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Authority of an Arbitration Panel to Issue Sanctions

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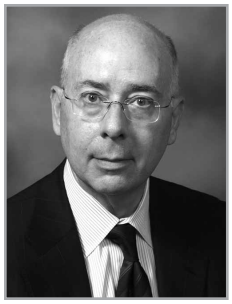


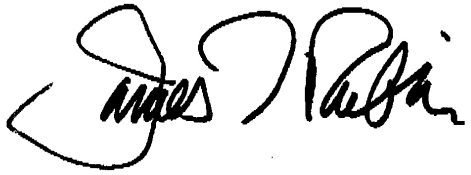
James I. Rubin

interim editor's comments

As most of you know, our esteemed Editor and Commentator-In-Chief recently passed away. Those of us who worked closely with Gene Wollan on the production of the *Quarterly* will miss his erudition, his skill as an editor and writer, his work ethic even in the face of illness, and his wonderful sense of both humor and the absurd. While the articles Gene published were a good reason to read the Quarterly, most of us depended on his Commentary to enlighten and lighten our day. His will be very large shoes for the next editor to fill.

The current issue of the Quarterly contains two important articles on sensitive subjects. The first, *The Authority of an Arbitration Panel to Issue Sanctions*, by Robert M. Hall, reviews the case law and rationale supporting a panel's decision to issue sanctions. The second, *Mid-Arbitration Business Relationships: A Cautionary Tale*, by Everett J. Cygal, reviews the Sixth Circuit's 2013 decision reversing an arbitration award where the law firm of the neutral member of a three-person panel accepted legal assignments from one of the parties years after the arbitration began. Ron Gass's case analysis of a recent Massachusetts federal decision refusing to enjoin an arbitration because of an inadvertent disclosure by a party that it had nominated the umpire is, as always, timely.

For those of us living in the upper mid-west, we have yet a second reason to look forward to the spring conference in Key Biscayne at the Ritz-Carlton. As if a day without sub-zero temperatures and the obligation to shovel snow wasn't enough (there is a good chance it will still be winter in May in Chicago), we have an entire conference devoted to "Making Better Decisions." Which suggests it's not too late for us.



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Editorial Policy

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

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

Manuscripts should be submitted as email attachments to ewollan@moundcotton.com .

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

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feature

Authority of an Arbitration Panel to Issue Sanctions


Robert M. Hall

Robert M. Hall

Introduction

Once in a great while, an arbitration panel encounters counsel who acts in an outrageous fashion or a party that declines to comply with panel orders. Since such situations are relatively rare, a panel may question what authority it has to order sanctions.

When the parties to a contract agree to arbitrate their differences pursuant to the rules of some organization, those rules sometimes authorize the panel to issue sanctions. For instance, R-58 of the Commercial Rules of the AAA provides:

> The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making (*sic*) of an award. The arbitrator may not enter a default award as a sanction.

But what of *ad hoc* arbitrations, not subject to any specific procedural rules? Does the panel have the authority to issue monetary penalties, dismiss claims or defenses, even issue default judgments? The purpose of this article is to explore selected case law on point.

Does the panel have the authority to issue monetary penalties, dismiss claims or defenses, even issue default judgments? The purpose of this article is to explore selected case law on point.

I. Attorneys' and Arbitrators' Fees

§ 10.3 of the reinsurance treaty at issue required that each party pay the fees of its own party arbitrator and attorneys and half the fee of the umpire *in ReliaStar Life Ins. Co. of N.Y. v. EMC National Life Co.* 564 F.3d 81 (2nd Cir. 2009). Nonetheless, the arbitration panel awarded the prevailing party its attorneys' and panel fees plus costs and interest characterizing the conduct of the losing party in the arbitration "as lacking good faith."[1] The issue on appeal was the award of the attorneys' and panel fees.

As a baseline for its ruling, the court made a broad, general statement on the power of arbitration panels:

> [W]e here clarify that a broad arbitration clause, such as the one in this case, . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that sanction may include an award of attorney's or arbitrator's fees.[2]

The court took its direction from the reason for arbitration as a dispute resolution technique:

> Indeed, the underlying purpose of arbitration i.e. efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney's fees, are appropriately viewed as a remedy within an arbitrator's authority to effect the goals of arbitration.[3]

Given the broad scope of the arbitration clause, the court reasoned that §10.3 was merely a statement of the American Rule on attorneys' fees, which is to apply to arbitrations conducted in good faith. Absent a more specific contractual limitation on the power of the panel to grant remedies in a bad faith context, the court declined to apply this section to such a context and upheld the award of fees:

> Precisely because the agreement in this case conferred broad authority on the arbitrators, because inherent in such authority is the power to

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> sanction bad faith conduct, and because bad faith is a recognized exception to the American Rule for attorney's fees, we conclude that the simple statement of that Rule in section 10.3 is insufficient to by itself to swallow the exception.[4]

II. Monetary Sanctions and Evidence Barred

Hamstein Cumberland Music Group v. Williams, 2013 U.S. App. Lexis 9528 (5th Cir.) was an appeal of an order with respect to an arbitration over music royalties. When the respondent in the arbitration failed to produce documents related to the royalties, the arbitrator ordered a fine of $500,000 and that the respondent not be allowed to introduce documentary evidence on royalties at the arbitration hearing. The respondent challenged these sanctions but the appellate court upheld them, ruling:

> [The respondent] argues that the arbitrator was not empowered to issue sanctions and therefore exceeded his authority within the means of FAA § 10(a)(4). We disagree. ... [A]rbitrators enjoy inherent authority to police the arbitration process and fashion remedies to effectuate this authority, including with respect to conducting discovery and sanctioning failure to abide by ordered disclosures.[5]

Seagate Technology v. Western Digital Corp., 834 N.W. 2d 555 (Ct. App. Minn. 2013) was a dispute over disclosure of trade secrets. The arbitrator found that the respondent had manufactured evidence to support its case and issued an order that: (a) the respondent was precluded from introducing any evidence on the trade secrets at issue; and (b) found for the petitioner on misappropriation of such trade secrets. The court upheld the award, ruling: "[W]e find persuasive and adopt the reasoning of the courts that have found that a broadly worded arbitration agreement, with no limiting language to the contrary, "confers inherent authority of arbitrators to sanction a party that participates in the arbitration in bad faith."[6]

III. Dismissal of Counterclaim

AmeriCredit Financial Services v. Oxford Mgt. Services, 627 F. Supp. 2d 85 (E.D.N.Y. 2008), involved a dispute between a principal and its collection agency agent over funds not remitted to the principal and the agent's counterclaim. The arbitrator found that that the agent deliberately destroyed evidence highly relevant to the dispute and dismissed the agent's counterclaim as a result. The agent moved to vacate the order, arguing that the arbitration clause in question did not give the arbitrator the authority to dismiss counterclaims on this basis and because the order violated the prohibition on punitive or exemplary damages in the arbitration clause. The court disagreed:

> Here, the arbitration clause broadly allows the arbitrator to resolve any claim arising out of the [contract]. Therefore, because the counterclaim clearly arose out of the [contract], the arbitrator did not exceed his authority under the [contract] in addressing and dismissing the counterclaim.[7]
>
> . . . [E}ven assuming that the dismissal was punishment or a sanction for [destruction of evidence], the [limitation of punitive and exemplary damages in the arbitration clause] is still not implicated because the decision had absolutely nothing to do with "punitive or exemplary damages." It is undisputed that the arbitrator's decision did not provide for punitive or exemplary damages of any sort.[8]

IV. Default Orders

The arbitration of a union grievance provided the backdrop for *American Postal Workers Union v. U.S. Postal Service*, 362 F.Supp.2d 284 (D.C. 2005). When the arbitrator was informed that the grievant would be unable to attend the scheduled hearing for medical reasons, the arbitrator asked for medical evidence on point and when the grievant would be able to participate in the hearing. When neither was forthcoming by the assigned date, the arbitrator dismissed the grievance. The union sought to vacate this order as violating the grievant's right to a fundamentally fair hearing and using a procedural device to deny due process. The court rejected these arguments:

> [T]he reason why the grievant did not receive a hearing was because neither she nor the [union] ever responded to these preliminary procedural matters. While the

Here, the arbitration clause broadly allows the arbitrator to resolve any claim arising out of the [contract]. Therefore, because the counterclaim clearly arose out of the [contract], the arbitrator did not exceed his authority under the [contract] in addressing and dismissing the counterclaim.

However, the cases above suggest that the courts are very reluctant to overturn sanctions under such circumstances. Perhaps this is because judges have deeply felt opinions about their ability to control their courtrooms and those who appear there. They can appreciate the need for arbitrators to have some means of maintaining control of their proceedings.

> parties certainly have a right to due process and to a fundamentally fair hearing, this does not give the parties the right to disobey a procedural order of an arbitrator and then claim they were treated unfairly because a default judgment is issued.[9]

A *pro se* (without counsel) claim for various types of discrimination and other wrongs against her employer was the issue in *Santos v. General Electric Co*., 2011 U.S. Dist. Lexis 131925 (S.D.N.Y.) *aff'g* 2011 U.S. Dist. Lexis 131882 (S.D.N.Y). The petitioner's employment agreement included an arbitration clause, which called for arbitration of employment disputes. The arbitrator went to extraordinary lengths to move the arbitration forward but the petitioner repeatedly ignored deadlines, failed to produce ordered documents and abruptly disengaged from telephone conferences. Finally, the arbitrator dismissed the complaint. The magistrate judge rejected any allegation of misconduct on the part of the arbitrator noting: "[T]here can be no question that given the history of plaintiff's failings and the prejudice that they were causing [the employer], the arbitrator acted well within her discretion in finally dismissing the proceedings. Under these circumstances, there is no basis for challenging the ruling."[10]

V. The Contrary View

There is plenty of verbiage in case law to the effect that the authority of arbitrators is limited by the contract and the issues submitted to the panel for resolution. It is easy to argue from these points that arbitrators lack the authority to issue sanctions unless specifically authorized to do so in the relevant contract. While the author has attempted no exhaustive search for cases that so hold, the author has not happened upon them.

One case that is worth noting, however, is *Luster v. Collins*, 15 Cal.App. 4th 1338 (1993) which involved an easement and the trees located on it. The arbitrator ordered the respondent to cut down trees on the easement and to ensure that the gate to the easement was locked at night. The arbitrator also ordered a sanction of $50 per day for each tree that was not cut down. The court ruled that the arbitrator did not have the authority to order the $50 per day per tree sanction since the California arbitration statute did not specifically authorize sanctions and that the exercise of such power by an arbitrator conflicted with the power of the courts.

VI. Commentary

Certainly the situations in which sanctions are appropriate in arbitrations are few and the behavior that generates them should be egregious. Panels should be extremely cautious about issuing sanctions, particularly those that deprive a party of its defense or cause of action. However, the cases above suggest that the courts are very reluctant to overturn sanctions under such circumstances. Perhaps this is because judges have deeply felt opinions about their ability to control their courtrooms and those who appear there. They can appreciate the need for arbitrators to have some means of maintaining control of their proceedings.

ENDNOTES

Mr. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator and mediator of insurance and reinsurance disputes and as an expert witness. He is a veteran of over 160 arbitration panels and is certified as an arbitrator and umpire by ARIAS•U.S. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright by the author 2014. Mr. Hall has authored over 100 articles and they may be viewed at his website: robertmhall.com.

1 564 F.3d 81 at 85.
2 *Id*. at 86
3 *Id*. at 87.
4 *Id*. at 89. For a review of prior related cases, see Robert M. Hall, "*Inherent Authority*" of *Arbitration Panels to Grant Attorneys' Fees and Costs*, XVI *ARIAS•U.S. Quarterly* No. 2 at 9 (2009).
5 2103 U.S. App. Lexis 9528 at *11-12 (5th Cir.)
6 834 N.W.2d 555, 563 ((Ct.App. Minn. 2013) quoting *ReliaStar Life Ins. Co. v. EMC National Life Co., supra*.
7 627 F. Supp.2d 85, 95 (E.D.N.Y. 2008).
8 *Id*. at 96.
9 362 F.Supp. 284, 290 (D.C. Cir. 2005).
10 2011 U.S. Dist. Lexis 131925 at *60-61 (S.D.N.Y.)

new and notices

Eugene Wollan

Eugene Wollan passed away on Sunday, February 2 in New York City. A partner and 60-year veteran in the law firm of Mound Cotton Wollan & Greengrass, he was an early supporter of ARIAS•U.S., becoming a Certified Arbitrator and Umpire. He served on the Board of Directors for six years, was a columnist for the *ARIAS•U.S. Quarterly* for six years, and Editor for the past four years. His humorous teachings about the proper use of the English language in his "Off the Cuff" column added a consistent sparkle to the journal.

A graduate of Harvard College (*cum laude*) and Harvard Law School, Mr. Wollan concentrated for over fifty years on property and casualty insurance claims litigation, commercial insurance litigation, and reinsurance controversies. His writings and lectures were widely praised.

Mr. Wollan served in the U.S. Army and the Army Reserve, becoming a Colonel in the Judge Advocate General's Corps. He was an Honor Graduate of the U.S. Army Command and General Staff College.

Services were held to honor Eugene Wollan on Tuesday, February 4, 2014 at the Frank E. Campbell Funeral Chapel in New York City. His family members, a military comrade, and a law firm partner recalled their fondest memories, of which there were many. An Army honor guard played taps and presented full military honors.

ARIAS•U.S. members, among many others, will miss him.

Anthony Clark is Certified Arbitrator

At its meeting on January 7, 2014, the Board of Directors approved **Anthony Clark** as an ARIAS•U.S. Certified Arbitrator, bringing the total number to 224. Mr. Clark's sponsors were Stephen Rogers, Richard Voelbel, and Lawrence Zell. His biography is on page 16 of this issue.

Shanman and Pollack Are Qualified Mediators

Also at its meeting on January 7, 2014, the Board of Directors approved **James A. Shanman** and **Lawrence W. Pollack** as ARIAS•U.S. Qualified Mediators, bringing the total to 36.

Washington Seminar Agenda Announced

Complete details of the March 13 Educational Seminar are available on the website calendar. The eleventh in the ARIAS•U.S. Educational Seminar Series. takes place on March 13 at the Hotel Monaco in the heart of Washington.

Whether you need to complete a seminar for certification or renewal, or are just interested in improving your craft in the realm of reinsurance (either as a company person, an attorney, or an arbitrator), you should consider attending this educational program if you see this notice in time.

Registration opened on January 29 on the ARIAS website home page. **The registration deadline is February 27**.

ARIAS•U.S. Announces First Webinar on March 25

The first ARIAS•U.S. webinar will take place on March 25 at 12:00 Noon; the topic is ***"Underwriting Reinsurance Risks - Ceding Company and Reinsurer Perspectives."*** Complete details about the Webinar Program and the content and presenters for the first two sessions are on the ARIAS•U.S. Website Calendar. Registration opened on the ARIAS•U.S. website home page on February 10.

For certification and renewal purposes, three of these webinars equal one educational seminar. It is important that those planning to use webinars understand how they apply. There will only be four of them in 2014 and three must be taken for certification credit.

Each webinar will be taken live at the attendee's computer and will last for approximately 75 minutes. The attendee will be required to respond to prompts to confirm presence during the session. Slides will be presented on-screen; audio can be through the computer or a telephone connection.

The Education Committee is planning to present sessions on March 25, June 17, December 10, and one other date (to be determined) in September.

ARIAS•U.S. Rules Are Modified

The Board of Directors and the ATF subcommittee on *ARIAS Rules* have fine-tuned a few points in the recently disseminated rules. The most significant are changes that detail alternatives that parties may wish to consider in applying rules to their disputes. These alternatives can be found in the opening section, entitled "Instructions for Adoption and Application." The *ARIAS•U.S. Rules* can be found on the website under the Resources menu.

Revised *Code of Conduct* and new *ARIAS•U.S. Rules* Are Online

The *ARIAS•U.S. Code of Conduct*, which was revised by the Ethics Discussion Committee and approved by the Board of Directors, is now available on the website, under the Resources menu. Also under that menu are the new *ARIAS•U.S. Rules for the Resolution of Insurance and Reinsurance Disputes*, which resulted from work by the Arbitration Task Force and were approved by the Board. Both of these documents are subjects of articles in the *Fourth Quarter 2013 ARIAS•U.S. Quarterly*, explaining each of them in detail.

The Rules do not replace the *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure*; parties can still agree to conduct arbitrations under those guidelines, instead.

feature

Mid-Arbitration Business Relationships: A Cautionary Tale *Thomas Kinkade Co. v. Lighthouse Galleries, L.L.C.*

Everett J. Cygal

Everett J. Cygal

Most reinsurance treaties require all disputes to be decided by arbitration, because "most insurers and reinsurers prefer to entrust reinsurance issues to experienced industry executives rather than to a judge or jury."[ii] Typical arbitration clauses require a tri-partite panel of arbitrators who are active or retired disinterested officials of insurance or reinsurance companies or Underwriters at Lloyd's, London not under the control of either party. In the parlance of the courts, treaty language like this limits potential arbitrators and umpires to "industry insiders."[iii]

While there are many benefits to using a limited set of industry insiders to decide disputes in lieu of a generalist judge, those benefits come with a substantial trade off – the loss of some of the impartiality protections afforded litigants in court proceedings. Because the courts respect the parties' right to structure their arbitration as they see fit, the courts have held arbitrators to lower standards of impartiality.

Because the courts respect the parties' right to structure their arbitration as they see fit, the courts have held arbitrators to lower standards of impartiality.

The Seventh Circuit has noted that "'[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.'"[iv] Similarly, the Third Circuit has observed that "[i]f the parties are willing to proceed in the face of apparent bias, they should be free to do so."[v]

In *International Produce, Inc. v. A/S/Rosshavet* (a maritime arbitration), the Second Circuit noted that: "[t]he most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose" and that "some degree of overlapping representation and interest" is inevitable.[vi] Similarly, in *Merit Ins. Co. v. Leatherby Ins. Co.* (a reinsurance arbitration), the Seventh Circuit, focusing on the use of industry insiders, stated: "[t]he more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties."[vii] In short, it is by no means unusual for arbitrators to be "precommitted to a particular substantive position"[viii] and have "overlapping representations and interests."[ix]

Decisions Addressing the Impartiality of Party Appointed Arbitrators

The various Courts of Appeal (in many cases reversing district court rulings) have condoned a variety of overlapping representations and interests, particularly with respect to party-appointed arbitrators. For example, the Sixth Circuit found no issue where a party-appointed arbitrator disclosed that he not only socialized with the attorneys of the party that appointed him, but had a 20-year professional relationship with that party.[x] Likewise, the Seventh Circuit, reversing the district court, found no fault with a party-appointed arbitrator who had failed to disclose his legal representation four years earlier of the party that appointed him.[xi]

In *Trustmark v. Hancock*, a subsequent Seventh Circuit decision, the Court interpreted the contractual requirement that all three arbitrators be "disinterested" in the context of industry realities.[xii] In *Hancock*, the party-appointed arbitrator agreed to serve as Hancock's arbitrator in successive arbitrations between the same parties relating to the same treaties.[xiii] The district court held that Hancock's arbitrator was not disinterested and enjoined the arbitration while Hancock's arbitrator remained on the panel.[xiv] The Seventh Circuit reversed, conceding that Hancock's party-appointed arbitrator had an interest in future

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employment but holding that interest was not enough because "the interest in potential future employment is endemic to arbitration that permits parties to choose who will decide."[xv]

> As we observed in Sphere Drake, however, private parties often select arbitrators precisely because they know something about the controversy. Arbitration need not follow the pattern of jury trials, in which a factfinder's ignorance is a prime desideratum. Nothing in the parties' contract requires arbitrators to arrive with empty heads.[xvi]

All of the foregoing decisions relate to party-appointed arbitrators, whom the courts increasingly tend to view as advocates.[xvii]

Decisions Addressing the Impartiality of Neutrals

If "party-appointed arbitrators are *supposed* to be advocates,"[xviii] perhaps neutrals should be held to a more exacting standard. The case law, however, provides little guidance as to the standard that should be applied to neutrals.xix *Commonwealth Coatings* – the only Supreme Court case to address the issue of evident partiality under §10(a)(2) of the Federal Arbitration Act[xx] ("FAA") – arguably turned, in part, on the notion that arbitrators, including neutrals, are "effective in their adjudicatory function" because they are part "of the marketplace."[xxi] However, in large part because *Commonwealth Coatings* was a plurality decision with different judges arriving at the same conclusion based on entirely different rationales, its precedential value on the impartiality standards to be applied to neutrals is, at best, attenuated.

In *Sphere Drake*, *supra*, Judge Easterbrook appeared to make a sharp distinction between the conduct of party-appointed arbitrators and neutrals: "Nor did *Commonwealth Coatings* so much as hint that party-appointed arbitrators are governed by the norms under which neutrals operate. The point of *Commonwealth Coatings* is that the sort of financial entanglements that would disqualify a judge will cause problems for a neutral under §10(a)(2) unless disclosure is made and the parties' consent obtained."[xxii] But the conclusion Judge Easterbrook reached about the "point" of *Commonwealth Coatings* directly contradicts that reached by Judge Posner nineteen years earlier in *Merit Ins*.

In *Merit Ins*., a neutral failed to disclose that he worked for the president of Merit for two years and was a key witness in an arbitration for Merit where the "stakes...were big."[xxiii] The relationship, however, ended 14 years earlier.[xxiv] Regarding *Commonwealth Coatings*, Judge Posner noted that the decision was a plurality decision and that the only issue that the Court agreed upon was the result. Justice Black authored the plurality decision and, referencing the 33rd Canon of Judicial Ethics as well as American Arbitration Association ("AAA") rules, stated "[this] rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."[xxv]

While Justice White concurred, stating that he was "glad to join in my Brother Black's opinion," [xxvi] he took a more circumscribed view of the issue: "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges" because arbitrators "are men of affairs, not apart from but of the marketplace...."[xxvii] Judge Posner, like most other courts, concluded that Justice Black's plurality decision "suggesting that arbitrators are subject to the same ethical standards as judges" was dictum and that "Justice White's opinion [was] a surer guide to the view of a majority of the Supreme Court than Justice Black's."[xxviii] As a general matter, the Federal Circuit Courts have refused to apply the appearance of bias standard to vacatur decisions.[xxix]

Judge Posner framed the test as "not whether the relationship was trivial; it is whether, *having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation*, the relationship between [the neutral] and [the party] was so intimate – personally, socially, professionally, or financially – as to cast serious doubt on [the neutral's] impartiality."[xxx] In other words, the conduct must be evaluated in light of the lower expectations of impartiality that inhere in arbitration.

Judge Posner considered the fact that the neutral's failure to disclose violated the ethical norms of the AAA, which administered this particular arbitration. After expressing sincere respect for the AAA, Judge Posner concluded that the neutral's violation of the AAA rules was "at worst a technical violation" that was not "powerfully suggestive of bias" to justify vacating the award under §10(a)(2) of the FAA.[xxxi]

In a more recent neutral non-disclosure case, the Second Circuit reversed a district court's vacatur of a reinsurance arbitration award.[xxxii] In *Scandinavian Re*, the neutral and one of the party-appointed arbitrators both failed to disclose their concurrent service together on separate arbitrations that "overlapped in time, shared similar issues, involved related parties, [and] included [a] common witness."[xxxiii] According to the district court, "[t]aken together, these factors ... constituted a material conflict of interest."[xxxiv] The district court cited *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.,* in which the Second Circuit held that a neutral arbitrator's failure to disclose a material relationship with a party would lead a "reasonable person" to conclude that the arbitrator was partial to one side.[xxxv]

The Second Circuit in *Scandinavian Re* reversed, holding that the "undisclosed matter [was] not a 'material relationship with a party.'"[xxxvi] The Court noted that "[i]n specialized fields such as reinsurance, where there are limited numbers of experienced arbitrators, it is common for the same arbitrators to end up serving together frequently" and the fact of overlapping service suggests nothing inherently negative about the impartiality of the arbitrators.[xxxvii]

* * *

As the above shows, it is rare for a court to vacate an arbitration award under §10(a)(2) of the FAA because of the evident partiality of any arbitrator, even

a neutral. 9 U.S.C. §1 et. seq. It is even rarer for a court to vacate an arbitration award in the face of the arbitrator's disclosure of the conflict. *Thomas Kinkade Co. v. Lighthouse Galleries, L.L.C.*, a Sixth Circuit decision affirming the district court, is that rare case.[xxxviii]

Thomas Kinkade Co. v. Lighthouse Galleries, L.L.C.

The facts of *Kinkade* are fairly straightforward. In the late 1990's, the Whites agreed to be "Signature dealers" of Kinkade's artwork. The dealer agreements required all disputes to be arbitrated in accordance with the AAA Commercial Arbitration Rules. After a dispute arose between the Whites and Kinkade, an arbitration was commenced in 2002. The dealer agreements called for a tri-partite panel. The neutral was a lawyer and a partner in a Michigan-based law firm.[xxxix]

The Sixth Circuit called the arbitration "a model of how not to conduct one."[xl] In the fifth year of the arbitration the Whites "and persons associated with them began showering [the umpire's firm] with new business."[xli] First, the umpire disclosed that, in connection with a case against the Whites' party-appointed arbitrator, that arbitrator had retained one of the umpire's partners to act as an expert. The fees were expected to be "substantial."[xlii] Less than eight weeks later, the umpire made a second disclosure: David White had retained the umpire's law firm "to represent White in an unrelated NASD arbitration." The umpire "assured the parties that he would prevent himself from obtaining any information about the NASD arbitration."[xliii]

Kinkade unsuccessfully moved before the AAA to disqualify the umpire. Thereafter, Kinkade "submitted a demand for disqualification directly to [the umpire], which he denied."[xliv] After the panel's final award – a 2-1 decision in favor of the Whites – Kinkade moved to vacate pursuant to §10.[xlv] The court was, to say the least, unimpressed with the neutral's conduct: "[a] party who pays a neutral arbitrator to prepare for, and then sit through, nearly 50 days of hearings over a five year period, deserves better treatment than this."[xlvi]

Of course the Whites argued that the umpire's disclosure cured the conflict. As to this argument, the Sixth Circuit held:

> It is no answer to assert, as the Whites do at length in their briefs to our court, that Kowalsky fully disclosed these arrangements to the parties. Five years into an arbitration, those disclosures were little better than no disclosure at all. On this point the district court's opinion was particularly thoughtful: "One major benefit of arbitration is that it allows parties to exercise some control over who will resolve their disputes." D. Ct. Op. at 16. Disclosures at the outset of an arbitration allow a party to reject an arbitrator as ethically encumbered as Kowalsky was here; and Kinkade obviously would have rejected Kowalsky out of hand if David White and Morganroth had hired Kowalsky's firm just prior to this arbitration rather than five years in. Thus, we entirely agree with the district court that, "[w]hen the neutral arbitrator engages in or attempts to engage in mid-arbitration business relationships with non-neutral participants, it jeopardizes what is supposed to be a party-structured dispute resolution process."[xlvii]

The Court also recognized the dilemma that the umpire's disclosures created for Kinkade. Kinkade was placed in the unenviable position of either objecting to the engagements, thereby potentially scuttling the additional work for the umpire's firm and offending the umpire, or agreeing to the situation, thereby waiving the conflict.[xlviii]

The question posed by the *Kinkade* decision is whether the Sixth Circuit's agreement with the district court's rationale means that a neutral is per se forbidden from "mid-arbitration business relationships with non-neutral participants." If so, how does that square with the parties' reliance on industry insiders? Should the narrow pool of industry insiders mean that a neutral should be free to accept work for one of the parties to the arbitration while the arbitration is pending?

Applying the rationale of *Kinkade*, the answer to the latter question is no. Indeed, in *Kinkade*, the financial benefit of the two engagements only indirectly benefited the neutral. While there is no doubt that, to the extent that the neutral was a partner in the law firm, he shared in the profits of those two retentions, it is reasonable to assume that the neutral's income attributable to those engagements was relatively minor. Contrast that with reinsurance arbitrations, in which most arbitrators (all but those currently employed by an insurance or reinsurance company) are sole practitioners who retain the full benefit of any engagement for themselves. Also, reinsurance arbitrators often are mindful of the potential for future assignments. Thus, it seems clear that the Sixth Circuit's logic applies with equal if not more force to an arbitration using industry insiders.

Similarly, applying the standard that Judge Easterbrook announced in *Sphere Drake*, a party's engagement of a neutral on other business during the pendency of an arbitration would appear to create "the sort of financial entanglements that would disqualify a judge [and] will cause problems for a neutral under §10(a)(2) unless disclosure is made and the parties' consent obtained."

Even the application of Judge Posner's test in *Merit* – balancing "the different expectations regarding impartiality that parties bring to arbitration than to litigation" against the relationship between the neutral and the party – should lead to the same result. The retention of a neutral during an arbitration on another matter creates a personally, professionally, and financially intimate relationship that would "cast serious doubt on [the neutral's] impartiality," especially where, as in the reinsurance industry, most arbitrators are sole practitioners.

But even if the opposing party recognizes the likelihood that a court would vacate an eventual adverse award under §10(a)(2), that would provide little comfort where the other party begins "showering [the neutral] with new

business." As outlined in *Kinkade*, the offer of a mid-arbitration business relationship with the neutral presents an untenable dilemma for the opposing party. That party can decide not to make waves and consent, but consent waives the evident partiality issue.xlix Alternatively, the party can object, potentially incurring the resentment of the neutral who decides to forego a potentially lucrative business engagement. Worse yet, the neutral could take the other assignment while proceeding with the arbitration, leaving the objecting party in the awkward circumstance of having its fate decided by a neutral whose integrity it has effectively challenged, and, in the event of an adverse decision, being forced to spend time and money in an uncertain effort to vacate the final award.[l]

However, parties are not completely defenseless. As the courts routinely state, the parties can agree to any level of impartiality they would like. Assuming that both parties at the start of the arbitration have a good faith interest in a true neutral, they can agree at the commencement of the arbitration that neither of them will offer the neutral (or any firm with which the neutral is affiliated) any engagements during the pendency of the arbitration.▼

i The author would like to thank his colleagues, David Spector and David Pi, for their invaluable comments and insights.

ii Robert W. Strain, *Reinsurance Contract Wording* 29 (1992).

iii *Freeman v. Pittsburgh Glass Works, L.L.C.*, 709 F.3d 240, 253 (3rd Cir. 2013) (citing *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

iv *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983) (reinsurance arbitration). The court also commented that "[n]o one would dream of having a judicial panel composed of one part-time judge and two representatives of the parties, but that is the standard arbitration panel, the panel Leatherby chose—presumably because it preferred a more expert to a more impartial tribunal—when it wrote an arbitration clause into its reinsurance contract with Merit." Id.

v *Freeman*, 709 F.3d at 253 (citing *Commonwealth Coatings*, 393 U.S. 145).

vi *International Produce, Inc. v. A/S/Rosshavet*, 638 F.2d 548, 552 (2d Cir. 1981).

vii *Sphere Drake Ins. Ltd. v. All. Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002); *accord, Freeman*, 709 F.3d at 253 ("[P]arties often select arbitrators precisely because they are industry insiders. Parties want someone who understands their business—even if that person already has some familiarity with the parties and issues.").

viii *Merit Ins.*, 714 F.2d at 679.

ix *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 646 (6th Cir. 2006).

x *See Nationwide*, 429 F.3d 640.

xi *See Sphere Drake*, 307 F.3d 617.

xii *Trustmark Ins. Co. v. John Hancock Life Ins. Co* (U.S.A.), 631 F.3d 869 (7th Cir. 2011).

xiii *Id.* at 871.

xiv *Trustmark Ins. Co. v. John Hancock Life Ins. Co* (U.S.A.), 680 F.Supp.2d 944 (N.D. Ill. 2010).

xv *Hancock*, at 871.

xvi *Id.* (citation omitted).

xvii *Id.* at 620; *accord, Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551-52 (8th Cir. 2007); *Nationwide*, 429 F.3d at 645; *and accord, Lozano v. Maryland Cas. Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988).

xviii *Sphere Drake*, 307 F.3d at 620. It is not uncommon for industry insiders serving as party-appointed arbitrators to have close relationships with the lawyers who represent the companies that appoint them. In at least two instances, such relationships may have led to behavior that two district courts have described as "unethical" and tainting the arbitration proceeding. *See Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, 2011 WL 4552997 (S.D.N.Y. Oct. 3, 2011) and *Star Ins. Co. v. National Union Fire Ins. Co.*, 2013 WL 5182745 (E.D. Mich. Sept. 12, 2013). In *Insco*, Insco's party-appointed arbitrator was alleged to have shared private panel communications with Insco's counsel to "demonstrate that [Northwestern's party-appointed arbitrator] was under the control of NNIC and its counsel." *Insco* 2011 WL 4552997 at*2. The disclosure of the panel communications came to light and Northwestern eventually moved in the district court to disqualify Insco's counsel. The district court granted the motion because counsel's "obtaining and hiding panel deliberations in an ongoing arbitration constituted a serious violation of the arbitral guidelines, as well as ethical rules." *Id.* at *6.
While the purported reason for the conduct in *Insco* was to show the bias of the other party-appointed arbitrator, a fact created because of multiple engagements, the alleged conduct in *Star* could have been the by-product of an overly close relationship between counsel and the party-appointed arbitrator. In *Star*, the court found that after the panel had ordered radio silence and after the panel had issued an Interim Final Award, counsel for National Union and National Union's party-appointed arbitrator had several hours of *ex parte* communications "about the Interim Final Award." *Star* 2013 WL 5182745 at *2. These *ex parte* communications came to light because they were part of National Union's fee petition. *Id.* at *3. Remarkably, the district court enjoined the arbitration because, among other things, "undisputedly, these two have engaged in *ex parte* communications. Combined, these allegations call into question whether the true nature of the relationship between the two was hidden." *Id.* *6.
Insco and *Star* demonstrate the potential problems arising from the lower standard of impartiality recognized by the courts. The lax rules relating to party-appointed arbitrators are likely to facilitate more envelope pushing conduct on the part of some arbitrators and the lawyers who retain them.

xix The Second Circuit had not addressed the issue of whether neutrals are held to different standards than party-appointed arbitrators. *See Scandinavian Re. Co. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 76 n.21 (2nd Cir. 2012) ("[W]e need not decide at this time whether the FAA imposes a heightened burden of proving evident partiality in cases in which the allegedly biased arbitrator was party-appointed.").

xx 9 U.S.C. §§ 1-16 (2012).

xxi *Commonwealth Coatings*, 393 U.S. at 146 (1968).

xxii *Sphere Drake*, 307 F.3d at 623.

xxiii *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983).

xxiv *See id.*

xxv *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968).

xxvi 393 U.S. at 150 (White, J., concurring).

xxvii *Id.*

xxviii *Merit Ins.*, 714 F.2d at 682.

xxix *Freeman v. Pittsburg Glass Works, L.L.C.*, 709 F.3d 240, 252 n.10 (3rd Cir. 2013) (citing *Morelite Constr. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82-83 (2nd Cir. 1984); *accord, Positive Software Solutions v. New Century Mortg. Corp.*, 476 F.3d 278, 280-85 (5th Cir. 2007) (en banc) (surveying cases).

xxx *Merit Ins. Co.* 714 F.2d at 680 (emphasis added).

xxxi *Id.* at 681-82.

xxxii *See Scandinavian Re. Co. v. St. Paul Fire and Marine Ins. Co.*, 732 F.Supp.2d 293, 307-08 (S.D.N.Y. 2010).

xxxiii *Id.*

xxxiv *Id.*

xxxv *See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi*, A.S., 492 F.3d 132, 137 (2nd Cir. 2007). The Second Circuit also held that "where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed under *Commonwealth Coatings*) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate." *Id.*

xxxvi *Scandinavian Re. Co. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 74 (2nd Cir. 2012).

xxxvii *Scandinavian Re. Co.*, 668 F.3d at 75 n.20.

xxxviii *Thomas Kinkade Co. v. Lighthouse Galleries, L.L.C.*, 711 F.3d 719 (6th Cir. 2013).

xxxix *Id.* at 720.

xl *Id.*

xli *Id.* at 721.

xlii *Id.*

xliii *Id.* at 721-22.

xliv *Id.* at 722.

xlv *Id.* at 723.

xlvi *Id.* at 725.

xlvii *Id.* at 724.

xlviii *Id.* at 724-25.

xlix *See, e.g., Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1359-60 (6th Cir.1989) holding that a party's failure to object waived the issue regarding alleged evident partiality.

l As a general matter, challenges concerning the bias of an arbitrator or umpire can only occur after the arbitration is completed.

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

John Dattner has retired from ARIAS and will not be accepting any further professional assignments. Anyone who wishes or needs to contact him can reach him at any time by cell at 302-507-3238, or by email at jdatt6163@gmail.com.

Elizabeth M. Thompson has moved offshore. Her new address is 4193 Kamalani Lane, Princeville, HI 96722, phone 970-471-0023, email, elizabeththompsonadr@gmail.com.

Merton E. Marks is now Of Counsel at Gordon & Rees LLP, 111 West Monroe Street, Suite 1600, Phoenix, Arizona 85003, phone 602-794-2478, fax 602-265-4716, email mmarks@gordonrees.com.

Thomas Paschos can now be found at Thomas Paschos & Associates, PC, 303 Chestnut Street, Philadelphia, PA 19106, phone 215-636-0555, fax 215-636-0460, email tpaschos@paschoslaw.com, website www.paschoslaw.com.

Barbara K. Murray is now a Director in the Actuarial Insurance Management Services group at Pricewaterhouse Coopers, serving as an insurance and reinsurance subject matter expert. She can be reached at PricewaterhouseCoopers LLP, 1 N. Wacker Drive, Chicago, IL 60606, cell 708-359-1425, email Barbara.K.Murray@us.pwc.com.

Paul Feldsher has retired from PartnerRe. He continues as an ARIAS•U.S. Certified Arbitrator and is now available for arbitrator and expert witness assignments. He can be contacted at phone 203-895-3158, email pfeldsher@rossfield.com.

After 43 years in the Law & Regulation Department of Allstate Insurance Company, Northbrook, Illinois, **James G. Sporleder** retired at the end of November. Mr. Sporleder, a Vice President and Assistant General Counsel of the company, is a long-time member of ARIAS•U.S. He will continue to offer his services as an ARIAS•U.S. Certified Arbitrator. His new contact information is 20 Lakeside Lane, North Barrington, IL 60010, phone 847-277-1533, email sporleder.arbitrations@gmail.com.

DID YOU KNOW...?

THAT, IN ADDITION TO MANY ANNOUNCEMENTS DURING THE YEAR, ARIAS•U.S. SENDS PDFS OF ALL ISSUES OF THE QUARTERLY AND ALL ANNOUNCEMENT BROCHURES FOR CONFERENCES TO MEMBERS BY EMAIL. IF YOU HAVE NOT BEEN RECEIVING THEM, YOUR EMAIL ADDRESS IN THE ARIAS•U.S. DATABASE MAY BE WRONG. CONTACT CHRISTINA CLAUDIO AT CLAUDIO@CINN.COM.

Full Calendar of ARIAS•U.S. Education Committee Training Sessions for 2014!

Details for all events are on the ARIAS•U.S. website calendar.

March 13 Educational Seminar
Half-day session including lunch starting at 12:00
Hotel Monaco
Washington, DC
Registration Deadline: February 28

Three panels will address these significant arbitration issues:

1. ***Privilege and Other Evidentiary Issues Frequently Encountered by Arbitration Panels***
2. ***Controlling the Arbitration Process and a Practical Discussion about Resolving Parties' Pre-Hearing Disputes***
3. ***Hearing Completion and Post-Hearing Issues (Functus Officio, Motions for Reconsideration, etc.)***

2014 Webinar Program
Four live sessions taken at your computer;
any three out of the four will earn one seminar credit

- March 25 - ***Underwriting a Risk from a Reinsurer's Perspective***
- June 17 - ***Using and Understanding Actuaries***
- September TBD - ***Current Issues in Claims***
- December 10 - ***Cyber Risk***

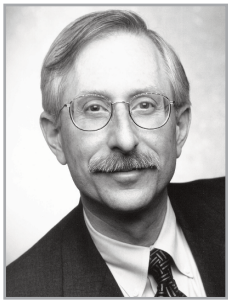
September 18 - Intensive Arbitrator Training Workshop
Full-day program, with lectures and mock arbitrations
Patton Boggs LLP
New York City
Registration Opens: July 30

November 13 - Basic Elements of Arbitration
Half-day session including lunch starting at 12:00
Educational Seminar credit
New York Hilton Midtown Hotel

November 13 - Umpire Master Class
Half-day session including lunch starting at 12:00
Educational Seminar credit
New York Hilton Midtown Hotel

case notes corner

Pre-Award Injunction for Alleged Umpire Bias Due to Nominating Party's Inadvertent Disclosure Denied by Massachusetts Federal Court


Ronald S. Gass

RONALD S. GASS

In early September 2013, Allstate filed a motion in Massachusetts federal district court to enjoin the arbitration proceeding, remove the umpire, and compel arbitration.

If the typical umpire selection process in a tripartite arbitration works well, the umpire is unlikely to know which party nominated him or her. But what, if anything, should happen if the identity of the party nominating that umpire is inadvertently disclosed during the arbitral process? This was the interesting scenario facing a Massachusetts federal district court in a recent case applying the Federal Arbitration Act ("FAA") and related case law.

Allstate Insurance Company ("Allstate") was embroiled in a dispute with OneBeacon American Insurance Company ("OneBeacon") arising under two reinsurance contracts. The substantially similar arbitration clauses required the parties in customary fashion to appoint their party-arbitrators, who would, in turn, name a slate of three umpire candidates, strike two from the other's roster, and then choose the umpire by drawing lots. The parties also agreed on a selection protocol that specifically required that there be no *ex parte* communications with any of the umpire candidates, each candidate would complete an umpire questionnaire based on the ARIAS•U.S. form, and the parties would jointly submit the questionnaire to each umpire candidate.

Following their selection protocol, the parties chose an umpire in July 2013. A month later, they submitted pre-organizational meeting statements of position to the panel. As an addendum to its position statement, OneBeacon included a previously exchanged supplemental arbitration demand. In addition to setting forth the parties' umpire selection methodology, that document inadvertently revealed that OneBeacon was the party who had proposed the selected umpire. In response to this disclosure, Allstate notified the panel in late August 2013 of the erroneous submission and demanded that the newly appointed umpire withdraw "because knowledge of his selection would 'fundamentally corrupt[] the integrity of the process.'" The umpire subsequently denied Allstate's request but acknowledged that "it is general practice that the Umpire is not made aware of who proposed him/her for the position."

In early September 2013, Allstate filed a motion in Massachusetts federal district court to enjoin the arbitration proceeding, remove the umpire, and compel arbitration. In tandem with this filing, Allstate requested that the panel stay the arbitration until the court could rule on its pending motion. In response, the panel ruled that it had been "duly constituted" and could proceed with the organizational meeting the following week. Allstate then filed an emergency motion for a temporary restraining order and preliminary injunction based on its prior court motion to enjoin the arbitration, and in response, OneBeacon filed a cross-petition to compel arbitration.

In analyzing Allstate's motion, the federal district court applied the customary four-pronged legal standard governing preliminary injunctions: (1) the moving party must demonstrate that it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Figuring prominently in the court's evaluation of these factors was the substantial body of FAA case law generally holding that § 10(a)(2) challenges for arbitrator "evident partiality" must await the

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

completion of the arbitration proceeding and final award absent the presence of a very few narrow, and in this case inapplicable, exceptions.

Allstate argued that OneBeacon's inadvertent disclosure that it had nominated the umpire violated the arbitration clause's requirement that the umpire be "disinterested;" breached the parties' agreed protocol that there were to be no *ex parte* communications with the umpire candidates; and was contrary to industry custom and practice, reportedly relying on an ARIAS•U.S. standard of conduct that "individuals named [as umpire] not be advised of which Party initiated their selection."[1] OneBeacon countered that there was no ex parte communication with the panel in violation of the parties' selection protocol; that ARIAS•U.S. guidelines had no legal effect because they were not incorporated into the parties' arbitration agreement; and even if there were a violation of the arbitration agreement or selection protocol, pre-award challenges to arbitrations are not permitted under the FAA for arbitrator bias claims.

In denying Allstate's motion for a preliminary injunction, the court found no violation of the express terms of the parties' arbitration clause or agreed protocol barring *ex parte* communications. Furthermore, the cited ARIAS-U.S. guidelines, which were not incorporated into the parties' agreement, could not serve as a basis for a breach of contract allegation. Allstate's effort to remove the umpire to "'maintain the neutrality of the umpire selection process,'" according to the court, was nothing more than a pre-award "dressed-up bias claim" that is not permitted under the governing FAA § 10(a)(2) case law.

With regard to the "irreparable harm" prong of the preliminary injunction standard, Allstate argued that it would be forced to participate in a "fatally flawed" arbitration from the outset and that the proceeding would have to start over from scratch if the umpire were subsequently removed. Allstate, the court determined, had an adequate remedy at law in the form of a post-award challenge despite its protestations that no remedy existed that would sufficiently compensate it for being forced to participate in what it described as a "fundamentally unfair" arbitration. The court did not consider this to be a case in which, for example, a party faced irreparable injury by being forced to continue a futile arbitration because the underlying dispute was essentially non-arbitrable. As for the other "balance of equities" and "public interest" prongs of the standard, the court found that neither weighed significantly in Allstate's favor. In denying Allstate's motion, the court concluded that none of the four required elements justifying a preliminary injunction was proven.

Clearly, the better practice here is for the parties and their party-arbitrators not to disclose to the selected umpire which party nominated him or her or, for that matter, any of the details surrounding umpire selection beyond what appears in the parties' arbitration clause. This information is irrelevant to the arbitration proceeding and certainly has the potential to taint the fairness, impartiality, and integrity of the process. Query whether the deliberate, as opposed to inadvertent, disclosure of who nominated the umpire would have altered the court's preliminary injunction analysis. The weight of the FAA case law regarding pre-award challenges for arbitrator bias suggests that it would still be an uphill battle, particularly in the absence of more compelling facts, given the apparent adequacy of a post-award challenge to redress fully allegations of evident partiality or corruption.

Allstate Insurance Co. v. OneBeacon American Insurance Co., Civ. Action No. 13-12368-NMG, 2013 U.S. Dist. LEXIS 146826 (D. Mass. Oct. 8, 2013).

1 The court erroneously referred to this as an ARIAS-U.S. "standard of conduct" when it actually was quoting a note to § 6.7 of the Insurance and Reinsurance Dispute Resolution Task Force's April 2004 Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes – Regular Version regarding its umpire selection procedure. The note states in full: "Unilateral contact between a Party-appointed arbitrator and an individual considered for appointment as a default umpire under this paragraph should not be permitted. It is intended that the individuals named not be advised of which Party initiated their selection." Id. at 12 (emphasis added).

Allstate argued that OneBeacon's inadvertent disclosure that it had nominated the umpire violated the arbitration clause's requirement that the umpire be "disinterested;" breached the parties' agreed protocol that there were to be no *ex parte* communications with the umpire candidates; and was contrary to industry custom and practice...

in focus

Recently Certified Arbitrators

Anthony Clark

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

Anthony Clark

Anthony "Tony" Clark is the principle of Clark Insurance Arbitration & Consulting, LLC. He recently retired as Head of the Property Claims Division for Allianz Global Corporate & Specialty North America where he managed claims arising from Property, Energy, and Engineering (Builder's Risk) lines of business for large global corporate insureds.

During more than 37 years in the industry, Mr. Clark has handled and supervised many classes of property losses. Besides the usual property involvement of building, contents, and business income coverage, he was involved in numerous claims dealing with Builder's Risk, Inland Marine, Boiler and Machinery, Energy Risks, and Cargo losses. He has experience dealing with issues and relationships that have arisen both as the representative for the primary insurer and the reinsurer. He also engaged in various management activities and training sessions and presentations regarding basic and advanced property issues on both the domestic and international level.

Mr. Clark has been active in the industry through involvement with the Property & Liability Resource Bureau (PLRB), Loss Executives Association (LEA), and Society of Registered Professional Adjusters (RPA). He has been a presenter on a variety of topics at a number of education meetings for those organizations, as well as presenting topics for the CPCU Society, the PCS Catastrophe Conference, the California Claims Conference (CCC), and the Chicago Chapter of the Inland Marine Underwriters Association (IMUA). He was a member of the Property and Liability Advisory Board for the PLRB and a past member of the Board of Directors for the RPA.

First Session: March 25
ARIAS•U.S. Webinars!

In 2014, The Education Committee will present four live webinars that will take place in March, June, September, and December.

These events, taken on your computer, will last for approximately 75 minutes. Members will have the option of taking any three offered in 2014. Registration and attendance at each webinar will provide 1/3 of a seminar credit point toward certification or renewal.

Complete details are available on the ARIAS website calendar.

www.arias-us.org

REGISTER NOW!

ARIAS•U.S.
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and
Annual Meeting

November 13-14, 2014

The 2014 Fall Conference will return to the Hilton New York on November 13th. Details will be on the website as they develop.

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 February 2014, ARIAS•U.S. was comprised of 309 individual members and 113 corporate memberships, totaling 865 individual members and designated corporate representatives, of which 192 are certified as arbitrators, 53 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 who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

Over the years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

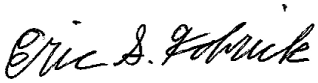
For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure*, *The ARIAS•U.S. Rules for the 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

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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

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

ARIAS U.S. Board of Directors

Administration