compensation disputes. He has also served as a provider of expert testimony.

Mr. Wilson has been an active participant in industry activities throughout his career. He is the former President of the Association of Life Insurance Counsel, and has served on its Board of Governors. He has chaired, or was a member of, numerous American Council of Life Insurance committees, as well as several state trade association committees, including the Chairmanship of the Association of California Life Insurance Companies Executive Committee. Mr. Wilson was involved in the formative years of the National Organization of Life and Health Insurance Guaranty Associations, and served on its Board for nine consecutive years, in addition to serving as a Board member on 12 different state guaranty associations.

He graduated from the University of Nebraska, with a B.S. in Business Administration, and a Juris Doctor in Law. He is a graduate of the Harvard School of Negotiation, and is certified as a arbitrator by both ARIAS•U.S. and the National Association of Securities Dealers (NASD).

Michael C. Zeller

Michael Zeller is Vice President in the Reinsurance Services Division of American International Group, Inc., where his responsibilities include supervising the contract wording department (treaty, facultative, security agreements), underwriting assumed programs, and general administration.

Before joining AIG in 2000, Mr. Zeller represented insurers, reinsurers, brokers, and intermediaries in reinsurance and insurance arbitration and litigation as an Of Counsel in the New York office of Gibson, Dunn & Crutcher (1998-1999), as an Associate and Partner of Grais & Phillips (1990-1998), and as an Associate at Grais & Richards (1989-1990). He started working in private practice, specializing in insurance litigation, at Hughes Hubbard & Reed (1987-1989).

Mr. Zeller's areas of expertise include nondisclosure and misrepresentation, allocation and aggregation of toxic torts, fiduciary duty, brokers liability, expense-related issues, follow the fortunes/settlements, utmost good faith, and ethics in arbitration.

Mr. Zeller is a 1982 graduate of Wesleyan University (Phi Beta Kappa) and a 1986 graduate of Stanford Law School (With Distinction). He has written extensively on reinsurance and is a frequent speaker at industry conferences.

Mr. Zeller serves on the Board of Directors of the Association of Insurance & Reinsurance Run-Off Companies and is a Member of the Insurance and Reinsurance Dispute Resolution Task Force. He is also a Member of the ARIAS Ethics Committee

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case notes corner

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

Ronald S. Gass

Sealing Confidentail Arbitration Documents – Federal Court Takes a Cautious Approach

Ronald S. Gass*
The Gass Company, Inc.

Ever wonder whether courts will respect arbitration panel confidentiality orders? A Texas federal district court took a hard look at one recently and ruled on public policy grounds that there was a presumption in favor of open access but, in recognition of the reinsurer's confidentiality obligations in this case, permitted the reinsurer to refile its summary judgment motion and evidence with the specific pages containing confidential material excised and filed separately under seal.

In this interesting case testing the authority of a panel's confidentiality order, a reinsurer filed a motion to file under seal a summary judgment motion and accompanying documents in litigation against a reinsurance broker alleging negligence and breach of fiduciary duty among other causes of action. The reinsurer was raising a collateral estoppel argument grounded in certain liability issues that had been previously resolved in a final arbitration award against the reinsurer's cedent. The reinsurer moved to seal its summary judgment motion because it contained information based on or included documents subject to the arbitration panel's "Confidentiality Agreement and Order," which provided that any information disclosed in connection with court proceedings relating to any aspect of that arbitration was to be filed under seal.

Citing policy concerns about the public's right of access to judicial records and proceedings, the district court strived to balance the common law right of access against any interests favoring non-disclosure, with the presumption favoring open access. Thus, the court was "reluctant" to seal over 450 pages of briefing and evidence and opted for a more conservative approach. Mindful of the reinsurer's obligations under the arbitral confidentiality order, the court permitted the reinsurer to refile its motion and supporting documents but required it to indicate in the court record that those pages containing confidential information were located in a separately sealed envelope, "thus ensuring public access to all portions of the Motion, Brief, and Appendix that do not contain confidential information."

TIG Insurance Co. v. AON Re, Inc., Civil Action No. 3:04-CV-1307-B, 2004 U.S. Dist. LEXIS 24795 (N.D. Tex. Dec. 9, 2004).

Citing policy concerns about the public's right of access to judicial records and proceedings, the district court strived to balance the common law right of access against any interests favoring non-disclosure...

Treaty's Access to Records Clause Does Not Constitute a Blanket Waiver of Attorney-Client Privilege

In a dispute over a cedent's indemnification of a sizeable claim settlement, it is not unusual for a reinsurer to seek discovery in arbitration of the entire underlying claim file, including any communications between outside claims counsel and in-house claims personnel, some of whom may also be attorneys. This scenario often raises important questions about whether those attorney communications should be protected from disclosure pursuant to the attorney-client privilege or the work product doctrine. Under these circumstances, reinsurers have argued that the reinsurance agreement's boilerplate access to records clause constitutes a blanket waiver of such privilege claims. However, this contention was recently rejected in a litigation context by the Appellate Division of the Supreme Court of New York.

Following a $226 million settlement of a lawsuit brought by a bank insured arising from its claim under a vehicle residual value protection policy, the insurer ceded the loss to its quota share reinsurers. The reinsurance agreement provided that "the

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Reinsurers . . . will have the right to inspect . . . all records of the Company that pertain in any way to this Agreement" - typical access to records clause wording. The reinsurers invoked this clause and demanded to inspect the insurer's claim files, including those of its in-house and outside claims counsel.

Although the insurer produced 22 bankers boxes of documents, it refused to turn over any attorney files asserting attorney-client privilege and claiming that they were not subject to the access to records clause. The reinsurers subsequently refused to pay their share of the loss. The insurer then sued for payment, and the reinsurers counter-sued for rescission and also claimed that the settlement was unreasonable, in bad faith, and ex gratia. In the context of this litigation, the reinsurers again sought the withheld attorney files, and the trial court granted their motion to compel discovery of these documents holding that the access to records clause was "extremely expansive . . . without any limitation."

Citing North River Insurance Co. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363 (D.N.J. 1992) as precedent, the Appellate Division on appeal unanimously reversed and ruled that the "[a]ccess to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges." Otherwise, according to the court, these privileges would be rendered "meaningless."

The Appellate Division hastened to add, however, that its ruling did not preclude the usual challenges to privilege claims or that the court would be bound by counsel's characterization of a document as privileged, i.e., these documents would still have to satisfy each element of the attorney-client privilege or work product doctrine and the burden of proving those elements rests with the party asserting the privilege. In deciding whether to uphold the privilege for the type of attorney-generated claims documents in dispute in this litigation, courts have typically focused on whether they were created by claims counsel in the ordinary course of the insurer's business of investigating and settling claims and whether outside claims counsel were merely acting as a claims adjuster and not as a true legal advisor. If so, some courts have rejected such claims of privilege.

Gulf Insurance Co. v. Transatlantic Reinsurance Co., No. 4762, 2004 N.Y. App. Div. LEXIS 15691 (Dec. 28, 2004).

...ruled that the "[a]ccess to records provisions in standard reinsurance agreements, no matter how broadly phrased, are not intended to act as a per se waiver of the attorney-client or attorney work product privileges.

ARIAS Website Locates Certified Arbitrators with Specific Insurance Experience.

If you are looking to appoint an arbitrator who is familiar with the customs and practices relating to your specific dispute, ARIAS provides a way to help.

The "Search for Arbitrators" button on the ARIAS website (www.arias-us.org) takes you to a system of check boxes with which you can indicate all the background experience descriptors of the arbitrator who would be ideal for the nature of your dispute. With one click, you receive a list of the names and locations of those, out of the 225 total, who meet all the criteria checked. Each name is linked to the arbitrator's profile for more information.

ARIAS U.S.

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

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

An Invitation...

The rapid growth of ARIAS·U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS·U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of March, 2005, ARIAS·U.S. was comprised of 429 individual members and 79 corporate memberships, totaling 799 individual members and designated corporate representatives, of which 237 are certified as arbitrators.

The society offers its Umpire Appointment Procedure, based on a unique software program created specifically for ARIAS·U.S., that randomly generates the names of umpire candidates from a list of 62 ARIAS arbitrators who have served on at least three completed arbitrations. The procedure is free to members and available at a nominal cost to non-members.

New in 2003 was the "Search for Arbitrators" feature on this website that searches the detailed background experience of our certified arbitrators. Results are linked to their biographical profiles, with specifics of experience and current contact information.

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

In March of 2005, the society is publishing Volume VI of the ARIAS•U.S. Directory, with Profiles of Certified Arbitrators. The organization also publishes the Practical Guide to Reinsurance Arbitration Procedure (2004 Revised Edition) and Guidelines for Arbitrator Conduct. These publications, as well as the Quarterly review, special member rates for conferences, and access to certified arbitrator training are among the benefits of membership in ARIAS.

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

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

Sincerely,

Thomas S. Orr
Chairman

Mary A. Lopatto
President

ARIAS U.S. Membership Application

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

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

FAX: (914) 699-2025

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

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