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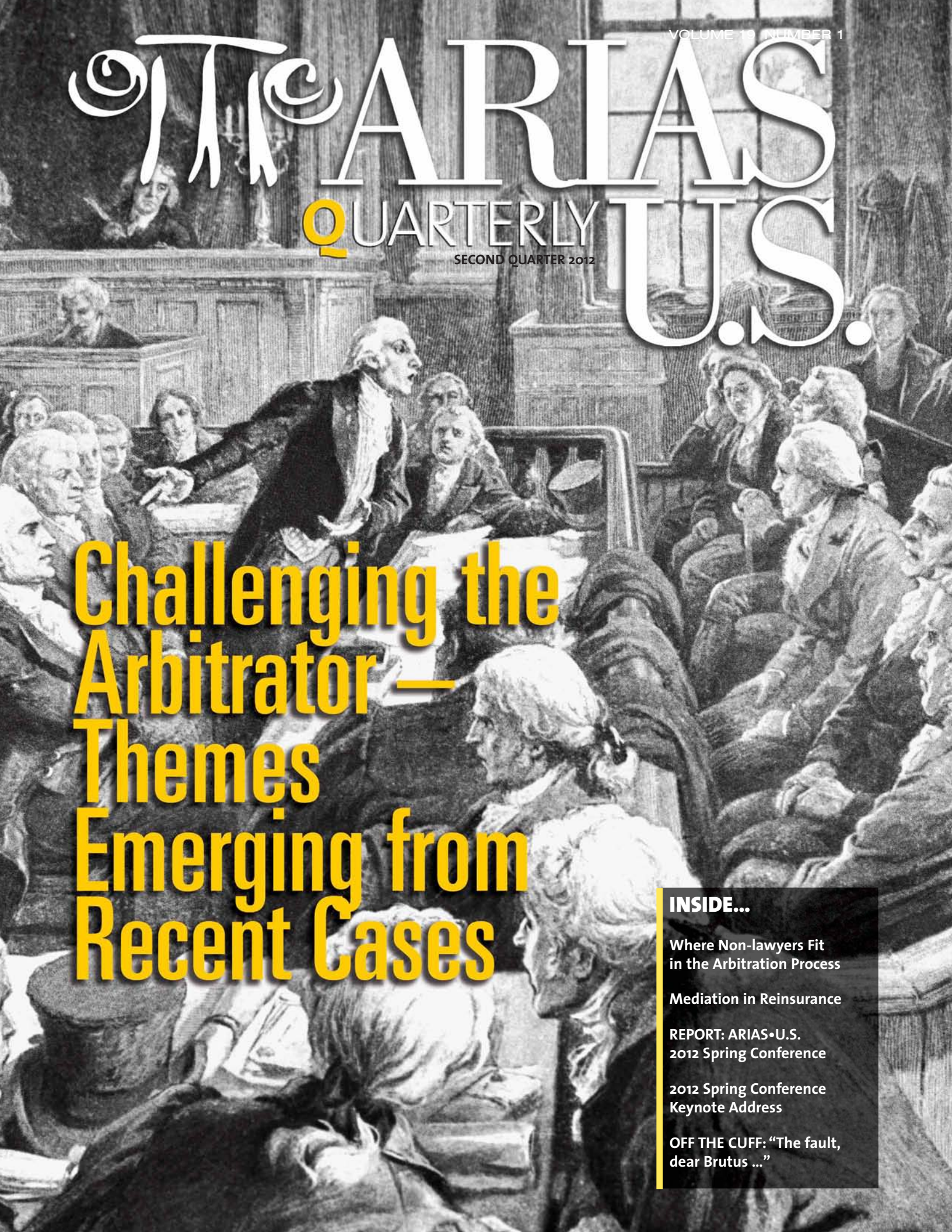

Challenging the Arbitrator—Themes Emerging from Recent Cases

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ARIAS•U.S.
P.O. Box 9001
Mt. Vernon, NY 10552
914.966.3180, x112
914.966.3264 fax
info@arias-us.org
www.arias-us.org

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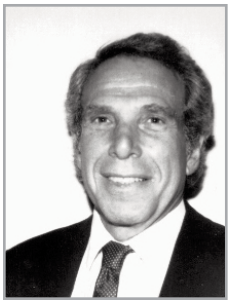

Eugene Wollan

editor's comments

Those who attended the Spring Meeting at The Breakers may experience a sense of *déjà vu* on perusing some of the contents of this issue, and the feeling will be entirely appropriate. A major source of the articles we publish is the written material prepared for, and distributed at, the Spring Meeting and the Annual Meeting. Call it self-dealing if you will, but we believe this serves a very useful purpose. The distribution list for the Quarterly consists of the entire membership, whereas attendance at the two big annual meetings never even approaches that number, so publication here guarantees the broadest possible exposure. It also helps to satisfy our ever-insatiable need for good articles to publish.

This sense of *déjà vu* will be reinforced for The Breakers contingent by reading Michael Sapner's Keynote Address. Even in this slightly truncated version, he had important things to say that we believe should be of interest to our entire membership. We would particularly welcome Letters to the Editor commenting on, agreeing with, disputing, or otherwise discussing the views he expressed, especially in his recommendations for steps ARIAS might take to improve the arbitration process.

One of the articles in this issue is Kathy Billingham's discussion of mediation. It might even be more accurate to call it a bit of pro-mediation advocacy, and I say that in a constructive, not a pejorative, way. Mediation as a tool for dispute resolution has achieved heightened prominence of late, and it deserves substantial coverage and discussion. This particular piece highlights its perceived advantages. An article pin-pointing any perceived disadvantages, or discussing mediation from a different perspective, would certainly receive full and equal consideration. As a matter of fact, from our point of view it would be great to see a real debate develop, whether on the merits of mediation or on any other subject of general interest. Some lively disagreement would add some spice to a generally scholarly approach.

Our lead article this time is an invaluable compilation and summary of the case law on another very hot topic, challenges to arbitrators. Amy Rubenstein and Sarah Ratliff are to be commended for this contribution.

Rounding out our selection of articles is a piece by Fred Marziano on a subject many of us have never probably paid much attention to but is in fact definitely worth thinking about, the role of non-lawyers in the arbitration process.

My brief contribution this time may strike many of you as revisiting a few themes that I have already belabored at some length, such as lawyer advertising and disrespect for the profession. My only defense is that these are, at least to me, important subjects that rankle enough to warrant being reconsidered from time to time.

I hope everyone has a pleasant summer – and uses some down time to write something for the Quarterly.

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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 ewollan@moundcotton.com .

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feature

Challenging the Arbitrator—Themes Emerging from Recent Cases

This article is based on a paper presented at the ARIAS•U.S. 2012 Spring Conference


Amy M. Rubenstein


Sarah A. Ratliff

Amy M. Rubenstein
Sarah A. Ratliff

This memorandum summarizes (in chart and narrative format) recent cases involving arbitrator selection disputes. Three main themes emerge from these cases.

First, courts often decline to intervene in arbitrator selection disputes and hesitate to disqualify an arbitrator, appoint an umpire, or vacate an award.

- Pre-award, courts disfavor challenges based on claims of partiality, bias, or interestedness.
- Post-award, the Federal Arbitration Act ("FAA") offers limited grounds to challenge arbitrator and umpire appointments. FAA challenges based on grounds other than "evident partiality," such as "corruption" and "other misbehavior," rarely succeed.

Second, "evident partiality" is becoming increasingly difficult to establish.

- To disqualify an arbitrator or vacate an award based on evident partiality, courts require a showing that an arbitrator has a personal stake, such as a financial or professional interest, in the arbitration's outcome.
- An arbitrator's disclosure can defeat claims of partiality, bias, or interestedness. For that reason, challenges to appointments and arbitration awards based on an arbitrator's disclosed activities or relationships are unlikely to succeed.
- Courts compare arbitrator impartiality to judicial disinterest, and presume that arbitrators can set aside knowledge gained from prior proceedings.
- At least two successful court challenges based on non-disclosure and lack of disinterestedness (one pre-award and one post-award) recently were reversed on appeal.

Third, courts are more likely to enforce contractual arbitrator and umpire selection provisions than to disqualify on other grounds.

- Where contractually required arbitrator or umpire selection procedures have failed, courts will intervene to implement those procedures.
- Courts may review arbitrator qualifications when a contract requires the arbitrator to have specific qualifications.
- Even if the contract requires arbitrator disinterestedness, courts rarely will review that provision pre-award because disinterestedness is presumed.

This memorandum summarizes (in chart and narrative format) recent cases involving arbitrator selection disputes. Three main themes emerge from these cases.

Amy Rubenstein and Sarah Ratliff are partner and associate, respectively, working in the General Litigation Group of Schiff Hardin, LLP, where they provide advice to cedents and reinsurers on a broad range of reinsurance-related matters.

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PRE-ARBITRATION AWARD CHALLENGES

SUCCESSFUL PRE-AWARD CHALLENGES

1. Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London No. 02-cv-1146, 2011 WL 3610411 (M.D. La. Aug. 16, 2011)

Background

After negotiating for six months, the parties failed to nominate an umpire for an arbitration involving workers' compensation risks. Underwriters asked the court to resolve the parties' dispute over the umpire's contractually required qualifications.

Result

The court granted Underwriters' motion and ordered that the umpire candidates have workers' compensation reinsurance experience. The court distinguished its decision to end an impasse in the umpire selection process from a decision removing an already-seated umpire. It focused on the limited relief sought by Underwriters and the court's ability to move the parties more quickly to arbitration.

2. Arrowood Indem. Co. v. Clearwater Ins. Co. No. 11-6018055-S (Conn. Super. Ct. July 26, 2011)

Background

Arrowood petitioned the court to appoint a neutral umpire in the pending arbitration proceeding, alleging that Clearwater violated the arbitration agreement by failing to name three neutral arbitrators. Clearwater moved to dismiss for lack of jurisdiction, arguing that the FAA — which governed the arbitration — does not allow pre-award challenges to the panel.

Result

The court rejected Clearwater's argument that the FAA prohibits state courts from selecting an arbitrator, and therefore denied its motion to dismiss. After defining the dispute as a procedural pre-arbitration matter, the court intervened "to protect the integrity of the arbitral process" by scheduling an evidentiary hearing to facilitate neutral umpire selection.

3. Liberty Mut. Ins. Co. v. Certain Underwriters at Lloyd's No. 10-CV-10623 (D. Mass. 2010)

Background

Liberty commenced arbitration against Underwriters and Equitas over several reinsurance treaties. The parties appointed arbitrators but reached an impasse regarding umpire selection. The arbitration agreements directed the two party-appointed arbitrators to select an umpire, but did not provide a method for umpire selection if the arbitrators disagreed. Liberty petitioned the court to intervene and appoint one of its three candidates and Underwriters cross-petitioned to ,compel the court to appoint one of its two nominees or a retired federal judge of the court's choosing.

Result

The court selected a retired judge as an umpire, after the judge completed an umpire questionnaire. Although Liberty argued that Underwriters had not fully disclosed prior dealings with the court-appointed umpire, the court held that the dealings between Underwriters and the umpire "[we]re not sufficient to cast doubt on [the umpire's] neutrality" and "those prior contacts [we]re themselves de minimus [sic] given [his] prior record as an umpire."

4. ***American Motorist Ins. Co. v. Employers Ins. Co.*** No. 09 C 4752 (N.D. Ill. Mar. 26, 2010)

Background

After the parties selected their party-appointed arbitrators, they agreed upon a protocol to select an umpire. The umpire selection process failed. American Motorist filed suit, and Employers agreed that the court should select the umpire. The parties each submitted three candidates and agreed that impartiality, arbitration experience, and reinsurance experience were the most critical qualifications.

Result

The court appointed one of American Motorist's umpire candidates. Although the umpire served on the ARIAS•U.S. board with American Motorist's party-appointed arbitrator, the court found no indication that their relationship went beyond that common service and stated that the parties "concede that they expect some contact between professionals in this specialized industry."

UNSUCCESSFUL PRE-AWARD CHALLENGES

1. ***IRB -Brasil Resseguros S.A. v. Nat'l Indem. Co. No***. 11-1965, 2011 WL 5980661 (S.D.N.Y. Nov. 29, 2011)

Background

National Indemnity Company ("NICO") commenced three reinsurance arbitrations against IRB. The parties nominated candidates in Arbitration 2 but did not select an umpire. In Arbitration 3, NICO appointed one of IRB's umpire nominees from Arbitration 2 as its party-appointed arbitrator.

IRB petitioned to disqualify NICO's party-appointed arbitrator in Arbitration 3 and to consolidate Arbitrations 2 and 3. The court declined to disqualify NICO's party-appointed arbitrator, but determined that by appointing one of IRB's umpire nominees as its party¬-appointed arbitrator in Arbitration 3, NICO "could be considered to have exercised its option to strike [that arbitrator] as one of IRB's umpire candidates in Arbitration 2."

Then, in Arbitration 2, NICO requested that its party-appointed arbitrator resign. Minutes later, NICO appointed its party-appointed arbitrator from Arbitration 3 as its party-appointed arbitrator in Arbitration 2.

IRB petitioned the court to reject NICO's appointment of the same arbitrator in Arbitrations 2 and 3. NICO cross-petitioned to disqualify IRB's remaining umpire candidate in Arbitration 2, claiming that he was under IRB's control.

Result

The district court denied both parties' petitions. It rejected IRB's request to remove NICO's new party-appointed arbitrator in Arbitration 2 and denied NICO's request to disqualify IRB's umpire candidate, holding that parties cannot challenge an arbitrator's partiality "until after an award has been issued." However, the court ordered IRB's umpire candidate to complete an umpire questionnaire and warned that "another effort to question [the umpire's] impartiality will be treated by this Court as not made in good faith."

2. ***Liberty Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*** No. 11-10651-DPW (D. Mass. July 6, 2011)

Background

After the parties each appointed an arbitrator in a reinsurance arbitration, the two arbitrators began contractual procedures to select the umpire. Liberty then petitioned the court to appoint an umpire, alleging that Nationwide's counsel had inserted itself in the selection process. Nationwide opposed court intervention, arguing that the parties were not at impasse and that the agreed-upon selection process should be allowed to proceed.

Result

In a one-sentence order, the court directed the two party-appointed arbitrators to proceed with umpire selection without "intermeddling, obstruction, interference or other direction from the parties or counsel."

3. ***B/E Aerospace Inc. v. Jet Aviation St. Louis, Inc.*** No. 11 Civ. 4032, 2011 WL 2852857 (S.D.N.Y. July 1, 2011)

Background

B/E Aerospace sought a preliminary injunction to stay the parties' pending arbitration, arguing that Jet Aviation's appointed arbitrator and the third arbitrator

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The court appointed one of American Motorist's umpire candidates. Although the umpire served on the ARIAS•U.S. board with American Motorist's party-appointed arbitrator, the court found no indication that their relationship went beyond that common service and stated that the parties "concede that they expect some contact between professionals in this specialized industry."

The court denied Northwestern's request for it to appoint Insco's replacement arbitrator. Although the contract did not specify a method for replacing arbitrators, the court determined that depriving Insco of its right to a party-appointed arbitrator would be inconsistent with the parties' arbitration agreement. Because Insco had already appointed a replacement, the court had no reason to intervene.

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selected by the AAA did not meet the underlying contract's qualification requirements.

Result

The court assessed the contract's arbitrator selection provisions under section 5 of the FAA, and found that the arbitrators met the contractual requirements.

Before the court conducted its review, it noted that "the Second Circuit has interpreted the FAA to preclude pre-award removal of arbitrators in most cases." It entertained the motion because it only involved implementing the agreement's arbitration method.

4. ***Northwestern Nat. Ins. Co. v. Insco, Ltd.*** No. 11 Civ. 1124(SAS), 2011 WL 1833303 (S.D.N.Y. May 12, 2011)

Background

In a pending reinsurance arbitration, a dispute arose after the parties learned that (1) Insco's law firm was working for an insurance company for which its arbitrator was a board member, and (2) Northwestern's arbitrator had been appointed in two arbitrations involving Northwestern's law firm. A few months later, Insco called for all three arbitrators to resign on the basis of their evident partiality. Insco's party-appointed arbitrator resigned — but the umpire and Northwestern's party-appointed arbitrator did not — and Northwestern petitioned the court to appoint Insco's replacement arbitrator. Insco objected because it had already named a replacement.

Result

The court denied Northwestern's request for it to appoint Insco's replacement arbitrator. Although the contract did not specify a method for replacing arbitrators, the court determined that depriving Insco of its right to a party-appointed arbitrator would be inconsistent with the parties' arbitration agreement. Because Insco had already appointed a replacement, the court had no reason to intervene.

5. ***Trustmark Ins. Co. v. John Hancock Life Ins. Co.*** 631 F.3d 869 (7th Cir. Jan. 31, 2011)

Background

After an arbitration between John Hancock and Trustmark had concluded, John Hancock commenced a second arbitration arising from the same reinsurance agreement, and appointed as its arbitrator the same party-appointed arbitrator who had served in the first arbitration. Trustmark sued to enjoin the second arbitration from proceeding with John Hancock's party¬-appointed arbitrator, arguing that he was not disinterested as required by the arbitration agreement. The district court granted Trustmark's preliminary injunction and Hancock appealed.

Result

The appellate court reversed the district court and refused to enjoin arbitration, ruling that an arbitrator's knowledge from a prior arbitration on the same matter did not require his disqualification. It held that the arbitrator was not partial, absent a "financial or other personal stake in the outcome." The court compared an arbitrator's repeated appointment to a judge that "regularly hear[s] multiple suits arising from the same controversy," and held that the arbitrator's knowledge about the dispute did not require his disqualification.

6. ***R.A. Wilson & Associates, Ltd. v. Certain Interest Underwriters at Lloyd's London*** No. 11-CV-2232, 2010 WL 2133950 (E.D.N.Y. May 26, 2010)

Background

The arbitration clause in a commercial liability insurance policy required the two party-appointed arbitrators to appoint the umpire but did not include a selection method. R.A. Wilson moved to enjoin umpire selection and establish an appointment method.

Result

The court denied R.A. Wilson's motion for a preliminary injunction because the arbitration agreement required the two party-appointed arbitrators to select the umpire and also named a person to make the appointment if the party-appointed arbitrators failed to do so. The court refused to circumvent the parties' agreement by supplying its own umpire selection method.

7. ***Employers Ins. Co. of Wasau v. Certain Underwriters at Lloyds of London*** No. 09-cv-201-bbc, 2009 WL 3245562 (W.D. Wis. Sept. 29, 2009)

Background

In a pending reinsurance arbitration, Employers petitioned the court to select a

neutral umpire from six candidates proposed by the party-appointed arbitrators. The arbitration agreements provided that, if the two party-appointed arbitrators could not agree on a neutral umpire, either party could petition the court to select the third arbitrator. Underwriters cross-petitioned to disqualify Employers' party-appointed arbitrator as non-neutral.

Result

The court relied on the agreements' language and appointed an umpire from the six candidates proposed by the party-appointed arbitrators. The court rejected Underwriters' arguments that the three umpire candidates proposed by Employers were biased because each had previously served on arbitration panels with Employer's party-appointed arbitrator.

The court also denied Underwriters' challenge to Employers' party-appointed arbitrator as non-neutral because Underwriters had "only speculated" that the arbitrator engaged in ex parte communications with Employers. Absent "blatant" partiality, the court noted that arbitrators are rarely disqualified while proceedings are pending. The court also advised that voluntary disclosure is "[t]he proper way in which to insure impartiality and neutrality in arbitration[s]."

POST-ARBITRATION AWARD CHALLENGES

SUCCESSFUL POST-AWARD CHALLENGES

1. ***Amoco D. T. Co. v. Occidental Petroleum Corp.*** 343 S.W.3d 837 (Tex. App. Ct. May 17, 2011)

Background

After the arbitrators issued an award in favor of Amoco and Shell ("Appellants"), Occidental discovered undisclosed relationships between Appellants and Appellants' party-appointed arbitrator. The arbitrator's law firm had previously represented Shell, and attorneys from the firm represented several Amoco-affiliated entities during the arbitration. Shell also had appointed that arbitrator in an unrelated matter after the award. Occidental moved to vacate the award for evident partiality. The trial court ordered vacatur and Appellants appealed.

Result

The appellate court affirmed the vacatur, applying an "appearance of bias" standard. In adopting this standard, the court determined that "nondisclosure is, without more, sufficient to establish partiality regardless of whether the undisclosed information necessarily proves partiality or bias." The court "recognize[d] that evident partiality is generally proved by an arbitrator's nondisclosure of *his own* potential conflicts, whereas here, [the arbitrator's] evident partiality was proved by his nondisclosure of his *firm's* potential conflicts." (Emphasis in original) However, it still held that "the fact that a reasonable person could conclude the circumstances might have affected [the arbitrator's] impartiality triggered his duty to disclose."

2. ***Dealer Computer Services, Inc. v. Michael Motor Co.*** No. H-10-2132, 2010 WL 5464266 (S.D. Tex. Dec. 29, 2010)

Background

The arbitration award issued, and Michael Motor petitioned to vacate the award after it discovered that the neutral arbitrator appointed by Dealer Computer Services ("DCS") had served on a panel in another DCS arbitration that concerned a nearly identical contract, and included similar damages calculations, the same damages expert, and related witnesses. The same law firm represented DCS in both arbitrations.

Result

The court vacated the award, ruling that the arbitrator's non-disclosed conduct "rose to the level of evident partiality." The court focused on the relatedness between the two arbitrations, noting that, because it would be unreasonable to expect the arbitrator to interpret the exact same contractual provision differently, she "may have prejudged the liability and damages issues." Finally, the court emphasized that the arbitration agreement required neutral arbitrators.

3. ***Thomas Kinkade Co. v. Lighthouse Galleries, LLC*** No. 09-10757, 2010 WL 436604 (E.D. Mich. Jan. 27, 2010)

Background

Five years into an arbitration, the neutral umpire and Lighthouse's party-appointed

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The appellate court affirmed the vacatur, applying an "appearance of bias" standard. In adopting this standard, the court determined that "nondisclosure is, without more, sufficient to establish partiality regardless of whether the undisclosed information necessarily proves partiality or bias." The court "recognize[d] that evident partiality is generally proved by an arbitrator's nondisclosure of *his own* potential conflicts, whereas here, [the arbitrator's] evident partiality was proved by his nondisclosure of his *firm's* potential conflicts."

The court vacated the arbitration award, limiting its holding to "the unique circumstances of this case." In finding the umpire's evident partiality, the court focused on the mid-arbitration disclosures and emphasized that the new relationships involving the umpire's law firm undermined the informed decisions that the parties made when they selected the panel. Thomas Kinkade also influenced the court's decision by showing that "time and again, irregularities in the proceedings favored defendants," beyond mere coincidence.

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arbitrator disclosed two business relationships that had developed during the arbitration between (i) the umpire's law firm and Lighthouse's party-appointed arbitrator, and (ii) the umpire's law firm and one of Lighthouse's co-defendants. Two years after the disclosure, and after the arbitration ended, Thomas Kinkade petitioned to vacate the arbitration award, claiming evident partiality of the neutral umpire appointed by the two party-appointed arbitrators.

Result

The court vacated the arbitration award, limiting its holding to "the unique circumstances of this case." In finding the umpire's evident partiality, the court focused on the mid-arbitration disclosures and emphasized that the new relationships involving the umpire's law firm undermined the informed decisions that the parties made when they selected the panel. Thomas Kinkade also influenced the court's decision by showing that "time and again, irregularities in the proceedings favored defendants," beyond mere coincidence.

UNSUCCESSFUL POST-AWARD CHALLENGES

1. W & J Harlan Farms, Inc. v. Cargill, Inc. No. 1:09-cv-113-WTL-TAB, 2012 WL 729329 (S.D. Ind. Mar. 6, 2012)

Background

Cargill initiated arbitration through the National Grain and Feed Association ("NGFA") to resolve a dispute over a grain sales contract with Harlan Farms. After Cargill prevailed, Harlan Farms moved to vacate the award on several grounds, including NGFA partiality. To support its partiality claims, Harlan Farms primarily relied on (i) historical NGFA arbitration decision rates in favor of grain buyers (and against farmers), (ii) Cargill's employees' affiliations with the NGFA Arbitration Committee, and (iii) NGFA's prohibition against individual farmers serving as arbitrators.

Result

Harlan Farms initially raised the evident partiality argument before the court in April 2011. The court rejected it, displaying a reluctance to find "structural bias" between NGFA arbitrators and farmer-litigants. It further held that Harlan Farms failed "to establish the direct, definite, bias necessary to show evidence partiality," and noted that the NGFA rules provided procedural safeguards to prevent bias.

In March 2012, when Harlan Farms renewed its motion, the court ultimately declined to reconsider the argument. The court confirmed the arbitration award, rejecting Harlan Farms' argument that NGFA arbitrators are partial to grain buyers.

2. Cont'l Cas. Co. v. Staffing Concepts, Inc. No. 8:09-CV-02036-T-23AEP, 2011 WL 7459781 (M.D. Fl. Dec. 20, 2011), mag. opinion adopted in full by 2012 WL 715652 (M.D. Fl. Mar. 5, 2012)

Background

Staffing Concepts, Inc. ("SCI") moved to vacate a unanimous arbitration award issued by a three-member panel in an insurance dispute. SCI argued that there was evident partiality shown by ex parte communications between one of the arbitrators and Continental Casualty's counsel.

Result

The court refused to vacate the award, holding that the arbitrator's ex parte communications did not provide direct, definite evidence of partiality. Rather, by looking at the content of the communications, the court determined that the arbitrator contacted both parties to address scheduling, logistics, and payment matters.

Finally, the court concluded that even if SCI established that one arbitrator was partial and his vote was not counted, the award would still be supported by the majority of the panel because it was unanimous.

3. Scandinavian Reins. Co. v. St. Paul Fire and Reins. Co. 668 F.3d 60 (2d Cir. Feb. 3, 2012)

Background

During an arbitration between Scandinavian Re and St. Paul, the umpire and St. Paul's party-appointed arbitrator simultaneously served together on another arbitration panel and failed to disclose that appointment. Two months after the award was issued, the parties learned of the concurrent arbitration.

Scandinavian Re petitioned to vacate the award on the basis of evident partiality. The district court granted the petition, holding that the non-disclosure amounted to evident

partiality because the other proceeding involved similar legal issues, a common witness, and a related party. It held that the arbitrator and umpire's participation in both proceedings amounted to "a material conflict of interest" that had to be disclosed. St. Paul appealed to the Second Circuit.

Result

The Second Circuit reversed the vacatur and ordered the district court to grant St. Paul's cross-petition to confirm.

The court said that "the evident partiality standard is likely to be met [when] an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties." But it held that Scandinavian Re had not met its burden because arbitrators can serve together in two arbitrations at the same time without being "predisposed to favor one party over another in either arbitration." The court "reject[ed] Scandinavian's assertion that the non-disclosure can only be explained by bias in favor of St. Paul."

The court also distinguished the situation where arbitrators serve together on a related panel from a "material relationship" such as an arbitrator's family connection or an ongoing business arrangement with a party or law firm. The court looked for a "special financial or professional interest" and found none.

4. NGC Network Asia, LLC v. PAC Pac. Grp. Int'l, Inc. No. 09 Civ. 8684, 2012 WL 377995 (S.D.N.Y. Feb. 3, 2012)

Background

The single arbitrator in the parties' proceeding disclosed that his law firm did work for the parent company of a potential witness. PAC Pacific Group International ("PPGI"), the party adverse to the witness, challenged the arbitrator but the AAA refused to disqualify the arbitrator during the proceeding. After the arbitrator entered an award against PPGI, it petitioned to vacate on evident partiality grounds.

Result

The court confirmed the award, finding no evidence of partiality. The court emphasized that — because the relationship with the witness's parent company was tangential to the underlying dispute — the arbitrator was not required to make the disclosure but did so anyway. In addition, the court noted that "[n]either the Supreme Court nor the Second Circuit have vacated an arbitration award when the arbitrator has in fact disclosed a conflict." However, "[f]ailure to make a disclosure, when one is actually required, could be evidence of bias."

5. United Healthcare Ins. Co. v. Azar No. 105236/11, 2011 NY Slip Op. 32351 (N.Y. Sup. Ct. Sept. 1, 2011)

Background

During a four-year arbitration brought by United and Oxford ("Claimants"), the sole arbitrator disclosed his participation in other proceedings involving the same Claimants. Azar objected when the arbitrator made a supplemental disclosure, five months before the hearing, that he had been selected to arbitrate another case in which Oxford was a claimant. The AAA refused to disqualify the arbitrator and an award issued in favor of Claimants. Azar petitioned the court to vacate the arbitration award on bias and partiality grounds.

Result

The court confirmed the award, holding that the arbitrator's final disclosure was timely because Azar had time to, and did, object. And even if the disclosure was untimely, the court stated, vacatur for bias or partiality requires a party to "show that the arbitrator and the party or witness have some ongoing relationship." Interactions limited to "occasional associations between an arbitrator and a party or a witness will not warrant disqualification of the arbitration on the ground of the appearance of bias or partiality."

6. STMicroelectronics v. Credit Suisse Sec., LLC 648 F.3d 68 (2d Cir. June 2, 2011)

Background

STMicroelectronics filed an arbitration claim with the Financial Industry Regulatory Authority ("FINRA") against Credit Suisse for claims under an investment contract. The parties selected a panel and commenced arbitration. Credit Suisse sought to remove one of the three arbitrators during the proceeding, arguing that he had failed to disclose prior expert testimony on issues relevant to the case and had "painted a more balanced picture" of his experience in his disclosures. FINRA denied the request for removal, and the panel ruled unanimously in favor of STMicroelectronics. Credit Suisse petitioned to vacate the award.

In March 2010, the district court confirmed the award and Credit Suisse appealed. On appeal to the Second Circuit, Credit Suisse invoked § 10(a)(3) of the FAA to argue that the arbitrator's failure to disclose facts bearing on predisposition (as opposed to partiality) constituted "other misbehavior by which the rights of a[] party have been prejudiced."

Result

The court held that the arbitrator's disclosure had been sufficient and rejected Credit Suisse's § 10(a)(3) "other misbehavior" argument. The court expressed doubt that § 10(a)(3) applied to insufficient disclosure issues, but hinged its decision on the absence of evidence that the arbitrator's work experience was one-sided. That the arbitrator only partially disclosed his experience was immaterial because his actual experience did not raise doubts about his behavior during the arbitration.

More fundamentally, the court compared an arbitrator's role to that of a judge and held that Credit Suisse's argument also failed because arbitrator impartiality does not require a "lack of predisposition regarding the relevant legal issues in a case."

7. Arora v. TD Ameritrade, Inc. No. CV 10-01216 CW, 2010 WL 2925178 (N.D. Cal. July 26, 2010)

Background

Arora moved to vacate an arbitration award entered in favor of TD Ameritrade on the basis of the arbitrator's ex parte contact, evident partiality, and actual bias. To support its challenges, Arora relied on personal conversations

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between the panel members and TD Ameritrade's representatives that were held without Arora's participation and outside of the arbitration proceeding.

Result

The court refused to vacate the arbitration award, stating that the "non-case-related small talk" among TD Ameritrade and the panel during breaks and at the end of the day did not qualify as evident partiality. The court also noted that Arora could not point to any facts indicating that the arbitrators had a specific interest in the outcome of the dispute.

8. ***Midwest Generation EME, LLC v. Continuum Chemical Corp.*** 768 F. Supp. 2d 939 (N.D. Ill. June 21, 2010)

Background

Continuum Chemical petitioned to vacate an arbitration award entered in favor of Midwest Generation for "evident partiality," and to take limited discovery of one of the arbitrators. Continuum argued that an arbitrator on the three-member panel had intentionally concealed a systematic and ongoing business relationship with Midwest Generation's law firm.

Result

The district court refused to vacate the award or allow discovery because "what is not disclosed must have significance apart from the mere fact of non disclosure." It held that the arbitrator's and attorneys' concurrent memberships in professional associations, presentations at the same events, and authoring of chapters for the same books did not constitute evident partiality. The court focused on the public nature of the professional contacts, noting that anyone could discover those contacts, and that they were of the type that one would expect of accomplished professionals in a specialized field.

9. ***Langstein v. Certain Underwriters at Lloyd's***, London 607 F.3d 634 (9th Cir. June 10, 2010)

Background

In an insurance arbitration, the two party-appointed arbitrators appointed a third arbitrator. The panel unanimously found in Langstein's favor as to liability, but one arbitrator dissented on the damages amount. Underwriters discovered that, ten years earlier, the two arbitrators in the majority had been involved in the same undisclosed ethical controversy. Underwriters petitioned to vacate the award. Although the district court vacated the award for other reasons, it ruled that Underwriters failed to establish the arbitrators' partiality. Langstein appealed.

Result

The Ninth Circuit reversed the vacatur, holding that the arbitrators' nondisclosure of the ethical controversy did not establish partiality because the controversy was unrelated to the parties in the case and occurred years earlier. Arbitrators need not disclose all matters that might interest a party; disclosure of relationships with the parties and their attorneys was sufficient. The court "decline[d] to create a rule that encourages losing parties to challenge arbitration awards on the basis of pre-existing, publicly available background information on the arbitrators that has nothing to do with the parties to the arbitration."

10. ***Ario v. Cologne Reins. (Barbados) Ltd.*** No. 1:CV-98-0678, 2009 WL 3818626 (M.D. Pa. Nov. 13, 2009)

Background

During a reinsurance arbitration between Ario (as liquidator of American Integrity) and Cologne, the neutral umpire agreed to serve as umpire on an arbitration panel in an unrelated case with Cologne's party-appointed arbitrator. Additionally, Ario's appointed arbitrator accepted an umpire appointment in a separate proceeding in which a Cologne affiliate was a party. After an award was entered in favor of Cologne, Ario moved to vacate, claiming the arbitrators' evident partiality or, alternatively, that they manifestly disregarded the law.

Result

The court confirmed the award, finding no evident partiality in an umpire accepting a position as umpire in an unrelated matter, even if the umpire position was obtained through a party-appointed arbitrator in the pending proceeding. It also held that an arbitrator's appointment in a concurrent proceeding where one party was an affiliate did not amount to evident partiality.

The court noted that, because reinsurance is such a specialized field, those with expertise can be expected to serve on multiple panels simultaneously and in proceedings involving affiliated parties, and that those appointments can be obtained through other arbitrators. Further, the court stated that there was no evidence that either party had received compensation directly from a party or party's counsel, only that they had received compensation for their duties as arbitrators.▼

The court confirmed the award, finding no evident partiality in an umpire accepting a position as umpire in an unrelated matter, even if the umpire position was obtained through a party-appointed arbitrator in the pending proceeding. It also held that an arbitrator's appointment in a concurrent proceeding where one party was an affiliate did not amount to evident partiality.

feature

Where Non-lawyers Fit in the Arbitration Process

Fred G. Marziano

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Many non-lawyers joined ARIAS•U.S. hoping to contribute to their industry by applying their underwriting, claims, broker and overall insurance/reinsurance expertise to the arbitration process. This article is intended to remind my colleagues of the values associated with considering the appointment of non-lawyers as arbitrators in many cases.

In discussing the movement towards all-lawyer arbitration panels with fellow ARIAS•U.S. members and company representatives in recent years, I have found that opinions about background requirements are summarized in two ways, depending upon the individual's professional background, with each group feeling it can offer the greatest value:

- From the perspective of lawyers: "Non-lawyers are ill-equipped to deal with lawyers who better understand law, are unable to argue legal precedents, and cannot successfully defend against rigorous arguments posed by lawyers."
- From the perspective of non-lawyers: "No one understands the business better than those who wrote and underwrote insurance/reinsurance products and directly handled the claims; the original intent of arbitration panels has been lost"

Since these views were based on anecdotal evidence acquired during ARIAS•U.S. conferences, discussions with cedents' reinsurance representatives, and meetings in attorneys' offices, I decided to formally survey fellow ARIAS•U.S. members more formally to learn how lawyers and non-lawyers are viewed by those who are charged with making the selections, and what skill differences should be considered in making an appointment.

The process included surveying twenty ARIAS•U.S. members in November 2011, evenly split among non-lawyers and in-house and outside lawyers who represent both cedents and reinsurers. Collectively their experience included participation in 1,177 arbitrations. Promising anonymity, I asked each to share his or her views about the skills and advantages non-lawyer professionals offer in arbitration proceedings that differ from those offered by lawyers. Thoughtful responses were submitted by a large majority of those surveyed, with an almost even split among all segments.

While the results of the survey clearly revealed that not everyone is right for every case, there was consensus of opinion that for a majority of matters brought before arbitration panels a non-lawyers could be an excellent choice for a party appointed arbitrator. Key points from the survey include:

> A former in-house lawyer opined "It has been my experience that many non-lawyers with substantial experience in the insurance industry knew as much or more about insurance and reinsurance contracts/policies, policyholder contracts, producer contracts and even regulatory requirements than I did as an in-house lawyer."
>
> Another said "Concerns about non-lawyers being unable to control the process, limit discovery, consider legal procedures like summary judgment, etc. are overblown given all the training that ARIAS•U.S. certified arbitrators have to take," and to overcome certain knowledge limitations of the legal system, "Non-lawyers can be informed on the legal requirements through briefs".

Several participants were convinced that, by virtue of their having had responsibility for resolving every day, real-world insurance problems, non-lawyer professionals are

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This article is intended to remind my colleagues of the values associated with considering the appointment of non-lawyers as arbitrators in many cases.

Fred Marziano is a principal in CIM, Inc. a private consulting firm specializing in serving the Property/Casualty Insurance Industry. His focus is on arbitration and expert witness services in support of litigation related to personal/commercial insurance and reinsurance, while also providing strategic and corporate development services to P/C companies.

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excellent problem solvers, and would therefore perform well as arbitrators.

In relating support for non-lawyers, participants tied their reasons to these commonly disputed issues:

Intent of the Contract: A key issue for both parties in many arbitrations is the intent of the meaning of a contract. Many believe that non-lawyers can more easily put themselves in the shoes of the underwriters who placed the reinsurance or the claims staff who adjusted the claim. Judging that intent is clearly within the province of non-lawyers because insurance contracts are entered into and drafted by professional underwriters who decide what risks to assume, what price to charge, and which terms to provide for the exposures. It is their intent that is key and we should assume they knew what they were agreeing to. Non-lawyers are less familiar with rules of construction and contract drafting, so may be more likely to interpret contracts and enforce them as they are written, without being overly distracted by extraneous and vague evidence about intentions.

Custom and Practice: Non-lawyer arbitrators bring to the process first-hand information and knowledge of how the industry works, what the relevant customs and practices are, and a unique understanding of the business that many lawyers do not have. Some offered the view that a less adversarial approach might prevail by focusing more on industry standards, and practices.

Honorable Engagement; Intent of the Parties; Strict Rules of Law: Although "Honorable Engagement" clauses are sometimes being omitted from contracts, they nonetheless still do exist, as does the language that arbitrators are not required to follow the strict rules of law or apply a strict interpretation of the contract. The very purpose of the arbitration clause, the intent of the parties, and the past practice was to have industry - not legal - standards used to determine the outcome.

Historical Knowledge: Many non-lawyers know the historical bases for the business and reinsurance provisions, unlike some attorneys who look at reinsurance agreements in isolation as documents that should simply be strictly enforced as written. In cases like this, lawyers' reliance on the application of law might be misplaced.

Cost and Process: Time and cost of arbitrations could be far less. A major reason for the decline in the number of arbitrations is that the original concept of arbitration, i.e., an expeditious and inexpensive process by former or current insurance or reinsurance executives as an alternative to litigation through the courts, has migrated into proceedings that are not unlike litigation, i.e. it takes a very long time to complete and is expensive.

Discovery and briefs drive up the costs of all arbitrations, even those with multi-million dollars involved. While the amount involved may justify high fees, it isn't always necessary. Non-lawyers fully understand the nature of the case and can add value in controlling the process and cost and direct it back to how it was intended to work. The value of briefs and legal cases is sometimes questionable. While arbitrators may consider legal cases for guidance, there seems to be an overall consensus that they are not the focus and do not form the basis of arbitrator awards. Why then do companies expend huge sums of money to research and prepare briefs? This has become the practice, and if one side is doing it, of course the other side must follow suit.

There would likely be faster dispute resolution with less emphasis on process, motions, and other legal maneuvers. Non-lawyer business people (particularly with former P & L responsibility) have a different, more "bottom line" orientation that could help streamline the process. Expert testimony often adds unnecessarily to cost. Why is it frequently necessary, if the panel is supposed to be made up of industry experts? Often it is because companies are choosing lawyers as arbitrators who don't have the expertise. Having fewer lawyers and more experienced business people would likely greatly reduce the need for expert witnesses, and thereby reduce the cost of the process if not the efficiency as well.

Relying Upon the Facts of the Case At Hand: Non-lawyers who are not trained in the importance of case precedent could help focus panels on the distinct issues of each dispute with no expressed or implied reliance on prior decisions. And in describing circumstances best supported by lawyers, participants most often cited reasons that fit into these three categories:

Judicial Procedure: Lawyers are more familiar with judicial procedure, e.g., discovery issues, motion practice, evidence, etc.; lawyers could be better at taking charge and moving the case toward the hearing and presiding at the hearing. Lawyers are more familiar with how to read the law, especially applicable precedents, and are more likely to render a decision that tracks with how a court would decide the case, if that is what the client wants. Non-lawyers are disadvantaged in understanding rulings on the now ever-present motion practice by the parties.

Control the Process: Non-lawyers or young lawyer-arbitrators with little experience

may feel intimidated by more experienced lawyers, and may indirectly allow lawyers to control the process, thereby reinforcing the feeling that lawyers are needed for panels.

Experience Disconnect: Not all non-lawyers are right for many cases, either. There should be concern about some non-lawyers who have little to no hands-on experience with the issue in the case.

Conclusions and Recommendations

There is room in the arbitration industry for both lawyer and non-lawyer professionals; not everyone is right for every case, and not every panel may need to be populated by all lawyers or all non

lawyers. There are many instances where company executives and outside lawyers could benefit by re focusing on

the values associated with using transaction-experienced former underwriting, claims, accounting, actuarial, or broker professionals as opposed to lawyer-only panels. Given arbitration's movement in the direction of a more traditional court system, lawyers bring necessary familiarity with judicial procedure and precedents, are advantaged in understanding rulings on the ever-present motion practice by the parties, and have the requisite qualifications to read and interpret the law.

Recognizing the values each background brings to the process, a balance for much arbitration might be for lawyers to serve as umpires and non-lawyers as party-appointed arbitrators. In this way our industry benefits from the experienced professional representing and evaluating the insurance/reinsurance issues, while a lawyer assists in guiding the process through legal and precedent-related challenges.▼

...a balance for much arbitration might be for lawyers to serve as umpires and non-lawyers as party-appointed arbitrators.

news and notices

Board Approves Glenn Waldman as Certified Arbitrator

At its meeting on May 9, the ARIAS•U.S. Board of Directors approved **Glenn J. Waldman** as a Certified Arbitrator. His sponsors were Lawrence Monin, Michael Wilder, Gerald Wald, David Lichter, and Joseph Huss.

Arbitration Task Force Holds Town Hall Conference Call

The recently appointed Arbitration Task Force conducted a Town Hall conference call on April 9. The purpose of the call was to allow ARIAS members to contribute ideas to the group's year-long deliberations that were just beginning.

Over 50 members participated, recommending a wide range of ideas, including various mediation approaches, ways to select neutral panels, ways to get better arbitration clauses in contracts, and how to involve newer arbitrators. Task Force members assured attendees that they will be bringing the various ideas into their upcoming discussions.

Complete information about the Task Force is on the website under **Arbitration Task Force**.

Auditor's Report and Annual Meeting Presentation Are in Members Area

In case any member would like to review the financial condition of ARIAS as of the last fiscal year, ended June 30, 2011, the report of the auditor, J.H. Cohn LLP, is in the **Members Area of the website**.

Also there is the slide presentation that was presented at the 2011 Annual Meeting by ARIAS Treasurer, Peter Gentile. It has been modified to a white background for easier printing and the "Non-Conference Subtotal" expenses have been broken out, as some members requested.

Four New Umpires Are Certified

At its meeting on March 15, the ARIAS Board of Directors approved the following arbitrators as ARIAS•U.S. Certified Umpires, bringing the total number of certified umpires to 58:

- **John D. Cole**
- **Paul D. Hawksworth**
- **Denis W. Loring**
- **Debra J. Roberts**

Swierkiewicz is Qualified Mediator

Also at that meeting, the Board approved **Akos Swierkiewicz** as an ARIAS•U.S. Qualified Mediator, bringing the total number of qualified mediators to 38.▼

ARIAS•U.S. Is on LinkedIn

ARIAS•U.S. now has a group discussion page on LinkedIn, where members can initiate a discussion topic and all 165 ARIAS•U.S. members who have joined the group will receive an email about it? To find the page, just sign on to LinkedIn, go to "Groups You May Like" in the Groups menu and search for ARIAS•U.S.


SAVE THE DATE
ARIAS•U.S.
Fall Conference
and
Annual Meeting
November 1-2, 2012
The 2012 Fall
Conference will
return to the
Hilton New York
on November 1st.
Details will be
on the website
as they develop.
Hilton

feature

Mediation in Reinsurance

This article is based on a paper presented at the ARIAS•U.S. 2012 Spring Conference.

Katherine Billingham

Most reinsurance disputes settle. That's a fact. Only a small percentage of disputes actually go to final hearing. In other words, most parties are amenable to settlement but can't quite figure out how to get there without first spending a lot of time, money, and aggravation.

Most mediations result in settlement. Also a fact. Mediation statistics are available from numerous resources, with some quoting success rates as high as 85- 90% for resolving the dispute, and none that I could find below 50%.

While the reinsurance industry has its foundation in the merchant and marine business of the 18th century (and marine policies date as far back as the early 1300's), it has only taken us two decades to chart a different course for dispute resolution in reinsurance. Some say the system is broken. Others say that arbitration is still the best alternative to litigation. No matter the view, is there another viable alternative?

I suggest that the answer is: Yes.

Part One: The Value

The reinsurance industry faces a dilemma. Arbitration costs have skyrocketed and arbitration outcomes rest on fault lines. In fact, several recent court decisions have vacated even seemingly secure "final" awards, presenting parties in arbitration with the chilling prospect of never-ending wasteful and expensive litigation. The chart[1] below demonstrates the allocation of costs spent during the course of typical litigation.

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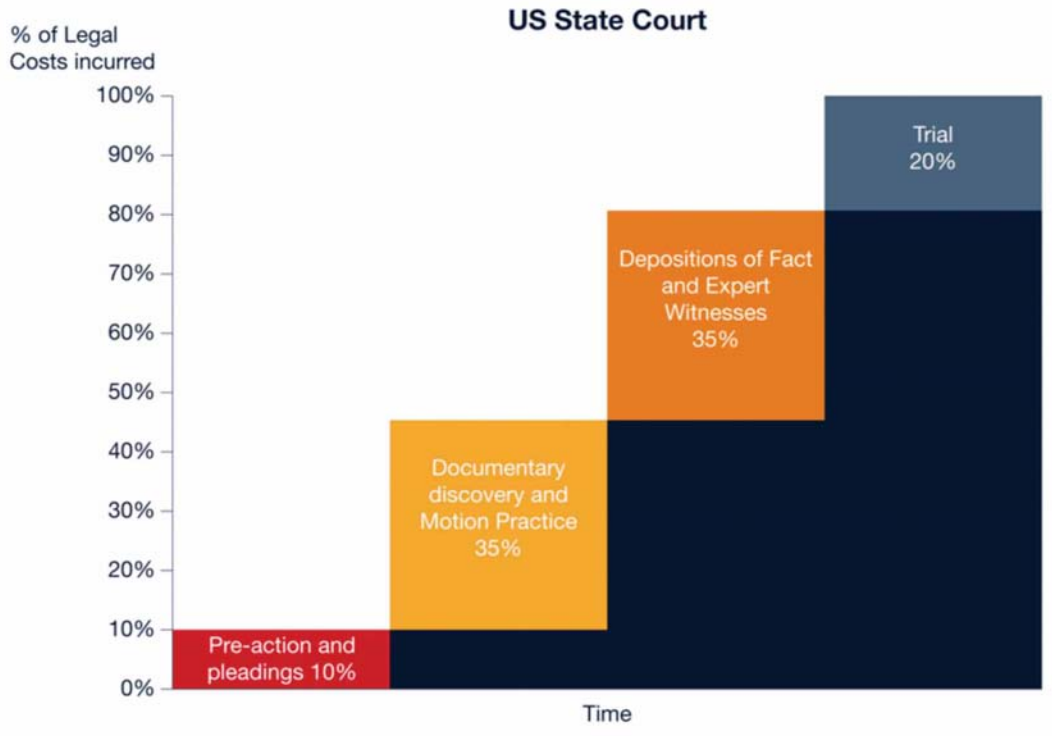

Katherine L. Billingham

Some say the system is broken. Others say that arbitration is still the best alternative to litigation. No matter the view, is there another viable alternative?

Katherine Billingham is an ARIAS•U.S. certified reinsurance arbitrator and mediator, an attorney and consultant. She is the Chair and CEO of ReMedi, the non-profit Re/Insurance Mediation Institute.

Nevertheless, historically mediation has been woefully ignored in the reinsurance arena, largely because, unlike lawsuits, there is no judge standing ready to mandate mediation. Additionally, since reinsurance is an arcane area to begin with, parties usually want their disputes reviewed by peers familiar with its nuances, customs and practices. Until recently, there were few mediators in the U.S. who specialized in this area.

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Most parties want to settle (and usually do settle) their disputes, whether early in the process or later. The number of legal disputes resolved by trial[2] (and by extrapolation, arbitration hearing) has declined steadily over the past thirty years. In 2002, despite increased new case filings, only approximately 2% of lawsuits were resolved by trial. Meanwhile, the use of mediation has grown exponentially. Nearly 90% of Fortune 500 companies now use mediation, which typically enjoys a settlement rate as high as 75-90%.

Nevertheless, historically mediation has been woefully ignored in the reinsurance arena, largely because, unlike lawsuits, there is no judge standing ready to mandate mediation. Additionally, since reinsurance is an arcane area to begin with, parties usually want their disputes reviewed by peers familiar with its nuances, customs and practices. Until recently[3], there were few mediators in the U.S. who specialized in this area.

With increasing frequency of late, parties to reinsurance disputes are turning to mediation. Possible reasons for this change include the state of the economy and, more likely, parties' successful exposure to mediations in other types of legal disputes.

Mediation offers cedants and reinsurers a streamlined alternative that shifts to them the power and opportunity to control the process of negotiating their dispute and to decide the terms of their settlement. Mediation is specifically designed to help parties reach commercially reasonable solutions that best serve their interests. And who knows their interests better than the parties themselves?

At its core, mediation is facilitated negotiation. The mediator's principal mission is to enhance communication, clarify issues, and identify interests to assist the parties in developing options to achieve their goals. This sort of flexibility, and the opportunity for parties to share their more candid and perhaps "higher" self, is not necessarily available in arbitration and litigation. Mediation is often better suited to provide commercial results for commercial problems as is reflected in the chart on the next page.

Part Two: Mediation vs. Party Negotiation

Why is mediation more effective than negotiating one's own dispute? There are facets of mediation - negotiating tools used by experienced mediators - that are simply not available in direct negotiations.

Assist in exploring options without bidding against self: One of the most common frustrations experienced in heated, contentious negotiations is the perceived inability to suggest or have your opponent seriously consider reasonable settlement options. The mediator will explore various options without disclosing them to the other side, and will assess the likelihood of success of each proposal before any is shared with the other side. In this way, parties can explore options without feeling as though they are bidding against themselves. A mediator can hold an offer as a condition to the other side also improving its offer, a useful tool that is unavailable to direct negotiators.

Assist in developing a more realistic analysis: Having an independent and objective person hear a party's version of the issues is always helpful. More often than not, a party focuses only on the strengths of his case and discounts the weaknesses. A mediator helps

"Recently we faced this issue: Where do two run-off entities, both cost conscious in nature who are usually able to resolve their differences amicably, principal to principal, go when they reach an impasse? We decided to retain a mediator and, within weeks, were able to achieve a satisfactory result through a single day mediation, costing a fraction of projected arbitration costs and enabling us to retain our good working relationship."

—Karen Amos
Joint Head of Claims, Resolute Management Services Limited
—Marianne Petillo
President and CEO, ROM Re

Efficiency criteria	Litigation	Arbitration	Mediation
Cost	High	High	Low
Speed of process	Slow	Usually slow	Fast
Who decides?	Judge	Arbitrator(s)	Parties
Likelihood of parties' relationship being destroyed	High	Significant	Low
Scope for tactical manoeuvring	High	High	Some
Who controls?	Judge	Arbitrator(s)	Parties
Evidence rules	Many	Tribunal decides	None
Chance of successful outcome	<50% (most often there is no real winner)	Unpredictable	>80% (chance of win-win outcome very high)
What the parties focus on	The past	Past conduct	The future
Negotiation form	Argument & antagonism	Adversarial	Collaboration & consensus
Communication	Superficial & formal	Formal	Intensive & personal
Jurisdictional problems	Possibly	Possibly	None
Ability to satisfy everyone	Low	Unlikely	High
Result	Win-lose	Win-lose	Win-win
Capacity to find solution outside confines of dispute	Non-existent	Unlikely	Enormous
Stress factor	Tension crystallized	Stressful	Tension released

Adapted from an original source: International Mediation Institute

parties to develop a more realistic analysis and to assess the likelihood of success.

Identify interests and discreet impediments: Parties often hold hidden interests in their positions that they cannot share with the other side. Examples include as yet undisclosed weaknesses in the case, budgetary or staffing limitations, unstated other business relationships, impending liquidation, distaste for their management or lawyers, etc. Mediators are trained to listen carefully and to gain an understanding of the party's underlying issues, motivations, and impediments to a settlement, especially during individual caucuses. Sometimes these interests were not even disclosed to their attorney. Mediators can and will assist in exploring ways to overcome impediments by folding these interests into a workable agreement.

Decision-makers focus on the case: Business people managing active or discontinued operations are busy with business. Given the time and cost-constraints of their business, managers want to ensure that the time and money devoted to prepare for and attend a negotiation with the other side is well-spent. Mediation requires the participation of decision-makers with authority to settle who are fully prepared and focused on the current dispute.

Parties educating parties: Knowledge is power, an axiom never as important as in mediation, where both lawyers and most importantly the parties, take an active role in explaining their positions directly to each other. These candid exchanges often lead to enlightened perceptions of the issues and also provide each side with a better understanding of the true bases for the problems, which can enhance a vetting of meaningful solutions.

Persistence is not a sign of weakness: As we have all experienced in arbitration or litigation, especially just before hearing or trial, if a party attempts to negotiate, is unsuccessful, and later tries again, the other side might view this approach as a sign of weakness. In mediation, however, the parties expect several rounds of negotiations as the mediator respectfully and persistently encourages them to develop areas of agreement. One common, counterintuitive axiom of mediation is that, when you hit impasse, you are actually making real progress. Being relentless and optimistic, even at an impasse, is the gift of a skilled mediator, and the parties' continued participation in the process is certainly not a sign of weakness.

Outlet for moral indignation: Bitter arbitrations and lawsuits are often brought, not because of substantive issues, but because powerful people, who might not have even spoken to

"I would recommend the use of mediation in a reinsurance dispute where the facts of a case are relatively well developed, but the parties are unable to bridge the gap in their perception as to the value of the dispute. An effective mediator, experienced in reinsurance custom and practice and the arbitration process, will often be able to manage those expectations to the point where a deal can be reached."

—Robert Redpath
Senior Vice President and General Counsel
Clarendon Insurance Group

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each other, have gotten mad. As differences escalate, the dispute becomes personalized, preventing parties from separating their subjective selves from the objective problem. In this environment, some prefer their "day in court" before they can be open to settlement. Allowing parties to air their grievances before a mediator with an empathetic ear, in the presence of the opposing party, provides an outlet for such emotions and, once accomplished, opens the door to productive negotiations.

Assist in reassessment without losing client confidence in the attorney: One of the most subtle but potentially most delicate elements of the process is the mediator's relationship with counsel. The reasons are simple to understand but often difficult to manage: clients often retain the attorney who they perceive will fight most vigorously, leaving the attorney reluctant to express doubt about the merits of the case. A mediator who challenges counsel's opinion in front of his/her client risks losing the trust of both the lawyer and the client. The mediator must carefully work with the parties and their lawyers to conduct a more realistic assessment of their chances of success without undermining the client's confidence in the attorney or the attorney's respect for the mediator.

Client control over negotiations: Many negotiators use posturing as a default strategy. During negotiations, lawyers, ethically charged to be zealous advocates, tend to extol the strengths of the client's case, usually for the client's benefit. This leaves little room for a frank discussion about the true merits of one's case. An experienced mediator can bypass posturing and help the parties make more meaningful progress in negotiations. A mediator ensures that all parties' voices are heard in the negotiations.

Selecting a mediator with exceptional skills and in-depth substantive knowledge is key to a successful outcome.

> *"I would recommend the use of mediation in a reinsurance dispute where the facts of a case are relatively well developed, but the parties are unable to bridge the gap in their perception as to the value of the dispute. An effective mediator, experienced in reinsurance custom and practice and the arbitration process, will often be able to manage those expectations to the point where a deal can be reached."*
>
> **—Robert Redpath**
> Senior Vice President and General Counsel
> Clarendon Insurance Group

Part Three: Mediation Law

Some exploration of the current state of the law on mediation could be useful. The courts have had numerous occasions to review a variety of issues raised in connection with mediations. At the Hamline University School of Law, two professors undertook an extensive study of the federal and state court decisions involving mediation that they identified in the Westlaw database from 1999 through 2007. In two of their premier articles[4], they analyzed the accumulated data from over 2,200 opinions and summarized their conclusions:

- The number of cases involving mediation issues tripled between 1999 and 2005
- Most of the litigation took place in California, Texas, and Florida.
- In the majority of the cases, the issue was enforceability of the settlement agreement, followed by the duty to mediate, fees, confidentiality, condition precedent, sanctions, ethics, and hybrid mediation. (See chart on the next page)[5].
- Courts frequently allowed evidence of what occurred in the mediation with only limited objections
- Traditional contract defenses were rarely successful in enforcement cases.
- Very few cases asserted mediator misconduct.
- Several decisions confirmed taxation of costs despite lack of clear authority.
- Opinions about sanctions increased dramatically over the years reviewed and sanctions were often awarded.

They also found that there has been a recent increase in cases involving hybrid mediation-arbitrations[6]. These cases included issues such as conflict of interest, waiver, and the use of confidential information. Additionally, they observed a recent increase in cases addressing ethics and malpractice[7] where the issues were primarily focused on the lawyers, not the mediators.

Uniform Mediation Act

The Uniform Mediation Act was drafted through the joint efforts of the American Bar Association's Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws, as well as other legal contributors. Its primary purpose is to provide a sound privilege that will ensure confidentiality in the process of a mediation, which will in turn promote full disclosure of facts to the mediator by all parties. More

> *"I recently participated in two reinsurance mediations which both resulted in resolution of the disputes. I believe that this type of dispute resolution process in specific situations is very effective and saves both time and costs"*
>
> **—Diane Ferro**
> Vice President-Claims
> CNA Insurance Companies

"Effective mediation, guided by experienced professionals, saves time and money and helps preserve business relationships. I have seen matters resolved in mediation in which the opening offers and demands were separated by as much as $75 million. I frequently recommend mediation as advisable prior to incurring the costs of discovery and motion practice that accompany formal proceedings."

—Rich Mason
Member, Cozen O'Connor

disclosure often results in greater success of the process as well as party satisfaction. The more parties find success in mediation, the more they will tend to use it.

The UMA protects all communications of the parties, the mediator and non-party participants, and it prevents the use of mediation communications in legal proceedings that take place after the mediation. Mediators and non-party participants can refuse to disclose their own statements made during mediation and can prevent others from disclosing them as well. Waiver of these privileges must be in a record or made orally during a proceeding to be effective. There is no waiver by conduct.

The UMA may be viewed on the www.nccusl.org web site. The Act has been enacted in eleven jurisdictions:

1. District of Columbia (D.C.Code §§ 16-4201 to 16-4213)
2. Idaho (Title 9, Chapter 8)
3. Illinois (710 ILCS 35/11 to 35/99)
4. Iowa (I.C.A. §§ 679C.101 to 679C.115)
5. Nebraska (Neb. Rev. Stat. §§ 25-2930 to 25-2942)
6. New Jersey (N.J.S.A. 2A:23C-1 to 2A:23C-13)
7. Ohio (Ohio R.C. §§ 2710.01 to 2710.10)
8. South Dakota (Chapter 19-13A)
9. Utah (Utah Code Ann. 78-31c-101 to 78-31C-114)
10. Vermont (Vt. Stat. Ann. tit. 12, §§ 5711 to 5723)
11. Washington (West's RCWA 7.07.010 to 7.07.904)

Mediation Issue	# of Opinions	% of Total Opinions
Enforcement	953	43%
Duty to Mediate	491	22%
Fees	453	20%
Confidentiality	237	11%
Condition Precedent	202	9%
Sanctions	180	8%
Ethics	160	7%
Med-Arb	144	6%

The UMA has also been introduced in Hawaii, Rhode Island, Maine Massachusetts, Minnesota, and New York. Although they did not adopt the Act, Delaware, Florida, Montana, Nevada, Oregon, New Mexico and Wyoming have adopted similar bills. Virginia adopted a similar bill before the UMA was finalized. Two states have rejected the UMA: Connecticut and Indiana.

Conclusion

What's the message? It's time to re-evaluate how we handle these disputes. In mediation, the parties retain control and tailor their own solution while saving precious resources. Simply put, mediation saves time and money. Rather than a win/lose as in arbitration, mediation can often be a win/win.▼

"Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough."

—Abraham Lincoln

1 Extracts based upon The Insurance Institute of London publication (RSG 263) in January 2011 "Alternative Dispute Resolution in Practice" (Figs. 6.1 and 6.2) –The Costs Profile of Litigation.
2 ABA Journal, The Vanishing Trial, October 2002.
3 The Re/Insurance Mediation Institute ("ReMedi") as well as ARIAS now certify qualified reinsurance mediators.
4 See James R. Coben & Peter N. Thompson, Disputing Irony: A Systematic Look at Litigation About Mediation, 11 Harv. Negot. L. Rev. 43 (2006) and Mediation Litigation Trends: 1999-2007, 1 WORLD ARBITRATION & MEDIATION REVIEW 395 (2007)
5 Chart created by extrapolation from similar chart found in Coben & Thompson articles referenced in fn 3 supra.
6 See Scaffidi v. Fiserv, Inc., No. 05-C-1046, 2006 WL 2038348 (E.D.Wis. July 20, 2006) affirmed, 2007 WL 648178 (7th Cir. Feb 28, 2007); U.S. Steel Mining Co., L.L.C. v. Wilson Downhole Services, No.02:00CV1758, 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006)
7 Attorney Grievance Com'n of Maryland v. Steinberg, 910 A.2d 429 (Md. 2006); Sealed Party v. Sealed Party, No. CIV. A. H-04-2229, 2006 WL 1207732 (S.D. Tex. May 4, 2006); Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C., 44 Cal.Rptr.3d 782 (Cal. Ct. App. June 20, 2006); Simpson v. JAMS/Endispute, LLC, No. A110634, 2006 WL 2076028 (Cal. Ct. App. July 26, 2006).
See also Cassel v. Wasserman, Comden, Casselman & Pearson, LLP, et al., Cal. Ct. App. Nov 12, 2009, 2nd Dist. Div 7 (B215215)

ARIAS·U.S.

Spring Co

Chairman Elaine Caprio Brady welcomes attendees.

2012 Spring Conference Finds for Arbitration

With three mock arbitration sessions and a three-part, detailed discussion of five ethics scenarios, the 2012 ARIAS•U.S. Spring Conference provided three days of highly substantive training. With the game-show-related theme of "**Survey Says...Arbitration Beats Litigation**," the sessions focused largely on comparing and contrasting the arbitration process with litigation.

Panelists examined each stage in the arbitration process and addressed the strengths and weaknesses of arbitration versus litigation, the arbitration advantage, and strategies for improving the arbitration process to keep arbitration competitive. To assure balance, one session focused exclusively on the advantages of litigation. Faculty members addressed potential improvements at various stages in the process, including panel selection, the

onference

organization and structure of the proceedings, and discovery limitations.

The conference was designed to complement the investigation being performed by the Arbitration Task Force and focused on ways of improving the arbitration process to better reflect the goals of the process, as defined when it was first adopted by the industry. To that end, panelists discussed the benefits of contract drafting to avoid disputes over the arbitration process itself, executives' roles in the dispute resolution process, mediation as a way to avoid arbitration (or to better focus the arbitration), and on the use of neutral panels.

ARIAS•U.S. was honored to have **Michael C. Sapnar**, President & CEO of Transatlantic Holdings, Inc. as the Keynote Speaker on the second day of the Conference. He provided the most directly relevant keynote address ever given at an ARIAS•U.S. conference. An edited transcript of his speech follows this report.

The conference attracted 310 participants. In addition, 33 spouses and guests attended the food events and recreational activities.

At the break on Thursday afternoon, 62 golfers took to the Ocean Course and 16

Videos of previous conversations by mock arbitration principals opened the first session.

CONTINUED ON PAGE 26

Arbitration Demand and Organizational Meeting... L-R: David Attisani, Michael O'Malley, Amy Kline, Michele Jacobson, Betty Mullins, Fred Marziano, Jonathan Bank, and Sylvia Kaminsky.

CONTINUED FROM PAGE 25

tennis players competed on the Breakers courts in their respective tournaments, under threatening skies. Rain showers did interfere with both events, but they held off enough to allow much of the play to be completed. **Jennifer Devery** and **Eric Kobrick**, respectively, chaired the golf and tennis tournaments.

Also on Thursday afternoon, for the first time, ARIAS•U.S. offered a sailboat trip on the ocean from a nearby marina. The captain of the boat managed to maneuver in front of the advancing rain squalls, so that the 33 ARIAS•U.S. sailors remained relatively dry. The trip was conceived and executed by **Bill Goldsmith**.

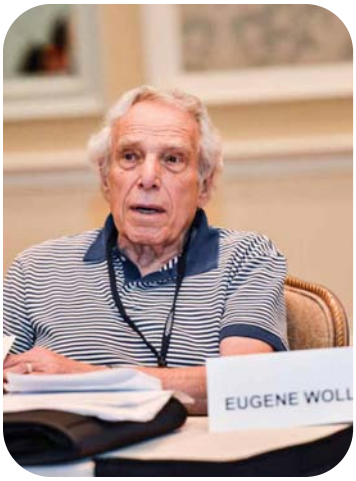
While praise for the quality of the training sessions was often heard, the comments about The Breakers were even more widespread. ARIAS•U.S. was last there in 2009. Attendees mentioned frequently that they had forgotten how exceptional the people and facility are. Everyone seemed pleased that next year the 2013 Spring Conference will be there again on **May 8-10. Save the Dates!**▼

Breaks were short, but energized.

Bill Yankus explains new CLE Board requirements.

Presenting the Ethics Scenarios... L-R: Moderator Eric Kobrick, panelists Andrew Maneval and Debra Hall.

Arbitrator and Umpire Selection... L-R: Moderator Thomas Orr, panelists John Nonna, Amy Rubenstein, Debra Roberts, and Robert Hall.



AROUND THE ETHICS DISCUSSION BREAKOUTS

Discovery Mock Session – (from left) Robert Kole, Amy Kline, Wendy Taylor, Randy Nordquist, Bina Dagar, James Dowd, and Susan Claflin

Settlement/Mediation Session – (from left) Katherine Billingham, Raenu Barod, Patrick Reardon, Alexandra Furth, and Moderator Michael Pontrelli.

Award and Appeal Mock Session

Hearing and Evidence: The Regular Panel (photo left) The Neutral Panel (photo right)

...And there was time for meeting old friends and making new ones.

L-R: Katherine Karnell, Bill O'Neill, Paul Kalish, Jen Devery

L-R: Mark Gurevitz, Leslie Sheldin, Liz Thompson, and Susan Mack

AROUND THE CONFERENCE

feature

2012 Spring Conference Keynote Address

[This article is a considerably abbreviated version of Mr. Sapnar's Keynote Address at the 2012 ARIAS Spring Conference. Unfortunately, however, it is impossible to capture in writing the wit and dynamism of his delivery.]

Michael C. Sapnar

Michael C. Sapnar

Thank you for inviting me to speak at your annual conference. ARIAS is an organization that is trying to improve things and is good for our industry, and I am honored to be here. I am going to talk about two things today: First I will touch on some interesting things going on in the reinsurance world and second I will discuss my views of the arbitration process from a user's perspective.

It is not a revelation that the reinsurance industry, like many industries, is massively different today from 25-30 years ago. Most of the changes make it increasingly difficult for companies that only focus on P&C reinsurance to thrive. Analysis of industry statistics tells us that Insureds are keeping more risk in house and, in turn, insurance companies are keeping more risk on their balance sheets. In most cases, the risk being retained is in less volatile business.

Analysis of industry statistics tells us that Insureds are keeping more risk in house and, in turn, insurance companies are keeping more risk on their balance sheets. In most cases, the risk being retained is in less volatile business.

Why is this happening?

1. Utility: Most companies/people view insurance as a necessary evil. They only tend to buy if they have to or are told to. They need insurance to buy a house or own a car. Many times an insurer needs reinsurance for rating agency and regulatory reasons.
2. Capital: The amount of capital held by Insurers today versus years ago is much higher. Reinsurance is essentially capital and thus there is less demand for it.
3. Perception: The insurance industry has gotten a lot of bad press from events like Katrina, WTC, and Florida Homeowners pricing. People think it has limited value. The reinsurance industry has similar obstacles as respects the Florida market, as well as from the last casualty soft market when both the ABILITY and WILLINGNESS to pay were questioned. We can debate the merits of this perception but, as always, it becomes reality.
4. The most important one: INFORMATION. Insurance companies have better technology and information today than fifteen years ago. They know real time pricing trends, risk concentration, and loss trends. They are also using predictive modeling to better select risk. And results have been good over the last ten years, which is in a sense a validation of what they are doing. One of the biggest reasons companies historically bought reinsurance was simply uncertainty... they did not really know what or how much risk they had on the books. With all of the real time information available and the models being used given the technology advances, insurers feel that for the most part that they have it cracked.

So what does all of this mean?

For one thing, P&C reinsurers aren't just P&C reinsurers any more. They are either insurers with reinsurance divisions and subsidiaries (essentially in-house reinsurance MGAs...ACE, XL, Arch, Axis, Allied World) or they are reinsurers with huge life operations (Hannover, Partner, Scor), or they are Cat-Only Reinsurers with large Asset Management initiatives (Validus, Ren. Re, Aeolus, Nephila). In addition, consider that 50% of Munich Re America's premium is from their Insurance Operations, and for Everest and Odyssey, it is 40%. The P&C Reinsurance business as a DISTINCT SECTOR virtually no longer exists. In 1980, there were 120 reinsurers reporting to the Reinsurance Association of America, today there are 17.

This has resulted in more volatile balance sheets and earnings for reinsurers, because the clients are predominately buying high layer or excess reinsurance, i. e., cat covers for most lines of business, whether Umbrella, Marine, Energy, or Property. This requires them to hold more capital, yet clients are reluctant to pay for the higher volatility cession. In addition, more and more, reinsurers' base earnings are dependent on

Michael Sapnar is currently President and CEO of Transatlantic Holdings, Inc. and its subsidiaries, Transatlantic Reinsurance Company and Putnam Reinsurance Company. He is resident in the firm's New York Office.

property cat losses, which makes profitability quite capricious. There is very little working layer business available, especially on the casualty side. This results in reinsurers having to keep more of their investments in short term assets with less opportunity for steady investment income, although this is less of an issue today than it will be in the future.

Reinsurance company fortunes are increasingly dependent on Property Cat activity and specifically property cat activity in Florida. They have balance sheet risk that is measured by models that do not model many perils — like Tornados which over the last 5 years have produced $61B of losses versus $18B for hurricanes in the US, and like European Flood which is perhaps the biggest unmodeled peril there is. And when there is a loss that is modeled, like New Zealand and Thailand, the models have proven to be virtually useless. Furthermore, cat writers are competing with and buyers are protecting themselves with Cat bonds based on these models. And now, funds are providing a collateralized product that has no credit risk, which has caused many cat writers to get into that game, somewhat cannibalizing our traditional product.

These dynamics, combined with low interest rates and less opportunity to generate float, point the investors in our sector to requiring higher return for access to their capital, a return that the industry has historically had trouble meeting. And another change is relevant here: Today's investment manager is young and impatient, and wants instant gratification in the nano-second world we live in. They are not patient, as they are measured every day and thus they measure the companies they hold that way as well, not great for reinsurers that want to be publicly traded.

It is for these reasons that we are seeing modest upward rate movement in many lines, but we are nowhere near a hard market. What will it take to get there? Who knows. The only thing I am sure of is that it will come.

One other observation on the marketplace in general. The role of the broker is changing. It is no longer truly an intermediary role, where the relationship could be drawn as an equal triangle. Today, it is a long isosceles triangle with the broker and client close together on one side and the reinsurer on the other. More and more brokers are providing advice on capital management and risk modeling, and spending less time on reinsurance placement. Furthermore, brokers have often undercharged or not charged for these services while at the same time cut or rebated brokerage. This is not a sustainable strategy. Major brokers will tire of selling discounted services and competing with smaller brokers solely on the basis of price. They may move to a fee for service platform, brokerage will eventually come off the slip and be negotiated between them and the client. Eventually the broker won't be the slip either, and monies will likely be exchanged between the direct parties. This will probably happen in my career. Many people refuse to believe this but it is inevitable, just like a College Football Playoff Format is. It will take time because of institutional bias, but it will come.

Despite all this, I am optimistic about the prospects of reinsurance operations that have the luxury of being patient and waiting (i.e., they are not public). Something unexpected will happen. It always does and when it does there will be chaos. Chaos is generally good for reinsurers that survive.

OK, let's turn to second part here: Arbitration.

The first thing I did when I sat down to prepare for this speech was to research what ARIAS stands for. Now you all probably already know this, but what I found out was that it is an acronym wrapped in an acronym. It is stands for the AIDA Reinsurance Insurance and Arbitration Society. I then had to look up AIDA. I googled AIDA + ARIAS and found out:

1. There is AIDA Intl which is the Worldwide Federation for Breathholding, so I moved on and found
2. It is a musical called Aida written by Elton John and Tim Rice. I moved on and found
3. Affective Intelligent Driving Agent, which is basically a computer that can drive your car for you and then I found
4. There are at least two people in the word named AIDA ARIAS

It turns out that AIDA is the English translated acronym from the French name for International Association of Insurance Law. Thus the full name for your organization is:

"The International Association of Insurance Law Reinsurance and Insurance Arbitration Society." How many attorneys were in the room for that creation? Sounds like Churchill's description of Russia: A riddle

continued on page 32

Eventually the broker won't be the slip either, and monies will likely be exchanged between the direct parties. This will probably happen in my career. Many people refuse to believe this but it is inevitable, just like a College Football Playoff Format is. It will take time because of institutional bias, but it will come.

I was under the impression that the mission of ARIAS was to develop a cheaper, quicker dispute resolution for INTRA industry disputes where industry people could more readily grasp issues and utilize industry custom and practice toward in deciding the issues at hand. My experience and Transatlantic's experience would suggest that it has gotten off course:

continued from page 31

wrapped in a mystery inside an enigma.

Now, I am only teasing as ARIAS is truly to be applauded for its efforts and, for the most part its history. It has been an effective platform for ADR and is clearly accepted by the industry. But I hasten to add that, much like the reinsurance industry, a lot has changed and not all for the better. And it is not all that clear that arbitration always beats litigation any more. In fact, it seems to me that arbitration is becoming more and more like litigation. I was under the impression that the mission of ARIAS was to develop a cheaper, quicker dispute resolution for INTRA industry disputes where industry people could more readily grasp issues and utilize industry custom and practice toward in deciding the issues at hand. My experience and Transatlantic's experience would suggest that it has gotten off course:

1. It is not as expeditious as it once was or was intended to be. Over the last fifteen years, TRC has had twenty- two disputes, twelve arbitrations and ten litigations. The average length to verdict or settlement was 1.9 years for arbitration and 2.5 years for litigation, but if you threw out the longest of each (we had one 8 year litigation case) the average is equal at 1.7 years. Exactly half of our arb cases and half of lit were settled before a verdict was issued.
2. It is not clearly less expensive to arbitrate. Costs in our arbitrations were 16% of the client claim while litigation was 17%.
3. Arbitration has taken on more of the characteristics of litigation with outside counsel, expert witnesses, conflicts, and extended discovery, but it has no clear or established procedures, process, civil rules,or precedents. More specifically:
    a. Courts seems more likely to grant summary judgment. It seems to me that arbitrations should be more likely. I am not sure if they are.
    b. Arbitration, from what I can gather, rarely used to provide for or allow discovery or expert witnesses. From my recent experience, not only are discovery and experts allowed, but what is allowed is extensive and inconsistent.
    c. The use of outside counsel is preordained. This is a major expense item because they are expensive and they want to spare no expense in winning a case.
    d. Confidentiality: this is a double edged sword, but courts are apparently lifting the shield more whereas arbitration strictly protects it. This provision may contribute to arbitrary results and certainly does not help build precedent or industry ground rules.
    e. Consolidation of discovery, motions, or reinsurers. Courts have rules and guidelines controlling when it can be done. Arbitration does not, so it rarely happens.
    f. Conflicts: again Courts have rules, whereas arbitration seems to have no bright line except for "financial interest". If a party appointed is representing a company on several cases or has a long history with it, is that a financial interest? If you are a party appointed for a company in a case does that prevent you from serving as an umpire in a different case involving the same company? Is it a conflict if a former employee serves as a party appointed against you, especially if the departure was acrimonious? Do companies who have more arbitrations have better positioning to win cases as a "frequent client"?
    g. Waivers of conflict: Courts are often clear. Is it unfair, however, in the arbitration process, to put companies in a position of having to decide whether to waive conflicts – saying no to waiver can hurt you in the future, saying yes can hurt you now.
    h. Awarding of penalties or interest: occasionally this happens in the courts. It just doesn't happen in arbitration - to the point where I am assuming it is not allowed.

Now, I am sure you are well aware of all of these issues. In fact, I know you are... I read Peter Scarpato's thoughtful article in your last Quarterly. I would like to briefly touch on a couple of his suggestions and offer a couple of my own:

1. One idea suggested was to preselect the arbitrators when you enter into a reinsurance contract. I do not see this as practical. We have a tough enough time negotiating reinsurance contracts and I could see this as a more debated than less debated contract item. Plus I do not like to fight over something that has a small likelihood of ever actually happening, and I don't want to treat it as a throwaway, because if it does happen, significant dollars may be in play. Also, given the long tail nature of most of the items that are arbitrated, to select a panel so far in advance seems a bit problematic.
2. Another suggestion was that the schedule should fit the dispute. Yes. Yes. YES. In fact, maybe so should the procedures, but more on that later.
3. Another was the simultaneous questioning of experts. Again, makes sense, but the bigger issue is the fact that you HAVE experts.
4. Appoint a Separate Master Discovery Arbitrator — Again, I may be naive here and maybe it makes sense, but the fact that this actually came up as a suggestion points out that we have a bigger problem. Plus, wouldn't this add to the cost when we want to go in the other direction?

Before I go on to my suggestions, I just want to point out that it is good you are aggressively looking to improve the process. There is significant danger in not adapting and changing. I may sound like a simpleton up here, but I am your client. And you are providing a service. Remember that. And just as I have a shrinking market, so do you. Recall the decrease in the percentage of casualty business being ceded. I would imagine that casualty accounts for a large part of the arbitrations that occur. There will be fewer.

I have a finite number of clients as a reinsurer...there are only about 2500 insurance companies in the US. That is not a large client base. You too operate in a small universe.

Also, just as I have competitors, so do you. There is litigation. In addition, I stumbled on the Association of Insurance and Reinsurance Run-Off Companies. They have an arbitration process that looks quicker and simpler, perhaps modeled after your initial process. While it does have some of the same issues, how long before they expand outside of run-off disputes?

So, my suggestions:

First, I saw the Procedure Guidelines on your website. It struck me that they have not been revised since 2004. They should be updated every two years or so, if nothing else from a marketing standpoint, although I am sure there are always tweaks you can make. In addition, I thought the fact that the Table of Contents section was twice as long as the Streamlined Arbitration Options and Suggestions ironically underscored some of the issues I have touched on here today.

Moreover, the Guidelines had a lot of "shoulds, woulds, coulds, and mays," instead of "wills, shalls and musts." Most of the suggestions in Peter's article and my comments here indicate to me that maybe ARIAS should leave less to the discretion, debate, and agreement by the parties who are already at odds and want to get to a resolution.

The purpose of the arbitration process is to have industry people decide industry disputes in a fair and expeditious manner at a reasonable cost, not to perpetuate a system in which the parties have representatives first struggling to define the process in which they will fight, where the deepest pockets and broadest relationships provide an advantage in a pseudo- legal proceeding in a proxy for a court room. Why not draw parties appointed and/or umpires at random? Or just draw a panel of three at random? Or just an Umpire or "judge" panel of one? Perhaps you can even have shorter lists for certain areas of dispute that are less common, so you know the adjudicators are well-versed in the subject.

There clearly should be alternate processes based on the amount in dispute. If it's less than $5mm, there should be no outside counsel allowed, one witness allowed, and there should be just a single presider. If a company can show the $5mm or less is material to their financials, they could opt out. Limitations should also be put on larger cases.

Finally, you have to find a way to establish some precedents or at least share the experience of all of the disputes you have seen. You can do it in a redacted format and provide suggestions on how to avoid similar disputes that you have arbitrated via contract wording improvements or information disclosure. You have a wealth of information and experience. To not share it would be a shame. My guess is you could even sell some of it.

Take a hint from the actuaries ...be selective about whom you let in. Be very selective. And lastly, make sure the process stays analytical and does not get political.

Thanks again for inviting me to speak here. You have great people providing a great service. The industry needs you. We can make it better.▼

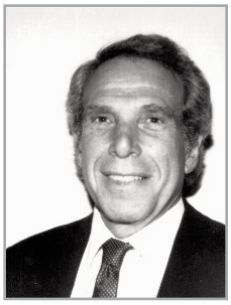
Before I go on to my suggestions, I just want to point out that it is good you are aggressively looking to improve the process. There is significant danger in not adapting and changing. I may sound like a simpleton up here, but I am your client. And you are providing a service. Remember that. And just as I have a shrinking market, so do you.

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the unconventional side of the business.

"The fault, dear Brutus ..."[1]

Eugene Wollan



This happens to me far too often:

- I will be at a social gathering of some kind;
- I am introduced to someone I haven't met before;
- There is the customary exchange of introductory pleasantries ranging all the way from "Do you live in the city?" to "Are you on the bride's side or the groom's side?";
- It emerges during this dialogue that I'm a lawyer;
- And I am then treated to an interminable jeremiad about the speaker's latest encounter with the legal system, invariably a saga that reduces Jarndyce v. Jarndyce to a minor blip on the radar screen.

The usual target of these screeds is not, interestingly, the legal system itself but rather the lawyers themselves. The folks regaling me with these tales of woe don't seem to find any fault with a system that, for example, allows for judicial review of an arbitration award (even under very limited circumstances), but plenty of fault with the lawyers who, working within the system as it's supposed to work, seek that judicial review. ("I thought a final award was supposed to be final.")

I wonder why this is so. Is it just easier to attribute devious or impure motives to specific individuals than it would be to take on a whole system? Is the narrator suggesting some kind of subtle discrimination at work, i.e., that some other lawyer might have behaved differently but singled him or her out for this particular abuse of the system? Does the speaker think I will be a more receptive audience if he castigates one of my competitors than if he criticizes the entire system - which, is, after all, my system too? Does he think that this recital of travail will elicit from me some brilliant, incisive, never-before-thought-of maneuver to solve the problem or cut the Gordian knot (and do I really look that smart)? These questions are, of course, unanswerable and rhetorical.

I wonder also why lawyers seem to invite so much more of this kind of reproach than most other professions. Or am I just being paranoid? I would guess that what doctors run into outside their examination rooms is more along the lines of I-have-this-twinge-in-my-lower-back-what-do-you-think-it-is than a direct criticism of another physician. An accountant may face a question about the deductibility from federal taxes of, say, the cost of liposuction, but is unlikely to hear a horror story about some other tax preparer who didn't know a capital gain from a capital improvement. An architect is unlikely to be backed into a corner to hear a story about the load-bearing capacity of the narrator's roof, or an engineer to be favored with a tale of a misaligned flange on a complicated piece of machinery.

I think one reason for this phenomenon is that what lawyers do seems (not "is" but "seems") more accessible and more readily understood by their clients and by the world at large. Other professions are shrouded in (and shielded by) far more in the way of technical impediments. Who but a pharmacist is really qualified to judge whether another pharmacist has committed an egregious blunder? Likewise for doctors, dentists, engineers, and so on down the line. Indeed, that's why expert witnesses figure so prominently in cases involving such issues. But lawyers don't work with mathematical computations or chemical formulations or Latin names (topic for another day: does the medical profession do this deliberately to insulate itself from lay comprehension, not to say lay criticism?). Lawyers work with words, and everybody knows - and purports to understand - words. (I am obviously alluding to most kinds of legal practice, not such special areas as tax law or patent law, which go beyond mere words; is it my imagination, or is it precisely those arcane fields of practice that are far less subject to the cocktail-party diatribes I have described?). The "guardhouse lawyer" is encountered far more often than, say, the amateur periodontist. It is simply much easier for an aggrieved client to question why the case

Does the speaker think I will be a more receptive audience if he castigates one of my competitors than if he criticizes the entire system - which, is, after all, my system too?

Eugene Wollan, Editor of the Quarterly, is a former senior partner, now counsel, of Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

dragged on for six years than for a dissatisfied patient to second-guess the specifics of the chemotherapy course.

To some extent, sad to say, we lawyers bring this on ourselves. (Hence the title of this piece.) Most of us are, of course, paragons of integrity, honesty, intelligence, morality, and all the related Eagle-Scout virtues. But because the work of our profession is so much more transparent than most others', we are particularly vulnerable to application of the old saw about a few bad apples. And some bad apples there unquestionably are.

To name names here would be inappropriate, unwise, and very likely actionable. Besides, I think the public's low opinion of lawyers generally, and the reason so many derogatory lawyer jokes make it into the pages of the New Yorker and onto the internet, is not so much a matter of individual bad apples as it is certain kinds of practitioners.

The old stereotype of the ambulance chaser, distributing his business card to accident victims in the Emergency Room, has been supplanted by the slickly coiffed guy in the TV commercial, sitting before a shelf of law books he may or may not have ever opened, earnestly telling the camera that he's there to help you enforce YOUR rights and he will receive no fee unless you win a recovery. Judging by TV commercials I have been subjected to, this species of pitchman has recently been augmented by a more specialized type who targets a more specific disease or injury. Thus: "Have you or a loved one been diagnosed with myelodyplastic/myeloproliferative neoplasms? If so, you may be entitled to compensation. Call the number on your screen for a free consultation. I am a compensated non-attorney spokesperson." [Let's not even think about the grammatical solecism of "have... a loved one been diagnosed...]

The basic practice category - the plaintiff's negligence lawyer - hasn't really changed. Most of them are also, of course, perfectly honorable practitioners, but that seems to be the area where more bad apples tend to crop up (pun intended), with repercussions that leak over to the rest of the profession. Unfortunately, not a lot can be done about this. Ethical constraints against lawyer advertising have long since gone the way of the Hays Office in Hollywood and prohibitions against four-letter words on cable TV - and whether this is so for free-speech considerations or competitive reasons is quite beside the point. Bar associations issue learned advices on whether it is acceptable for a lawyer to use the term "specialty" in describing his practice, but simply do not have the power to do anything about that smarmy guy in the Zegna suit or his "compensated spokesperson." Parts of the public eat it up, parts of the public find it deplorable. And the rest of us practitioners simply have to grin and bear it.▼

1 The fault, dear Brutus, is not in our stars but in ourselves. - Julius Caesar (I, ii)

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members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email that have come in during the last quarter, so that members can adjust their address directories.

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us at director@arias-us.org.

Do not forget to notify us when *your* address changes. Also, **if we missed your change below**, please let us know, so that it can be included in the next Quarterly.

Recent Moves and Announcements

Timothy C. Rivers has relocated. His new contact information is

Rivers Re Resolutions, LLC, 69 Prestwick Green, Daufuskie Island, SC 29915, phone 843-842-3868, fax 843-842-4360, cell 917-587-5557.

The offices of the **Specialty Operations Law Practice Group of the Department of Law & Regulation of Allstate Insurance Company** have moved to 2775 Sanders Road – Suite A2E, Northbrook, IL 60062, fax 847-326-7323. Telephone numbers of respective members are as follows: **James Sporleder** 847-402-9085, **Deidre Derrig** 847-402-9013, **Paul Ryske** 847-402-9044.

in focus

Recently Certified Arbitrators

Glenn J. Waldman

Glenn J. Waldman

Glenn Waldman has more than 29 years' experience in the insurance and reinsurance industry, primarily as an outside counsel, Mediator and Arbitrator. Mr. Waldman founded the Waldman Trigoboff Hildebrandt Marx & Calnan, P.A. complex commercial litigation law firm on July 4, 1991 and is the managing shareholder.

Mr. Waldman has been practicing law continuously in the State of Florida and in federal court for more than 29 years. He holds the maximum rating "AV" (pre-eminent) by the Martindale-Hubbell® Law Directory and is similarly rated the maximum 10.0 ("Superb") by the AVVO ratings guide. He is admitted to practice in all state and federal trial courts in Florida, the federal Tenth and Eleventh Circuit Courts of Appeals, and the United States Supreme Court.

In addition to his complex commercial litigation practice, Mr. Waldman is a certified Mediator (state and federal court) and Arbitrator (certified by the American Arbitration Association and American Health Lawyers Association). He received his Bachelor's degree in Economics from the University of Florida in 1980, *magna cum laude*, and his Juris Doctorate from the University of Florida in 1983, *magna cum laude*, as well. He is a member of the University of Florida College of Law Board of Trustees of the Law Center Association. Mr. Waldman was appointed in 2010 by former Governor Charlie Crist to the Fourth District Court of Appeal Judicial Nominating Commission (a State Florida constitutional Commission recommending appellate judges to the Governor for appointment), and by current Governor Rick Scott in 2011 to the Governing Board of the South Florida Water Management District. The South Florida Water Management District, with an annual budget of approximately $1 billion, is a regional governmental agency that oversees water resources in the southern half of the State, covering 16 counties from Orlando to the Florida Keys and serving a population of 7.5 million.

Mr. Waldman has served as the sole arbitrator in over 25 insurance/reinsurance related arbitrations and in others as a party-appointed arbitrator. He has also presided in over 250 mediation conferences as the sole mediator, the majority of which were related to insurance/reinsurance disputes. Mr. Waldman's clients include large U. S. and multi-national corporations such as Humana Inc., Coventry Health Care, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Oppenheim Immobilien Kapitalanlagegesellschaft, and iconic Florida destinations such as Fontainebleau Resorts, LLC (Miami Beach) and Cheeca Holdings, LLC (Islamorada, Florida Keys). Mr. Waldman was ranked by Florida Trend -- The Magazine of Florida Business Distinction as one of the "Florida Legal Elite" (top 2% of lawyers practicing in Florida) continuously for the last seven years, and as one of the "Florida Super Lawyers" (top 5% of lawyers practicing in Florida) by Thompson Reuters Law & Politics continuously for the last five years.▼

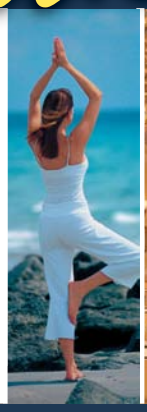
Profiles of all certified arbitrators are on the website at www.arias-us.org

THE BREAKERS
PALM BEACH, FLORIDA

www.thebreakers.com

Back to the Breakers!





Two Years in a Row!

In the past, ARIAS•U.S. has interspersed The Breakers with visits to other venues. We have never before returned for a second consecutive year. However, the record of good experiences there is reason enough to stay settled for a second year. Block out the dates of May 8-10, 2013 to avoid planning anything else. Many members have said we should always have ARIAS•U.S. Spring Conferences at The Breakers. Let's see how we like it two years in a row.

Save *the* Date...

May 8-10, 2013

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 May 2012, ARIAS•U.S. was comprised of 365 individual members and 118 corporate memberships, totaling 995 individual members and designated corporate representatives, of which 259 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure,* based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Umpires. The procedure is free to members and non-members. It is described in detail in the Umpire Selection Procedure section of the website.

Similarly, a random, neutral selection of all three panel members from a list of ARIAS Certified Arbitrators is offered at no cost. Details of the procedure are available on the website under Neutral Selection Procedure.

The website offers the "Arbitrator, Umpire, and Mediator Search" feature that searches the extensive background data of our Certified Arbitrators who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

Over the 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, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the *ARIAS•U.S. Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, 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 director@arias-us.org or 914-966-3180, ext. 116.

Join us and become an active part of ARIAS•U.S., the leading trade association for the insurance and reinsurance arbitration industry.

Sincerely,

Elaine Caprio Brady
Chairman

Mary Kay Vyskocil
President

ARIAS U.S. Membership Application

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

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

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

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

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/11

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$400	$1,175
FIRST-YEAR DUES AS OF APRIL 1	$267	$783 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$133	$392 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

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

*** As a benefit of membership, you will receive the ARIAS·U.S. Quarterly, published 4 times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $400 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
Dept. CH 16808, Palantine, Il. 60055-6808

Payment by credit card: Fax to 914-966-3264 or mail to ARIAS·U.S., P.O. Box 9001, Mt. Vernon, NY 10552.
Please charge my credit card: (*NOTE: Credit card charges will have 3% added to cover the processing fee.)*

☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

_____

Signature of Individual or Corporate Member Applicant

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration

Treasurer
Peter A. Gentile
7976 Cranes Pointe Way
West Palm Beach, FL. 33412
203-246-6091
pagentile@optonline.net

Executive Director/ Corporate Secretary
William H. Yankus
Senior Vice President
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180 ext. 116
wyankus@cinn.com

Carole Haarmann Acunto
Executive Vice President & CFO
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180 ext. 120
cha@cinn.com