VOLUME 21 NUMBER 4

ARIAS U.S.

QUARTERLY

FOURTH QUARTER 2014

20 Years of Improving Arbitration

HIGHLIGHTS

THE ARIAS U.S.
VOL. 21 NO. 4
FOURTH QTR. 2014

ARIAS•U.S.
7918 Jones Branch Dr., Suite 300,
McLean, VA 22102
Phone: 703-506-3260
Fax: 703-506-3266
info@arias-us.org
www.arias-us.org

The ARIAS•U.S. Quarterly (ISSN 7132-698X) is published Quarterly, 4 times a year by ARIAS•U.S., 131 Alta Avenue, Yonkers, NY 10705. Periodicals postage pending at Yonkers, NY and additional mailing offices.

POSTMASTER: Send address changes to ARIAS•U.S., P.O. Box 9001, Mt. Vernon, NY 10552

Thomas P. Stillman

editor's comments

I was bowled over when the Hilton rose to our 20th anniversary blockbuster celebration to deliver a dinner appropriate to the occasion. While we hit some of the highlights on the ARIAS website and in this edition of the Quarterly, we'll be reporting in depth on the substantive aspects of the meeting in our next edition. Suffice it to say, we can take pride in being members of an organization that has accomplished much in its first 20 years and will surely accomplish more in the 20 years to come. The celebration featured a shout out to the members who made ARIAS what it is today with special thanks to Bill Yankus for his 12 years of leadership as our Executive Director. In response to requests for the text of Jeff Rubin's presentation of the ARIAS AWARD to Bill, we've included it in this edition. The ARIAS website features a slideshow from the event that is well worth a click.

What do e-discovery, waivers of arbitration, and disputes arising out of MGA relationships have in common? Hard to say? Not really. They each give rise to disputes, disputes within the insurance/reinsurance community and disputes that may arise in arbitrations.

Know what else these diverse subjects have in common? The membership of ARIAS has dealt with all or most of them during the course of their careers. So if you're searching for a community of knowledgeable and experienced individuals capable of adjudicating disputes involving these matters and many more, you've come to the right place, ARIAS. Can similar knowledge and experience be found among the American judiciary? No, not hardly.

The articles we feature in this edition of the Quarterly illustrate the diversity of our practice.

Many years ago it was thought a matter involving 25,000 documents was a substantial case. In the age of electronically stored information, we now deal in the realm of terabytes, For those unfamiliar with the term, "terabyte", I won't define it but the entire Library of Congress is said to contain ten of them. While it's not routine (yet) there certainly are reinsurance disputes that involve discovery requests for two or three terabytes of information. **Michele Jacobsen** and **Royce Cohen** lead off with a discussion of whether arbitrators should take a page from the litigation world in dealing with burgeoning e-discovery disputes.

We all know that arbitration is a matter of contract, not an inherent right. Contractual provisions can be waived and arbitration is no different. What is unique to waiver of arbitration is the unique manner in which waiver will be found to have occurred. Equally important is who decides waiver. In an article on the subject, **Tom Newman** explains it all.

MGA arrangements seem to be praised one minute and reviled the next. Is this an inevitable cycle? **Dale Crawford** explains why MGA disputes occur and suggests how they may be avoided.

Last but not least, in a Law Committee report **Elizabeth Kniffen** summarizes the case of *Transatlantic Reinsurance Co. v. Nat'l Indem. Co.*, which addresses the circumstances under which non-signatories to a reinsurance agreement containing an arbitration provision may be compelled to arbitrate.

I hope you'll find the articles in this issue interesting. As always, I end with a statement that the Quarterly welcomes, needs and depends on articles authored by our membership. There are many out there who want to share their knowledge, dreams of being the next Hemingway, or at least Fitzgerald, or just want to sound off. Here's your chance to do so. Just send your piece to me at tomstillman@aol.com.

contents

VOLUME 21 NUMBER 4

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 tomstillman@aol.com .

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

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

Copyright Notice

feature

Taking a Page from Litigation: Curbing Discovery Costs in Arbitration

Michele L. Jacobson
Royce F. Cohen

Michele L. Jacobson

Royce F. Cohen

New York courts are taking a giant leap forward in curbing the costs of discovery by adopting a Rule in New York Supreme Court's Commercial Division designed to lessen the burden of producing privilege logs.

Michele L. Jacobson is a Partner in the Insurance Practice Group of Stroock & Stroock & Lavan LLP. Royce F. Cohen was Special Counsel in Stroock's Insurance Practice Group and co-chair of Stroock's eDiscovery and Information Governance Group. Currently, Ms. Cohen is a partner in the New York office of Tressler LLP.

A common complaint these days is that arbitration is becoming more like litigation. Protracted motion practice surrounding discovery disputes has become the norm in the arbitration arena. Privilege determinations and privilege logs, which can involve thousands of individual entries, have been at the forefront of discovery disputes in both litigation and arbitration.

New York courts are taking a giant leap forward in curbing the costs of discovery by adopting a Rule in New York Supreme Court's Commercial Division designed to lessen the burden of producing privilege logs. Rule 11-b of Section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) ("Rule 11-b"), which goes into effect on September 2, 2014, establishes a preference for "categorical" privilege logs. Rule 11-b is intended to "promote more efficient, cost-effective pretrial disclosure by establishing a 'preference' in the Commercial Division for use of 'categorical designations' rather than document-by-document logging."[1]

A categorical privilege log "has a single entry that corresponds to several documents that relate to some subject matter category or have the same type of information."[2] Accordingly, rather than requiring litigants to prepare a log containing a separate entry for each document withheld from disclosure on a claim of privilege, Rule 11-b suggests that documents may logged by category thus considerably reducing the number of log entries. Significantly, categorical logging does not obviate privilege review, but rather allows documents that would otherwise have to be logged individually to be grouped into categories.

The Rule cements New York's efforts to become a leading venue for the cost-effective, efficient resolution of commercial disputes. Like judges, arbitrators have the broad authority to control the proceedings pending in front of them. Arbitrators should be guided by the courts' efforts to streamline discovery in litigation, and should consider utilizing measures which would equally streamline the arbitral process. Taking a page from litigation will, in this instance, both foster the goals of arbitration and permit arbitration to remain a preferred alternative to litigation.

Why Streamline Discovery Now?

In recent decades, the cost of discovery in the dispute resolution process has been dramatically increased by the creation and use of electronically stored information ("ESI"). Discovery of ESI is likely to be the greatest, largely uncontrolled cost growth area for the foreseeable future. As a result of the volume of ESI, privilege review and the creation of a privilege log can be the most expensive part of the discovery process, if not the entire litigation or arbitration.[3]

Arbitration is intended to be far more expedient and less costly than litigation.[4] The conventional wisdom is that the real cost savings lies in the likelihood that an arbitrator will be less inclined than a judge to entertain extensive discovery and motion practice, both of which frequently drive up the fees and costs of litigation. This has not always been the case. In fact, many practitioners and users of arbitration, alike, have observed that arbitrations often have the same "trappings" as litigations. Chief among their complaints is the extent and cost of discovery in arbitrations. Of course, the sky-rocketing cost of discovery is not a phenomenon of arbitration alone. Courts have become keenly aware of the impact of e-discovery on their litigants, and have proposed rule changes to combat this growing concern. These rule changes have included: (1) cooperation; (2) case management, (3) proportionality[5]; and (4) cost allocation.

Rule 11-b

The Chief Administrative Judge of the New York State Courts has issued a new Rule 11-b of the Uniform Rules of Practice for the Commercial Division (the "Rules") that, effective September 2, 2014, establishes a preference for categorical privilege logs for cases pending in the New York Supreme Court, Commercial Division.[6]

For the first time, the Rules will require attorneys to "meet and confer" at the outset of a case, "and from time to time thereafter," to discuss "the scope of the privilege review" of documents, and the amount of information and categorization of privilege logs, "including the entry of an appropriate non-waiver order." The rule expresses "the preference in the Commercial Division" for the parties "to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." The specifics of the categorical log would have to be worked out at the meet and confer. The parties are urged to agree – at the directed meet and confers – "where possible" to employ a categorical approach to privilege designations.

The producing party shall provide, for each such category, a certification "setting forth with specificity those facts supporting the privileged or protected status of the information included within the category." The certification must also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted.

If, however, the demanding party refuses to agree to a categorical approach, instead demanding that the producing party produce a document-by-document listing in the privilege log, the producing party may seek judicial relief to narrow its obligations. Alternatively, the new Rule provides an additional safeguard for the producing party; it permits the producing party to seek an allocation of costs incurred in preparing the document-by-document log upon a showing of good cause. In addition, if the demanding party insists on a document-by-document log, "absent an order to the contrary," the following will be the protocol with respect to e-mail chains:

> [E]ach uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of a dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients – together with sufficient identifying information about each person (e.g., name of employee, job title, role in the case) to allow for a considered assessment of privilege issues.[7]

Email chains containing multiple emails over days or weeks generally present a challenge for the attorneys responsible for reviewing emails to decide which emails to withhold on the basis of privilege. The most common question that these attorneys have had to address is whether, when logging email chains, each email in the string is considered a separate document and thus should be logged separately or whether the entire email chain should be logged as a single document. Rule 11-b now answers that question by stating that the entire email chain may be logged as a single entry on a privilege log.

Other Judicial Attempts to Limit the Burden of Privilege Logs

The concept of categorical privilege logs is not a novel concept. As early as 1996, in the United States District Court for the Southern District of New York, United States Magistrate Judge Michael H. Dolinger found that courts may permit categorical privilege logs where "(a) document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded."[8] Magistrate Judge Dolinger found support for this proposition in both the Federal Rules of Civil Procedure and the Civil Rules for the United States District Court for the Southern District of New York.[9]

Similarly in 2004, Sedona[10] suggested that parties consider agreeing to use categorical privilege logs at the outset of litigation, while agreeing that challenges to privilege

The most common question that these attorneys have had to address is whether, when logging email chains, each email in the string is considered a separate document and thus should be logged separately or whether the entire email chain should be logged as a single document. Rule 11-b now answers that question by stating that the entire email chain may be logged as a single entry on a privilege log.

claims be settled document-by-document and noting that such an approach would "reduce motion practice regarding log deficiencies and other procedural challenges that are becoming more common given the huge volume of documents at issue."[11] Sedona based this approach on the 1993 rules amendment comment to Federal Rule of Civil Procedure 26(b)(5).[12]

Although other courts have condoned the use of categorical privilege logs, New York may be one of the first to establish it as the preferred method.[13] On December 4, 2012, the Delaware Court of Chancery announced an expansion of its Guidelines for Practitioners, which now states that "[i]t may be possible for parties to agree to log certain types of documents by category instead of on a document-by document basis."[14] Similarly, effective September 3, 2013, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York state:

> Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.[15]

Thus, although Rule 11-b is not innovative in approach, it is unique in its express preference for categorical privilege logs.

Conclusion

Twenty years ago, the legal community understood that the creation of privilege logs was becoming a substantial expense due to the exponential growth in the size of document productions that resulted from the use of computers and similar devices, and emails other forms of electronic communications, all of which generate electronically stored information. As the amount of ESI continues to rise, this expense is only increasing. In many disputes, the cost of producing document-by-document privilege logs outweighs their value, because the logs are not used in any meaningful way by the parties.

The judicial system is addressing this growing concern. The arbitration community should as well. Arbitration should be more efficient and less costly than litigation. After all, that is one of the primary reasons that companies choose arbitration over litigation. In order to remain the preferred manner of dispute resolution, arbitration must retain its core attributes, and not fall behind the judiciary in addressing the exponential costs of e-discovery.▼

1 Mem. of N.Y. Sup. Ct. Commercial Division Advisory Council to All Interested Persons on Proposed Adoption of Rule 22NYCRR §202.70(g) (April 3, 2014).

2 Joseph A. Saltiel & Michael G. Babbitt, *Is There a Better Way to Create Privilege Logs?*, 4 Bloomberg Law Report No. 30 (2010).

3 Gideon Mark, *Federal Discovery Stays*, 45 U. Mich. J.L. Reform 405, 420 (2012) ("Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process.").

4 Robert M. Hall, *How Reinsurance Arbitrations can be Faster, Cheaper and Better (Revisited),* 18 Journal of Reinsurance No. 2 (Spring 2011), *available at* http://www.robertmhall.com/articles/CheaperFaster_Revisited.pdf.

5 Proportionality factors include: (1) the burden or expense of the proposed discovery outweighing its likely benefit, (2) considering the needs of the case, (3) the amount in controversy, (4) the parties' resources, (5) the importance of the issues at stake in the action, and (6) the importance of the discovery in resolving the issues. Fed. R. Civ. P. 26. These proportionality factors are included in the current FRCP 26(b)(2)C)(iii), which allows a court on a motion or *sua sponte* to limit discovery based on the proportionality factors. The proposed FRCP 26(b)(1) limits the scope of allowable discovery based on the proportionality factors in every case, not just at the request of the parties.

6 Currently, parties in New York state court are required to exchange privilege logs pursuant to NYCPLR §3122(b). Rule §3122(b) would co-exist with Rule 11-b. It requires parties who withhold privileged documents to prepare a log containing a separate entry for each document, including pertinent information such as the type, general subject matter, date and such other information that is sufficient to identify the document.

7 22 N.Y.C.R.R. 202.70(g), Rule 11-b.

8 *SEC v. Thrasher*, No. 92 Civ. 6987 (JFK), 1996 WL 125661 (S.D.N.Y. Mar. 20, 1996).

9 Fed. R. Civ. P. 26(b)(5) (party is required to "describe the nature of the documents ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."); S.D.N.Y. Civ. R. 46(e)(2)(ii)(A) (details of document, including author and addressee, should be provided "where appropriate").

10 The Sedona Principles represent a best-practice guideline for eDiscovery that evolved out of the discussions of The Sedona Conference®, a nonpartisan law and policy think tank.

11 *The Sedona Principals: Best Practices Recommendations & Principals for Addressing Electronic Document Production* Comment 3.b. Privilege Logs for Voluminous Electronic Documents (Jan. 2004), *available at* https://thesedonaconference.org/publication/The%20Sedona%20Principles.

12 Fed. R. Civ. P. 26, Advisory Committee Notes 1993 ("Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.").

13 *See, e.g., Teledyne Instruments, Inc. v. Cairns*, 6:12-CV-854-ORL-28, 2013 WL 5781274 (M.D. Fla. Oct. 25, 2013); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 479 (S.D. Cal. 1997); *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 17 (D.D.C. 2008) *aff'd on other grounds*, 329 F. App'x 283 (D.C. Cir. 2009); *U. S. v. Gericare Med. Supply Inc.*, CIV.A.99-0366-CB-L, 2000 WL 33156442 (S.D. Ala. Dec. 11, 2000); *Turner & Biosseau, Chartered v. Nationwide Mut. Ins. Co.*, 95-1258-DES, 1996 WL 129815 (D. Kan. Feb. 29, 1996).

14 Court of Chancery Guidelines for the Collection and Review of Documents in Discovery, *available at* http://courts.state.de.us/chancery/docs/CollectionReviewGuidelines.pdf.

15 S.D.N.Y. Civ. R. 26.2(c).

The judicial system is addressing this growing concern. The arbitration community should as well. Arbitration should be more efficient and less costly than litigation.

new and notices

Birrell and Cerone are Certified Arbitrators

At its meeting on November 14, the Board of Directors approved **Scott P. Birrell** and **James F. Cerone** as ARIAS•U.S. Certified Arbitrators, bringing the total to 205. Their profiles are available on the website; their biographies are on page 32.

Forty-eight Sponsors Supported 20th Anniversary Gala Dinner

The number of sponsors of the 20th Anniversary Gala Reception and Dinner totaled 48. These sponsors, at three sponsorship levels, helped fund the November 13 event. Sponsors' names and logos were on display at the dinner and were featured in conference publications, the website, and the Quarterly. Platinum sponsors, the highest level, each had a table designated and were able to invite other conference attendees and registered guests to join their tables for dinner. Information about the dinner can be found in the 2014 Fall Conference Report on page 18.

Sponsor Logos Brighten Up the ARIAS Website

ARIAS·U.S. is continuing to feature logos of the sponsors of the 20th Anniversary Gala Reception and Dinner which can be accessed from the window on the home page of the ARIAS•U.S. website.

ARIAS Board of Directors Announces New Management Company

The current contract to manage ARIAS•U.S. will expire on December 31, 2014. In the exercise of its duties as fiduciaries of the organization, last fall, the Board authorized the issuance of a Request for Proposals for a new association management contract, to assure the continued success of the ARIAS•U.S. mission as it embarks on the next 20 years. The Board was gratified by the number of proposals received and the interest in ARIAS•U.S. expressed by several qualified firms. Initial screening of proposals was carried out by a sub-committee of the Strategic Planning Committee and the Board then interviewed the leading candidates. As of January 1, 2015, Coulter, a Charter Accredited Association Management Company, will assume the management of ARIAS•U.S. and **Sara Meier**, a Senior Vice-President at Coulter with twenty years of non-profit experience, will serve as the new Executive Director. The Board acknowledges and is grateful for the contributions that CINN has made to the organization's development. It is especially appreciative of the years of service and dedication of **Bill Yankus**, long-standing Executive Director. At the November 13 dinner, all attendees joined the Board in thanking him for his many years of exemplary service on behalf of ARIAS•U.S. by presenting him with the **ARIAS Award** (additional information is in the 2014 Fall Conference Report).

Intensive Workshop Trains Twelve Arbitrators

This year's Intensive Arbitrator Training Workshop took place on September 18 in the New York City offices of Squire Patton Boggs LLP. Presentations by three Education Committee members and three experienced arbitrators provided a comprehensive overview of the arbitrator's role and how to manage it. And arguments by eight attorneys in four hearing rooms gave the twelve students first-hand experience in two mock arbitration sessions, while the six presenters provided guidance and observations, along the way. This intensive training is a requirement of ARIAS•U.S. certification for any candidate with little or no significant experience as an arbitrator.

Orr Certified as ARIAS Umpire

At its meeting on September 10, the Board of Directors approved **Thomas S. Orr** as an ARIAS•U.S. Certified Umpire, bringing the number to 57.

Byrne Certified as ARIAS Arbitrator

Also, at its meeting on September 10, the Board approved **Matthew J. Byrne** as an ARIAS•U.S. Certified Arbitrator, bringing the number to 203. His biography is on page 32.

McComas Approved as ARIAS Qualified Mediator

At that same meeting, **Albert McComas** was approved as an ARIAS•U.S. Qualified Mediator, bringing that number to 36.

As of January 1, 2015, Coulter, a Charter Accredited Association Management Company, will assume the management of ARIAS•U.S. and Sara Meier, a Senior Vice-President at Coulter with twenty years of non-profit experience, will serve as the new Executive Director.

feature

Waiver of Arbitration

Thomas R. Newman

Thomas R. Newman

Arbitration is a contractual process for extrajudicial dispute resolution and both federal and state courts recognize and enforce the "long and strong public policy favoring arbitration" as an alternative to traditional litigation in court.[1] The potential advantages of arbitration include confidentiality, expertise of the decision-maker in the subject of the dispute, and speed and economy, although not all may be attained in every case. As a negotiated term of the parties' contract, however, the right to arbitrate, like all other contractual rights, may be waived or abandoned.

The general principles governing the doctrine of waiver are well settled and, while New York cases are cited herein, these principles are pretty much the same throughout the United States and in federal courts. "Waiver" is "the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it."[2] Mere suspicion of something is not enough. The knowledge required for a waiver of a right is "full knowledge of all the facts upon which the existence of the right depends."[3] The intent to waive must be clearly established. It may not be inferred from a doubtful or equivocal act[4] and "should not be lightly presumed."[5] Waiver can be express or inferred, but mere silence is not sufficient to establish waiver. Where a purported waiver is conditional, and the condition is unfulfilled, there is no waiver.[6]

A party may waive its right to arbitrate by participating in "protracted litigation" regarding the same subject matter that results in demonstrable prejudice to the opposing party. That is the type of waiver considered more fully below. First, however, we note the general principles regarding who decides whether there has been waiver in the context of a challenge to arbitration.

The general principles governing the doctrine of waiver are well settled and, while New York cases are cited herein, these principles are pretty much the same throughout the United States and in federal courts.

Thomas R. Newman is counsel to Duane Morris LLP in its New York office and co-author of Ostrager & Newman, Handbook on Insurance Coverage Disputes (16th ed. 2012). He specializes in insurance and reinsurance coverage, arbitration and litigation, as counsel, expert witness and arbitrator. He is a Fellow of the Chartered Institute of Arbitrators and has participated in numerous Bermuda Form arbitrations in London and Bermuda.

It is well-settled that whether a dispute is arbitrable is generally an issue for the court to decide unless the parties have "evinced a 'clear and unmistakable' agreement to arbitrate arbitrability as part of their alternative dispute resolution choice."[7] *In First Options of Chicago v Kaplan*[8] ("*First Options*"), the Supreme Court of the United States stated, "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter."

When deciding whether the parties agreed to arbitrate the question of arbitrability, the Supreme Court stated that courts generally should apply ordinary state-law principles that govern the formation of contracts, with one "important qualification" – "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[9]

When the question is *who* should decide arbitrability "the law reverses the presumption" that is applied when the question is *whether* a particular dispute is arbitrable. In the latter case, there is a strong presumption in favor of arbitration, and "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[10] Since a party can only be forced to arbitrate those issues it specifically has agreed to submit to arbitration, courts are reluctant to interpret silence or ambiguity on who should decide arbitrability as conferring upon the arbitrators the power to do so.[11]

If it is found that the parties agreed to submit the arbitrability question itself to arbitration, then "the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should

give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances,"[12] such as those set out in section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10.

In *Howsam v. Dean Witter Reynolds, Inc.*,[13] the Supreme Court stated that "the presumption is that the arbitrator should decide "allegation[s] of waiver, delay, or a like defense to arbitrability." "[P]rocedural issues, even if potentially dispositive, are left to the arbitrator while substantive questions about the kind of disputes intended for arbitration are reserved for the court, absent clear and unmistakable evidence to the contrary."[14] Few courts have had occasion to consider the impact of Howsam on the doctrine of waiver of arbitration by conduct, and while some have followed *Howsam* to conclude that litigation conduct waiver issues must be decided by arbitrators, other courts have continued to themselves decide whether there has been a waiver of the right to arbitrate.

For example, the Eight Circuit has held that waiver is presumptively an issue for the arbitrator, and not for the courts, at least where the conduct allegedly constituting waiver is due to litigation in some other court.[15] The First and Fifth Circuits both have held that where the alleged waiver is due to litigation conduct, as opposed to other types of action or inaction, the issue of waiver should be determined by the court rather than an arbitrator.[16]

Although the Second Circuit has not ruled on this specific issue, lower courts in that Circuit have continued to apply Second Circuit precedent preceding *Howsam* to hold that waiver of the right to arbitrate in cases involving litigation conduct is for the court to decide.[17] Thus, in *Ralph Lauren Corp. v. United States Polo Ass'n*,[18] the court noted, "[t]raditionally, courts, not arbitrators, have decided claims of waiver of the right to arbitrate based on participation in protracted litigation. . . . Moreover, there are policy reasons for the court to decide whether a party has waived its right to arbitration through prior litigation—namely, the district court has the inherent power to control its own docket and to prevent abuse in its proceedings, such as forum shopping."

Whether the right to arbitration has been waived "is factually specific and not susceptible to bright line rules."[19] The crucial question is whether, under the circumstances of the particular case, the defaulting party acted "'inconsistently' with the arbitration right."[20] This "requires a finding that the party engaged in litigation to such an extent as to "manifest[ ] a preference clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration' . . . and thereby elected to litigate rather than arbitrate."[21] The party seeking a finding that his opponent has waived a conceded right to arbitration has a "heavy burden"[22] and "[t]he key to a waiver analysis is [a demonstration of] prejudice" to the opposing party.[23]

Where waiver of the right to arbitrate is claimed because a party has engaged in litigation, two types of prejudice may be claimed: substantive prejudice and prejudice due to excessive delay or costs incurred as a result of a party's pursuit of litigation prior to seeking relief in arbitration.

"Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense."[24] Substantive prejudice may also result when the other party has participated in substantial motion practice in an action, or seeks arbitration after engaging in discovery that is unavailable in arbitration.[25]

Mere delay in seeking arbitration will not be found to constitute a waiver of the right to arbitrate unless the opposing party can show that it has been prejudiced by the delay and there is no "bright line" test to determine whether such prejudice exists.[26] "[N]either a particular time frame nor dollar amount automatically results in such a finding — but it is instead determined contextually, by examining the extent of the delay, the degree of litigation that has preceded the invocation of arbitration, the resulting burdens and expenses, and the other surrounding circumstances."[27] Delay prior to the onset of litigation is often necessary to allow the parties to engage in good faith efforts to resolve their dispute and the fact that the parties engaged in preliminary negotiations concerning a settlement is not sufficient to waive arbitration.[28] It also is of moment that the

The crucial question is whether, under the circumstances of the particular case, the defaulting party acted "'inconsistently' with the arbitration right." This "requires a finding that the party engaged in litigation to such an extent as to "manifest[ ] a preference clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration' . . . and thereby elected to litigate rather than arbitrate."

In determining what constitutes "protracted litigation" for a waiver analysis, "the court should consider three factors: (1) the amount of time between the commencement of the action and the request for arbitration; (2) the amount of litigation thus far; and (3) proof of prejudice to the opposing party."

party seeking arbitration did not do so until after the other party filed a lawsuit against it.[29]

In Cusimano v. Schurr,[30] the New York Appellate Division, First Department, reversed a judgment staying arbitration of all claims against the defendant on statute of limitations grounds and stayed the action pending arbitration of non-time-barred claims. The court found, "A delay of one year does not, in itself, amount to protracted litigation. . . . Further, the expense the accountants incurred in responding to plaintiffs' procedural motion and subpoenas does not, by itself, establish waiver. . . . 'pretrial expense and delay, without more, does not constitute prejudice sufficient to support' waiver.'"[31] The court found that while plaintiffs could have sought arbitration sooner, "the fact that they did not file a substantive motion or obtain discovery material that would not have been available in arbitration weighs in favor of allowing arbitration to proceed." When the issue is waiver, 'any doubts concerning whether there has been a waiver are resolved in favor of arbitration.'"[32]

Pretrial expense and delay, without more, does not constitute prejudice. For example, in *Blimpie Int'l, Inc. v. D'Elia*,[33] respondent had engaged in minimal discovery and had not engaged in motion practice prior to seeking arbitration. All discovery was produced by respondent (the party seeking arbitration) and no depositions had been taken. Since the appellants (who sought to stay the arbitration) benefitted from the limited discovery undertaken, the court held they could not claim prejudice; it granted respondent's motion for a stay of the main action pending arbitration of appellant's counterclaims.[34]

"Not every foray into the courthouse effects a waiver of the right to arbitrate."[35] A party does not waive the right to arbitrate "simply by pursuing litigation, but by 'engag[ing] in protracted litigation that results in prejudice to the opposing party."[36] In determining what constitutes "protracted litigation" for a waiver analysis, "the court should consider three factors: (1) the amount of time between the commencement of the action and the request for arbitration; (2) the amount of litigation thus far; and (3) proof of prejudice to the opposing party."

The party opposing arbitration will not be found to have been prejudiced simply because the demand for arbitration was not made until after judicial proceedings were commenced against it. Thus, where defendant asserted its right to arbitrate only two months after plaintiff filed its complaint and there had been no discovery or other significant pre-trial activity, the court found that defendant had not waived its right to arbitrate.[37] However, the proximity of a trial date when arbitration is first sought is relevant.[38]

Where claims that are or have been litigated in court and then are sought to be arbitrated are entirely separate, no waiver of arbitration will be implied from the fact that litigation was commenced in court on other claims; and this is so even though the claims all arise from the same agreement.[39]

Another instance where prior litigation will not result in a finding of waiver is "where urgent need to preserve the status quo requires some immediate action which cannot await the appointment of arbitrators."[40] In such cases, there is neither waiver nor an election of remedies if the plaintiff applies to the court for protective relief to preserve the status quo while simultaneously exercising his contractual right to demand arbitration.

A litigant "may not compel arbitration when its use of the courts is 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration."[41] Waiver is more likely to be found the longer the litigation goes on, the more a party avails itself of the opportunity to litigate and obtain discovery that may not be available in arbitration, and the more that the litigation results in prejudice to the opposing party.

When the parties have engaged in extensive discovery or litigated the merits of a claim, prejudice will be found.[42] Thus, where a party takes advantage of broad discovery devices available in litigation, the prejudice to the opponent stems from the fact that similar discovery would not be available as of right in arbitration. When a pre-trial motion is made that addresses the substantive merits of a claim prior to moving to compel arbitration, prejudice may be found in the opponent having to prematurely reveal its case in responding papers and arguments.[43]

Com-Tech Associates v. Computer Associates International,[44] is one of those "rare cases" in which the defendants' conduct resulted in prejudice to the plaintiffs resulting in a

waiver of the right to compel arbitration. The defendants did not assert the defense of arbitration in their answers, extensively deposed the plaintiffs and waited until shortly before the scheduled completion of discovery, only four months before the scheduled trial date, to first raise the issue of arbitration in an omnibus motion for judgment on the pleadings and partial summary judgment, thereby forcing plaintiffs to litigate arbitrable issues. The court found these "maneuvers put plaintiffs to considerable additional expense" and that to permit a party to "delay assertion of a contractual right to compel arbitration until the eve of trial defeats one of the reasons behind the federal policy favoring arbitration: that disputes be resolved without 'the delay and expense of litigation.'"[45]

Kramer v. Hammond[46] is another case where the court found prejudice and a waiver of arbitration. Hammond entered into an agreement with a number of California inventors to license a medical device. The agreement contained a broad arbitration clause. Kramer was the attorney for the California inventors. The parties agreed that Hammond would have the option to license the invention, provided he raised the necessary capitalization. When Hammond was unable to do so, his option expired. The parties signed a new subscription agreement which reduced Hammond's responsibilities and ownership rights in the corporation. He found this objectionable and sued.

Hammond filed suit in March of 1986 in South Carolina alleging "a conspiracy and an agreement to fool, cheat and manipulate" him in order to "greatly dilute and/or take away" his rights in the corporation. Kramer unsuccessfully moved to dismiss the action as against him for lack of personal jurisdiction. He appealed to the South Carolina Supreme Court, which affirmed the decision He then moved to stay the action pending his petition in the United States Supreme Court for a writ of certiorari. When a stay was denied in July of 1990, Kramer filed an answer in which, for the first time, he raised the arbitration clause as an affirmative defense.

Meanwhile, Hammond had commenced an identical suit in New York, apparently to protect his rights in the event the South Carolina court determined that it lacked personal jurisdiction over Kramer. Kramer noticed Hammond's deposition and a few days later answered the complaint, asserting six affirmative defenses, but not the arbitration clause. He also advanced four counterclaims and, shortly thereafter, moved for summary judgment.

The Second Circuit reversed the district court's judgment granting Kramer's motion to compel arbitration noting that "over four years passed between the time that Hammond first brought suit and Kramer at last raised the arbitration clause as a bar. . . . [and,] before invoking the arbitration clause, Kramer had litigated issues to the highest state courts of New York and South Carolina, and had petitioned the United States Supreme Court for a writ of certiorari. By engaging in such aggressive, protracted litigation for over a four-year period, Kramer waived his contractual right to arbitration. To allow him to invoke arbitration at this late date would severely prejudice Hammond, who has expended a great deal of time and money in contesting Kramer's motions and appeals. It would also undercut the very rationale — speed and efficiency — that supports the strong presumption in favor of arbitration in the first place."[47]

Although the party who commences an action may generally be assumed to have waived any right it may have had to submit the issues to arbitration, this assumption does not apply to a defendant. Nevertheless, "a defendant's right to compel arbitration does not remain absolute regardless of the degree of his participation in the action."[48] A defendant may also be found to have waived his right to arbitration.

However, assuming he acts promptly, "so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver."[49] Thus, entering a stipulation to extend the time to answer is a purely defensive action not inconsistent with a later attempt to force arbitration.[50] And merely answering on the merits and even asserting a counterclaim or cross-claim, without more, will not necessarily constitute a waiver.[51] On the other hand, contesting the merits, as by a motion to dismiss or for summary judgment, is an acceptance of the judicial forum and waives any right the defendant may have had to seek a stay of the action in favor of arbitration.[52] As noted above, the strong public policy in favor of arbitration

However, assuming he acts promptly, "so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver." Thus, entering a stipulation to extend the time to answer is a purely defensive action not inconsistent with a later attempt to force arbitration.

On the other hand, contesting the merits, as by a motion to dismiss or for summary judgment, is an acceptance of the judicial forum and waives any right the defendant may have had to seek a stay of the action in favor of arbitration. As noted above, the strong public policy in favor of arbitration means that "any doubts concerning whether there has been a waiver are resolved in favor of arbitration."

means that "any doubts concerning whether there has been a waiver are resolved in favor of arbitration."[53]▼

ENDNOTES

1 *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49, 689 N.E.2d 884, 889, 666 N.Y.S.2d 990, 995 (1997); *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995).

2 *City of New York v. State,* 40 N.Y.2d 659, 669, 389 N.Y.S.2d 332, 340 (1976). 1 Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 2.06[a] (16th ed. 2012).

3 *S. & E. Motor Hire Corp. v. New York Indem. Co.*, 255 N.Y. 69, 72, 174 N.E. 65, 74-75 (1930); *Amrep Corp. v. Am. Home Assur. Co.*, 81 A.D.2d 325, 440 N.Y.S.2d, 244, 247 (1st Dep't 1981).

4 *Horne v. Radiological Health Servs., P.C.*, 83 Misc.2d 446, 371 N.Y.S.2d 948, 961 (Suffolk Co. 1975), aff'd, 51 A.D.2d 544, 379 N.Y.S.2d 374 (2d Dep't 1976).

5 *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 968, 520 N.E.2d 512, 514, 525 N.Y.S.2d 793, 795 (1988).

6 *Thompson v. Postal Life Ins. Co.,* 226 N.Y. 363, 123 N.E. 750 (1919).

7 *Matter of Smith Barney Shearson v Sacharow*, 91 N.Y.2d 39, 45, 689 N.E.2d 884, 887, 666 N.Y.S.2d 990,993 (1997).

8 514 U.S. 938, 943-945 (1995).

9 *Id*. at 944.

10 *Id*. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); *Security Life Ins. Co. of Am. v. Southwest Reinsure, Inc.*,. 2013 U.S. Dist. LEXIS 17786 at *13 (D. Minn. 2013); *North River Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 2002 U.S. Dist. LEXIS 10637 at *23 (ND Tex. 2002).

11 514 U.S. at 945.

12 *Id*. at 943.

13 537 U.S. 79, 85 (2002); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

14 *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 11 (1st Cir. 2005).

15 *National Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *see also Bellevue Drug Co. v. Advance PCS*, 333 F. Supp. 2d 318, 324 (E.D. Pa. 2004) (relying on *Howsam* for the proposition that "it appears that . . . the issue of whether the defendant, by litigating in this Court the present case, has waived the right to demand arbitration should properly be presented in the first instance to the arbitrator").

16 *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 11 (1st Cir. 2005); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of America*, 97 Fed. Appx. 462, 464 (5th Cir. 2004); *see also Am Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-52 (Ky. 2008) *Howsam* did not actually reach the question of litigation-conduct waiver. Rather Howsam focused upon whether a party waived its arbitration rights by not complying with a contractual time limitation for asserting arbitration.

17 See cases collected in *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 610 F. Supp. 2d 226, 231 (EDNY 2009). "Waiver operates as "an equitable defense" and is appropriately decided by the Court." *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438, 454-56 (2d Cir. 1995).

18 2014 U.S. Dist. LEXIS 123968 *12 (SDNY 2014).

19 *Thyssen, Inc. v. Calypso Shipping Corp.*, S.A., 310 F.3d 102, 105 (2d Cir. 2002).

20 *Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535, 537 (7th Cir. 1980).

21 *Matter of Cusimano v Berita Realty, LLC,* 103 A.D.3d 720, 721, 959 N.Y.S.2d 711, 712 (2d Dept 2013).

22 *Security Life Ins. Co. of Am. v. Southwest Reinsure, Inc.*,. 2013 U.S. Dist. LEXIS 17786 at *19 (D. Minn. 2013); *Sweater Bee by Banff v Manhattan Indus.*, 754 F.2d 457, 466 (2d Cir. 1985); *Morrie Mages & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir. 1990).

23 *Id. See also Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 925 (3d Cir. 1992); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2d Cir. 1985).

24 Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d at 105; *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991).

25 *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991); *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25-26 (2d Cir. 1995).

26 *Id*.

27 *Kramer v. Hammond*, 943 F.2d at 179.

28 *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 641 (7th Cir. 1981).

29 *Id*.

30 2014 N.Y. App. Div. LEXIS 5602 at*11 (1st Dept Aug. 7, 2014).

31 *Id*. at *15.

32 *Id*. at *16; Leadertex, 67 F.3d at 25.

33 277 A.D.2d 69, 70, 716 N.Y.S.2d 384 (1st Dept 2000).

34 277 A.D.2d at 70, 716 N.Y.S.2d at 385.

35 *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 475 N.E.2d 772, 776, 486 N.Y.S.2d 159, 163 (1985); *Argonaut Ins. Co. v. Reinsurance Corp. of N.Y.*, 1994 U.S. Dist. LEXIS 6020 (ND Ill. 1994).

36 *Cusimano v. Schurr*, __ A.D.3d __, __N.Y.S.2d __, 2014 N.Y. App. Div. LEXIS 5602 at *11 (1st Dept Aug. 7, 2014); *Kramer v. Hammond, supra*, 943 F.2d at 179.

37 *Argonaut Ins. Co. v. Reinsurance Corp.*, 1994 U.S. Dist. LEXIS 6020 at *8 (ND Ill. 1994); *Morrie & Shirlee Mages Found. v. Thrifty Corp.*, 916 F.2d 402, 405 (7th Cir. 1990)

38 *Leadertex*, 67 F.3d at 25; *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1576-77 (2d Cir. 1991).

39 *Sherrill v. Grayco Builders, Inc., supra*, 64 N.Y.2d at 273, 475 N.E.2d at 776, 486 N.Y.S.2d at 163; *Denihan v Denihan*, 34 N.Y.2d 307, 310, 313 N.E.2d 759, 357 N.Y.S.2d 454 (1974).

40 *Sherrill v. Grayco Builders, Inc., supra*. *See also Zachariou v Manios*, 68 A.D.3d 539, 540, 891 N.Y.S.2d 54, 56 (1st Dept 2009); *Preiss/Breismeister Architects v Westin Hotel Co.-Plaza Hotel Div.*, 56 N.Y.2d 787, 789, 452 N.Y.S.2d 397 (1982).

41 *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67, 845 NYS2d 217 (2007).

42 *Windward Agency v. Cologne Life Reinsurance Co.*, 1997 U.S. Dist. LEXIS 4154 at *14 (ED Pa. 1997).

43 *Id*.

44 938 F.2d 1574, 1576 (2d Cir. 1991).

45 *Id; see also Flores v Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 372, 828 N.E.2d 593, 795 N.Y.S.2d 491 (2005).

46 943 F.2d 176, 179 (2d Cir. 1991).

47 *Id*.

48 *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 405, 321 N.E.2d 770, 772, 362 N.Y.S.2d 843, 846 (1974).

49 *Id*.

50 *Id*.

51 *Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777, 783 (3d Cir. 1975).

52 *Id*.

53 *Leadertex*, 67 F.3d at 25.

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 here, 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

Klaus Kunze has relocated to 919 Riverview Place, Cincinnati, OH 45202, phone 513-381-1687, cell 917-224-3970, email kkunze08@gmail.com.

David L. Fox's new address for all purposes is 150 West End Avenue, Apt 29D, New York, NY 10023, email davidlfox@gmail.com.

After 24 years at the same location, **Mound Cotton Wollan & Greengrass** has moved to bigger, better, and state-of-the-art offices located at One New York Plaza, 44th Floor, New York, NY 10004. Phone numbers and email addresses remain the same.

J. Russell Stedman's new address is: Hinshaw & Culbertson LLP, One California Street, 18th Floor, San Francisco, CA 94111-1826, phone 415-743-3705, fax 415-834-9070, email rstedman@mail.hinshawlaw.com.

Williams Lopatto has moved to 1707 L St., N.W. Suite 550, Washington, DC 20036. Phone and email remain the same.

David V. Axene's full address is Axene Health Partners, LLC, 38975 Sky Canyon Drive, Suite 204, Murrieta, CA 92563, phone 951-294-0841, email david.axene@axenehp.com. Be sure to catch the Suite number as "204."

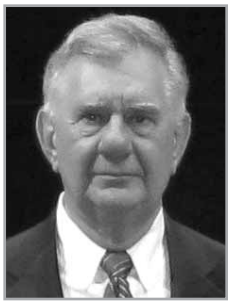
James J. Powers is no longer in Mahwah. But, you can find him at 412 Ridgely Court, Pompton Plains, NY 07444.

Katherine Billingham has joined Scottish Re, a life and annuity reinsurance company in Charlotte, as Assistant Vice President and Associate Counsel. She works with the General Counsel in the management of the legal disputes, supervision of arbitrations, litigation and mediation, contract matters, regulatory compliance and corporate governance. She continues to provide services as Umpire and Arbitrator to the reinsurance industry, both property/casualty and life reinsurance. Contact information remains the same.▼

feature

Managing General Agency Disputes: Why They Recur And Some Thoughts For Prevention

Dale Crawford



Dale Crawford

For the potential arbitrator or consulting expert, the phone call always goes in one of two distinct directions. The caller identifies him/herself as an attorney, and the conversation quickly turns to the business at hand:

> I represent Honesty Insurance Company. Three years ago, my client entered into an agreement with Reliable Managing General Agency to write business on our behalf. We have found that Reliable violated the agency agreement in multiple ways, failed to disclose required information, and may have fraudulently withheld funds owed my client. We have filed for arbitration under the terms of the contract for damages and premium funds owed.
>
> —or—
>
> I represent Reliable Managing General Agency. Two years ago, my client agreed to represent Honesty Insurance Company to produce business. We have carefully followed every term of the contract, made all records available to Honesty, and remitted all premiums as required. Now Honesty cancelled the contract, failed to pay earned commissions and profit sharing, and has filed suit.

The dispute resolution process then follows, and may result in a lengthy and expensive conflict for both sides. While litigation is not uncommon in the insurance industry, these disputes are not over benefits from an insurance policy, but are rather conflicts between two business partners that involve a frequency and repetition of the same issues - violation of contract terms, lack of disclosure, and misapplication of funds. Anyone who has been in the business for a significant time has seen the identical scenario repeated over many years. Why is it not infrequent for the term MGA to be inherently associated with instances of downright corruption or fraud and why do these battles continue to develop among experienced industry executives on both sides?[1]

Why is it not infrequent for the term MGA to be inherently associated with instances of downright corruption or fraud and why do these battles continue to develop among experienced industry executives on both sides?

First, a caveat is necessary that cannot be overemphasized. There is a wide and successful industry of MGA's that have been in operation for many years, and enjoy lucrative symbiotic relationships with specialty carriers operating in this environment. The business is usually written through insurers with rate and coverage flexibility. These MGA's are an important and vital part of the property-casualty industry; they are creative, innovative professionals who utilize specialized skills to locate and work with insurers to fill gaps left by the standard carriers.

In contrast to the stable, long-term affiliations with specialty carriers are those MGA relationships that are the typical breeding grounds for disputes. Several characteristics are common in these circumstances:

1. A contract that applies only to program business. Instead of broad, across-the-board surplus lines business of general liability, property, and auto, these contracts will have narrow restrictions - typically, some singular line of business. It may be some form of professional liability, contractors of a certain type, or some narrow industry. The focus is a relatively small group of homogenous exposures.
2. A lack of operating history of the program. These are usually new ventures, perhaps with a producer who has access to the prospective group and expectations to expand on what may be a small base of accounts anticipated to grow considerably with an insurance program tailored to the coverage objectives of the members.

Dale Crawford is former insurance and reinsurance executive who provides services an an arbitrator, umpire, and expert witness in complex insurance and reinsurance disputes.

3. A producer - either retail or MGA - that has relatively little or no experience in managing a program. The owners of the MGA may have some experience with the business, but had been operating without underwriting authority; the business has been previously written in the traditional system of submission and individual acceptance by the insurers.

4. The insurance company joining with the MGA has no previous history with the type of business to be written. A personal experience comes to mind involving a large retail jewelry chain that owned an insurance subsidiary whose sole purpose was to provide insurance for merchandise sold and financed. This was low limit, first party coverage that the stores required borrowers to carry during the term of finance. A new MGA convinced the insurer to write commercial umbrella liability through a complex web including a reinsurance broker and reinsurer that would, supposedly, fully protect the insurer from ultimate loss. The results were predictably disastrous. The reinsurers denied coverage and attempted to rescind. This leap from property coverage on financed jewelry to commercial umbrella through MGA's was not all that unusual. For added measure, this took place during a highly competitive era in the industry when competition was brutal, such that rock-bottom terms and pricing were necessary to write business.

Anyone involved in the excess and surplus lines or reinsurance industries has seen these MGA scenarios play out at least since the 1970's. Yet attorneys, arbitrators and consulting experts still see these types of MGA arrangements. Since the same issues continue as the core of these disputes, there have to be reasons why these continue, almost always following a very similar pattern. Thirty years of observations within the industry and an additional dozen in dispute resolution provide a viewpoint into the rationality and business dynamics that create these situations.

First, from the standpoint of the MGA, these are entrepreneurs out to create a market niche for themselves and build a successful business. Properly managed and if successful, they can be quite rewarding through commission income, contingent bonuses based on underwriting results, and building a business with a substantial value. For an insurer, it can be a potentially attractive enterprise as well – a chance to expand into new lines or classes of business and increase profits. Why then do so many go so wrong?

The answers are frequently found in the essential nature of the enterprise itself. For the insurer, this is most often an introduction into a new class of business in which it lacks an experience base. Instead of a building its own internal institutional knowledge, this is delegated outside the organization to the MGA. Thus the insurer does not have and is not acquiring the overall comprehension and subtleties of the business; instead it relies on the MGA while remaining responsible for the results. If properly analyzed, what would induce an insurer to enter into such an arrangement? The answer appears to be opportunity-an insurance executive envisions the opportunity to enter a new line of business and increase volume with projections of significant profits. The real attraction is that this can be done with virtually no effort or upfront cost to the insurer. The expansion can be accomplished without adding personnel, office space, and processing facilities; the insurer only has to take the premium and the MGA performs all the functions, often also processing claims. This attractiveness and ease of entry tends to mask the real danger in transferring underwriting authority outside the building. The prospective insurer is often provided an additional sweetener where the MGA obtains reinsurance to protect the insurer from loss. This can be structured as total protection, where all underwriting risk is reinsured, or the issuing carrier retains only a small participation. In the former, the insurer then becomes only a front and receives a fee of a certain percentage of premiums; in the latter, risk is significantly minimized.

When these ventures borne of mutual optimism begin to lose luster, it typically results from claims activity. Losses occur that exceed the anticipated levels. Based on the severity and circumstances, the insurer may simply terminate the contract and walk away. Often, however, the problems may escalate dramatically. If there is reinsurance, that protection may prove illusory. In some cases, the reinsurance never existed because the MGA simply did not obtain the protection. In others, the reinsurer denied

First, from the standpoint of the MGA, these are entrepreneurs out to create a market niche for themselves and build a successful business. Properly managed and if successful, they can be quite rewarding through commission income, contingent bonuses based on underwriting results, and building a business with a substantial value. For an insurer, it can be a potentially attractive enterprise as well – a chance to expand into new lines or classes of business and increase profits. Why then do so many go so wrong?

liability based on fraud or misrepresentation or it may have become insolvent. Then the insurer finds not only are the losses more than projected, but also that the protection it relied upon does not exist. Typically once problems have been identified, the insurer will conduct an underwriting and financial audit. Based on the results, arbitration or a lawsuit may soon follow.

When the dispute escalates to outside resolution, the issues are typically complex and focus on numerous discrete issues such as violation of the MGA's authority including underwriting classifications and pricing; failure to report and disclose; and often include misappropriation of funds. An arbitration panel or jury must sort through these and decide whether the MGA committed the alleged improprieties or whether it was nothing more than underwriting results worse than anticipated; in other words, simply a business deal gone badly. Based on numerous observations over the years, there seems to be an element of truth both ways. In some instances, the MGA was downright fraudulent, with egregious violations of underwriting authority and absconding with premiums. Other instances were more benign, and appear to be little or nothing more than poor underwriting experience. In the latter instance, instead of acknowledging an unsuccessful - albeit costly - business relationship, the executive or management team responsible for the MGA venture may be under pressure to place the blame elsewhere; thus the desire to "make the MGA pay" for its transgressions and recover the underwriting losses.

Since these scenarios have been repeating for at least 40 years, what is the realistic likelihood that insurers will adopt the necessary vigilance to refrain from granting underwriting authority for classes of business in which they have no experience or that MGA's will universally act with total adherence to all contractual requirements? The answer might unfortunately be no different than the high tech or housing bubbles preventing future financial calamities. Perhaps the most fundamental reason why these scenarios will continue is the inherent foundation for conflict of interest where the MGA is charged with providing the vigilance necessary for successful underwriting while being compensated by commission based on the volume of business written.

It bears mention here that this inherent conflict of interest has been addressed by the National Association of Insurance Commissioners in its adoption of the NAIC Model No. 225, known as the Managing General Agents' Act, which sets restrictions on the powers that may be granted to MGA's. Each state has adopted this in some form.[2] The extent to which this Act will reduce or eliminate these disputes remains to be seen.

Just as with traditional, long-standing MGA arrangements of writing multiple lines and classes with experienced partners on both sides, there can be legitimate opportunities in new ventures. How can there be potentially successful prospects for both sides, while protecting the insurer and creating a successful business for the MGA? Here are a few basic tenets:

Above all else, understand the business. If an insurer has no internal expertise in a certain class or line of business, consider long and hard before making an entry by delegating underwriting authority to an outside entity. If a decision is made to go forward, examine and evaluate the business just as if it were part of the internal underwriting function.

Audit, audit, audit. Both parties benefit by the insurer visiting frequently to review files and financial records. Underwriting audits should include all submissions to show exactly how the contract provisions are being applied. The applications that are declined can provide valuable insight into the operating practices and compliance with contract provisions. At the same time, have an open and continuous dialogue between the MGA management and the responsible executives at the insurer.

Document, document, document. The importance of documentation cannot be exaggerated. First, the MGA agreement should be a comprehensive road map for all aspects of the operation and should be followed. Additionally, any exceptions or side agreements should be immediately written and communicated to the other side and internally within both organizations. Any discussions resulting from visits should likewise be memorialized. In the event of a dispute, it is to the advantage of both sides to have a complete paper trail of all agreements.

Insurance is a microcosm of the increasingly complex global venture of finance, and there will continue to be opportunities for creative entrepreneurs who identify needs, design solutions, and establish long-lasting effective partnerships. These observations are intended to aid those who will have the opportunities and desire to participate.▼

1 The term Managing General Underwriter is often used synonymously with Managing General Agency. The two will be used together here and referenced as MGA.
2 For a complete text of the Act, go to www.naic.org.

Insurance is a microcosm of the increasingly complex global venture of finance, and there will continue to be opportunities for creative entrepreneurs who identify needs, design solutions, and establish long-lasting effective partnerships.

ARIAS·U.S.

20 Years of Improving Arbitration

ANNIVERSARY GALA DINNER

ARIAS•U.S. thanks our platinum, gold, and silver sponsors for supporting the Gala Dinner on November 13.

Platinum Sponsors

ACE Group
Budd Larner, P.C.
Butler Rubin Saltarelli & Boyd LLP
Cahill Gordon & Reindel LLP
Chadbourne & Parke LLP
Chaffetz Lindsey LLP
Choate, Hall & Stewart LLP
Clyde & Co LLP
Crowell & Moring LLP
Foley & Lardner LLP
FTI Consulting, Inc.
Hinshaw & Culbertson LLP
Locke Lord LLP
Mound Cotton Wollan & Greengrass
Schiff Hardin LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Squire Patton Boggs (US) LLP
Steptoe & Johnson LLP
Stroock & Stroock & Lavan LLP
Thomson Reuters
Richard L. White
Winter Reporting
Wollmuth Maher & Deutsch LLP

Gold Sponsors

Day Pitney LLP
Debevoise & Plimpton LLP
Edwards Wildman Palmer LLP
Morris, Manning & Martin LLP
Saul Ewing LLP
Daniel E. Schmidt IV
White and Williams LLP

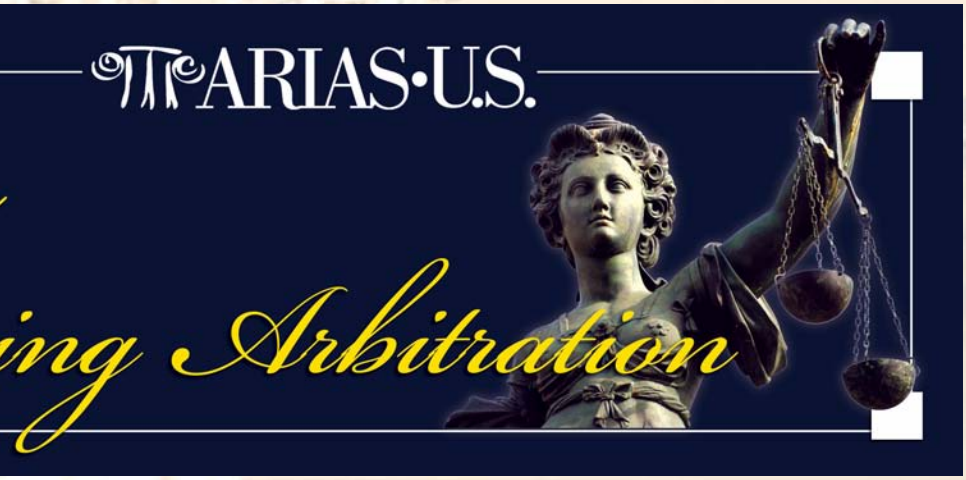
20 Years of Improv

Over 400 Turn Out to

The 2014 Fall Conference and Annual Meeting drew 406 paid attendees to the New York Hilton Midtown Hotel on November 13 and 14. Entitled "**The Arbitrators Speak: Insight and Perspective from the Arbitrators, Themselves**," the conference focused extensively on the view of arbitration as arbitrators see it.

The conference presented experienced arbitrators' views on how to conduct a traditional reinsurance organizational meeting, discovery, and briefing; how to conduct an evidentiary hearing involving life reinsurance issues; how to conduct an arbitration involving health reinsurance issues; and how to conduct an insurance arbitration involving direct insurance with cross border issues.

It addressed best practices from the arbitrators' perspective, explaining what works and what does not work. Participants participated in breakout sessions on life reinsurance and



Hear Arbitrators Speak

ethics in which they were able to ask questions and express their views.

The conference opened with a keynote address from Ambassador **Frank G. Wisner**, who has served as Under Secretary of Defense, Under Secretary of State, ambassador to four countries, currently as a Director of AIG Property Casualty, Inc., and International Affairs Advisor to Squire Patton Boggs LLP. His deeply insightful comments were widely praised among attendees.

In the opening panel discussion, moderated by **Lawrence S. Greengrass**, four experienced arbitrators, **Jonathan F. Bank**, **Mary Ellen Burns**, **Susan S. Claflin**, and **John D. Cole**, discussed specific approaches for making the organizational meeting, discovery, and briefing as efficient and productive as possible. They candidly shared which approaches to these parts of the arbitration process are effective and which are not.

Chairman Rubin opened the conference.

John Nonna introduced the keynote speaker.

The second Thursday morning panel, moderated by **David M. Raim**, focused on life reinsurance, a developing segment for arbitration. Experienced arbitrators from this segment, **Paul E. Dassenko**, **Caleb L. Fowler**, **Denis W. Loring**, and **Diane M. Nergaard**, gave their opinions on best practices and common pitfalls for counsel in conducting the evidentiary hearing of a life reinsurance arbitration. The scenario of a fictional case was also discussed in preparation for afternoon breakouts.

Before breaking for lunch, **Mark S. Gurevitz** highlighted a number of themes and issues that are presented by the New ARIAS•U.S. Code of Conduct that would be addressed in the ethics breakout sessions that afternoon.

Following the life reinsurance and ethics breakouts, the second-ever ARIAS•U.S. speed dating sessions took place in six separate rooms. Arbitrators, prospective arbitrators, and others who market their services to companies and law firms engaged in timed pitches (eight minutes after which a whistle signaled time to move on) intended to give them experience in promoting themselves in short interactions. As happened in Key Biscayne, those involved found the experience useful for training and, in many cases, specifically useful in establishing connections that would not have happened, otherwise.

Closing out the afternoon, at the **2014 Annual Membership Meeting**, outgoing Chairman **Jeffrey M. Rubin** summarized the accomplishments of the past year, principally completion of the ARIAS•U.S. Neutral Panel Rules and the Streamlined Rules for Small Claim Disputes. He thanked the Board for its contributions toward bringing these projects to fruition. President **Eric S. Kobrick** presented Mr. Rubin with the Meritorious Service Award. In addition, Mr. Rubin presented the Outstanding Service Award to **Christina Claudio**, who is retiring as Assistant to the Executive Director after eight years. Members then elected one new Board member, **Brian Snover**,

Ambassador Frank G. Wisner

and re-elected three, **Ann L. Field**, **Elizabeth A. Mullins**, and **John M. Nonna**. Election details are in a following report.

Also, at the Annual Meeting, the ARIAS•U.S. financial results for the last fiscal year (ended June 30, 2014) were presented by Treasurer **Peter A. Gentile**. He pointed out that lower attendance at the Spring Conference, lower than expected dues income, and unexpected higher Fall Conference costs had reduced net return. For the year, there was a net gain of $20,193, instead of a budgeted net contribution to the reserve of $111,575. The slides from this presentation are available in the Members Area of the website, accessed through the Membership menu.

Of course, the unique event of this conference was the 20th Anniversary Gala Reception and Dinner. This celebration, which took place on Thursday evening, attracted 450 ARIAS•U.S. members and guests.

GENERAL SESSIONS

Moderator Lawrence S. Greengrass along with Arbitrators (l-r) Mary Ellen Burns, John Cole, Jonathan Bank, and Susan Claflin

During the five-course dinner, a timeline of the past 20 years was presented by **Daniel L. FitzMaurice**, including marking of key milestones, photos of past events, and graphs of trends over the years. **Ann L. Field** followed with presentation of a montage of scenes and graphics from the past, accompanied by music, which then silently repeated on screens during the dinner. Later, messages from CINN Chairman **Steve Acunto** and ARIAS•U.S. founding Chairman **T. Richard Kennedy** were read by Mr. Kennedy's son, **Stephen M. Kennedy**. Attending other founders were introduced and applauded, and all past and current Board members were recognized. Then, **Daniel E. Schmidt IV** looked back at those who had major influences on the development of ARIAS who had passed on.

Moderator David Raim along with Arbitrators (l-r) Diane Nergaard, Denis Loring, Caleb Fowler, and Paul Dassenko

The climax of the three-days of events came in the final dinner speech, when **Jeffrey Rubin** awarded the ARIAS Award (see insert on page 29) to retiring 12-year Executive Director **Bill Yankus**, who received two standing ovations.

During the dinner, a quartet made up of students from the Juilliard School of Music in New York City filled the room with classic jazz. Overall, it was a nostalgic and joyous event.

On Friday morning, **Jeffrey M. Rubin** and **Scott P. Birrell**, leaders of the Arbitration Task

AROUND THE BREAKOUTS

Mark Gurevitz - Preparing for Ethics

Force, provided an overview of the new ARIAS•U.S. Neutral Panel Rules and the new Streamlined Rules. These will be presented in full review at the 2015 Spring Conference.

In the most spirited panel of the conference, **Eric S. Kobrick**, Chair of the Ethics Discussion Committee, moderated a panel of four veteran arbitrators and umpires, **Mark S. Gurevitz**, **Martin D. Haber**, **David Thirkill**, and **Richard G. Waterman**, in a discussion of the new Code of Conduct. A number of dissenting opinions were heard, especially with regard to the rules being considered requirements, rather than guidelines.

AROUND THE SPEED TRACK

Bob Lewin and Joe Schiavone – Preparing the Racers

Chip Healy signals time to shift


ROBERT LEWIN
New York Hilton

ANNUAL MEETING

Mary Kay Vyskocil Nominates

Eric Kobrick counts votes

Retiring Chairman Rubin receives award

Retiring Christina Claudio receives award

Peter Gentile presents Treasurer's report

GALA RECEPTION AND DINNER

GALA RECEPTION AND DINNER

Dinner Moderator Mary Kay Vyskocil

Dan FitzMaurice lays out timeline.

Ann Field presents visuals from the past (available on the website).

Betty Mullins presents each Founding Board member.

Peter R. Chaffetz moderated a panel that discussed key recurring procedural and legal issues in the arbitration of direct coverage disputes under the IBA Rules on Taking of Evidence in International Arbitration. Participating were **Jonathan Sacher, Klaus H. Kunze, William** (**Rusty**) **Park** (a professor at Boston University), **Jonathan Rosen**, and **Daniel E. Schmidt IV**. The conversation highlighted the differences between a cross-border insurance coverage arbitration and a domestic reinsurance arbitration.

The final panel session of the conference, moderated by **Jennifer Devery**, discussed the ways that a reinsurance arbitration that focuses on health issues differs from issues that arise in other contexts. Panel members **Bruce A. Carlson**, **Susan E. Mack**, and **Thomas M. Zurek** also keyed in on arbitrators' perspectives about processes that make health reinsurance arbitrations efficient, as well as methods to put on an effective case involving health covers.

As cold winds began to blow on the last day, members began looking forward to the **2015 Spring Conference at The Breakers on May 6-8**.▼

Steve Kennedy extends his father's wishes.

Eric Kobrick presents all current and former Board members.

Dan Schmidt IV recalls significant people who have passed on.

Jeff Rubin presents the ARIAS Award to Bill Yankus.

THE ARIAS AWARD *presented by Jeff Rubin*

The ARIAS Award is given, at the discretion of the Board, to an individual who, through his or her own conduct and initiative, has epitomized the objectives of ARIAS•U.S. It is the highest honor the Board can bestow on an individual.

The recipient of the ARIAS Award tonight has worked selflessly and tirelessly on behalf of the Association. While doing so, he has exhibited the highest standards of professionalism, competency, dedication and integrity. His very presence has come to be associated with ARIAS and all that it stands for and has been a source of inspiration to those who have had the good fortune of working with him. There is no question that ARIAS would not be all that it is today without his efforts.

On a personal level, I am a better executive as a result of all that I have learned from working closely with him over the past seven years.

It is my privilege and honor to present the ARIAS Award to Bill Yankus.

***Inscription**: In recognition of your towering contributions to ARIAS•U.S. as its long-standing Executive Director. Through your unwavering dedication and steadfast leadership, you have played an unparalleled role in enabling ARIAS•U.S. to become the leading trade association for the insurance and reinsurance arbitration industry.*

Eric Kobrick and Elizabeth Mullins Chosen as ARIAS•U.S. Chairman and President for 2015

Eric S. Kobrick

Elizabeth A. Mullins

James I. Rubin

Ann L. Field

Brian Snover

Eric S. Kobrick, Vice President, Deputy General Counsel & General Counsel, Claims, Reinsurance, Operations and Technology at American International Group, Inc. (AIG), was elected Chairman of ARIAS•U.S. at its 2014 Fall Conference in New York City. He succeeds **Jeffrey M. Rubin**, Senior Vice President, Director Global Claims at Odyssey Reinsurance Company, who has retired from the Board. **Elizabeth A. Mullins**, Managing Director and head of Global Dispute Resolution & Litigation at Swiss Re America Holding Corporation (Swiss Re), was elected President succeeding Mr. Kobrick.

Also at the conference, **James I. Rubin**, head of the reinsurance litigation and arbitration practice at Butler Rubin Saltarelli & Boyd LLP, and **Ann L. Field**, Vice President in Zurich Insurance Group's Reinsurance Department, were elected Vice Presidents.

In addition, at its Annual Meeting held during the conference, ARIAS•U.S. members re-elected three Board members and elected one new member. Ms. Field, Ms. Mullins, and **John Nonna** of Squire Patton Boggs (US) LLP were elected to second, three-year terms. **Brian Snover**, Senior Vice President and General Counsel at Berkshire Hathaway's Reinsurance Division, was elected to a first term, succeeding Mr. Rubin as a reinsurance representative.

At AIG, in addition to a wide variety of other responsibilities, Mr. Kobrick oversees reinsurance dispute resolution (litigation, arbitration and insolvency proceedings), as well as reinsurance contract wording, regulatory, and transactional issues. He is an ARIAS•U.S. Certified Arbitrator, served on the ARIAS•U.S. Long Range Planning Committee, and was Chairman of the ARIAS•U.S. Ethics Discussion Committee. He also serves on the Finance and Executive Committees.

Mr. Kobrick received a B.A. in Government from Cornell University and a J.D. from Columbia Law School. Prior to joining AIG, he clerked for Judge Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York, and he was an associate at Simpson Thacher & Bartlett LLP in New York City.

At Swiss Re, Ms. Mullins leads a team of lawyers with global responsibility for advising on and managing a wide range of disputed matters and investigations including certain insurance and reinsurance disputes. She is Chairman of the ARIAS•U.S. Certification Committee, Co-Chair of the Strategic Planning Committee, and serves on the Finance and Executive Committees.

Ms. Mullins received both her B.A. and J.D. degrees from New York University and is a member of the Bar of the State of New York. Prior to joining Swiss Re, she was a litigation partner with Stroock & Stroock & Lavan LLP in New York City.▼

Law Committee Case Summaries

Since March of 2006, in a section of the ARIAS•U.S. website entitled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration and reinsurance-related issues. Individual members are also invited to submit summaries of cases, legislation, statutes or regulations for potential publication by the committee.

As of December 2014, there were 97 published case summaries and five regulation summaries on the website. A comprehensive listing of relevant state statutes is also provided. The committee encourages members to review the existing summaries and to routinely peruse that section for new additions.

Provided below is one case summary taken from the Law Committee Reports.

Transatlantic Reinsurance Co. v. Nat'l Indem. Co. No. 14 C 1535, 2014 WL 2862280 (N.D. Ill. filed June 24, 2014)

Court: United States District Court, N.D. Illinois, Eastern Division

Dates Decided: June 24, 2014

Issues Decided: Under what circumstances may non-signatories to a reinsurance agreement containing an agreement to arbitrate be compelled to arbitrate?

Submitted by Elizabeth V. Kniffen

In *Transatlantic Reinsurance Co. v. National Indemnity Co.*, the United States District Court for the Northern District of Illinois denied Transatlantic Reinsurance Company's ("TRC") motion to compel National Indemnity Company ("NICO") to join in an ongoing arbitration between Continental Insurance Company ("Continental") and TRC.

Continental entered into a blanket casualty excess of loss reinsurance agreement with TRC, under which TRC indemnified Continental with respect to net excess liability accrued by Continental in a variety of classes of general and specialty casualty insurance business, effective January 1, 1985 (the "Reinsurance Agreement"). The Reinsurance Agreement between Continental and TRC contained an arbitration agreement providing that "if any dispute shall arise between the COMPANY [Continental] and the REINSURERS [TRC] with reference to the interpretation of this AGREEMENT or their rights with respect to any transaction involved," the dispute would be submitted to arbitration.

In 2010, Continental purchased reinsurance from NICO for asbestos and environmental risks pursuant to a Loss Portfolio Transfer agreement ("LPT Agreement") with NICO. Continental also entered into an Administrative Services Agreement ("ASA Agreement") with NICO, providing for the administration of "Third Party Reinsurance Agreements" whereby NICO acts as Continental's agent and is responsible for collecting reinsurance proceeds on behalf of Continental and pursuing reinsurance recoveries on behalf of and in the name of Continental.

After TRC stopped making payments to Continental in 2012, Continental commenced arbitration against TRC in March 2013. TRC first demanded that NICO join the arbitration as a Petitioner and later filed suit seeking to compel NICO to arbitrate in the Continental-TRC arbitration.

The court held that a party may not be compelled to arbitrate a dispute absent an agreement to do so. Citing 417 F.3d 682, 687 (7th Cir. 2005), the court held that the Seventh Circuit recognized five doctrines through which a non-signatory can be bound by an arbitration agreement entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference.

The court rejected each of TRC's arguments that NICO should be compelled to arbitrate. First, the court held that the arbitration clause in the Reinsurance Agreement included narrow language specifying that the dispute must "arise between the COMPANY and the REINSURERS" and therefore could not be construed broadly to include disputes with non-signatories. Second, the court rejected TRC's argument that by entering into the Loss Portfolio Transfer, NICO assumed the Reinsurance Agreement. To be bound under the theory of assumption, the non-signatory must "manifest a clear intent to arbitrate the dispute." The court found that NICO entered into a separate transaction with Continental and did not assume the obligation to arbitrate under the Reinsurance Agreement. Third, the court held that the Reinsurance Agreement had not been incorporated by reference into the LPT Agreements. The court reasoned that the language in the LPT and ASA Agreements was not sufficiently explicit and specific to incorporate by reference the arbitration provision of the Reinsurance Agreement. Finally, the court held that because NICO's benefit under the LPT and ASA Agreements only indirectly related to the Reinsurance Agreement, NICO could not be estopped from refusing to arbitrate under the theory of estoppel.

in focus

Recently Certified Arbitrators


Scott P. Birrell


Matthew Byrne


James F. Cerone

Scott P. Birrell

Scott Birrell is Vice President and Associate General Counsel for The Travelers Companies, Inc. As head of the Travelers Reinsurance Legal Group, Mr. Birrell has oversight of all ceded and assumed reinsurance litigation and arbitration for the Company as well as certain oversight responsibilities relative to commutation, regulatory, wording and transactional issues. Prior to joining Travelers, he was in private practice, specializing in the litigation and trial of general commercial and insurance-related matters.

From 2001 through 2007, Mr. Birrell was certified as an Arbitrator and Fact Finder by the Connecticut Judicial Branch and, in that capacity, conducted mediations, arbitrations, and evidentiary hearings on a pro-bono basis. He currently serves as a member of the ARIAS•U.S. Arbitrator and Umpire Certification Committee and as Co-Chair of the ARIAS Arbitration Task Force. In addition to certification through ARIAS•U.S., Mr. Birrell is certified as an arbitrator with The Association of Insurance & Reinsurance Run-Off Companies (AIRROC).

Mr. Birrell received his undergraduate degree from the University of Colorado and his Juris Doctorate, *cum laude*, from the New England School of Law in Boston, Massachusetts, and is an adjunct faculty member of the University of Connecticut School of Law.

Matthew Byrne

Matthew Byrne is Vice President, Unit Manager and Claims Counsel at XL Reinsurance America Inc. He has over 20 years of experience in reinsurance claims across all property and casualty line of business.

At XL Re America, Mr. Byrne acts as claims counsel to the full claims group on large, complex, and disputed claims. He also manages the group's legacy business primarily involving asbestos and pollution claims. In addition, he leads a team that reports to and makes recommendations to senior management on commutations.

Prior to joining XL in 2005, Mr. Byrne practiced law as a Partner in a law firm, where he specialized in reinsurance arbitration and litigation.

Mr. Byrne is a member of the New York State Bar and is admitted to practice in the Federal Courts of the Southern and Eastern Districts of New York. He is also Authorized House Counsel in the State of Connecticut. In addition, he has received the designation of Registered Professional Liability Underwriter.

Mr. Byrne received his Bachelor's Degree in Business Administration from the State University of New York at Albany and his J.D. from Brooklyn Law School.

James F. Cerone

James Cerone earned a BS in Business from Villanova University and an MBA from the University of Chicago, Graduate School of Business. His experience in all lines of property casualty insurance began over 50 years ago and continues. His concentration is in the area of claims. He has worked nearly equally in the claim departments of insurers and for consulting firms providing services to regulators, insurers, self-insurers, brokers, governmental entities, and to buyers and sellers of insurers.

Mr. Cerone has gone through all the chairs of a claim department from adjuster to serving as senior claim officer at four insurers including service as Executive VP at The Travelers. As a claim consultant, he served as Vice President with Tillinghast; Kramer Capital Consultants; and, Equity Principal with Milliman and Robertson where he founded the claims consulting practice.

Since 1997, Mr. Cerone has served as an arbitrator and umpire in property casualty matters. He also served as a Special Master in the Federal Courts at Atlanta. He has been retained by both policyholders and insurance companies as a claim adjusting expert in 32 litigations and hearings at the state and Federal levels across the country. He formed his own consulting practice in 1998 in Chicago. He relocated to NYC in 2012.

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

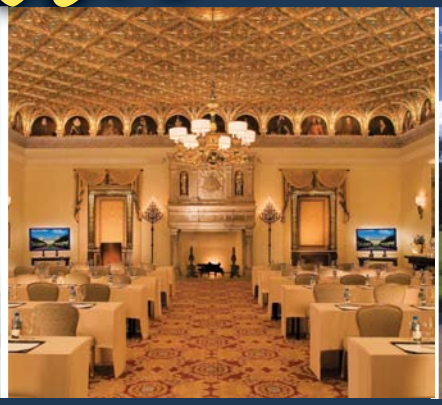
THE BREAKERS

PALM BEACH, FLORIDA

www.thebreakers.com

Back to the Breakers!




ARIAS•US intersperses Spring Conference visits to other venues to avoid having The Breakers become too routine, but the record of good experiences there compels us to return. Block out the dates of May 6-8, 2015 to avoid planning anything else. Many members have said we should always have ARIAS•U.S. Spring Conferences at The Breakers, but a change of scenery helps us to keep our Breakers experiences fresh. Plan to be there for our 2015 return!

Save *the* Date...

May 6-8, 2015

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 November 2014, ARIAS•U.S. was comprised of 286 individual members and 105 corporate memberships, totaling 798 individual members and designated corporate representatives, of which 205 are certified as arbitrators, 57 are certified as umpires, and 36 are qualified as mediators.

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 *Selecting an Umpire* 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. The search results list is linked to their profiles, containing details about their work experience and current contact information.

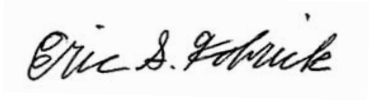
Over the years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, Key Biscayne, and Bermuda. The Society has brought 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*, *The ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, and *the ARIAS•U.S. Code of Conduct*. These online 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.

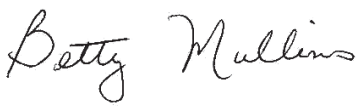
If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Sara Meier, Executive Director, at director@arias-us.org or 703-506-3260.

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

Sincerely,



Eric S. Kobrick
Chairman



Elizabeth A. Mullins
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
7918 JONES BRANCH DR., SUITE 300
McLEAN, VA 22102

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.

703-506-3260

Fax: 703-506-3266

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 10/1/14

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$450	$1,500
FIRST-YEAR DUES AS OF APRIL 1	$300	$1,000 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$150	$500 (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 four 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 $425 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:

By First Class mail: ARIAS·U.S., 6599 Solutions Center, Chicago, IL 60677-6005

By Overnight mail: ARIAS·U.S., Lockbox #776599, 350 E. Devon Ave., Ithaca, IL 60143

Payment by credit card: Fax to 703-506-3266 or mail to ARIAS·U.S., 7918 Jones Branch Dr., Suite 300, McLean, VA 22102.

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 *ARIAS•U.S. Code of Conduct* and the By-Laws of ARIAS•U.S. and agree to abide and be bound by the *ARIAS•U.S. Code of Conduct* and the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org under the About ARIAS menu. The *Code of Conduct* is available under the Resources menu.

_____

Signature of Individual or Corporate Member Applicant

ARIAS U.S. Board of Directors

Chairman
Eric S. Kobrick
American International Group, Inc.
80 Pine Street, 35th Floor
New York, NY 10005
212-458-8270
eric.kobrick@aig.com

President
Elizabeth A. Mullins
Swiss Re America Holding Corporation
175 King Street
Armonk, NY 10504
914-828-8760
elizabeth_mullins@swissre.com

Vice President
Ann L. Field
Zurich Insurance Group
1400 American Lane
Schaumburg, IL 60196
847-605-3372
ann.field@zurichna.com

Vice President
James I. Rubin
Butler Rubin Saltarelli & Boyd LLP
Three First National Plaza
70 West Madison Street
Chicago, IL 60602
312-696-4443
jrubin@butlerrubin.com

Michael A. Frantz
Munich Re America
555 College Road East
Princeton, NJ 08543
609-243-4443
mfrantz@munichreamerica.com

Deirdre G. Johnson
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, D.C. 20004
djohnson@crowell.com

Mark T. Megaw
ACE Group Holdings
436 Walnut Street
Philadelphia, PA 19106
215-640-4020
mark.megaw@acegroup.com

John M. Nonna
Squire Patton Boggs (US) LLP
1185 Avenue of the Americas
New York, NY 10036
Phone: 646-557-5172
john.nonna@squirepb.com

Brian Snover
Berkshire Hathaway Group
100 First Stamford Place
Stamford, CT 06902
Phone: 203-363-5200
bsnover@berkre.com

Chairman Emeritus
T. Richard Kennedy

Directors Emeriti
Charles M. Foss
Mark S. Gurevitz
Charles W. Havens III
Ronald A. Jacks*
Susan E. Mack
Robert M. Mangino
Edmond F. Rondepierre*
Daniel E. Schmidt, IV

**deceased*

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

(**After January 1, 2015**)
Executive Director/Corporate Secretary
Sara Meier
ARIAS•U.S.
7918 Jones Branch Dr., Suite 300
McLean, VA 22102
Phone: 703-506-3260
Fax: 703-506-3266
smeier@wearecoulter.com