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The Perfect Front - Securing the Ceding Insurer

INSIDE...

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Thomas P. Stillman

editor's comments

Happy Anniversary! To us! Starting with the 2014 Spring Conference, we commence the celebration of the twentieth anniversary of the founding of ARIAS•U.S.

With 20 years of having provided a fair and neutral forum for the resolution of disputes, ARIAS•U.S. has much to celebrate. What makes ARIAS•U.S. attractive is a knowledgeable group of arbitrators with a solid commitment to ethical standards. How to maintain this commitment, how to burnish our crown jewel, if you will, is something that can never be too far from our minds. In a thought-provoking article, Richard Waterman argues that ethics are best maintained by a focus on general precepts and intensive training, rather than on specific rules dealing with specific situations. The *Quarterly* welcomes opinions from other members on this subject, either in the form of a full article or as a "letter to the editor."

In previous issues of the *Quarterly* (most recently in the Second Quarter of 2013 and Fourth Quarter of 2012) we've published articles addressing the power of arbitrators to require pre-hearing security. But why shouldn't the parties eliminate wrangling over security and get directly to the crux of their dispute? One setting in which the question of security arises is fronting. In this issue of the *Quarterly*, Larry Ruzzo suggests addressing security in fronting agreements before disputes arise and offers practical tips for drafting those agreements.

In a Law Committee report illustrating one of the major differences between arbitration and litigation, Rob Kole summarizes the recent case of *Eagle Star Insurance Co. v. Arrowood Indemnity Co.*, where the court ruled that confidential arbitration information filed under seal as part of a petition to confirm an award should be unsealed because of the presumption of public access to judicial proceedings.

Finally, with this issue, the editorship of the *ARIAS•U.S. Quarterly* transitions from the late Gene Wollan to me. Gene was a true gentleman, admired by all for his proverbial wit, grace, and charm, all of which he possessed in abundance. An expert dialectician and grammarian, Gene took pride in ascending to his pulpit in the *Quarterly* to offer a learned discourse on such topics as his literary Ten Commandments and the misuse of words such as further/farther and fewer/less. To follow in his footsteps would be a tall order, which I won't even pretend to fill. In the words of a cigarette commercial way back from the days of Mad Men: "What do you want, good grammar or good taste?" I offer neither but I can promise that I'll try my best to maintain the *Quarterly* in a manner that would make Gene proud — only less grammatical.

With that out of the way, allow me to introduce myself. I began my career in the industry before I knew better at seven years old, serving as an envelope stuffer, stamp licker, and general factotum in my family's insurance business in Brooklyn. From there I was promoted to positions of increasing responsibility until I left to become a messenger boy for a broker on Nassau Street in Manhattan, delivering and picking up important documents at insurance companies, most of which have ceased to exist. My first position with an insurer was as an underwriting trainee, where I came to specialize in loss-making business. Luckily I departed to attend law school before my loss ratio became known. It was as a lawyer that I first became involved with CNA, for which I eventually went to work. Back then, CNA was a conglomerate owning such unrelated businesses as a home builder, a consumer finance lender, a mutual fund, and one of the country's first cable TV networks. My law firm successfully represented CNA in a dispute with dissident directors of the network, who surreptitiously acquired the company's debt, attempted to foreclose on it, and, for icing on the cake, walked away with all of its technology. Afterwards, CNA offered me a job and there I stayed for nearly a quarter of a century,

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Editorial Policy

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

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

Manuscripts should be submitted as email attachments to 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.

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editor's comments

continued from inside front cover

finally leaving corporate life to enter into the wonderful world of arbitration full time. Like Gene, I have many strong opinions, but other than a passing interest in distinguishing "different from" from "different than," I have few grammatical passions. Now, when it comes to finding my next meal, well that's a different story but not one to dwell on here.

The *Quarterly* is not the product of the Editor or even the Editorial Board. The publication is what you, the membership of ARIAS•U.S., make it. That pretty well telegraphs what's coming next: a plea for articles. We invite each of you to submit an article, which you, yourself, would find valuable, interesting, and worthwhile to read. We're going to aim for submissions that will run 3 to 5 pages in the *Quarterly*. Each printed page equals two typed double-space ones. So let the floodgates open and the articles flow forth. The place to send articles, comments, or anything else of value: tomstillman@aol.com.▼

feature

A Perfect Front — Securing the Ceding Insurer

Loreto J. Ruzzo, Esq.

When an admitted company agrees to issue policies with the intent to cede 100% of the risk to a non-admitted entity, regulators have a legitimate interest in evaluating the fronting arrangement's impact on the issuing company's solvency.

Loreto J. Ruzzo, Esq.

Overview

Historically, regulators have taken a jaundiced view of admitted insurance companies fronting for an unlicensed reinsurer. When an admitted company agrees to issue policies with the intent to cede 100% of the risk to a non-admitted entity, regulators have a legitimate interest in evaluating the fronting arrangement's impact on the issuing company's solvency.[i] This article describes methods of securing the reinsurer's obligation to indemnify the issuing carrier against losses on the fronted policies, thereby ameliorating some of the concerns over fronting. Creating self-help remedies for the issuing company also changes the dynamic of current arbitration practices in resolving disputes among admitted and non-admitted insurers.

Background

Fronting provides a method of originating policies in a jurisdiction in which the ultimate risk bearer is unable to provide policies that meet the requirements of its insureds. For example, an offshore captive wishing to assume the risks of its owner or a risk retention group ("RRG") intending to assume the risks of its members may not have the requisite ratings to issue policies that satisfy entities doing business with those insureds. In such instances the captive or RRG can contract with an admitted company of sufficient financial strength to issue policies on the condition that all risk of loss will be transferred to the non-admitted entity.

From the issuing company's perspective, fronting offers an opportunity to earn revenue in the form of ceding commissions (and claims handling or other fees) without risk of underwriting loss. Credit risk, however, remains a principal concern of the issuing company whenever it undertakes to front for a non-admitted reinsurer.

Total elimination of risk may prove elusive. When the ultimate risk bearer becomes insolvent or otherwise fails to indemnify the issuing company for ceded losses, the issuing company remains liable to its direct policyholders while being unable to claim credit for reinsurance as an asset on its balance sheet. To avoid the prospect of suffering a reduction in policyholder surplus, the issuing company must obtain security to support the reinsurer's obligation to indemnify it on fronted policies.

Security for Losses

Using New York law as a model, issuing companies may take advantage of several methods to protect their balance sheets against risk of non-payment by the non-admitted reinsurer. The most common of these are:

- Requiring the reinsurer to post collateral in the form of a Regulation 114 Trust; or
- Requiring the reinsurer to supply a clean, irrevocable letter of credit from an acceptable bank.

Either of these devices must allow the issuing company to draw immediately (and without unnecessary conditions) any indemnity payments owed but unpaid by the reinsurer. The amount of security should equal outstanding loss reserves established by the ceding company on covered policies, including any incurred but not reported ("IBNR") losses where the issuing company is required to post such reserves on its balance sheet.

A third tool to protect the issuing carrier exists whenever the reinsurer seeks to retrocede a portion of its assumed losses to a retrocessionaire. In these instances, the issuing company must secure beforehand the right to approve or reject the proposed retrocessionaire. The ceding company may also condition its approval on securing a cut-through endorsement in the retrocession

Loreto J. ("Larry") Ruzzo is a New York-licensed attorney and the principal in an independent consulting practice. He offers ADR services for all lines of commercial property & casualty insurance and reinsurance.

agreement that will enable the ceding company to proceed directly against the retrocessionaire in the event the non-admitted reinsurer becomes insolvent.

Drafting Agreements

The rights and responsibilities of parties to a fronting arrangement should be embodied in a program or "umbrella" agreement that clearly specifies the roles to be played by the issuing company and the ultimate risk bearer.[ii] At a minimum, the umbrella agreement should specify:

- The type of policies to be issued, including scope and limits of coverage, required exclusions, etc.;
- Eligibility and premium rating criteria for insureds, as well as identification of the party that may exercise underwriting authority;
- Claims handling authority, with requirements to notify the reinsurer of case reserves or settlements that exceed a threshold established by the reinsurer;
- Compensation paid to the issuing company, whether in the form of ceding commission, underwriting or claims handling fees; and
- The parameters of an acceptable 100% quota share reinsurance treaty, including the security devices demanded by the issuing company and an arbitration clause broad enough to encompass any disputes arising under or related to the program agreement.

Thus, while an umbrella agreement may give the issuing company rights against the ultimate risk bearer that are broader than the traditional cedent / reinsurer relationship, it should maintain arbitration as the exclusive form of dispute resolution.[iii]

The required security devices may be embodied in the program agreement or drafted into the reinsurance treaty itself. If made part of the reinsurance contract, a standard "Unauthorized Reinsurer" clause may be used to model the ultimate risk bearer's obligations.

One such clause[iv] might read:

> *The Ceding Company shall forward to the Reinsurer no less frequently than once per calendar year a Statement reflecting the reserves set up on its books in respect of policies coming within the scope of this Treaty, including, where required, reserves for losses incurred but not reported. The Reinsurer agrees to fund such reserves within thirty (30) days by delivering to the Ceding Company a clean, irrevocable and unconditional Letter of Credit issued by a bank and containing provisions acceptable to the insurance regulatory authorities having jurisdiction over the Ceding Company in an amount equal to the reserves reflected on the Ceding Company's Statement.*

The better practice would be to have the reinsurer establish a Regulation 114 Trust before the issuance of any fronted policies. Regulation 114[v] requires, inter alia:

> *(a) The agreement must be in the form of a trust agreement made and entered into among the beneficiary, the grantor and a bank...*
>
> *(b) The trust agreement must create a trust account into which assets shall be deposited.*
>
> *(c) All assets in the trust account must be held by the trustee...*
>
> *(d) The trust agreement must be clean and unconditional, in that:*
>
> *(1) the trust agreement must stipulate that the beneficiary shall have the right to withdraw assets from the trust account at any time, without notice to the grantor, subject only to written notice from the beneficiary to the trustee;*
>
> *(2) no other statement or document need be presented in order to withdraw assets, except the beneficiary may be required to acknowledge receipt of withdrawn assets;*
>
> *(3) the trust agreement must indicate that it is not subject to any conditions or qualifications outside of the trust agreement....*

Thus, while an umbrella agreement may give the issuing company rights against the ultimate risk bearer that are broader than the traditional cedent / reinsurer relationship, it should maintain arbitration as the exclusive form of dispute resolution.

Thus, unlike the situation in which a reinsurer denies payment on claims and requires the cedent to arbitrate its recovery of indemnity, disputes under secured fronting arrangements would rarely, if ever, begin with a request for pre-answer security. As practitioners in reinsurance arbitration know too well, requests for pre-answer security often divert arbitrations into civil litigation and defeat the principal reason parties chose arbitration in the first instance.

(e) The trust agreement must be established for the sole use and benefit of the [cedin company]...[vi]

Where a Regulation 114 Trust is created, the reinsurance treaty should provide that any premium ceded to the Reinsurer (net of ceding commissions):

> *...shall first be deposited into the Trust established pursuant to New York State Insurance Regulation 114 by the Reinsurer with XYZ Bank as Trustee and Ceding Company as Beneficiary until the corpus of the Trust shall equal the reserves set up on the books of the Ceding Company in respect of policies coming within the scope of this Treaty, including, where required, reserves for losses incurred but not reported. If, and to the extent that, premiums collected in respect of policies coming within the scope of this Treaty exceed the reserves set up on the books of the Ceding Company in respect of the policies, such premiums (net of ceding commission) shall be paid to the Reinsurer, provided however that the Reinsurer shall be required to maintain the corpus of the Trust equal to the amount of the outstanding reserves on the policies.*

Similarly, the Treaty should also provide that indemnity payments owed to the Ceding Company may, immediately upon becoming due, be withdrawn from the corpus of the Trust, provided that the Reinsurer remains obligated to increase the corpus of the Trust to the level of reserves set forth in the periodic Statement of the Ceding Company.

Restrictions on retroceding any portion of the losses assumed by the reinsurer should be embodied in the program agreement to ensure that the issuing company retains the right of prior approval for any retrocessionaire selected by the reinsurer, as well as the option to require that the retrocession agreement contain an appropriate cut-through endorsement. Although not enforceable in every jurisdiction in which the initial reinsurer might be regulated, the presence of a cut-through endorsement could serve to place the fronting insurer on the same footing as other policyholders of the insolvent reinsurer and ahead of its general creditors.[vii]

A typical cut-through endorsement for the retrocession agreement might read:

> *In the event the Reinsurer is declared insolvent and is unable to pay any Loss under the Reinsurance Treaty entered with Ceding Company, Retrocessionaire will become liable to the Ceding Company for its portion of such loss, and will make payment directly to the Ceding Company, subject to the terms, limits and conditions contained in the Reinsurance Treaty. The Retrocessionaire shall be subrogated to all rights of the Ceding Company against the Reinsurer to the extent of such payment.*
> *The Ceding Company will have a direct right of action against the Retrocessionaire for amounts payable under the Reinsurance Treaty.*

Implications for Arbitration

As should be obvious, the various security devices described above are designed to ensure that the issuing / ceding company encounters minimal or no delay in recovering indemnity payments owed on claims paid pursuant to fronted policies. In the case of the Regulation 114 Trust, indemnity for losses and ALAE may be withdrawn at the instigation of the ceding company as soon as it pays losses or defense costs on underlying claims. Under the Letter of Credit method, the ceding company must generally make a demand and await a default in the reinsurer's payment of indemnity before proceeding to draw on the LOC bank. In neither instance does payment depend on an affirmative act of the reinsurer to transfer funds to the ceding company.

Thus, unlike the situation in which a reinsurer denies payment on claims and requires the cedent to arbitrate its recovery of indemnity, disputes under secured fronting arrangements would rarely, if ever, begin with a request for pre-answer security. As practitioners in reinsurance arbitration know too well, requests for pre-answer security often divert arbitrations into civil litigation and defeat the principal reason parties chose arbitration in the first instance.

Disputes under secured fronting arrangements will more likely be initiated by the reinsurer to recover funds it alleges were improperly drawn under the LOC or

withdrawn from the Regulation 114 Trust. However, because the reinsurer typically secures for itself greater control of claims handling and settlements through the program agreement, the likelihood of disputes over improper drawing of security is greatly diminished. An exhaustive review of published cases has yet to reveal a single instance in which a reinsurer's claim of improper withdrawal of security by the fronting / ceding insurer has escaped the ADR process and brought the parties to court.[viii]

Conclusion

Secured fronting arrangements offer benefits to both the issuing / ceding company and the non-admitted reinsurer. Cedents may secure multiple streams of revenue, while minimizing the likelihood of suffering an unreimbursed underwriting loss. The non-admitted reinsurer stands to collect underwriting profit on an appropriately priced book of assumed business, albeit with somewhat higher administrative costs than if the reinsurer had issued the fronted policies directly. Both parties benefit from the speed and convenience of arbitration as a dispute resolution mechanism, with a greatly reduced likelihood that their proceedings will become bogged down in litigation over pre-answer security.

Notes

i Fronting has also been challenged as an improper attempt to evade statutes prohibiting the unauthorized practice of insurance. See, *e.g.*, New York Insurance Law Section 2117 (McKinney's Supp. 2014). This article does not address the appropriateness of fronting generally, because it is based on situations in which the non-admitted reinsurer may lawfully issue direct policies but chooses not to do so.

ii In drafting the agreements, the ceding company's attorneys should also be aware of New York Insurance Law Section 1308(e)(1)(A), which requires a domestic non-life insurer to submit to the Superintendent for prior approval any agreement in which the insurer cedes reinsurance premiums in excess of half "of the unearned premiums on the net amount of its insurance in force..." Fortunately, the Office of General Counsel has taken an expansive view of Section 1308(e)(1)(A) by stating that prior approval is only necessary for agreements that cede more than half of the unearned premium for the totality of the domestic insurer's policies in force across all lines written by the domestic carrier. See, *e.g.*, OGC Op. No. 10-3-02 (March 5, 2010). In any event, delegation of the issuing / ceding company's statutory authority must comply with state laws on licensing of managing general agents, claims adjusters, *etc.*

iii It behooves the parties to draft the arbitration clause broadly enough to encompass not only the interpretation of the reinsurance treaty, but also all disputes concerning the formation of the fronting arrangement itself, as well as the meaning and effect of all collateral agreements. *See ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24 (2d Cir. 2002) and cases cited therein on the scope of claims deemed arbitrable under appropriately worded broad arbitration clauses. *Gerling Global Reinsurance Co v. ACE Property & Casualty Insurance Co.*, 42 F. Appx. 522 (2d Cir. 2002) (In the absence of all-encompassing language required to create a broad arbitration clause, dispute seeking rescission of facultative reinsurance certificates for alleged fraudulent inducement to contract not required to be arbitrated).

iv This clause is offered for illustrative purposes and is not intended to be comprehensive. In an actual treaty, security may be required to encompass indemnity for the ceding company's obligations to pay allocated loss adjustment expenses ("ALAE") and / or maintain unearned premium reserves as well.

v 11 NYCRR Part 126 (2014)

vi Additional requirements address the receipt and valuation of securities placed in the trust, the trustee's obligation to notify the parties upon occurrence of certain events, and the terms under which the trust may be terminated.

vii The potential difficulties in successfully battling an insolvent reinsurer's estate for proceeds under a retrocession agreement are beyond the scope of this article. *But see, generally*, L. Schiffer, "Cut-Through Provisions in Reinsurance Agreements," IRMI.com (March 2001) and L. Schiffer, "Playing the Name Game – An Update on Cut-Through Clauses," IRMI.com (August 2009).

viii Indeed, perhaps the only reported cases of litigation over a cedent 's drawdown of an LOC involve LOCs that were ordered by the arbitration panel after the arbitration incepted. *Global Reinsurance Corp. v. Sompo Japan Insurance, Inc.*, 2005 U.S. Dist. LEXIS 37969 (S.D.N.Y 2005); *Meadows Indemnity Co., Ltd. v. Arkwright Mutual Insurance Co.*, 1996 U.S. Dist. LEXIS 14318 (E.D. Pa. 1996). In such instances, the panel reserved to itself the authority to permit the cedent to draw under the LOC.

Secured fronting arrangements offer benefits to both the issuing / ceding company and the non-admitted reinsurer. Cedents may secure multiple streams of revenue, while minimizing the likelihood of suffering an unreimbursed underwriting loss. The non-admitted reinsurer stands to collect underwriting profit on an appropriately priced book of assumed business, albeit with somewhat higher administrative costs than if the reinsurer had issued the fronted policies directly.

new and notices

20th Anniversary Committee Announces Gala Dinner

If you were at the 2014 Spring Conference, you witnessed the opening round of this year's commemoration of the founding of ARIAS•U.S. in 1994. **Charles M. Foss**, one of the founders, took attendees back to the earliest days of the Society, showing reproductions of the minutes from the first Board meeting and the first *Quarterly*, and describing the sentiments and desires of the founders that resulted in the original objectives and organizational structure.

The commemoration will reach its climax on November 13 with a Gala Dinner on the first night of the 2014 Fall Conference at the New York Hilton Midtown. There will be a short reception followed by a full dinner. The 20th Anniversary Committee encourages all ARIAS members to mark their calendars now and plan to be a part of this celebration. They strongly urge that ARIAS•U.S. members not host or attend competing dinners on the night of the Gala and instead to join with the Society in marking the occasion.

In an effort to keep the cost of the dinner from being an added burden on attendees, ARIAS•U.S. is offering companies, law firms, arbitrators, and third party vendors who serve the arbitration community the opportunity to sponsor the event. There are three different sponsorship levels: a Silver sponsorship is offered at $1,000, Gold at $2,500, and Platinum at $5,000, with various benefits for each level. The announcement, posted on the website provides details and the form for sponsors to commit.

The committee is asking prospective sponsors to reply as soon as possible, so that advance planning can proceed. Anyone interested in joining as a sponsor of the Anniversary Gala Celebration is asked to please complete the posted sponsorship form and return it by email to Christina at Claudio@cinn.com before July 15.

First Webinar Notable Success; Second Coming on June 17

If you missed the first webinar and would like to catch up on what you missed about "**Underwriting Reinsurance Risks – Ceding Company and Reinsurer Perspectives**," you can go through the appropriate yellow button on the ARIAS•U.S. website home page, sign up for an account (no cost) and have access to the OnDemand version of the webinar. There is no cost and you receive no credit, but the session received rave reviews from those who attended, so it may be worth an hour and a half of your time to gain the knowledge that was offered up by **Bill O'Farrell** and **Mike Toman**, with moderation by **Marc Abrams**.

If you are looking to attend the second webinar, you will have to hurry. Registration will be open right up until June 17. It is entitled "**Using and Understanding Actuaries**." For a complete description of this event and of the Webinar Program, go to the Webinar Program calendar page. If you are already up to speed on the program and just would like to register for June 17, go to the yellow button on the ARIAS•U.S. website home page.

International Committee Posts Worldwide Insurance Events Calendar

A new service for ARIAS members is now up and running on the ARIAS website. The International Committee has created a calendar of insurance and reinsurance events that are scheduled to take place around the world. All relevant events currently planned for the next three years are included. The committee will update the list frequently as new programs are scheduled.

The International Calendar is located under the Resources menu.

Stillman Is New Editor of *Quarterly*

James I. Rubin, Chairman of the Publications Committee, has announced that **Thomas P. Stillman** has agreed to become the new Editor of the *ARIAS•U.S. Quarterly*. Mr. Stillman, an ARIAS•U.S. Certified Arbitrator since 2008, has a broad range of experience in major reinsurance and insurance disputes, having spent 23 years with CNA. He was Senior Vice President and Deputy General Counsel of the firm before his recent retirement. Mr. Rubin described him as an excellent writer who will be a very worthy successor to Eugene Wollan, who recently passed away. Mr. Rubin asked ARIAS members to welcome the new editor by directing submissions to him for consideration as feature articles in future issues of the *Quarterly*.

Mack is ARIAS Umpire

At its meeting on March 3, the ARIAS•U.S. Board of Directors officially confirmed an earlier vote to approve **Susan A. Mack** as an ARIAS•U.S. Certified Umpire, bringing the total number to 54.

Frankel and McComas are Certified Arbitrators

Also at its meeting on March 3, the ARIAS•U.S. Board approved **Glenn Frankel** and **Albert McComas** as Certified Arbitrators, bringing the total to 198. Mr. Frankel's sponsors were David Attisani, Lloyd Gura, and Andrew Maneval. Mr. McComas's sponsors were John Cole, James Engel, and David Bowers.

opinion

Code of Conduct: A Focus on Guiding Principles or Rules of Behavior?

Richard G. Waterman

The original ARIAS•U.S. Guidelines for Arbitrator Conduct were promulgated in 1998. The Guidelines, also known as the arbitrators' code of conduct, contained ten canons with explanatory comments to provide ethics guidance for conducting arbitrations based on prevailing industry practice and principles of the organization. The Guidelines focused on best practices and did not contain mandatory rules. In 2010, Additional Ethics Guidelines were promulgated as a supplement to the Guidelines to elucidate and expand on the ethical considerations embodied in the original Guidelines. In addition, several mandatory rules were added. Effective January 1, 2014, ARIAS•U.S. adopted a new Code of Conduct. The revised Code of Conduct is an integration of the original Guidelines for Arbitrator Conduct and the Additional Ethics Guidelines. The new Code of Conduct contains significant updates, clarifying amendments and the creation of additional mandatory rules.[i]

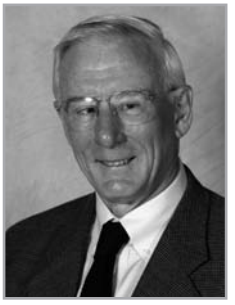
There is no question that professional ideals and practices provide important internal benefits for those who engage in them and external benefits for those served by them. The professional ideal defines ethical principles of an organization. For instance, the Guidelines for Arbitrator Conduct adopted in 1998 were intended to express the ideals, values, and ethical standard of conduct to guide the obligations, behavior, and procedures of arbitration professionals. The revised Code of Conduct articulates similar guiding principles, however, also sets out compliant restrictions on behavior that is far more rule focused than ideal or principle focused. By their nature, best practice principles are broad and more qualitative while mandatory rules are more detailed, specific and quantitative. Instead of a complex rules-based Code, a competing model, similar to other professional organizations, would be to separate best practice principles from mandatory rules and work on educational initiatives that heighten an awareness of correct ethical behavior.

Few of us live up to professional ideals perfectly, and some fall short under certain circumstances. Nonetheless, since the founding of ARIAS•U.S. in 1994, there have been very few reported ethical violations.[ii] ARIAS•U.S. certified arbitrators have demonstrated a commitment to ethics and integrity without a laundry list of mandatory rules and without enforcement oversight. The issue, therefore, is how much behavior does ARIAS•U.S. believe it needs to regulate with rules and how much to leave to the conscience and good judgment of individual members.

Arbitration and Professionalism

Most people of good will always strive to work ethically by adhering to the standards of their profession. It is a mark of professionalism to act ethically. Although the practice of arbitration may not be regarded as a traditional learned profession such as medicine, law or the ministry, the term profession taken broadly includes teachers, engineers, scientists, accountants, business specialists and literally many other occupations. Similarly, the term ethics used broadly refers to ideals and aspirations as well as rules of conduct. Since ideals, role responsibility, actions and comprehensive norms are the source of specific rules, a priority should be placed on ideals rather than rules in determining professional ethics standards.

Codes of conduct function primarily as the professional ideology of the organization. They codify and communicate best practice standards followed by members of the organization and promote a sense of belonging to a group with common values and a common purpose. Codes are generally



Richard G. Waterman

Effective January 1, 2014, ARIAS•U.S. adopted a new Code of Conduct. The revised Code of Conduct is an integration of the original Guidelines for Arbitrator Conduct and the Additional Ethics Guidelines.

Mr. Waterman is a charter member and certified arbitrator/umpire of ARIAS•U.S. He co-authored the original Guidelines for Arbitrator Conduct and served as chairman or co-chairman of the ARIAS•U.S. Ethics Committee for ten years.

aspirational in character and represent the principal objectives that every member of the organization strives to attain. The effectiveness of codes to influence high practice standards varies greatly. The main requirement is that the code of conduct be a clear and plausible formulation of the shared values of the organization and its members.

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational organization to promote the integrity of the arbitration process. Through seminars and publications, ARIAS•U.S. seeks to train knowledgeable and experienced industry professionals for service as arbitration panel members. ARIAS•U.S. does not have the power to control ethical behavior, but it can contribute to the ethical responsiveness of arbitrators by calling their attention to ethical dilemmas and helping them understand the architecture of their obligations. The articulation of an ethics code and its firm acceptance by practitioners who serve on arbitration panels is an important first step toward ensuring confidence and trust in the arbitration process.

The invitation to join ARIAS•U.S. and become a certified arbitrator must include an understanding that encourages individuals to learn the best arbitration practices recognized by the organization and to incorporate those virtues in their arbitration practices. ARIAS•U.S. offers ethics training to equip individuals to become professional arbitrators. The aim of ethics training is to motivate arbitrators to observe the ethical obligations prescribed by the Code in the conduct of arbitration proceedings. Everyone agrees that the reputation of the arbitration process is dependent in a large measure upon the manner in which the arbitrators live up to the letter and the spirit that the Code of Conduct represents.

Due in part to the rarity of unethical professional conduct, ARIAS•U.S. has not initiated a process for filing, investigating and resolving complaints of unethical conduct and probably does not want to legally regulate professional conduct beyond the provisions of the Federal Arbitration Act statutes already in place. Nonetheless, if it is determined that allegations of ethics violations have tarnished the reputation of ARIAS•U.S. and its members, ARIAS•U.S. needs not only to add mandatory rules to its Code of Conduct, preferably in a separate appended section of the Code, but also establish a disciplinary body with formal sanctions to enforce the mandatory rules. Although the disciplinary body's power and influence would be weaker than other traditional professional organizations, the existence of a disciplinary body empowered to suspend or revoke arbitrator certification or reprimand any member who is found guilty of violating the rules would stimulate heightened awareness to voluntarily follow established ethical norms.

Rules and More Rules

Much of the contemporary literature regarding codes of conduct is preoccupied with rule-governed behavior. Understandably, we may need rules to clarify fundamental professional standards and the main parameters of professional conduct expected of everyone. Nonetheless, there can never be enough rules to cover everything we recognize as an ethical situation. If all members of an organization observed the highest professional practice principles voluntarily, we could simply forget about mandatory rules.

Furthermore, rules would not be necessary if the obligations of arbitrators were always clear and obvious and could be met without difficulty or sacrifice. Unfortunately arbitrators are frequently confronted with conflicts of duty and conflicts between duty and self-interest. However, an overemphasis on rules in professional codes can lead a practitioner to assume that prescribed actions are obligatory and all actions that are not prohibited are permitted. To counteract this tendency, codes of conduct should incorporate ideals and the traditions of the profession that challenge individuals to transcend the requirements of rules and more rules.

Much too much is being asked of recently adopted mandatory rules that have been devised piecemeal in response to often cited criticism of the arbitration process. It is not that mandatory rules do not help to alleviate some of the criticism; they clearly do. Rather, it is that no matter how many rules and interpretations of rules have been or will be created, they will never suffice to generate best arbitration practices on their own. ARIAS•U.S. must emphasize its core guiding principles with education strategies and not by merely adding more new rules. Adequate education and enforcement policies are needed to complement the organization's efforts to promote the integrity of the arbitration process.

There seem to be possibly three main reasons ARIAS•U.S. has adopted so many rules. First, members seek clarity through rules. Secondly, arbitrators want to conduct the process fairly and do not want to be held accountable for not complying with broadly worded guiding principles. Thirdly, some rules may have been adopted in response to a few problems isolated among a few bad actors rather than widespread abuses or clear violations of core organizational principles. In the twenty years since ARIAS•U.S. was founded, there have been only a few reported, bona fide lapses in ethical judgment that possibly violated best practice principles. Moreover, every violation of a particular principle need not be addressed through prescriptive mandatory rules. If ARIAS•U.S. wants to promote high ethical standards with fewer rules, the best approach would be more emphasis on ethics training.

Though the idea of adding more mandatory rules to the Code of Conduct may be appealing to some, ARIAS•U.S. might still want to consider a few reasons why combining guiding principles with specific prescriptive rules and prohibitions might not be the best approach. The original Guidelines were intended to encourage aspirational best practice arbitration standards while the revised Code is mixture of best practice ideals and enumerated mandatory rules as a means to control certain behavior. ARIAS•U.S. has not established a system to monitor and sanction bad behavior rule violations. Although Article II, Section 5 of the ARIAS•U.S. By-Laws contains provisions to suspend or expel

a member for cause, such as violation of any by-laws or rules, this mechanism appears designed for enforcement of gross misconduct situations. The provisions do not provide adequate protocol needed for the fair enforcement of Code of Conduct rule violations.[iii] A different mechanism would be more appropriate for enforcement of mandatory rules; however, the existence of mandatory rules puts the organization in the business of enforcement in addition to providing educational programs and ethical guidance for arbitrators. Training and guidance seem a more appropriate role for ARIAS•U.S.

Generally, members of ARIAS•U.S. acknowledge the need for certain rules and are prepared to voluntarily abide by them in the absence of deterring sanctions, provided other members are doing likewise. Rules against conflicts of interest, confidentiality and ex parte communications are examples. To actively combat ethical missteps or actual misconduct, rules must be enforced with penalties to discourage acts that conflict with best practice principles. Inadequate ethics training can lead to ill-considered actions based on erroneous information, especially when self-interest seems to be at stake. At this time, ARIAS•U.S. has not established a disciplinary body empowered to examine rule violations in order to reprimand, suspend or revoke the membership or certification of any professional who is found guilty of violating the revised Code of Conduct.

Where Do We Go From Here

ARIAS•U.S. is a professional organization that has a fundamental challenge to promote best practice professionalism among its members. ARIAS•U.S. determines the professional qualifications for membership, determines the qualifications for arbitrator certification and offers educational programs required to maintain arbitrator certification. Anyone who has not met the criteria for certification is not accepted, while those who do not maintain their educational requirements are de-certified. These control mechanisms influence the professionalism of its members, but do not absolutely control their ethical behavior. ARIAS•U.S. must provide leadership to cultivate an environment in which members are inspired to accept their ethical responsibility voluntarily and follow the best practice principles of the organization without a bevy of mandatory behavioral rules.

The original Guidelines for Arbitrator Conduct and the new Code of Conduct emphasize first principles. Arbitrators are expected to uphold the integrity of the arbitration process, conduct each arbitration in a fair manner and render a just decision. It is a shared foundational understanding that broad industry support of arbitration largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. Although no one has been sanctioned, reprimanded or de-certified for violating core principles of the Guidelines, unfortunately the perceived unethical practices of a few have brought into question the fairness, integrity and trust in arbitration to resolve industry disputes. If actual unethical behavior of ARIAS•U.S. members is the root cause in a loss of confidence and trust in the arbitration process, that confidence and trust must be restored by organizational leadership and structural changes in policy that strengthen and raise the level of professional practices including some form of enforcement oversight. Three proposals to influence ideal professional practices are worthy of consideration.

1. First and foremost is the crucial role of ethics training. Professional organizations have limited control over members' behavior despite the existence of a code of conduct, mandatory rules and punishments to encourage proper behavior. Consequently, ARIAS•U.S. should continue its efforts to perfect its Code of Conduct to increase the clarity of core values with an emphasis on comprehensive best practice norms based on sound industry custom and practice dynamics rather than mandatory rules. Every member should be acutely aware of the importance of ethical behavior concerning all aspects of the arbitration process. Therefore, initiatives that place a renewed focus on training to avoid ethical lapses need to be developed. Every member should be regularly exposed to no-holds-barred debates on ethical quandaries of professional conduct and discuss alternatives to resolve ethical dilemmas encountered in actual practice. With enhanced ethics training, educational support and guidance, ARIAS•U.S. members will continue to use their individual initiative, experience and insight to follow acceptable ethical norms far beyond what is required by mandatory rules.
2. Since it might not be enough to rationally inspire everyone to act ethically and voluntarily follow best practice principles and mandatory rules in all circumstances, ARIAS•U.S. should consider forming a disciplinary body with limited scope to initially receive and investigate arbitration practice and rule violation complaints. Such a disciplinary body must be given the power to safeguard against the potential of unwarranted allegations being used inappropriately in the arbitration process. ARIAS•U.S. could isolate enforceable rule provisions of the revised Code in a separate appended section to focus on an effective mechanism to regulate improper conduct and sanction violations.
   Attempts to form a disciplinary body to monitor the ethical behavior of certified arbitrators to enforce mandatory rules may not be successful. A disciplinary body would need to rely on complaints by parties in arbitration, their attorney or criticism of colleagues. In addition, since a typical disciplinary body would not have the authority nor the resources for an effective investigation and due process hearing, their limited scope of enforcement effort would be powerless to sanction misdeeds in most circumstances. Clearly, a disciplinary body faces challenges in investigating and ensuring due process, which is why mandatory rules and enforcement are problematic. Alternatively, a disciplinary body formed to receive ethics complaints

ARIAS•U.S. certified arbitrators have an exemplary record of upholding the principles of integrity and fairness without specific mandatory rules. They have honored the arbitration profession by using their industry knowledge and experience to render fair and independent decisions following core organizational guiding principles since the formation of ARIAS•U.S. twenty years ago.

could consider issuing advisory opinions based on an accumulation of practice complaints. The explanatory value of advisory opinions may be limited because they interpret particular issues with incomplete information and do not represent an argued consensus among the membership. Nonetheless, careful scrutiny of complaints would help identify a need for clearer rules which in turn would probably reduce cases of improper behavior. Another approach to monitor ethical practices could be an arrangement whereby individuals on an ethics committee are available to offer an informal, confidential opinion to any member seeking advice for a specific ethical ambiguity or dilemma.

3. A traditional code of conduct incorporates values, principles and professional standards. The revised Code of Conduct recently adopted by ARIAS•U.S. conflates those broad practice standards with specific mandatory behavior rules. The mismatch of process standards and specific outcome standards seems to be inconsistent with a fundamental organizational goal to promote practices that challenge members to transcend the requirements of rigid rules. Ideally, best practice qualitative standards that guide arbitrators' professional conduct should be separated from mandatory quantitative rules in a two-tier but closely related arrangement. One section would articulate basic responsibilities, broad objectives and venerable best practice principles while the other would enumerate enforceable mandatory rules. While ideal practice principles and mandatory rules are interrelated and distinctions are not always clear-cut, a two-tier Code of Conduct would allow ARIAS•U.S. to concentrate on enhanced ethics training and rational persuasion to encourage certified arbitrators to voluntarily follow ethical best practice standards.
Moreover, the ability to enforce mandatory rules would be more efficient if the revised Code of Conduct separated best practice norms from mandatory rules of specific behavior. Reported cases of suspected improper behavior by arbitrators should be carefully examined to identify the practice standards or rules that need clarification or revision. Rogue arbitrators found guilty of wrongdoing should be punished and possibly removed from the organization. Separating best practice guidelines and commentary from mandatory behavioral rules would also allow ARIAS•U.S. to actively combat misconduct by developing measures of detection to monitor ethical misbehavior that causes problems and implement a fair procedure to sanction rule violations.

On balance, ARIAS•U.S. will not be better off in the long run with the creation of more rules and convoluted rule interpretations. Rather, organizational ideals and best arbitration practice principles need to be emphasized with enhanced educational content. The inherent benefits of arbitration to resolve industry disputes rests with the commitment of ARIAS•U.S. certified arbitrators to uphold and advance the integrity of the arbitration process and the spirit which the Code of Conduct represents. ARIAS•U.S. certified arbitrators have an exemplary record of upholding the principles of integrity and fairness without specific mandatory rules. They have honored the arbitration profession by using their industry knowledge and experience to render fair and independent decisions following core organizational guiding principles since the formation of ARIAS•U.S. twenty years ago. With a renewed focus on qualitative ethical standards that guide professional conduct, integrity and fairness will continue to be organizational watchwords.▼

End Notes

About the Author: Mr. Waterman is a charter member and certified arbitrator/umpire of ARIAS•U.S. He co-authored the original Guidelines for Arbitrator Conduct and served as chairman or co-chairman of the ARIAS•U.S. Ethics Committee for ten years. Additionally, Mr. Waterman has studied ethical concepts and examined model codes of conduct in a number of fields, including ethical problems faced by the insurance/reinsurance industry. He has also written several published essays pertaining to ethics in small group decision making similar to arbitration panel deliberations. Mr. Waterman is an industry consultant and former reinsurance executive. He has served on numerous industry arbitration panels and has mediated many other reinsurance disputes.

i *ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, also revised effective January 1, 2014, is not a subject of this commentary.

ii The category "ethical violations" encompasses a range of behaviors including arbitrator bias or partiality; however, bias, partiality and debiasing techniques are not directly addressed in this commentary. See generally, Richard G. Waterman, *Debiasing the Biased*, *ARIAS•U.S. Quarterly*, Number 4 (2011).

iii See *By-Laws* of ARIAS•U.S., Article II, Section 5 – Suspension/Expulsion

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

William M. Popalisky is now at Crowell & Moring LLP. He can be reached at 590 Madison Avenue, New York, NY 10022, phone 212-895-4334, fax 212-223-4134, email wpopalisky@crowell.com.

Peter J. Hildebrand has moved to new offices. He can be found at Peter Hildebrand LLC, 690 Americas Cup Cove, Alpharetta, GA 30005. All other contact information remains the same.

Everyone at Patton Boggs has a new email address and company name. The new company name is **Squire Patton Boggs (US) LLP.** Otherwise, phone numbers and addresses remain the same. New emails are as follows:

John M. Nonna John.Nonna@squirepb.com, **Suman Chakraborty** Suman.Chakraborty @squirepb.com, **Eridania Perez** Eridania.Perez@squirepb.com, **Larry P. Schiffer** Larry.Schiffer@squirepb.com.

Vincent J. Vitkowsky and **Charles W. Fortune** have joined Seiger Gfeller Laurie LLP as Partners. Their new contact information is as follows:

> Charles W. Fortune, Seiger Gfeller Laurie LLP, 65 Memorial Road / Suite 340, West Hartford, CT 06107, phone 860-760-8423, fax 860-760-8401, email cfortune@sgllawgroup.com.
>
> Vincent J. Vitkowsky, Seiger Gfeller Laurie LLP, 330 Madison Avenue, 6th Floor, New York, NY 10017, phone 212-653-8870, fax 646-495-5006, email vvitkowsky@sgllawgroup.com.

James W. Schacht and The Schacht Group have a new address and phone numbers, namely, The Schacht Group, c/o FTI Consulting, 227 West Monroe St., Suite 900, Chicago, Illinois 60606, phone 312-428-2624, cell 312-259-4161, fax 312-759-8119. Email remains the same.

Former ARIAS Chairman **Mary Lopatto** launched her own firm on February 3 with trial attorney **John Williams**. She will continue her practice in reinsurance arbitration and litigation. Ms. Lopatto can be reached at Williams Lopatto PLLC, 1776 K Street, N.W., Suite 800, Washington, D.C. 20006, phone 202-296-1661, email MALopatto@WilliamsLopatto.com, website www.WilliamsLopatto.com.

Key Coleman has moved to Philadelphia. He is now with Smart Devine, 1600 Market Street, 32nd Floor, Philadelphia, PA 19103, phone 267-670-7373, fax 215-238-8469, email KColeman@smartdevine.com.

DID YOU KNOW...?

THAT ALL ARTICLES PUBLISHED IN PAST ARIAS•U.S. QUARTERLIES CAN BE LOCATED BY AUTHOR, TITLE, ISSUE (IN WHICH IT APPEARED), AND KEYWORD? THE QUARTERLY ARCHIVE IS ON THE WEBSITE UNDER THE RESOURCES MENU. ALL LISTINGS LINK TO THE RESPECTIVE ISSUES.

Spring Co
Produced Better

This year's conference, on May 7-9 at The Ritz-Carlton Key Biscayne, was directed by Co-Chairs **Mark Megaw** of ACE and **Harry Cohen** of Crowell & Moring; it was entitled "**Making Better Decisions**."

Of course, ARIAS•U.S. members already think they know how to make decisions. After all, they have been doing it all their lives. So there were many doubters who arrived on Wednesday for the opening session. They quickly found themselves doubting their skills as **Dr. Joan Schmit**, a professor at the University of Wisconsin, schooled them on the hidden influences that guide people's thinking and cause biased and irrational decisions throughout the business and judicial systems, including dispute resolution. She provided some guidance on how to avoid these influences, as well.

After learning that the decision-making processes that attendees had confidently relied upon for years were flawed, the next session told them how to make them better using decision trees. **Dr. Bruce Beron**, of the Litigation Risk Management Institute, tracked through the process of breaking down decisions into components about which probabilities can be estimated. He then showed how to use them in determining allocation of settlements.

The conference began with lunch on the patio.

Next, bringing that process into the real world of arbitration, **David Attisani** and **Michael Olsan** presented two sides of a hypothetical dispute to arbitrator **Barbara Niehus**, arguing how the allocation of the settled loss – as shaped by the decision tree – informed the outcome of a reinsurance presentation. The debate covered post-settlement allocation law and showed how different decision-making orientations can lead to different conclusions.

Wrapping up the first day, the Strategic Planning Committee Co-Chairs **Elizabeth Mullins** and **Mary Kay Vyskocil** summarized the latest work on a number of initiatives being pursued by the committee, and two of the Co-Chairs of the Arbitration Task Force, **Scott Birrell** and **Jeffrey Rubin**, did the same for two of their developing programs, the Neutral Arbitration Rules and Streamlined Arbitration Rules.

Advance billing of the conference had featured ARIAS's first ever "Speed Dating." There was doubt and fear about how speed dating would work out, but when it came together on

onference
Decision Makers

Thursday morning, there was a roar of enthusiastic conversation in three rooms for the hour and fifteen minute breakouts. Arbitrators sat across from company and law firm representatives, gave concise summaries of their qualifications, and heard about company values and characteristics. The sound of air horns could be heard every five minutes throughout the ballroom area at The Ritz-Carlton as arbitrators were signaled to move to their next stations. The consensus was that it was a valuable training experience for all.

The launch of the 20th Anniversary Commemoration took place at mid-morning on Thursday as **Charlie Foss**, one of the founders and a long-time Board member, showed some of the original documents that brought about the Society, including the minutes of the first Board meeting on May 6, 1994 and the first *Quarterly*, dated December 1994. He described the sentiments and desires of the founders that brought about the original objectives and organizational structure. The commemoration will conclude with a gala dinner at the Fall Conference on November 13.

A focus on making better ethical decisions was provided by small-group discussions of a challenging ethics hypothetical, written and directed by **Edward P. Krugman**. The six breakouts had two discussion leaders each. A summary of the conclusions reached by

President Eric Kobrick welcomed conference attendees.

Co-Chairs Harry Cohen and Mark Megaw introduced the conference theme.

Are We Rational? *– Dr. Joan Schmit makes a point...*

...and emphasizes her conclusion.

What Does a Decision Tree Tell Us? *- Dr. Bruce Beron explained how it works.*

The audience focused intently on how to use decision trees.

the groups was presented on Friday morning by Mr. Krugman and other members of the Ethics Discussion Committee, **Mark Gurevitz**, **Eric Kobrick**, and **James Rubin**.

The first sessions on Friday morning, "**Making Better Choices – Choose your Door**" consisted of three tracks, chosen by attendees at registration. **Dr. Philip Anthony**, CEO of DecisionQuest, using videos and study results, showed how jury research reveals the dynamics behind group decision making and what case methodologies fail to reach them.

A second track explored social media's impact on arbitration decision making, including its role in arbitrator selection decisions and within the dispute resolution process.

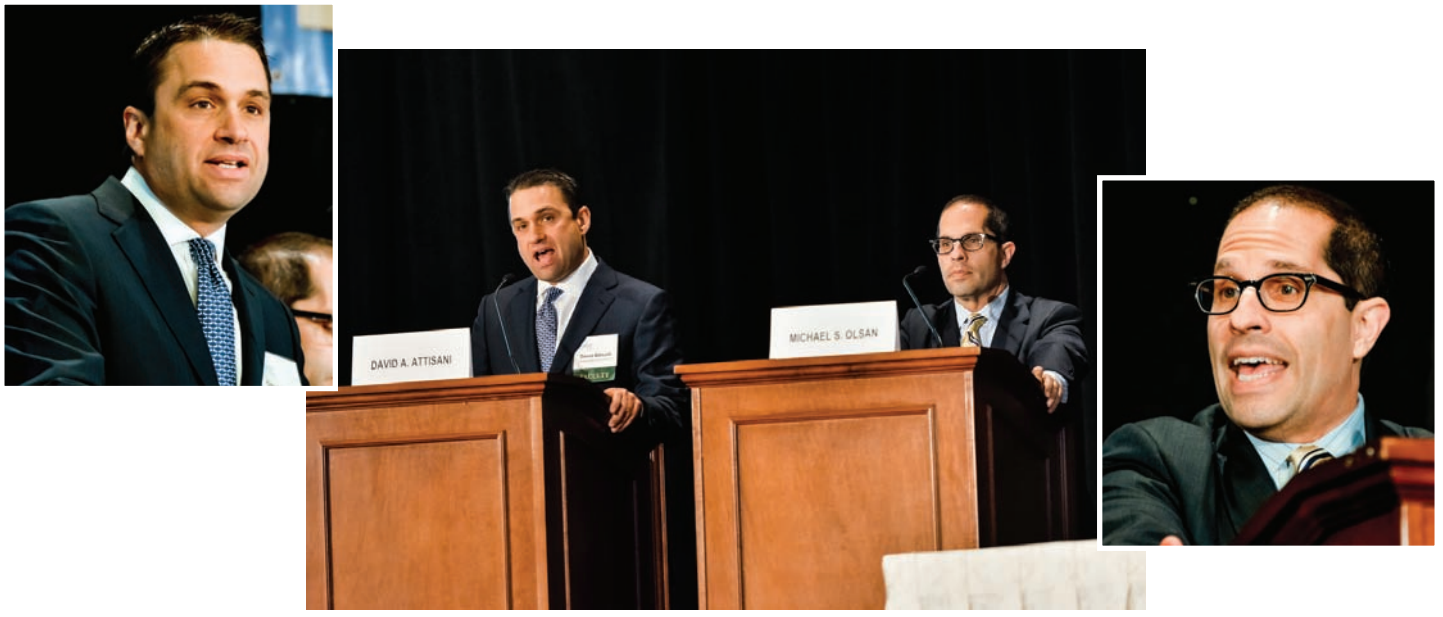
The third track gave attendees the opportunity to hear from some of our most experienced arbitrators how to make the best decisions at key moments in the arbitration process.

A significant contribution to the subject of decision making was provided on Friday morning by the keynote speaker, **Judge Michael B. Mukasey**, former U.S. Attorney General and former Chief Judge of the U.S. District Court of New York. The Judge was interviewed by Mark Megaw for what became a fascinating hour.

Of course, there was time for recreation on Thursday afternoon, with a golf tournament at nearby Crandon Golf, chaired by **Jennifer Devery** , a tennis tournament at the hotel's Cliff Drysdale-designed tennis courts, chaired by **Eric Kobrick**, and a tour to the Everglades.

Two receptions on the Grand Lawn gave attendees opportunities to spend some time renewing old acquaintances and making new ones.

In all, the 2014 ARIAS•U.S. Spring Conference was a refreshingly different type of training event that left everyone feeling a little more confident in making decisions on many aspects of reinsurance arbitration. And the Ritz-Carlton ended up leaving everyone impressed by the beautiful, friendly environment...a perfect venue for ARIAS•U.S. training.



Carving Up the Giving Tree *– David Attisani and Michael Olsan battled two sides of a dispute, each using decision trees to make their points.*

Arbitrator Barbara Niehus judged the battle.

Dr. Beron critiqued the battle.

The Strategic Planning Committee and Arbitration Task Force *provided progress reports. From left, Elizabeth Mullins, Mary Kay Vyskocil, Jeffrey Rubin, Scott Birrell.*

Marty Haber (l) and David Thirkill expressed opinions about the reports.

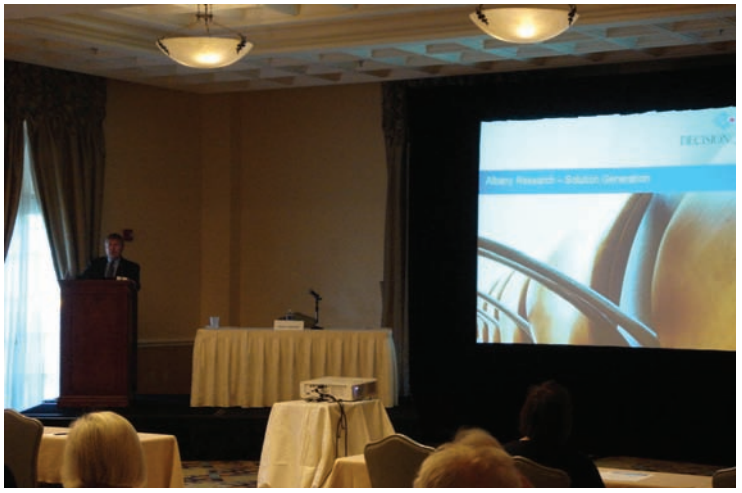
Speed daters moved to new positions when the horns sounded every five minutes.

Co-Founder Charles Foss described "What Prompted ARIAS•U.S."

Edward Krugman laid out the issues in the fact pattern for ethics breakouts.

The next day, Ethics Discussion Committee members presented the breakout results. From left, Mark Gurevitz, Eric Kobrick, Edward Krugman, and James Rubin.

Making Better Choices - Choose Your Door



Door One – Jury Research Insight into Group Decisions. *Dr. Philip Anthony cited extensive jury research studies.*

Door Two – How Does Social Media Change Hiring and Arbitral Decisions? *From left, Martin Haber, Vivian Hood, Seema Misra, Larry Schiffer.*

Door Three – What Tools Do Seasoned Arbitrators Use to Reach Decisions? *From left, Richard White, Robert Hall, Caleb Fowler, and moderator Deirdre Johnson.*

Chairman Jeffrey Rubin wrapped up the 2014 Spring Conference

For the Keynote, Judge Michael Mukasey was interviewed by Mark Megaw.

Around the Conference


RECEPTION


20 Years
of Impr
ARIA


ARIAS·U.S.
20 Years
of Improving Arbitration


Ileana Diaz
Kathleen Karnell

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.

These reports are on the website under the Resources menu.

As of the middle of May 2014, there were 96 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 this section for new additions

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

Eagle Star Insurance Company Ltd. v. Arrowood Indemn. Co., Ltd.

2013 U.S. Dist. LEXIS 135869 (S.D.N.Y. Sept. 23, 2013)

Court: United States District Court for the Southern District of New York

Dates Decided: September 23, 2013

Issues Decided: Whether confidential arbitration information can remain sealed when submitted to a federal court, as part of a petition to confirm an arbitral award.

Submitted by Robert A. Kole*

Factual Background

Eagle Star Insurance Company and Home and Overseas Insurance Company (Eagle) sought to confirm an award resulting from an arbitration with Arrowood Indemnity Company (Arrowood). Eagle's petition to confirm, and Arrowood's subsequent motion to dismiss, contained information deemed by the parties to be confidential arbitration information (Arbitration Information), in accordance with the confidentiality agreement governing their dispute (the Confidentiality Agreement). As a result, the parties sought to file their briefs and supporting evidence under seal, which the Court initially allowed, via three different sealing orders.

Before the Court issued a substantive decision, the parties reached a settlement and filed a joint stipulation of dismissal, thereby obviating the need for the Court to address the merits of their dispute. Subsequently, five insurance companies (the Movants) that were involved in separate, on-going arbitrations with Arrowood sought to intervene, and to unseal any records that had been filed in the case, asserting both a common law and First Amendment right to access judicial documents.

The Holding

The Court concluded that the confidential arbitration information should be unsealed. After addressing certain procedural arguments, the Court conducted a three-step analysis.

First, the Court analyzed whether the documents sought by Movants qualified as "judicial documents," for which a presumption of access applied. Id. at *5. The Court concluded that they did, because they were "relevant to performance of the judicial function and useful in the judicial process" – a relatively low burden. Id. (citations omitted).

Second, the Court considered the weight that should be given to the presumption of access, by looking to "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* at *7 (citations omitted). Because the Confidential Information sought by Movants was at "the heart of what the Court [was] asked to act upon," the Court concluded that the "weight of the presumption of access ... is correspondingly high." *Id*.

Third, the Court sought to balance the high presumption of access against any competing considerations supporting continued confidentiality. The primary considerations identified by Arrowood were its expectation of confidentiality (due to the Confidentiality Agreement and the Court's prior sealing orders), and the possibility that disclosure would "compromise its position with respect to the separate arbitrations in which it is engaged with Movants." *Id.* at *9. The Court concluded that those considerations failed to trump the presumption of public access, and unsealed the documents filed by the parties. *Id.*

** Robert A. Kole is the co-chair of the Insurance/Reinsurance Practice Group of Choate, Hall & Stewart LLP, as well as the Co-chair of the ARIAS Law Committee.*

in focus

Recently Certified Arbitrators

Glenn A. Frankel

Since 2006, Glenn Frankel has served as Vice President of the Reinsurance Group for The Hartford, where he currently leads the Assumed Claim, Reinsurance Collections, Commutations and Reinsurance Operations units. His responsibilities include oversight of: (1) Hartford's assumed reinsurance exposure, consisting of complex domestic and international claims. The book includes asbestos, environmental, toxic tort, workers' compensation, general liability, auto and property exposures; (2) all noticing, reporting and collection functions for all property and casualty ceded reinsurance (runoff and ongoing); (3) commutation analysis, negotiation and execution of all property and casualty ceded and assumed reinsurance contracts (runoff and ongoing), and all scheme and liquidation proceedings; and (4) unit that provides operational and administrative support to all reinsurance functions.

Mr. Frankel is also responsible for all of The Hartford's reinsurance litigations and arbitrations. From 2003-2006, Mr. Frankel was an Associate General Counsel and Assistant Vice President with The Hartford's Complex Claim Legal Group, where he was joint-head of an in-house legal group responsible for asbestos, environmental and toxic tort direct claims. Mr. Frankel supervised attorneys who provided day-to-day legal advice to claim handlers, supervised outside counsel, drafted legal documents and memorandums, negotiated complex matters, and managed coverage litigation.

Prior to joining The Hartford, Mr. Frankel served as Managing Counsel with Travelers Property & Casualty Company (working primarily on asbestos, environmental and toxic tort direct claims), and was a litigation associate with the law firm of Day, Berry & Howard (now Day Pitney) in Hartford, CT.

Mr. Frankel earned his J.D. from St. John's University School of Law (Cum Laude), and his B.A. in economics from Wesleyan University.

Albert L. McComas

Since his retirement from Zurich North America in 2007, Albert McComas has served as a court-appointed mediator and insurance consultant. As a mediator, he has presided over 43 cases. As an insurance consultant, he has provided expert testimony on issues related to claim handling and bad faith in state and federal cases.

During his 21 years at Zurich North America and its affiliates, Mr. McComas served in various capacities including business unit General Counsel and group Chief Claims Attorney. In the latter capacity, he oversaw the department responsible for the management of virtually all of the company's coverage and bad faith litigation. He also oversaw the claim audit department. Over the course of his career at Zurich, Mr. McComas managed hundreds of coverage and bad faith cases, including some of the most significant exposures confronting the company. He also personally negotiated many of the company's largest settlements with insureds.

Prior to his career at Zurich North America, Mr. McComas served for several years as a litigation attorney at a Baltimore law firm. Most of his work there was focused on the defense of tort claims for insurance companies.

In addition to his law degree from the University of Maryland School of Law, Mr. McComas has a Bachelor's degree in Business Administration and a Master's in Business Administration from Loyola University Maryland.

Glenn A. Frankel

Albert L. McComas

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

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!

THE BREAKERS

PALM BEACH, FLORIDA

www.thebreakers.com

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 June 2014, ARIAS•U.S. was comprised of 315 individual members and 112 corporate memberships, totaling 865 individual members and designated corporate representatives, of which 199 are certified as arbitrators, 54 are certified as umpires, and 35 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 Bill Yankus, Executive Director, at director@arias-us.org or 914-966-3180, ext. 116.

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

Sincerely,

Jeffrey M. Rubin

Chairman

Eric S. Kobrick

President

ARIAS U.S. Membership Application

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

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

914-966-3180, ext. 116
Fax: 914-966-3264
Email: info@arias-us.org

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

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/13

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$425	$1,300
FIRST-YEAR DUES AS OF APRIL 1	$283	$867 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$142	$433 (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 914-966-3264 or mail to ARIAS·U.S., P.O. Box 9001, Mt. Vernon, NY 10552.

Please charge my credit card: (*NOTE: Credit card charges will have 3% added to cover the processing fee.)*

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

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the *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.

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Signature of Individual or Corporate Member Applicant

P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration

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

Executive Director/ Corporate Secretary
William H. Yankus
Senior Vice President
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