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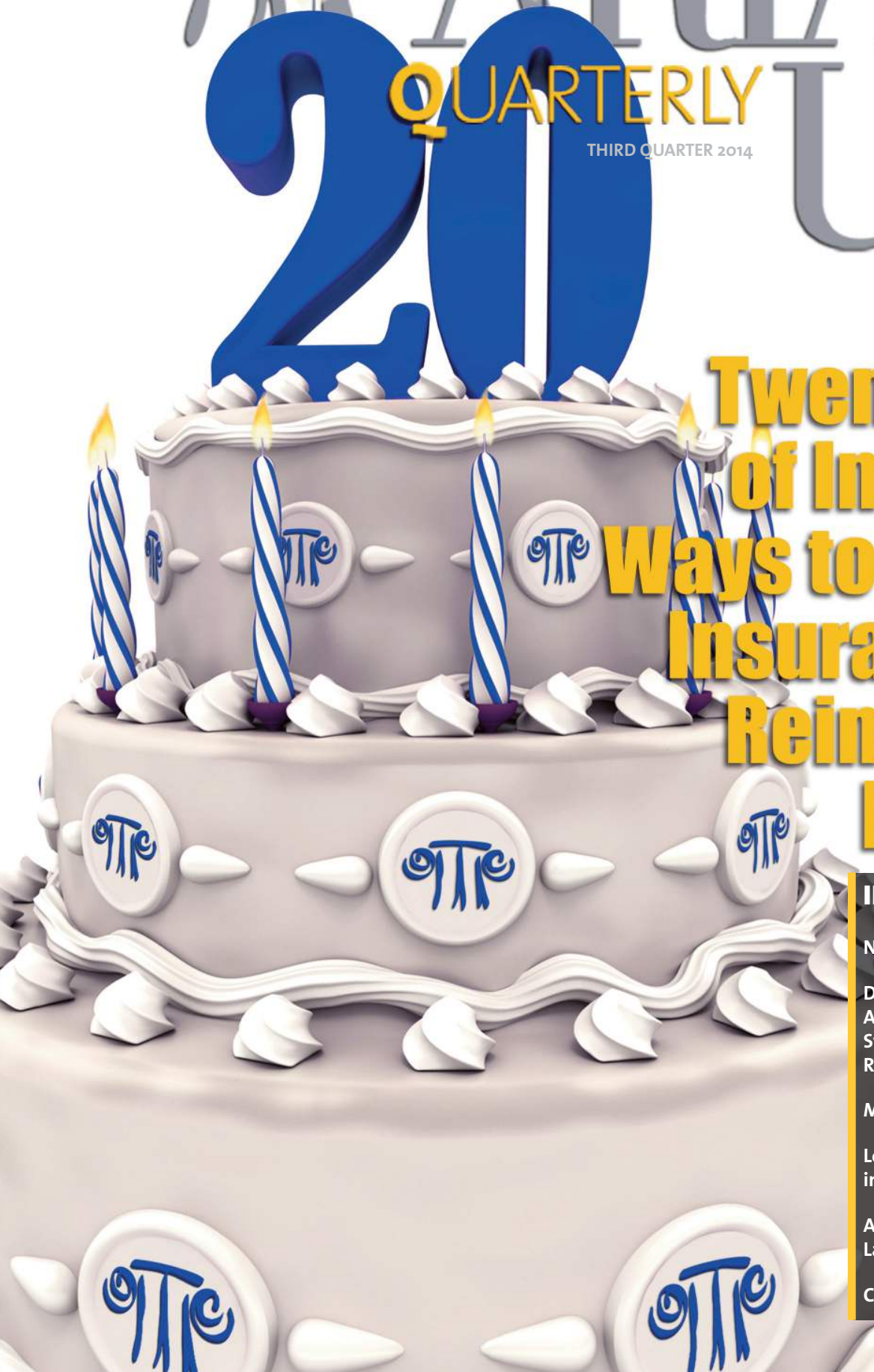
THIRD QUARTER 2014



Twenty Years of Improving Ways to Resolve Insurance and Reinsurance Disputes

INSIDE...

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Thomas P. Stillman

editor's comments

I stand strong in favor of efficiency and as for food, my attitude is somewhere on the spectrum of love and lust and worship. Thus, I have a certain attraction to Gala Dinners. When they're held to celebrate momentously worthwhile events, I think of attending them as killing the proverbial two birds with one stone. Efficiency at its peak. Of course, it would help if the two birds were a duck and a pheasant or a quail, or a partridge. (Alternatively, no need to worry about the birds, I also eat meat and fish, thank you) So when I read that ARIAS•U.S. was going to mark its 20th Anniversary, with a Gala Dinner at the Fall Conference, my heart skipped a beat. You don't like food? Well, there's also going to be music. If that doesn't set your spine a'tingling, there'll be anniversary speeches, as well. Attend? Wouldn't miss it for the world. I hope that each of you will be there, too.

Looking back at ARIAS•U.S. over its twenty year history, the organization could be described as either dynamically consistent or consistently dynamic. Actually, "vibrant" might be more apt. The founding objectives of fostering and advancing the arbitration process have remained constant, but the organization has pursued a course of continuous discussion, assessment, and improvement to make it better. In this issue of the *Quarterly*, Dan Fitzmaurice takes us on an historical journey, from the founding of ARIAS twenty years ago to the present day.

Also in this issue of the *Quarterly*, John DeLascio has authored an article dealing with the effect of state statutes of limitations on arbitration proceedings. Can such statutes operate to bar arbitrations? And who gets to decide, a court or a panel? John's article takes us through some judicial decisions on point.

Companies, arbitrators, and legal counsel can often be heard clamoring for a quicker and cheaper way to arbitrate minor disputes. Many ARIAS•U.S. members are involved in disputes taking place in England. As explained in an article by Jonathan Sacher, the Brits have now adopted a fast track arbitration procedure, themselves. Time will tell whether the clamorers will actually make use of it.

In addition, we're featuring an article by Bob Hall, dealing with notice of loss and sunset clauses in reinsurance treaties. Bob reviews a series of cases involving the same cedant and reinsurer where the courts considered whether a bordereau claim report will suffice for sunset clause reporting purposes.

Finally, in a *Case Notes Corner* article Ron Gass discusses a decision in which a party asserted it was entitled to vacate an award where one of the panel members had failed to disclose a serious medical condition. Spoiler alert: the court said: "No".

Until I became Editor of the *Quarterly* I never noticed that every issue contains a Statement of Editorial Policy, which states, and I quote:

> *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.*

Help celebrate our twentieth anniversary. See your name in print. Send in your article, book review, comment or case note today!

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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.

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feature

ARIAS•U.S.: Twenty Years of Improving Ways to Resolve Insurance and Reinsurance Disputes

Daniel L. FitzMaurice

Daniel L. FitzMaurice

As it celebrates its twentieth anniversary in 2014, ARIAS•U.S. remains as Kennedy envisioned: a society dedicated to improving the resolution of insurance and reinsurance disputes.

The Beginnings

In 1992, T. Richard Kennedy, a named partner at a boutique law firm in New York, had an idea. A member of the Association Internationale de Droit des Assurances ("A.I.D.A."),[i] Kennedy envisioned a society in the United States dedicated to improving the processes for resolving insurance and reinsurance disputes. Kennedy pursued this idea over the next two years with a group of individuals from the insurance and reinsurance industry. The individuals who became the initial organizers of this society were: Debra J. Anderson (now Hall), Vice President & General Counsel, Reinsurance Association of America; Joseph A. Bambury, Jr. Esq.; Ronald A. Jacks, Mayer, Brown & Platt; T. Richard Kennedy, Werner & Kennedy; Robert A. Mangino, Senior Vice President & General Counsel, Swiss Re Holding (North America) Inc.; Franklin W. Nutter, President, Reinsurance Association of America; Edmond F. Rondepierre, Senior Vice President and General Counsel, General Reinsurance Corporation; Daniel E. Schmidt, IV, Senior Vice President and General Counsel, Sorema N.A. Reinsurance Company; and Bert M. Thompson, retired Vice President and General Counsel, RLI Insurance Company.[ii] The organizers created the A.I.D.A. Reinsurance and Insurance Arbitration Society (ARIAS•U.S.) in 1994. As it celebrates its twentieth anniversary in 2014, ARIAS•U.S. remains as Kennedy envisioned: a society dedicated to improving the resolution of insurance and reinsurance disputes.

Ten years after the founding of ARIAS•U.S., Dick Kennedy and Mark Gurevitz, members of the first Board of Directors, wrote an article about the founding of the Society. They explained that the need for an organization like ARIAS•U.S. flowed from several events that began in the mid-to-late 1980s.

> [D]ue to the advent of asbestos, pollution and toxic tort claims coupled with the decision of many companies to cease writing and run-off their book of business, the number of arbitrated reinsurance disputes has grown exponentially. Along with the increase in sheer numbers came a sharp increase in the complexity of the disputes and the amount of money at issue.[iii]

Although the nature and number of disputes have varied over time, the need for qualified and trained arbitrators persists.

Writing in the first edition of the *ARIAS•U.S. Quarterly*, Ed Rondepierre, the first President of ARIAS•U.S., announced the formation of the society and the objective to "promote the use and assist in the development of insurance and reinsurance arbitration for the international and domestic market."[iv] Rondepierre identified key elements for how ARIAS•U.S. planned to fulfill this mission:

> ARIAS will provide initial training and continuing education seminars in the skills necessary to serve effectively on a reinsurance arbitration panel. Upon certifying a pool of qualified arbitrators, ARIAS•U.S. will serve as a resource for parties involved in a dispute to find the appropriate persons to resolve the matter in a professional, knowledgeable and cost-effective manner.

Twenty years later, ARIAS•U.S. continues to serve as a resource for parties seeking qualified arbitrators, to offer a pool of certified arbitrators, and to engage in training and continuing education.

The Development and Growth of the Membership of ARIAS•U.S.

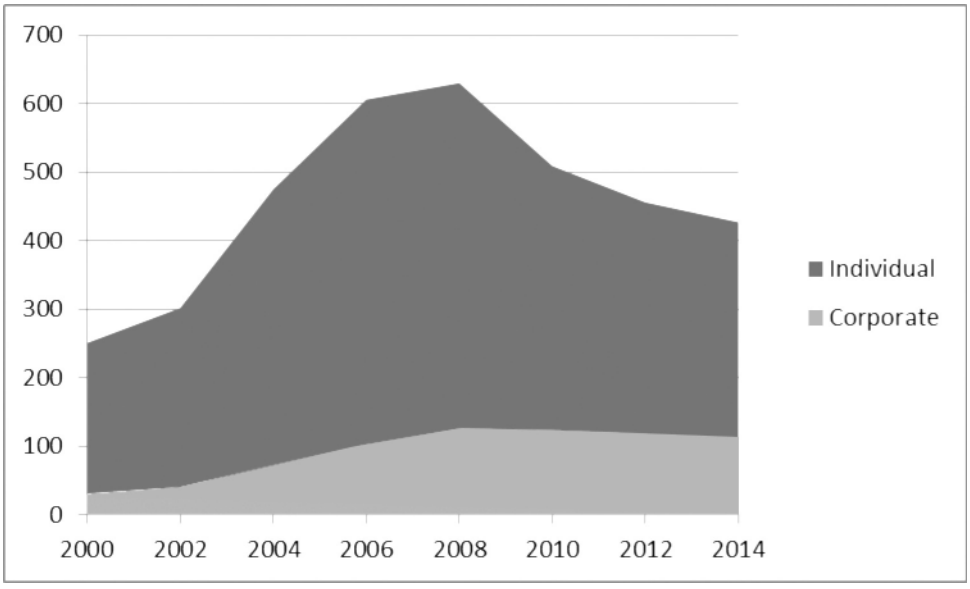
The initial organizers of ARIAS•U.S. reflected major constituencies that still comprise

Daniel FitzMaurice is a partner in the Hartford Office of Day Pitney LLP, where he handles arbitrations, trials, and appeals of complex commercial disputes, including insurance and reinsurance.

most of its membership: representatives of insurance and reinsurance companies; practicing lawyers; and arbitrators. Some individuals may fall within two or even three of these categories at some point in their careers. Other members may not fit neatly into any of these categories but may work in areas affiliated with the insurance industry or arbitration process, including brokers, reinsurance intermediaries, independent actuaries or business consultants, and other positions.

At all times,[v] the membership process has been handled by application, subject to a vote of approval by either a majority of the members of the Society present at a meeting or a majority vote of the Board of Directors or of the Executive Committee.[vi] Membership is open to any "person, law firm or corporation."[vii] Corporate and law firm members are currently entitled to designate up to five representatives for a set amount of annual dues and to designate additional representatives for additional amounts.[viii] Each member, whether an individual, corporation, or law firm is entitled to one vote.[ix]

2000-2014: Number of Members of ARIAS•U.S.



The membership of ARIAS•U.S. grew dramatically in the Society's first fourteen years.[x] In 1999, five years after its formation, ARIAS•U.S. had 250 members.[xi] By 2004, ten years post-formation, the membership had risen to 443, with 375 individual members and 68 corporate and law firm members.[xii] Membership reached its high-water mark in early 2008, with 515 individuals and 121 corporations and law firms for a total of 636 members.[xiii] Counting individuals and representatives of corporations and law firms, the ranks of those associated with ARIAS•U.S. reached 1,183 in 2008.[xiv]

The financial crisis that began in 2008 and continues to some degree today[xv] did not spare ARIAS•U.S. Two years after reaching a high of 636 members in 2008, the membership had dropped to 560 by the second quarter of 2010, with 434 individuals and 126 corporations and law firms.[xvi] Two years later, in 2012, membership slid further to 483, with 365 individuals and 118 corporations and law firms.[xvii] By the first quarter of 2014, the total membership was down to 422, with 309 individuals and 113 corporations and law firms.[xviii] Perhaps not surprisingly, individual memberships experienced the greatest declines, falling from a high of 515 in 2008 to 309 in 2014. As discussed below, changes to the criteria for arbitrator certification may have compounded the effects of the financial crisis on the roll of individual members.

Although its ranks may be somewhat diminished, ARIAS•U.S. remains a vibrant organization with an enviable roster of members. By reviewing the Society's website, one can see that most of the major insurance and reinsurance companies doing business in the United States, particularly in the property-casualty field, participate actively in the Society, as do many national and international law firms and prominent arbitrators.[xix] The members of the current Board of Directors provide a measure of the

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The founding Board, now known as "Directors Emeriti," consisted of: T. Richard Kennedy (Chair), Werner & Kennedy; Edmond F. Rondepierre (President), General Reinsurance; Charles M. Foss, Travelers; Mark S. Gurevitz, The Hartford; Charles W. Havens, III, LeBoeouf, Lamb; Ronald A. Jacks, Mayer Brown; Susan E. Mack, Aetna; Robert M. Mangino, Swiss Reinsurance, and Daniel E. Schmidt, IV, Sorema.

active participation by major players: ACE Group, AIG, Munich Re, Odyssey Re, Swiss Re, and Zurich, and partners from Crowell & Moring, Squire Patton Boggs, and Butler Rubin. Active participants appearing in recent programs include representatives of The Hartford, Travelers, General Re, Allstate, and XL Re. Furthermore, other members of ARIAS•U.S. hale from law firms including Simpson Thatcher & Bartlett, Sidley, Cahill Gordon, Milbank, Clyde & Co., and many others. In addition, several leading insurance and reinsurance arbitrators are active members of the Society and its committees, including the following certified arbitrators who are currently serving on two or more committees: Nasri Barakat (International and Technology); Paul Dassenko (Certification and Forms & Procedures); Charles M. Foss (20th Anniversary and Publications); Mark S. Gurevitz (Ethics Discussion, Forms & Procedures, and Publications); Jim Leatzow (International and Technology); Debra J. Roberts (Education and International); Daniel E. Schmidt IV (Ethics Discussion, Publications, and Strategic Planning); and David Thirkill (International and Forms & Procedures).[xx] These and other members contribute in many ways to make ARIAS•U.S. an active and constructive force in arbitral reform.

The Leadership of ARIAS•U.S.

From its founding to the present, ARIAS•U.S. has enjoyed the benefits of having devoted and strong leaders, including members of its Boards of Directors, committee chairs and members, conference co-chairs, and many other contributors.

The Board of Directors has always been comprised of nine members, chosen to represent three constituencies: ceding companies, reinsurers, and practicing lawyers. The founding Board, now known as "Directors Emeriti," consisted of: T. Richard Kennedy (Chair), Werner & Kennedy; Edmond F. Rondepierre (President), General Reinsurance; Charles M. Foss, Travelers; Mark S. Gurevitz, The Hartford; Charles W. Havens, III, LeBoeouf, Lamb; Ronald A. Jacks, Mayer Brown; Susan E. Mack, Aetna; Robert M. Mangino, Swiss Reinsurance, and Daniel E. Schmidt, IV, Sorema.[xxi] The current members are: Jeffrey M. Rubin (Chairman), Odyssey Re; Eric S. Kobrick (President), AIG; Elizabeth A. Mullins (Vice President), Swiss Re; James I. Rubin (Vice President), Butler Rubin; Ann L. Field, Zurich; Michael A. Frantz, Munich Re; Deidre G. Johnson, Crowell; Mark T. Megaw, ACE; and John M. Nonna, Squire Patton Boggs.

BOARD CHAIRS	
1994-1997	T. Richard Kennedy
1998-2000	Robert M. Mangino
2000-2002	Mark S. Gurevitz
2002-2003	Daniel E. Schmidt, IV
2003-2004	Charles M. Foss
2004-2005	Thomas S. Orr
2005-2007	Mary A. Lopatto
2007-2008	Thomas L. Forsyth
2008-2009	Frank A. Lattal
2009-2010	Susan A. Stone
2010-2011	Daniel L. FitzMaurice
2011-2012	Elaine Caprio
2012-2013	Mary Kay Vyskocil
2013-2014	Jeffrey M. Rubin

Over the years, members of ARIAS•U.S. have devoted countless hours to develop programs and resources to facilitate the resolution of insurance and reinsurance disputes. A list of the current committees provides some measure of the level of activity that surrounds the Society: Executive Committee; 20th Anniversary Committee; Arbitration Task Force; Certification Committee; Education Committee; Ethics Discussion Committee; Finance Committee; Forms & Procedures Committee; International Committee; Law Committee; Mediation Committee; Member Services Committee; Publications Committee; Strategic Planning Committee; and Technology Committee.

In 2004, the Society adopted a form of special distinction for leadership, the "ARIAS Award:"

> The ARIAS AWARD is given, at the discretion of the ARIAS Board of Directors, to an individual who, through his or her own conduct and initiative, has epitomized the objectives of ARIAS•U.S. by making significant contributions towards the improvement of the arbitration process and by fostering the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and equitable manner.

Only three individuals have received this recognition:

T. Richard Kennedy: On November 11, 2004, the Board conferred the first ARIAS AWARD in recognition of Mr. Kennedy's significant contributions, including his role in founding the Society, his service as Chairman of the founding Board, and his position as Editor-in-Chief of the *Quarterly*.

Mark S. Gurevitz: On November 3, 2011, the Board conferred the ARIAS AWARD in recognition of Mr. Gurevitz's significant contributions, including his service as a founding member of the Board, Chairman of the Board (2000-2002), Chairman of the Long Range Planning Committee (2006-2010), member of the Editorial Board and of the Ethics Discussion Committee.

Charles M. Foss: On December 17, 2013, the Board conferred the ARIAS AWARD in recognition of Mr. Foss's significant contributions, including service as a founding member of the Board, Chairman of the Board (2003-2004), and member of the Editorial Board as well as his role in conceiving the Intensive Arbitrator Training Workshop and the Umpire Selection Procedure.

Although the field of insurance and reinsurance might seem to be male-dominated, women members have contributed significantly to the growth and development of the Society – in ways that would easily fill another article. As noted above, Debra Hall was one of the organizers of the Society, and Susan Mack served on the first Board of Directors. Therese Arana-Adams, Debra Roberts, and Mary Ellen Burns were among the early-certified arbitrators. Mary Lopatto not only served on the Board of Directors as an officer and Chairman, she also participated actively as a member of the Long Range Planning Committee from 2006-2010. Susan Stone served on the Board for an extended term (eight years), because she completed part of the term of a departing member; during her tenure, Susan was an officer and Chairman of the Board, oversaw the Long Range Planning Committee, and worked assiduously to improve the finances of the Society. Elaine Caprio also served as an officer and Chairman, and she initiated the Newer Arbitrator Program and co-chaired the Arbitration Task Force.

Mary Kay Vyskocil, another officer and Chairman, continues to serve as Chair of the 20th Anniversary Committee, Co-Chair of the Strategic Planning Committee, and member of the Education Committee. Three women, Betty Mullins, Ann Field, and Deirdre Johnson, currently serve on the Board.

Aside from members of the Board, many other individuals have volunteered and worked tirelessly for the Society. For example, some individuals have taken on significant responsibility by serving as the Treasurer of the Society. These individuals have included James P. White, Richard L. White, Robert Quigley, and Peter A. Gentile. Peter also teamed with Jeff Rubin as members of the first Finance Committee to help build financial reserves – a program that proved to be prudent when the Society was forced to postpone and truncate the Fall Conference in 2012, because of Hurricane Sandy.[xxii]

Stephen H. Acunto of CINN Group served as the first Executive Director of ARIAS•U.S. [xxiii] Although Steve and his wife, Carol, have remained involved in the Society's operations for the past twenty years, he was succeeded as Executive Director in 2002 by William Yankus. For the past twelve years, Bill Yankus has been indefatigable in his efforts to improve the operations of the Society.

Arbitrators, Umpires, and Mediators

When the Board of Directors of ARIAS•U.S. first met on May 6, 1994, they made what turned out to be an important decision regarding the pool of arbitrators they intended to create. Rather than depend on other organizations to train these arbitrators, the Board decided that the Society would undertake that responsibility.[xxiv] As discussed below in the

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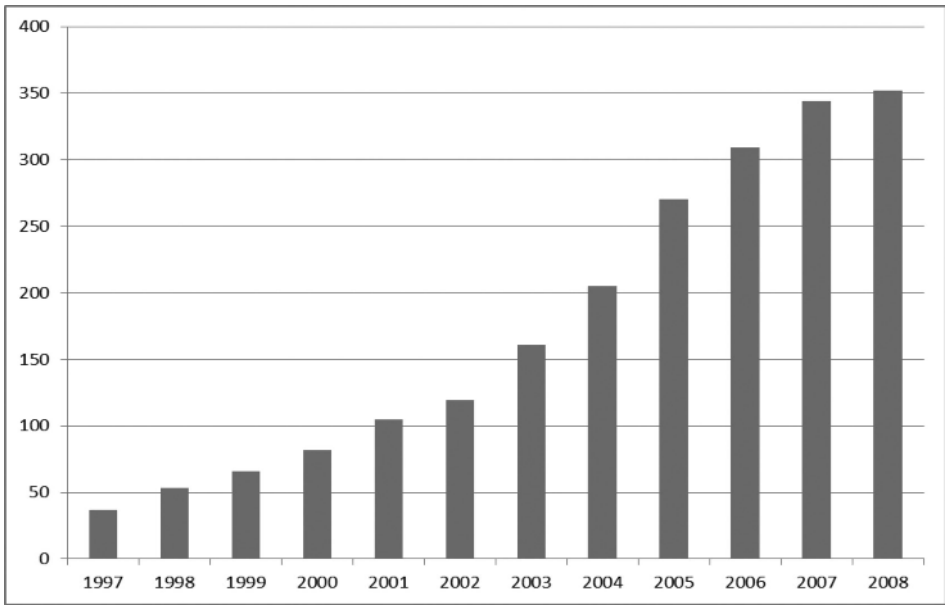
section entitled "Conferences, Seminars, Workshops, and Master Classes," ARIAS•U.S. has trained hundreds of individuals to be arbitrators and has required that, to remain certified, arbitrators must continue to attend educational programs.

At its annual meeting in November 1995, ARIAS•U.S. adopted criteria for certifying individuals as arbitrators that required attendance at conferences and seminars of ARIAS•U.S., membership in the Society, and experience. By November 1997, the pool of certified arbitrators consisted of thirty-seven individuals:

As shown by the asterisks below, ten of these individuals remain in the pool of certified arbitrators today.[xxvi]

1997-2008: ARIAS•U.S. Certified Arbitrators



Howard Anderson
Therese Arana-Adams
Richard Bakka
Peter Bickford*
Michael Cass
Dewey Clark
James Corcoran*
Anthony DiPardo
Caleb Fowler*
James Frank
Peter Frey
Dennis Gentry
William Gilmartin
Richard Gilmore
Thomas Greene
Franklin Haftl
Robert Hall*
Robert M. Huggins
Michael Isaacson
Ronald Jacks
Peter Malloy
Robert Miller*
Charles Niles
Wayne Parker
James Powers*
J. Daniel Reilly
Robert Reinarz
Debra Roberts*
Edmond Rondepierre
Daniel Schmidt, IV*
N. David Thompson
Thomas Tobin*
Peter Tol
Norman Wayne
Paul Hawksworth
James White
Richard White*[xxv]

Paralleling the growth patterns of the membership of the Society, the ranks of certified arbitrators rose significantly through 2008.

After 2008, the size of the pool of certified arbitrators dropped. In 2010 alone, the number of certified arbitrators dropped from 330 in the second quarter to 262 by the fourth quarter. The decline continued over the next years from 240 in 2012, to 223 in 2013, to 192 as of the first quarter of 2014.[xxvii] The pool grew, however, in the second quarter of 2014 to 199 and, as of this writing stands at 205.[xxviii] Although the recent data are still immature in describing a trend, there is reason to believe that the number of certified arbitrators may continue to grow.

Some of the decline in the number of certified arbitrators since 2008 may be attributable to more than the economic downturn. In 2008, the Board announced that it had adopted additional requirements for certification, effective January 1, 2009.[xxix] These requirements originated in recommendations that the Long Range Planning Committee made after extensive deliberations, including "Town Hall" meetings conducted in conference calls with members. The new certification standards, which applied to all arbitrators (even those who were currently certified), included four components: (1) attendance at one ARIAS•U.S. conference within the past two years; (2) industry experience of at least ten years of significant specialization in the insurance/reinsurance industry; (3) attainment of certain levels of experience in handling arbitrators and/or specified levels of participation in educational workshops and seminars conducted by the Society; and (4) completion of an ethics training module[xxx]. A fifth component applied to individuals who were not currently certified – namely, they would need to provide recommendations from three sponsors. Moreover, after meeting the new standards, arbitrators were now required to satisfy ongoing requirements every two years to maintain certification: (a) attendance at one ARIAS•U.S. conference; (b) completion of an on-line ethics refresher; and (c) completion of an ARIAS•U.S. educational session or service as a faculty member at an ARIAS•U.S. conference, workshop, or training session. At the same time that it adopted these enhanced certification requirements, the Board created two new committees, Certification and Education, to facilitate the certification process and provide the necessary educational seminars, ethics modules, and workshops.

The present pool of certified arbitrators is deep in experience and ability. Although the majority of the proceedings probably arise in the context of property/casualty reinsurance, ARIAS•U.S. certified arbitrators have handled disputes over insurance coverage, health care, disability, ocean marine, business interruption, and many other subject areas. Moreover, certified arbitrators have presided over proceedings in Bermuda, China, the United Kingdom, Germany, France, and many other parts of the world. The list of certified arbitrators is available to members and non-members of the Society, and it generates frequent visits by those in search of arbitrators who have the requisite training and experience to manage complex disputes.

Acting on another recommendation from the Long Range Planning Committee, the Board also adopted in 2008 standards for certifying individuals as umpires. Previously, the Society maintained an "Umpire List," which consisted of those certified arbitrators who had completed service as party-appointed arbitrators and/or neutrals in at least three arbitrations. The Umpire List grew from 36 in 2000[xxxii] to 89 when this list was discontinued in 2008.[xxxiii] The newly-designated title of "Certified Umpire" became effective in 2009. To be certified as an umpire, an individual must meet three requirements: (1) be a certified arbitrator; (2) participate as an arbitrator or umpire in five or more insurance or reinsurance arbitrations through final award after completion of an evidentiary hearing lasting at least three days; and (3) have completed at least one of the five arbitrations within five years before applying for umpire certification.[xxxiv] Presently, there are 56 certified umpires.[xxxv]

Arbitration is not the only way to resolve an insurance or reinsurance dispute. In recognition of the growing significance of mediation, the Board approved a change to the bylaws in 2003 to include mediation training within the Society's areas of potential endeavor.[xxxvi] In 2006, the Board approved the designation of ARIAS•U.S. Qualified Mediator[xxxvii] and added mediation experience to the search function for certified arbitrators on the Society's website.[xxxviii]

Instead of providing training to mediators, however, the Society chose to accord the designation of Qualified Mediator to individuals who completed a minimum of thirty-five hours of instruction from a recognized organization or who submitted evidence of other specialized experience satisfactory to the Board.[xxxix] Presently, there are thirty-five Qualified Mediators.[xl]

The *ARIAS•U.S. Quarterly*

In December 1994, the Society issued its first publication, the *ARIAS•U.S. Quarterly*. Included in this publication was an article by John Nonna entitled "A Modest Proposal," in which he suggested two modifications to current arbitral procedures: all-neutral panels and reasoned awards.[xli] On its own, this historical reference might suggest that a period of stasis has persisted for the past twenty years: John Nonna still participates actively in the Society and, indeed, serves on the Board of Directors; and the two major suggestions that he made in 2004 remain open to regular debate and proposals today.[xlii] Nevertheless, the past twenty years at ARIAS•U.S. have been replete with significant projects and accomplishments.

The publication of *ARIAS•U.S. Quarterly* in December of 1994 was far from a singular event. ARIAS•U.S. published two editions of the *Quarterly* each year from 1997 to 2002. Since 2003, the Society has published four editions per year. The varied content of the *Quarterly* has included law review-style articles, opinion pieces, photos and recaps from conferences, information about newly certified arbitrators, and, until his passing, many entries offering the wit and wry observations of Gene Wollan. For example, Rhonda Rittenberg and David Thirkill conducted an extensive survey of members' views about various issues relating to arbitration in 2004 and published the results in the *Quarterly* in 2005.[xliii]

A dedicated group has edited the *Quarterly* over the years. Dan Schmidt served as Chairman of the Editorial Board from 1997 to 2003; Dick Kennedy was the Editor-in-Chief from 2003 to 2010; Gene Wollan was Editor-in-Chief from 2010 through to the Fourth Quarter of 2013. After Jim Rubin served a brief stint as Interim Editor, Tom Stillman became the current Editor-in-Chief this year.

1998: The Practical Guide and the Code of Conduct

In 1998, ARIAS•U.S. announced the publication of two, seminal resources. Tom Allen and Mark Gurevitz oversaw the

ARIAS•U.S. published two editions of the *Quarterly* each year from 1997 to 2002. Since 2003, the Society has published four editions per year. The varied content of the *Quarterly* has included law review-style articles, opinion pieces, photos and recaps from conferences, information about newly certified arbitrators, and, until his passing, many entries offering the wit and wry observations of Gene Wollan.

development of the *Practical Guide to Reinsurance Arbitration Procedure*, an invaluable compendium of advice, forms, and processes designed to aid arbitrations from initiation to completion. The Society published a revised edition of the *Practical Guide* in 2004, under the co-chairmanship of Tom Allen and Tom Orr.[xliv] The other resource that ARIAS•U.S. first published in 1998 was entitled *Guidelines for Arbitrator Conduct*. Three members, Jim Rubin, Dan Schmidt, and Richard Waterman, thoughtfully prepared these ethical canons and commentary. Since its initial publication in 1998, the Code of Conduct has guided arbitrators, parties, and counsel, as well as several courts.[xlv] As discussed below, the Ethics Discussion Committee conducted a comprehensive review of the Code in 2013.

Conferences, Seminars, Workshops, and Master Classes

KEYNOTE SPEAKERS
Hon. Samuel Alito, Jr., Associate Justice, United States Supreme Court
Hon. Thomas A. Daschle, former U.S. Senate Majority Leader
Vincent J. Dowling, Co-founder, Dowling & Partners
Kenneth R. Feinberg, Professor and Special Master of the Federal September 11 Victim Compensation Fund
Maurice (Hank) Greenberg, CEO of Starr Companies
Hon. Dennis G. Jacobs, U.S. Circuit Chief Judge
Edmund F. "Ted" Kelly, Chairman, President, and CEO of Liberty Mutual Group
Michael G. Kerner, CEO - General Insurance at Zurich Insurance Company, Ltd
Hon. George LeMieux, U.S. Senator, Florida
Thomas B. Leonardi, Connecticut Insurance Commissioner
Hon. John S. Martin, Jr., U.S. District Judge (ret.)
Scott P. Moser, CEO of Equitas Ltd.
Hon. Michael B. Mukasey, former U.S. Attorney General and United States District Chief Judge (ret.)
Michael C. Sapnar, President & CEO of Transatlantic Holdings, Inc.
J. Eric Smith, President and CEO of Swiss Re Americas

The inaugural edition of the *Quarterly* announced that "ARIAS•U.S. will hold its first training seminar on January 20th & 21st 1995 in New York."[xlvi] The announcement also stated that "[t]he Program includes featured speakers, seminars, and a mock arbitration panel."[xlvii] In most years since then, the Society has conducted two conferences a year, the fall conference in New York and the spring conference in various locations, including, among others, Hamilton, Bermuda, San Diego, California, Baltimore, Maryland, Las Vegas, Nevada, and, most frequently, in West Palm Beach, Florida. The Fall Conference in 2007 set the attendance record at 660 registered participants.[xlviii] The conferences have covered a wide variety of topics and demonstrations. The format has included video "news" reports of hypothetical storms and other events, multiple phases in a single, hypothetical dispute, and panel discussions in point-counterpoint style. Moreover, although conferences often address procedural issues relating to the arbitration process, in recent years conferences have also addressed substantive issues and emerging insurance and reinsurance topics, including climate change, business interrupt of supply claims, and aggregation of complex medical claims.

Featured keynote speakers at various conferences have included not only of CEOs from the world of insurance and reinsurance but also political figures and judges, even an Associate Justice of the United States Supreme Court. ARIAS•U.S. has also conducted numerous educational seminars over the years, starting with a one-day workshop in Chicago in 1995 that Nick DiGiovanni and Richard Waterman co-chaired, up to and including four live webinars that the Society is currently offering on "Underwriting a Risk from a Reinsurer's Perspective," "Current Issues in Claims," "Cyber Risk," and "Using and Understanding Actuaries."

As noted above, the Board created the Education Committee in 2008. Under the leadership of Mary Kay Vyskocil, the Education Committee has developed two Ethics Training Modules and instituted several seminars and webinars as part of the continuing educational program for arbitrators. The Education Committee also conducted the first Umpire Master Class in September 2013, in which twenty-four students participated.

Special Projects and Strategic Plans

ARIAS•U.S. has launched a number of special projects and programs over the years. For example, in 2000, the Society announced a facility that allows parties to select neutrals randomly and fairly, enabling them to reduce the gamesmanship that may affect the selection process.[xlix] In 2005, ARIAS•U.S. member and certified arbitrator Andrew Walsh wrote a letter requesting that the Board establish a committee to help arbitrators. He suggested that the committee might assist members with items, such as, finding professional liability insurance, a conflicts-tracking system, and guidance with computer applications and systems. Recognizing the value in Andy's suggestion, the Board formed the Member Services Committee.[l]

In January 2006, Mary Lopatto, as Chairman of the Board, conducted a form of retreat unique in the Society's history. In addition to the current Board, several former Chairmen of ARIAS•U.S. participated in discussions about the purpose and mission of the organization and how the Society should proceed.[li] The retreat led to the formation of the Long Range Planning Committee, chaired by Mark Gurevitz. Perhaps not coincidentally, three of the eight members of that committee, Eric Kobrick, Ann Field, and Mark Megaw, later became members of the Board. The Long Range Planning Committee's mission included "a comprehensive review of the arbitrator and umpire certification requirements, whether the requirements should be enhanced, whether additional educational requirements should be required to maintain certification (beyond the required attendance at an ARIAS meeting within a two year period), and whether there should be a mechanism to regularly review an arbitrator's or umpire's certification. The Committee will also consider what ARIAS offers to insurance and reinsurance companies and to individual members, how ARIAS can demonstrate the value it adds to the arbitration process, and how ARIAS can continue to address its members' needs and interests."[lii] As discussed above, the Committee's work from 2006 to 2010 resulted in significant changes to the certification requirements and process, increased ethics and educational requirements, and several other constructive ideas.

In 2011, the Board approved the formation of the Arbitration Task Force.[liii] The Board invited a number of company representatives "to analyze and discuss the current state of the [arbitration] process, and the role of ARIAS•U.S., with an eye toward transformational changes."[liv] With the help of advisors, the six voting members of the Task Force – all from insurance and reinsurance companies — have proposed several changes to the Board. For example, the Task Force fulfilled one of the six objectives in the By-Laws of ARIAS•U.S —"To propose model rules of arbitration proceedings" – by proposing *Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, which the Board modified and adopted.[lv] The work of the Task Force continued, including development of Neutral Arbitration Rules and Streamlined Arbitration Rules, which have now been approved by the Board, among other ideas.

The Ethics Discussion Committee, formed as a recommendation from the Long Range Planning Committee and chaired by Eric Kobrick, has been another special project that has borne fruit. In 2013, the Committee completed the first comprehensive review of the *ARIAS•U.S. Code of Conduct*.[lvi] The revised Code of Conduct includes an extensive amount of clarification, amplification, and guidance to arbitrators on the complexities of ethical standards and requirements. The role of this committee is ongoing and includes a review of the ethics module and coordination with the work of Education Committee.

Last but not least, in March of 2011, the Board formed the Strategic Planning Committee and appointed Mary Kay Vyskocil as the first Chair. The mission of this committee is broad: "to address strategic issues of the organization, itself, including finances, By-Laws, the nomination process, the certification process (e.g., is it now where it should be), conferences (e.g., is two the right number), the development of a formal response of ARIAS•U.S. to amicus brief requests and to arbitration procedures promulgated outside the organization, the mission of ARIAS•U.S., and core values.[lvii] The committee's role is to plan and make recommendations to the Board, not to implement.[lviii] At its meeting in March of this year, the Board established the Strategic Planning Committee as a permanent standing committee of the Society.[lix] Thus, ARIAS•U.S. is planning for the future of the Society and arbitral reform.▼

Conclusion

Dick Kennedy's remarkable idea has grown and flourished in many ways over the past years. Through the contributions of those referenced in this article and far too many others to mention, ARIAS•U.S. serves as more than an important forum for discussions about the arbitration process. The Society has become a fertile source of solutions to improve the resolution of insurance and reinsurance disputes.▼

i According to the organization's website, "AIDA was formed in 1960 for the purpose of promoting and developing, at an international level, collaboration between its members with a view to increasing the study and knowledge of international and national insurance law and related matters." http://www.aida.org.uk/default.asp.

ii E. Rondepierre, *ARIAS•U.S. Will Serve the International Insurance and Reinsurance Law Community, ARIAS•U.S. Quarterly*, Vol. 1, No.1 at 2 (December 1994).

iii M. Gurevitz & T. R. Kennedy, *ARIAS•U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes, ARIAS•U.S. Quarterly*, 2d Q. at 5, (Sept. 2002)

iv E. Rondepierre, *ARIAS•U.S. Will Serve the International Insurance and Reinsurance Law Community, ARIAS•U.S. Quarterly*, Vol. 1, No.1 (December 1994) at 2.

v ARIAS•U.S. offered charter membership status to the first two hundred members. *See Charter Membership Application, ARIAS•U.S. Quarterly*, Vol. 1, No.1 at 8 (December 1994).

vi By-Laws of ARIAS•U.S., Art. 2 §2 available at http://www.arias-us.org/index.cfm?a=6.

vii By-Laws of ARIAS•U.S., Art. 2 §1 available at http://www.arias-us.org/index.cfm?a=6.

viii ARIAS•U.S. Membership Application, available at http://www.arias-us.org/mp_files/img_ftp/ARIAS%202013%20Membership%20Application.pdf.

ix By-Laws of ARIAS•U.S., Art. 5 §6 available at http://www.arias-us.org/index.cfm?a=6.

x ARIAS•U.S. offered charter membership status to the first two hundred members. *See Charter Membership Application, ARIAS•U.S. Quarterly*, Vol. 1, No.1 (December 1994) at 8.

xi *An Invitation, ARIAS•U.S. Quarterly*, (2d/3d Q. 1999) (December 1994) at 18.

xii *An Invitation, ARIAS•U.S. Quarterly*, Vol. 11, No.3 (3d Q. 2004) at 46.

xiii *An Invitation, ARIAS•U.S. Quarterly*, Vol. 15, No.1 (1st Q. 2008) at 36.

xiv *An Invitation, ARIAS•U.S. Quarterly*, Vol. 15, No.2 (2d Q. 2008) at 44.

xv For an interesting article on the financial crisis and its ongoing effects, see *The Origins of the financial crisis: Crash Course*, The Economist (Sept. 7, 2013) available at http://www.economist.com/news/schools-brief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article.

xvi *An Invitation, ARIAS•U.S. Quarterly*, Vol. 17, No.2 (2d Q. 2010) at 44.

xvii *An Invitation, ARIAS•U.S. Quarterly*, Vol. 19, No.2 (2d Q. 2012)..

xviii *An Invitation, ARIAS•U.S. Quarterly*, Vol. 21, No.1 (1st Q. 2014) at 18.

xix A list of the Society's corporate members appears at http://www.arias-us.org/index.cfm?a=227).

xx This lists excludes the following current members of the Board of Directors who are also certified arbitrators: Eric S. Kobrick, Ann L. Field, and Mark T. Megaw.

xxi Two of the Directors Emeriti, Ron Jacks and Ed Rondepierre, are deceased.

Dick Kennedy's remarkable idea has grown and flourished in many ways over the past years. Through the contributions of those referenced in this article and far too many others to mention, ARIAS•U.S. serves as more than an important forum for discussions about the arbitration process. The Society has become a fertile source of solutions to improve the resolution of insurance and reinsurance disputes.

xxii *News and Notices*, 19 *ARIAS•U.S. Quarterly* No. 4 (4th Q. 2012) at 8
xxiii *ARIAS•U.S. Quarterly*, Vol. 1, No.1 (Dec. 1994) at 2.
xxiv Minutes of the First Meeting of the Board of Directors of ARIAS (U.S.), May 6, 1994 (copy provided by Charles M. Foss and presented at ARIAS•U.S., Spring Conference, May 7-9, 2014).
xxv ARIAS•U.S. Certified Arbitrators, *ARIAS•U.S. Quarterly*, Vol. 3, No.5 (Winter 1997) at 13.
xxvi ARIAS•U.S. Certified Arbitrators, available at http://www.arias-us.org/index.cfm?a=16&app=arbitrators.
xxvii See *An Invitation*, *ARIAS•U.S. Quarterly*, Vol. 19, No.4 (2d Q. 2012) at 25; An Invitation, *ARIAS•U.S. Quarterly*, Vol. 20, No.4 (4th Q. 2013) at 46; *An Invitation*, *ARIAS•U.S. Quarterly*, Vol. 21, No.1 (1st Q. 2014) at 18.
xxviii See *An Invitation, ARIAS•U.S. Quarterly*, Vol. 21, No.2 (2d Q. 2014) at 26; ARIAS•U.S Certified Arbitrators as of July 16, 2014, available at http://www.arias-us.org/index.cfm?a=16&app=arbitrators.
xxix *Board of Directors Approves New Certification Requirements*, *ARIAS•U.S. Quarterly*, Vol. 15, No.2 (2d Q. 2008) at 9.
xxx *New Arbitrator and Umpire Certification Requirements*, *ARIAS•U.S. Quarterly*, Vol. 15, No.2 (2d Q. 2008) at 32-34.
xxxi *New Certification, Education, and International Committees Forming*, *ARIAS•U.S. Quarterly*, Vol. 15, No.2 (2d Q. 2008) at 9.
xxxii ARIAS•U.S. Umpire List, *ARIAS•U.S. Quarterly* (1st Q. 2008) at 6.
xxxiii *ARIAS•U.S. Umpire List*, Vol. 15, No.1 (1st Q. 2008) at 35.
xxxiv *New Arbitrator and Umpire Certification Requirements, ARIAS•U.S. Quarterly*, Vol. 15, No.2 (2d Q. 2008) at 32-34.
xxxv ARIAS•U.S. Certified Umpires, available at http://www.arias-us.org/index.cfm?a=344&app=certified_umpires.
xxxvi Minutes of the Board of Directors of ARIAS•U.S. (Jan. 16, 2003) (noting that, on the recommendation of Director T. Forsyth, the Board approved the addition of mediation training).
xxxvii Minutes of the Board of Directors of ARIAS•U.S. (March 9, 2006).
xxxviii *Mediation Experience Added to ARIAS•U.S. Website Search System*, *ARIAS•U.S. Quarterly*, Vol. 13, No.1 (1st Q. 2006) at 8.
xxxix *Qualified Mediator Program Launched on Website, ARIAS•U.S. Quarterly*, Vol. 13, No.1 (1st Q. 2006) at 5.
xl ARIAS•U.S. Qualified Mediator List, available at http://www.arias-us.org/index.cfm?a=374&app=mediators.
xli J.M. Nonna, A Modest Proposal, *ARIAS•U.S. Quarterly*, Vol. 1, No.1 (December 1994) at 1.
xlii *See, e.g.*, ARIAS•U.S. Arbitration Task Force (available at http://www.arias-us.org/index.cfm?a=413) (describing the mission of this still-active effort to include "exploring whether the arbitration process could be improved . . . [by[the potential use of Neutral Panels") *see also* Derek T. Ho, *The Standards for a Reasoned Award: Emerging Lessons from Case Law*, *ARIAS•U.S. Quarterly* , Vol. 19, No. 1 (1st Q. 2012) at 17-19 (discussing judicial treatment of reasoned awards and the increased trend toward using reasoned awards in American arbitrations)
xliii R. Rittenberg & D.A. Thirkill, *Results of Our Survey, ARIAS•U.S. Quarterly*, Vol. 12, No. 3 (3d Q. 2005) at 17.
xliv See New Practical Guide Completed, *ARIAS•U.S. Quarterly*, Vol. 11, No. 2 (2d Q. 2004) at 10.
xlv *See, e.g., Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 66 (2d Cir. 2012) (discussing arbitrator disclosure obligations in reference to Canon IV); *IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, No. 11 Civ. 1965 (NRB), 2011 U.S. Dist. LEXIS 136640 (S.D.N.Y. Nov. 29, 2011) at *16, n.6 (discuss ethical considerations relating to the withdrawal of arbitrators in reference to Canon IV); *Northwestern Nat'l Ins. Co. v. Insco, Ltd.*, No. 11 Civ. 1124 (SAS), 2011 U.S. Dist. LEXIS 113626 (S.D.N.Y. Oct. 3, 2011) at *23 (discussing the confidentiality of panel deliberations in reference to Canon VI).
xlvi *Seminar Set for New York, Jan. 20-21, 1995, ARIAS•U.S. Quarterly*, Vol. 1, No.1 at 1 (1994).
xlvii *Id.*
xlviii *See Record 660 Attendees Look to the Future at ARIAS Fall Conference, ARIAS•U.S. Quarterly*, Vol. 13, No. 4 (4th Q. 2006) at 10.
xlix C.M. Foss, *The ARIAS•U.S. Umpire Appointment Procedure, ARIAS•U.S. Quarterly* (1st Q. 2000) at 2-4.
l Minutes of the Board of Directors of ARIAS•U.S. (June 16, 2005).
li *See Board Creates Long Range Planning Committee, ARIAS•U.S. Quarterly*, Vol. 13, No. 4 (4th Q. 2006) at 24.
lii *Id.*
liii *See* D.L. FitzMaurice, E. Caprio, *ARIAS•U.S. Announces Company Project to Improve Arbitration, ARIAS•U.S. Quarterly*, Vol. 18, No. 3 (3d Q. 2011) at 2.
liv *Id.*
lv *See* D.L. FitzMaurice, S. Kennedy, & T. Farrish, *The ARIAS•U.S Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, ARIAS•U.S. Quarterly*, Vol. 20, N. 4 (4th Q. 2013) at 17.
lvi The Revised ARIAS•U.S. Code of Conduct, *ARIAS•U.S. Quarterly*, Vol. 20, N. 4 (4th Q. 2013) at 25.
lvii Minutes of the Board of Directors of ARIAS•U.S. (January 18, 2012).
lviii *Id.*
lix Minutes of the Board of Directors of ARIAS•U.S. (March 3, 2014).

Register Now! Fall Conference Announced

ARIAS•U.S. 2014 Fall Conference and Annual Meeting will take place on Thursday, November 13 and Friday, November 14, 2014 at the New York Hilton Midtown Hotel in New York City. The highlight of the conference will be a gala dinner celebration of the 20th Anniversary of the founding of ARIAS on Thursday evening, November 13. The announcement brochure with full details was emailed and mailed to all members in mid-August and is on the website home page, along with online registration and hotel reservation.

Entitled, "**The Arbitrators Speak: Insight and Perspective from the Arbitrators, Themselves**," the conference will elicit from experienced arbitrators their views on how to conduct a traditional reinsurance organizational meeting, discovery, and briefing; how to conduct an evidentiary hearing involving life reinsurance issues; how to conduct an arbitration involving health reinsurance issues; and how to conduct an insurance arbitration involving direct insurance with cross border issues.

Unlike most previous conferences, this one will address best practices from the arbitrators' perspective, explaining what works and what does not work. Participants can expect to participate in breakout sessions in which they will have the opportunity to ask questions and express their views.

In addition, the conference will include an ethics session, again addressing important issues from the perspective of the arbitrators and, importantly, a second speed dating session.

A block of guest rooms has been set aside at the Hilton at below market rates. At $359 for a Standard King Room and $419 for a Deluxe King, these rooms are $25 and $21 below last year's rates. The ARIAS•U.S. website home page (yellow button) now links to the "Welcome ARIAS•U.S." page of Hilton's online reservation system. If you prefer to call 212-586-7000 to make your reservation, be sure to mention that you are with ARIAS. Plan to stay, at least, the nights of November 12th and 13th.▼

20th Anniversary Dinner Details Announced

The 20th Anniversary Committee has begun to release some of the details of the Gala dinner on November 13. The evening will begin with a reception at 6:00. A jazz quartet will play during that time and later during dinner.

Dinner will begin at 7:00. Attendees will each be assigned to a table, including those conference attendees who have been invited to sit at platinum sponsors' tables. Table assignments will be given out in advance, upon arrival at the reception. Spouses and guests who have been included with conference registrations (at $200 each) will have table assignments, as well.

Flowers will decorate the tables. Banners will decorate the room. At appropriate times during the dinner, speakers will address the gathering, showing photographs from the past and introducing people who have been important to ARIAS•U.S. or who still are. Although the event was still coming together at press time, early plans indicate a very happy and rewarding experience for all attendees.▼

September 18 Intensive Workshop is Set

The Education Committee will conduct the next Intensive Arbitrator Training Workshop on September 18. The experienced arbitrators who will lead the teaching sessions are **Susan S. Claflin**, Alea Group, **Ronald S. Gass**, The Gass Company, Inc., and **Susan Grondine-Dauwer**, SEG-D Consulting LLC. In total, these long-time ARIAS members have served as arbitrators in 228 arbitrations.

The day-long event will be led by **Lisa Keenan**, Odyssey Reinsurance Company, **Charles W. Fortune**, Sieger Gfeller Laurie LLP, and **Stephen M. Kennedy**, Clyde & Co., all experienced arbitration attorneys.

Full details of the workshop were emailed to all members in July and are on the website calendar. Registration closed on August 29.

This will be the only intensive workshop offered during 2014. It will take place in the New York City offices of Squire Patton Boggs (US) LLP at 1185 Avenue of the Americas.▼

news and notices

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news and notices

The remaining two events are set for September 24 and December 10. Details are available on the Webinar Program calendar page. Registration for the September session is open now (from the home page) and will remain open until it begins.

"Career Gear" and "Dress for Success" Clothing Drives at Fall Conference

Again this year at the Fall Conference, ARIAS will be collecting gently used business clothes for disadvantaged men and women trying to find jobs. Mound Cotton Wollan & Greengrass volunteers will handle the collection process and distribute the clothes to the two organizations. Collection will take place on the morning of November 13. Full details will be announced by email to registrants.▼

Wallis Named ARIAS Certified Umpire

At its meeting on June 20, the ARIAS•U.S. Board of Directors approved **Jeremy R. Wallis** as an ARIAS Certified Umpire, bringing the total number to 56.▼

Second Webinar Draws 32

The second-ever ARIAS webinar took place on June 17 and attracted a total of 32 attendees, ten better than the March session. This webinar is part of a four-session schedule in 2014.▼

This session, entitled "Using and Understanding Actuaries," was led by two actuaries, with decades of experience in both industry norms and the ARIAS dispute resolution process: **Paul Braithwaite**, Senior Managing Director of FTI, and **Barbara Niehus**, President of Niehus Actuarial Services. Education Committee member **Seema A. Misra** moderated the discussion, which lasted 85 minutes.

Leaders addressed a variety of matters, such as understanding the credentials of the actuary before you, assessing his/her professional background and expertise, and evaluating opinions in light of actuarial practice and standards. Case studies demonstrated how actuarial insights can add valuable perspective on interpreting reinsurance contract provisions. This session is available on demand at no cost (and no credit) through the webinar link.

The remaining two events are set for September 24 and December 10. Details are available on the Webinar Program calendar page. Registration for the September session is open now (from the home page) and will remain open until it begins.▼

Umpire Master Class and Basic Elements of Arbitration on Track for November 12

Last year, the first-ever Umpire Master Class took place in September. This year, it will be one of two tracks on the afternoon before the Fall Conference, along with the Basic Elements of Arbitration. The latter course this year will focus on **Dealing with Discovery, Ex Parte, and Experts**.▼

The Umpire Master Class will address **Dissent in the final award, confidentiality, and the new disclosure requirements in the ARIAS•U.S. questionnaire**.

Full details was be announced by email to all members in late August and can always be found on the 2014 Fall Seminars calendar page of the ARIAS•U.S. website. Registration opens on September 15 and closes on October 24.▼

Kevin J. Walsh

ARIAS•U.S. member Kevin Walsh, a partner in the New York Office of Locke Lord LLP, passed away on June 22 after a long struggle with lymphoma. He was 64 years old.▼

feature

Disregarding Honored Traditions: Attempts to Invoke State Statutes of Limitations in Reinsurance Arbitration

John E. DeLascio

John E. DeLascio

I. Introduction

As courts increasingly resolve and address reinsurance disputes, the reinsurance landscape continues to be altered and the private arbitration process becomes progressively transformed into a more courtroom-like experience. In an industry where once it was "not uncommon to form reinsurance contracts via 'gentlemen's agreements' concluded with handshakes or written on cocktail napkins..." much has changed.[2] Historically, reinsurance relationships were premised upon the honored tradition of "utmost good faith," and certain fundamental principles of reinsurance and "honorable engagement" provisions set reinsurance apart from the realm of general commercial contracts.[3] The fact that reinsurance disputes were traditionally resolved through confidential and private arbitrations, as opposed to public court actions, further preserved the distinctly unique nature of reinsurance. Yet, the industry's rich history and customs appear to be eroding and may be giving way to new commercial and legal realities.

Over the past decade, "reinsurance contracts have moved away from the handshake agreements of yesteryear and focus more on the realities of the bottom line."[4] Numerous courts have addressed and resolved reinsurance disputes and, in doing so, some have injected strict legal concepts into the reinsurance relationships which may serve to fundamentally change how reinsurance disputes are resolved in the future.[5]

Whether one views these recent developments as shedding light into the "shadows"[6] of reinsurance or as the lamentable "legalization" of the reinsurance world, the fact remains that reinsurance relationships are changing and the manner within which disputes are resolved appears to be as well. One area which signals a drastic change in the reinsurance arbitration arena is the effort by some to impose statutes of limitation.

Of course, there are numerous factual and legal issues that would need to be considered in determining whether a particular statute of limitations applies to reinsurance disputes and, if so, when the clock starts ticking. However, this article will focus on the two most fundamental of threshold inquiries. First, there is the question of whether a state's statute of limitation even applies to reinsurance contract disputes at the outset.[7] Although statute of limitation defenses were not traditionally raised in reinsurance disputes, some courts appear to have effectively disregarded this long-observed industry custom. Some courts have recognized the departure from industry custom and tradition and found that the statute of limitations defense was now "fair game" in reinsurance cases pending before courts. *See, e.g., Transport Insurance Company v. TIG Insurance Company*, 202 Cal. App. 4th 984, 136 Cal. Rptr.3d 315, 320 (Cal. App. 2012). This precedent may have some limited applicability with respect to court actions; however many reinsurance disputes are still resolved by private arbitrations as opposed to in public courtrooms.

Accordingly, the next inquiry is whether a particular state's statute of limitations applies to private arbitrations or whether the statute of limitations applies only to court actions. A body of law has emerged from courts across the country finding that statutes of limitations do not apply to disputes in a private arbitration. However, not all courts have agreed on this point and the issue remains hotly contested or is

Over the past decade, "reinsurance contracts have moved away from the handshake agreements of yesteryear and focus more on the realities of the bottom line."

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largely unresolved in many jurisdictions. Finally, even if the hurdles to applying the statute of limitations are otherwise overcome, there are multiple considerations to address in determining whether the statute of limitations acts as a bar to the particular claim. The answer normally will depend on various facts, as well as the nuances of the particular state's law.

II. The Venerable History of Reinsurance vs. Applying the Statutes of Limitations Defenses to Reinsurance Contracts

Statutes of limitations generally were not raised as defenses to reinsurance contracts by virtue of the unique and special nature of reinsurance, its long history of "gentility," and the bedrock concepts of "utmost good faith" that govern reinsurance relationships.[8] Courts and reinsurance experts recognized that the reinsurer and reinsured were "partners," who owed each other a duty of utmost good faith. Importantly, the parties in a reinsurance relationship must treat each other with "utmost good faith." *Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd.*, 217 F.3d 33, 43 (1st Cir. 2000), cert. den. 531 U.S. 1146 (2001). This duty of extreme good faith arises out of "the traditional mores of the industry" under which reinsurance is seen as "an honorable engagement." *Transport Ins. Co. v. TIG Ins. Co.*, 202 Cal. App. 4th 984, 136 Cal. Rptr. 3d 315 (Cal. App. 2012).

A. Some Courts Have Declared that Statute of Limitations Defenses May Now Be "Fair Game" in Reinsurance Disputes Pending in Courts

The United States Court of Appeals for the Second Circuit Court in *Continental Casualty Company v. Stronghold Insurance Company*, Ltd., 77 F.3d 16 (2d Cir. 1996) applied New York's statute of limitations to a reinsurance dispute pending before a court and held that the statute had begun to run only after a reinsured reported the losses to its reinsurers and the reinsurers had denied the claims. Although there did not appear to be a great deal of discussion and/or argument in the appellate briefing regarding the fundamental question of whether statutes of limitations even apply to reinsurance contracts, the Second Circuit acknowledged that its ruling departed from the historical view that statutes of limitations had not been applied to reinsurance disputes. 9 Specifically, it noted that:

> Because custom and usage have established a gentility and unity of interest between the reinsured and its reinsurer, *cf. Sumitomo Marine & Fire Ins. Co. v. Cologne Reins, Co.*, 76 N.Y.2d 295, 298, 552 N.Y.2d 891, 892, 552 N.E.2d 139, 140 (1990) (reinsurance is "a field in which differences have often been settled by handshakes and umpires"), a generation ago, we doubt that the defendants would even have considered asserting a statute of limitations defense. ("Defenses based on available periods of limitation usually have not been taken by insurers in the London market, and some participants in the market feel that it is a custom not to assert them.") With the collapse of prominent British reinsurers, and the financial distress of Lloyd's of London, times may have changed. . . . (citations omitted). As Francois Villon sighed: *Où sont les neiges d'antan?* ("Where are the snows of yesteryear?").

Id. at 22.

In *Stronghold*, it was also recognized that "[a]lthough it has been said that the relationship between a reinsured and its reinsurer is not technically a fiduciary one. . . centuries of history have treated both as allies, rather than adversaries" and, accordingly, "[d]efenses based on available periods of limitations usually have not been taken by insurers in the London market, and some participants in the market feel that it is a custom not to assert them." 77 F.3d 16, 21-22 (2d Cir. 1996). *See also Superintendent of Financial Services of the State of New York v. Guarantee Insurance Company*, 2013 N.Y. Misc. LEXIS 2442 (N.Y. Sup. Ct. June 10, 2013) (finding that the breach of contract claims accrued shortly after the ceding insurer provided its reinsurer with notice of loss and that the reinsurance claims were barred by the statute of limitations).

In *Transport Ins. Co. v. TIG Ins. Co.*, 202 Cal. App. 4th 984, 136 Cal. Rptr. 3d 315 (Cal. App. Jan. 13, 2012) a California court also acknowledged the history of reinsurers treating their reinsureds with "the utmost good faith," yet rejected the historical view concluding that: "[i]n other words, all issues are fair game, including the statute of limitations..." *Transport*, 202 Cal. App. 4th at 990.

B. Applying the "Storm Warnings" Doctrine in a Reinsurance-Related Dispute: Further Eroding Industry Custom and Traditions

The Second Circuit, in an unpublished opinion, has adopted the "storm warnings" doctrine in a reinsurance dispute. *AXA Versicherung AJ v. New Hampshire Ins. Co.*, 391 Fed. Appx. 25, 2010 WL 3292927 (2d Cir. (N.Y.) 2010) (unpublished). Generally speaking, the "storm warning" doctrine creates a duty on the part of a reinsurer to inquire into circumstances when it receives "storm warnings" that it is being defrauded. The statute of limitations begins to run at the time the duty arises. In *AXA Versicherung AJ v. New Hampshire Ins. Co.*, 2010 WL 3292927 (2d Cir. (N.Y.) 2010) (unpublished), the Second Circuit found that reinsurance facility members' allegations sounded in fraud and thus were not subject to arbitration. It also held the parties' fraudulent inducement claims were time-barred and that, under New York law, the period of limitations began to run when the insurance facility member was placed on inquiry notice that it was being operated in a manner that directly contradicted its own expectations. The Second Circuit found that "storm warnings" of fraud or

misrepresentation by a cedent may trigger the running of the statute of limitations and that the reinsurance facility member was "confronted with clear storm warnings in August of 1998, as well as additional facts in 2000 'such as to suggest. . . the probability that [it] had been defrauded.'" *Id*. at *3 (citations omitted). The unpublished decision arguably sheds little, if any, light on whether a statute of limitations will be applied in the context of a reinsurance arbitration. Yet, the court's embrace of the "storm warning" doctrine in the context of a reinsurance dispute may signify the further judicial expansion of strict legal principles into reinsurance relationships.

Although there is a swelling of cases from some courts applying the statute of limitations to reinsurance contract disputes, the issue has not been resolved in most jurisdictions.[10] Moreover, many reinsurance disputes are still resolved by private arbitrations and, as discussed below, numerous courts have declared that a particular state's statute of limitations applies only to court actions and not to private arbitrations.

III. A Majority Rule Has Emerged That Statutes of Limitations Apply Only to Court Actions and Not Private Arbitrations

The fact that some courts now deem the statute of limitations defense as "fair game" in court actions does not resolve or even address the issue of whether statutes of limitations apply to private reinsurance arbitrations. In fact, numerous courts across the country hold that statutes of limitations apply only to court proceedings and do not apply to private arbitration. Reinsurance treatises note that it is "unusual" for a reinsurer to even assert the statute of limitation in a reinsurance arbitration. Eugene Wollan, Handbook on Reinsurance Law, § 105 (2003). An ARIAS U.S. Quarterly article explained that "a specific jurisdiction's statute of limitations is almost always inapplicable" in the context of private reinsurance arbitrations and stated:

> The reinsurance legal world does not operate this way – in fairness, it usually does not need to. Statutes of limitations are largely unimportant because the vast majority of reinsurance disputes are resolved through private arbitration. In this setting, a specific jurisdiction's statute of limitations is almost always inapplicable.

Thomas E. Klemm, *Statute of Limitations Issues and Reinsurance Disputes – The Overlooked Potential for a Problem*, *ARIAS•U.S. Quarterly* (2008).

There are several arguments to support the position that statutes of limitations do not and should not apply to private arbitrations, including that: (1) numerous courts hold that statutes of limitations apply only to court actions and not to private arbitrations; (2) arbitration is a consensual and private contractual resolution process in which parties are free to arbitrate any disputes - "including old ones"; (3) "honorable engagement" clauses found in reinsurance contracts free arbitrators from following strict legal rules such as the statute of limitations; and (4) the doctrine of utmost good faith mandates that the parties treat each other with a heightened duty.

Of course, the arguments in favor for extending statute of limitations to the arbitration setting include some of those same reasons that support the argument that statute of limitations should apply in courts, including preventing parties from having to address stale claims, avoiding the risk of witness memories fading and documents (proof) no longer being available, and discouraging parties from sitting on their rights. Moreover, even if a party is successful in convincing an arbitration panel that the strict rules of a statute of limitations does not apply in an arbitration, the arbitrators are most likely free to apply the doctrine of laches if the facts of the case so warrant. In addition, there are other significant and relevant timeliness issues beyond the strict application of a notice statute of limitation including, for example, late notice.

A. Numerous Courts around the Country Have Held that Statutes of Limitations Do Not Apply to Arbitration Matters

Numerous courts across the country have held that statutes of limitation apply only to court "actions" or lawsuits and do not apply to bar any claims asserted in

Although there is a swelling of cases from some courts applying the statute of limitations to reinsurance contract disputes, the issue has not been resolved in most jurisdictions.10 Moreover, many reinsurance disputes are still resolved by private arbitrations and, as discussed below, numerous courts have declared that a particular state's statute of limitations applies only to court actions and not to private arbitrations.

In addition, an arbitration proceeding generally is regarded to be in the nature of an equity proceeding. In many jurisdictions, statutes of limitations only apply to actions in law. Statutes of limitations have traditionally applied to actions in law, but not to proceedings in equity. Accordingly, statute of limitations may not apply to equity matters such as arbitrations.

arbitrations. *See, e.g., Broom v. Morgan Stanley DW, Inc.*, 236 P.3d 182 (Wash. 2010) (holding that a private arbitration, unlike a traditional lawsuit in court, is not an "action" and the statute of limitations did not bar claims in arbitration); *Aetna Casualty and Surety Co. v. Dravo Corp.*, 1997 WL 560134 (E.D. Pa. 1997) (affirming arbitration award refusing to apply statute of limitations in an arbitration context); *Lewiston Firefighters Ass'n v. City of Lewiston,* 354 A.2d 154, 167 (Me. 1976) ("arbitration is not an action at law and the statute [of limitation] is not, therefore an automatic bar" to recovery); *Tufaro v. Allstate*, 2010 WL 2573529 (Conn. Super. May 14, 2010) (holding that arbitration was not a "legal action" against an insured and therefore did not fall within scope of statute of limitations); *Har-Mar, Inc. v. Thosen & Thorshov, Inc.*, 300 Minn. 149 (Minn. 1974) (stating that a time bar is confined to court actions, not to arbitrations); *Clayton v. Unsworth*, 188 Vt. 432, 8 A.3d 1066, 1073 (Vt. 2010) ("[c]ertainly, parties are free to agree to arbitrate all kinds of disputes, including old ones."); *Morgan v. Carillon Investments*, 109 P.3d 82, 210 Ariz. 187 (2005) ("Statutes of limitations apply to actions brought in court. Arbitration agreed to by contract is not an action brought in court."); *Skidmore, Owings & Merrill v. Connecticut General*, 197 A.2d 83 (Conn. 1963) (recognizing that an arbitration is not the bringing of an action within the meaning of that phrase as used in the statute of limitation); *Son Shipping v. De Fosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952) (finding that arbitration is not within the term "suit" as used in the statute of limitation, and is instead the performance of a contract providing for the resolution of controversy without suit).

In *NCR Corp. v. CBS Liquor Control* ("NCR"), the court affirmed the arbitrator's refusal to apply a statute of limitation in an arbitration, finding that the arbitrator's decision did not amount to manifest disregard of the law.[11] The court explained that: "the effect of a statute of limitations is to bar an action at law, not arbitration." NCR, 874 F.Supp. 168, 172 (S.D. Ohio Nov. 16, 1993).

Courts do not speak with one voice on this issue, however, as noted in the recent decision from the Supreme Court of Florida. *Raymond James Financial Services, Inc. v. Phillips*, 126 So.3d 186 (Fla. 2013). Some states' statutes of limitations, like that in Florida, are worded so as to apply to "proceedings." Until mid-last year, two Florida courts, including the District Court of Appeal of Florida, found that the Florida statute of limitations' use of the word "proceeding" did not render it applicable to arbitrations. In the Spring of 2013, the Supreme Court of Florida reversed that precedent and, in a controversial opinion, held that the term "proceeding" as used in the statutory provision was a broad term so as to encompass arbitrations. 126 So.3d 186 (Fla. 2013). The Florida Court's recent expansive reading of the Florida statute of limitations as to include arbitrations may have some additional impact. As suggested by a Florida Bar Journal article, such an interpretation opens a "Pandora's Box." *Answer Brief of Respondents*, 2012 WL 6569452 at * 25 (2012) (citations omitted). For example, the state's evidence code, which defines its reach to include "civil actions and all other proceedings pending" could arguably next be applicable to all arbitrations in the state. *Id.* at * 25 (citations omitted).

Notably, some states such as New York, Delaware, and Georgia have a special statute of limitations limiting the ability to arbitrate.[12] After the 2010 *Broom* case, wherein the Washington Supreme Court found the statute of limitations did not apply to arbitrations, the Washington Legislature amended the State's Uniform Arbitration Act to allow the statute to apply to arbitral proceedings. R.C.W. § 7.04A.090 became effective July 28, 2013. The fact that some state legislatures specifically reference "arbitration" as being within the scope of the statute of limitation lends some support to the argument that those states with statutes that do not specifically reference arbitration did not intend to include arbitrations as within the scope of their respective statute.

In addition, an arbitration proceeding generally is regarded to be in the nature of an equity proceeding. In many jurisdictions, statutes of limitations only apply to actions in law. Statutes of limitations have traditionally applied to actions in law, but not to proceedings in equity. Accordingly, statute of limitations may not apply to equity matters such as arbitrations. *See, e.g., In re IMO Restated Recoverable Trust of Lawrence F. Conlin*, 2014 WL 242655 at *3 (Del. Ch. Jan. 21, 2014)("Because . . . claims sound in equity, the statute of limitations does not technically apply").

B. Arbitration Is a Private Contractual Resolution Process and Parties Are Free to Arbitrate All Manner of Disputes - including Old Ones

Another asserted rationale for not extending the reach of statutes of limitations to private arbitrations is to further the goal of preserving arbitration as a private dispute resolution process, a process which is a creature of contract.[13] Arbitration, as a contractual creature, can be conducted in a variety of ways under procedures established by the parties themselves. For example, the parties to the contract can agree on whether the arbitration will be held with one or more arbitrators, or under the formal rules of a dispute resolution provider, such as ARIAS, JAMS, FINRA or AAA.[14] These rules are usually contractually agreed upon by the parties and this contractual element distinguishes arbitration from litigation. Declining to apply statute of limitations further preserves the private contractual elements of arbitration.

Under this argument, if arbitrations continue to be more akin to court proceedings, it could ultimately eliminate the usefulness of and need for private arbitration and effectively erase the desirable distinctions between arbitration and litigation. To that point, parties to an arbitration agreement choose to resolve disputes in a manner different from litigation for a number of reasons. There are many significant differences between private arbitration and litigation. For example, arbitrator selection differs dramatically from judicial selection. In fact, the parties to an arbitration generally agree to a process where the rules of evidence are either completely absent or are relaxed. In addition, appellate review of arbitration rulings is often much more limited, as is discovery. The fundamental differences between arbitration and litigation are by design. Transforming arbitrations to more courtroom-like proceedings potentially could eliminate the need for arbitrations altogether.

Some courts, in declining to bless the applicability of the statute of limitations to arbitrations, have recognized and reaffirmed the contractual elements that keep arbitrations distinct from court actions. For example, in *Clayton v. Unsworth*, 188 Vt. 432, 8 A.3d 1066, 1073 (Vt. 2010) the Supreme Court of Vermont reaffirmed that "absent an agreement to the contrary, the relevant statute of limitations, by its plain terms, does not apply." After discussing the fundamental nature of arbitration, it pointed out that "[u]nlike the initiation of a civil suit, parties who participate in private arbitration must agree to arbitrate and it is their agreement that provides the source of the arbitrator's authority." Stating the obvious, the court recognized that "[c]ertainly, parties are free to agree to arbitrate all kinds of disputes, including old ones." *Id*. at 1073.

The Alabama Supreme Court recently reversed and remanded a court's order denying a motion to vacate an arbitration award, finding that the arbitrator exceeded his powers in applying a statute of limitations. *Gower v. Turquoise Properties Gulf, Inc*., 2013 WL 6703453 (Ala. Dec. 20, 2013). The court noted that:

> Turquoise contends that Gower is seeking to impose the procedural rigors of court proceedings in arbitration, which "undermines a central purpose of arbitration, that is to resolve disputes between parties in a manner not subject to the formalities and rules of court proceedings." Turquoise is correct that the many procedural requirements of court proceedings do not apply in the arbitration context.
>
> [T]he due process safeguards found in judicial proceedings are largely absent in arbitration. The reputed informality and the relative speediness of an arbitration procedure are achieved by severely limiting discovery; imposing few evidentiary rules; giving the arbitrator almost unbridled discretion to make decisions without basing them on established principles of law or making written findings to support the arbitrator's conclusions; and providing virtually no right of appeal in the case of error in the arbitrator's decision.

Id. at * 8 (citations omitted).

C. Honorable Engagement Clauses Free Arbitrators from Applying Strict Legal Rules

Those seeking to avoid the statute of limitations defense may also argue that "honorable engagement" clauses effectively free arbitrators from applying a statute of limitations. Reinsurance contracts typically contain honorable engagement clauses which may arguably support the position that statutes of limitations are not to be applied in private arbitrations. Honorable Engagement and/or Honorable Undertaking clauses may vary as to the particular verbiage used yet they typically relieve arbitration panels of "judicial formalities," such that "strict rules of law" will not need to be adhered to so that arbitration panels are free to act "reasonably" and in accordance with industry standards.[15]

Generally speaking, courts have read honorable engagement clauses generously, consistently finding that arbitrators have wide discretion to order remedies they deem appropriate. *See, e.g., Banco de Seguros del Estado v. Mut. Marine Office, Inc*., 344 F.3d 255, 261 (2d Cir. 2003); *St. Paul Fire & Marine Ins. Co. v. Eliahu Ins. Co. Ltd*., 1997 WL 357989, at *7 (S.D.N.Y. June 26, 1997) (stating that arbitrators are "free to disregard New York substantive law."). This language frees an arbitration panel "from technical constraints under any body of substantive or procedural law, authorizing it to do substantial justice in the circumstances, according to the professional judgment of its members." *Elwood v. One Beacon America Ins. Co*., 28 Mass. L. Rptr. 81, 2011 WL 679840 at *3 (Mass. Super. Feb. 9, 2011).

Importantly, too, is the fact that often times arbitration provisions call for a

On the other hand, those seeking to utilize a statute of limitations defense may assert that, if a reinsurance contract has an express choice of law provision, this language potentially undercuts the argument that the "honorable undertaking" clauses relieves the arbitration panel from strictly following the state's law.

panel composed of arbitrators with present or past industry experience, which may provide further support that statutes of limitations do not apply. As a court in Massachusetts noted, the contract requirement in the arbitration provision that the members of the arbitration panel be "executive officers of insurance companies" may suggest an intent that the panel apply norms in the insurance industry. *Elwood v. One Beacon America Ins. Co.*, 2011 WL 679840 at n. 8 (Mass. Super. Feb. 9, 2011).

D. Choice of Law Provisions in Arbitration Agreements Likely Do Not Include the Procedural Rules, such as Statutes of Limitations

On the other hand, those seeking to utilize a statute of limitations defense may assert that, if a reinsurance contract has an express choice of law provision, this language potentially undercuts the argument that the "honorable undertaking" clauses relieves the arbitration panel from strictly following the state's law. However, some courts hold that express choice of law provisions do not encompass statute of limitations. *Federal Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 142-43 (10th Cir. 1985) (recognizing that contractual choice of law provisions do not encompass statute of limitations absent express statement of intent); *Gluck v. UNIYS Corp.*, 960 F.2d 1168, 1179-80 (3rd Cr. 1992) ("Choice of law provisions in contracts do not apply statutes of limitations, unless reference is express.").

Courts hold that: "[c]hoice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitation." *Gluck v. UNIYS Corp.*, 960 F.2d 1168, 1179-80 (3rd Cir. 1992). Generally speaking, courts hold that statutes of limitations are procedural provisions and not substantive. *See, e.g., Westinghouse Electric Corp. v. Worker's Compensation Appeal Board*, 584 Pa. 411, 426, 883 A.2d 579, n. 11 (Pa. 2005) (holding statute of limitations are procedural and extinguishes the remedy rather than the cause of action).

In *Trenwick American Reinsurance Corp. v. Unionamerica Ins. Co.*, 2013 WL 3716384 (D. Conn. July 12, 2013), Trenwick sought to enjoin Unionamerica from pursuing an arbitration demand previously sent to Trenwick. Ultimately, the court found that Unionamerica was entitled to pursue arbitration against Trenwick despite the fact that the agreement contained a choice of law provision calling for the law of a state with a statute of limitations relative arbitration. The court reasoned that:

> The Supreme Court has held that a choice of law provision contained in an arbitration agreement, without more, cannot impute a specific intent to exclude certain disputes from arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) ("We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but *not to include special rules limiting the authority of arbitrators*. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.") (emphasis added).

Id. at * 6.

E. "Who Decides Who Decides" Whether the Action Is Timely

Another area of some dispute in the courts is the issue of whether the arbitrators or the courts are to determine the timeliness of an arbitration demand. Many courts have held that an arbitration panel rather than a court can address the timeliness issue. *See, e.g., Merchants Mut. Ins. Co. v. American Arbitration Ass'n.*, 433 Pa. 250, 248 A.2d 842 (1969) (stating that the issue of the applicability of the statute of limitations came within the arbitrator's purview). *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86, 123 S.Ct. 580, 154 L.Ed. 2d 491 (2002) (holding the question of whether NASD limitations rules barred arbitration is a matter for the arbitrators to decide).

In contrast, New York Civil Practice Law and Rules (§ 7502(b)) makes New York one of the few state statutes stipulating that threshold statute of limitations issues are for a court to decide. *See also Chambers v. Sun West Mortgage Company, Inc.*, 2014 WL 2211015 (S.D. Ohio May 28, 2014) (finding that it is for arbitrators to decide whether a claim is time-barred). Recently, a court in New York, *In Re ROM Reinsurance Management Company, Inc. v. Contintental Ins. Co.,* 2014 WL 92835 (N.Y.

A.D. 1 Dep't March 11, 2014), concluded that, given the arbitration agreement's choice of law provision calling for application of New York law, the timeliness issue was to be decided by the court. *See also, Central States, Southeast and Southwest Area Pension Fund v. Allega Concrete Corp.*, 2014 WL 99075 (N.D. Jan. 9, 2014) (holding that question of whether the arbitration request was timely was for the court, rather than the arbitrator to decide). Previously, the *Second Circuit in Bechtel De Brasil Construcoes Ltda v. UEG AraucAria Ltda.*, 638 F.3d 150 (2d Cir. 2011), found that the district court had erred in deciding the statute of limitation issue. The Second Circuit determined that "the provisions in question do not modify the parties' fundamental and broad commitment to arbitrate any dispute relating to the agreement." *Id.* at 155 (emphasis in original).

IV. Conclusion

As the trend continues for courts to resolve reinsurance disputes, litigants and parties may be tempted to further transform private arbitrations into a more courtroom-like experience complete with the statutes of limitations defense. Participants in the industry should be mindful of erosion of the reinsurance industry's honored traditions and the potential ramifications of having arbitrations mirror court proceedings.▼

2 *Trenwick America Reinsurance Corp. v. IRC, Inc.*, 764 F.Supp. 2d 274, 299 (D. Mass. 2011) (citations omitted).

3 That the reinsurance industry has generally been regarded as unique is further evidenced by the fact that several courts have entertained expert testimony from individuals in the reinsurance industry regarding the traditional mores of the industry. *See, e.g., Commercial Union Ins. Co. v. Seven Provinces Ins. Co., Ltd.*, 217 F.3d 33, 44 (1st Cir. 2000) (citations omitted) (considering extrinsic evidence from reinsurance experts on trade usage and industry custom); *Munoz v. PHH Corp.*, 2013 WL 2146925 (E.D. Cal. May 15, 2013) (considering expert testimony of reinsurance "industry standards").

4 John J. McDonald, Jr. *Reinsurance Arbitration 2001: Will The New Ways Cripple The Arbitration Clause*, 68 Def. Couns. J. 328, 329 (July 2001).

5 *Republic Ins. Co. v. Banco DeSecuros Del Estado*, 2013 WL 3874027 at *6 n. 4 (N.D. Ill. July 26, 2013) ("Consistent with the practice of some underwriters. . ., claims against other quota share participants were settled without the invocation of the statute of limitations.") (Citations omitted).

6 *See Transport Insurance Company v. TIG Ins. Co.*, 202 Cal. App. 4th 984, 136 Cal. Rptr.2d 315, 320 (Cal. App. 2012) ("reinsurance has emerged from the shadows in the last 20 years.") (quotations omitted).

7 The Federal Arbitration Act ("FAA") does not provide a statute of limitations under which a party must institute an arbitration. 9 U.S.C. §12.

8 *See, e.g., Transport Insurance Co. v. TIG Ins. Co.*, 202 Cal. App. 4th 984, 991, 136 Cal. Rptr. 3d 315, 321 (Cal. App. 2012) (citations omitted).

9 *See* Brief for Defendant-Appellants at 1995 WL 17203514 (2d Cir. 1995); Brief of Plaintiff-Appellee, 1995 WL 17203515; Reply Brief of Defendant-Appellants, 1995 WL 17049722 (2d Cir. 1995); Reply Brief for Defendant-Appellants, 1995 WL 17203516 (2d Cir. 1995).

10 Some courts simply address the statute of limitations without discussion of the threshold issue of whether they even apply to reinsurance contracts or the parties agree to the applicability of a particular state's statute. *See, e.g., OneBeacon Ins. Co. v. Aviva Ins. Ltd.*, 2013 WL 2147958 at * 4 (E.D. Pa. May 17, 2013) (concluding that certain ceded claims were time barred wherein the parties in the case had agreed that the applicable statute of limitations was four years.)

11 *NCR Corp. v. CBS Liquor Control*, 874 F.Supp. 168 (S.D. Ohio 1993), *partially modified on unrelated grounds*, 1993 WL 767119 (S.D. Ohio Dec. 24, 1993) (No. C-391-027, C-3-01-031), *aff'd sub nom NCR Corp v. Sac-Co.*, 43 F.3d 1076 (6th Cir. Ohio 1995), *rehearing en banc denied*, 1995 U.S. App. LEXIS 3559 (6th Cir. Feb. 21, 1995), *cert. denied sub nom. Sac-Co Inc. v. AT&T Global Info. Solutions Co.*, 516 U.S. 906, 116 S. Ct. 272, 133 L. Ed. 2d 193 (1995).

12 Some statutes specifically apply statute of limitations to arbitrations. *See*, e.g., N.Y. CPLR § 7502(b) (New York).

13 *See, e.g., Answer Brief of Respondents*, 2012 WL 6569452 at * 27 (2012).

14 *Id.*

15 *See, e.g., B.D. Cooke & Partners Ltd. v. Certain Underwriters at Lloyd's, London*, 606 F.Supp.2d 420 (S.D. N.Y. 2009) (addressing arbitration clause stating: "[t]he arbitrators and umpire shall consider this Contract an honourable engagement rather than merely a legal obligation [and] they are relieved of all judicial formalities and may abstain from following the strict rule of law"); *Global Reinsurance Corp. v. Argonaut Ins. Co.*, 634 F.Supp.2d 342 (S.D. N.Y. 2009) (contracts were not strict legal documents, as the panel was given substantial freedom to interpret them as honorable undertakings).

As the trend continues for courts to resolve reinsurance disputes, litigants and parties may be tempted to further transform private arbitrations into a more courtroom-like experience complete with the statutes of limitations defense. Participants in the industry should be mindful of erosion of the reinsurance industry's honored traditions and the potential ramifications of having arbitrations mirror court proceedings.

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

Save *the* Date…

May 6-8, 2015

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

There has been very little member movement this quarter.

Jay Deiner has moved to a new location. He is now at Burt & Scheld Facultative Corporation, 802 Sterthaus Drive, Suite C, Ormond Beach, FL 32174, phone: 386-677-4453 ext. 3001, fax: 386-673-1630, cell: 386-383-0459, email deiner@ormondre.com .

Tom Stillman has a new address, specifically, 55 East Erie, 4805, Chicago, Il. 60611, phone 312 961-4897, email tomstillman@aol.com .

As of September 1, 2014, **Jonathan Rosen** has relocated his office to 1133 Broadway, Suite 600, New York, NY 10010. All of his other contact details remain the same.

Susan Mack has returned to her home in beautiful Ponte Vedra Beach to resume full-time practice as an umpire, arbitrator, and mediator. She can be reached at 1510 Birkdale Lane, Ponte Vedra Beach, FL 32082. Phone for Portia Consulting Services LLC is 904-280-7779, cell remains 904-477-6461.

feature

Loss Notice and Sunset Clauses in Reinsurance Treaties

Robert M. Hall

Robert M. Hall

I. Introduction

Sunset clauses were invented during the hard market of the mid-1980's as a means of reducing the reinsurer's long tail exposure. In essence, they terminate the reinsurer's liability for claims which are not reported by a specific date. It has always been an open question as to what type of report is necessary to preserve the cedent's rights to claim reinsurance recoverables *i.e.* a brief bordereau approach or the full detail required by the loss notice provision in the treaty. Thirty years hence, there is some case law which suggests an answer to this question.

II. Contract Language

The case law on point is a series of decisions related to a retrocessional contract between Munich Reinsurance America, Inc. ("Munich") as cedent and American National Insurance Company ("American National") as the assuming carrier. The sunset clause, which was contained within a commutation provision, provided:

> Seven years after the expiry of this Agreement, the Company shall advise the Reinsurer of all claims for said annual period, not finally settled which are likely to result in a claim under this Agreement. No liability shall attach hereunder for any claim or claims not reported to the Reinsurer within this seven year period.[i]

The loss notice provision provided:

> A. The Company agrees to advise the Reinsurer promptly of all claims coming under this Agreement on being advised by [the policy issuing company], and to furnish the Reinsurer with such particulars and estimates regarding same as are in the possession of the Company. An omission on the part of the Company to advise the Reinsurer of any loss shall not be held to prejudice the Company's rights hereunder.
>
> B. In addition, the following categories of claims shall be reported to the Reinsurer immediately, regardless of any questions of liability of the Company or coverage under this Agreement:
>
> 1. Any accident reserved at 50% of the reinsured attachment point;
> 2. Any accident involving brain injury;
> 3. Any accident resulting in burns over 25% or more of the body; or
> 4. Any spinal cord injury.[ii]

III. Sunset Clause Claim Reporting

The sunset clause reporting by Munich consisted of a bordereau-like, 24 page spreadsheet that listed all workers compensation claims reported to Munich by the policy issuing insurer during the course of the program including claims during years that American National did not participate in the cover. The spreadsheet, as of August 8, 2008, provided 21 categories of information for each claim including named insured, date of loss and reported and paid loss amounts and ALAE. There was no legend on the spreadsheet to identify codes used and Munich's fact witnesses could not identify all of the codes.[iii]

IV. The Decision

A. Round One

In general, this was a suit by Munich against American National for reinsurance recoverables. American National asserted a defense of late notice and counterclaimed for rescission based on violation of the

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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.

This series of cases suggests an answer to the question of whether or not a bordereau claim report will suffice for sunset clause purposes. However, the decision is notable in that it did not subject the claim reporting for purposes of the sunset clause to the requirements of the general notice of loss requirements described in § II, supra. Perhaps subsequent case law will determine what level and/or type of claim reporting will be sufficient for sunset clause purposes.

obligation of utmost good faith, among other things. Round one, *Munich Reins. Amer., Inc. v. American National Ins. Co.*, 2012 U.S. Lexis 140334 (D.N.J.) consisted of rulings on motions for partial summary judgment.

On the issue of loss notice, the court ruled that providing notice in accordance with the loss notice clause in § II, supra, is not a condition precedent to the obligation to pay claims.[iv] However, the court did not address the sunset clause issue.

B. Round Two

Munich Reins. Amer., Inc. v. American National Ins. Co., 2013 U.S. Dist. Lexis 4435 (D.N.J.) was a reconsideration of the earlier decision. The court agreed to reconsider the loss notice issue on the basis that the sunset clause issue had not been sufficiently highlighted in the briefs. The court found that the sunset clause was a condition precedent to the obligation to pay claims commenting: "On its face, the sunset provision here is straightforward: it prevents Munich from reporting claims in perpetuam, by excluding from coverage those claims not noticed with seven years following the expiration of each retrocessional agreement."[v] The court ruled:

> In sum, because [the sunset clause] operates as a condition precedent, it makes clear that [American National] is obligated to indemnify only those claims that were noticed within seven years following the expiration of the relevant retrocessional agreement. . . . With respect to the 2001 agreement, Munich was obligated to notify [American National] of all claims by the sunset deadline of December 21, 2008, Munich contends that it provided notice of those claims via the August 8, 2008 spreadsheet.[vi]

The court found that there were issues of material fact as to the sufficiency of the notice provided by the spreadsheet thus setting the stage for round three.

C. Round Three

The court cited to testimony from a claims person at American National that when she received the spreadsheet, she informed her counterpart at Munich that the spreadsheet was not sufficient notice and that an individual notice on each claim in accordance with the loss notice provision quoted above in § II. *Munich Reins. Amer., Inc. v. American National Ins. Co.*, 2014 U.S. Dist. Lexis 25078 *94-5. Apparently, this was not forthcoming.

The court considered expert testimony that: (a) loss bordereaux are a common form of treaty loss reports but that (b) the sunset clause was part of a commutation provision and that more robust information is necessary to determine which claims might penetrate the reinsured layer and to support the calculations necessary for a commutation. The court held that the spreadsheet did not provide adequate notice characterizing the issue as follows:

> I find that the August Spreadsheet did not include sufficient information that would have allowed [the MGA for American National] to make a determination on the likelihood that a claim arising under the [relevant treaty] would breach [American National's] retrocessional layer.[vii]

V. Comments

This series of cases suggests an answer to the question of whether or not a bordereau claim report will suffice for sunset clause purposes. However, the decision is notable in that it did not subject the claim reporting for purposes of the sunset clause to the requirements of the general notice of loss requirements described in § II, supra. Perhaps subsequent case law will determine what level and/or type of claim reporting will be sufficient for sunset clause purposes.▼

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. Mr. Hall has authored over 100 articles and they may be viewed at his website: robertmhall.com.

i *Munich Reins. Amer., Inc. v. American National Ins. Co.*, 2013 U.S. Dist. Lexis 44345 *46 (D.N.J).
ii *Id.* at *4.
iii *Munich Reins. Amer., Inc. v. American National Ins. Co.*, 2014 U.S. Dist. Lexis 25078 *90-2 (D.N.J).
iv 2012 U.S. Dist. Lexis 140334 *41.
v 2013 U.S. Dist. Lexis 44345 *51.
vi *Id.* at 59-60.
vii 2014 U.S. Dist. Lexis 25078 *99 – 101.

feature

Arbitration Enters the Fast Lane in England

Jonathan Sacher
David Parker

The recent publication of the ARIAS UK Fast Track Arbitration Rules ("AFTAR")[1] introduces an arbitration procedure that offers a fast and cost efficient solution to disputes in England.

Will AFTAR be a success or will it get stuck in the Pit Lane?

Developments in English Arbitration

If asked, reinsurers would probably cite the relative speed and the consequent cost savings as reasons for choosing arbitration over other dispute resolution forums, particularly resolution in court. In fact, the need for speed is enshrined in the English Arbitration Act 1996 ("the Act") which governs arbitration in England. Section 1 of the Act states that "... the object of *arbitration is to obtain the fair resolution of disputes [...] without unnecessary delay or expense...*"[2]

This, together with the opportunity to appoint arbitrators with experience of market customs and practice and England's finely tuned and developed body of reinsurance law, leads to a large number of reinsurance contracts containing English arbitration clauses.

Increasingly, the arbitration process in England has moved away from its roots. In many cases, arbitrators and disputing parties alike adopt the very procedures used in court that arbitration was originally envisaged to avoid. Perhaps the most striking example of this is the disclosure/discovery process. Despite the parties having wide discretion to agree on the scope and extent to which documents will be exchanged, arbitrators often adopt the English court approach. This usually results in parties having to produce a significant number of documents, usually beyond those upon which they rely.

Coupled with the preference to have arbitration tribunals which consist of three arbitrators (each party appointing an arbitrator with a third arbitrator/chairman appointed by the party appointed arbitrators), all leads to longer and expensive arbitrations.

AFTAR – Key Provisions

AFTAR was drafted by an experienced panel made up of those in the insurance and reinsurance market in London and lawyers with many years of practice.

The key features of AFTAR are:

1. Arbitration will be before a sole arbitrator;
2. Unless the arbitrator deems an oral hearing is required, the case will proceed on documentary evidence alone. The Guide to AFTAR published on the ARIAS UK website states that : "*The presumption is that oral argument and evidence will be the exception, not the rule*";
3. Directions will be given at a preliminary meeting within seven days of the arbitrator being appointed;
4. The directions will aim to set out a process which enables the arbitration to be concluded in four months (from the appointment of the arbitrator); and
5. On legal fees ("costs"), the guidance to the rules provides: "*ARIAS recommend that when convening the preliminary meeting the Arbitrator requests each Party to estimate the nature and extent of the costs they anticipate incurring to the conclusion of the arbitration. The Arbitrator should also consider whether to place an overall limitation on costs that may be recovered by a successful party. The Arbitrator may then take these estimates into account when making an award relating to costs....*"

However, the general principle on costs remains as set out in the Act and the arbitrator "*shall award costs on the general*

Jonathan Sacher

David Parker

The recent publication of the ARIAS UK Fast Track Arbitration Rules ("AFTAR"), introduces an arbitration procedure that offers a fast and cost efficient solution to disputes in England.

Jonathan Sacher, Partner and Head of Dispute Resolution and David Parker, Senior Associate, Berwin Leighton Paisner LLP, London

For centuries, oral argument and witness evidence have been pillars of the dispute resolution process and perhaps the biggest challenge that AFTAR will face is how parties take to a procedure where this will be the exception rather than the norm.

principle that costs should follow the event except where it appears to the (Arbitrator) that in the circumstances this is not appropriate in relation to the whole or part of the costs."[3]

The AFTAR draftsmen set out four situations where they consider that parties might consider agreeing to adopt AFTAR (this is only guidance), namely where disputes are of:

(1) limited scope;

(2) particular urgency;

(3) modest value; and/or

(4) a "one-off" kind.[4]

How Will AFTAR Work in Practice?

The whole process is to be completed in four months from the date of the arbitrator's appointment which means that the parties will need to proactively manage their diaries to ensure this happens. Arbitrators will also have to be proactive in dealing with any attempts to delay matters by either party.

The Way Ahead?

The success of AFTAR depends, ultimately, on how willing the insurance and reinsurance industry is to embrace the new procedure. In some ways, AFTAR is a hostage to fortune and its success or otherwise depends upon the frequency with which disputes are considered suitable for resolution under the new procedure arise. Those with a dispute which might result in legal fees becoming disproportionate are certainly likely to welcome the option of adopting the new fast track procedure.

For centuries, oral argument and witness evidence have been pillars of the dispute resolution process and perhaps the biggest challenge that AFTAR will face is how parties take to a procedure where this will be the exception rather than the norm.

Whilst, as yet, there is little empirical evidence on the extent to which AFTAR is are being adopted, the new rules should help to keep London on the front row of the grid for reinsurance arbitrations.▼

1 AFTAR came into effect on 3 October 2013
2 Section 1(a) of the Act
3 Introduction to the Guide to AFTAR
4 Section 6(2) of the Act

BRING AN EXTRA SUIT TO THE 2014 FALL CONFERENCE!

Again, this year, take a look in your closet before the Fall Conference. See if there isn't a suit or two in there that are in fine condition, but that you haven't worn for a year because you have moved on to newer ones. There are people who could use those suits, and any accessories that you aren't using, to help them land jobs and change their lives.

At the Fall Conference, ARIAS•U.S. will be collecting men's and women's suits and accessories that are in very good condition for distribution to Career Gear (men) and Dress for Success (women). These are national non-profit organizations that promote the economic independence of disadvantaged men and women by providing not only a suit, but also a network of support and the necessary career development tools to help them become successful, self-sufficient members of their communities.

Full details will be sent to members in late September.

case notes corner

Is an Arbitrator "Corrupt" or Guilty of "Misconduct" for Failing to Disclose a Serious Illness Warranting Vacatur of an Award?

Ronald S. Gass

Ronald S. Gass

Cases addressing the perplexing question of what happens when an arbitrator dies or resigns due to a serious illness during an arbitration have been featured in several previous Case Notes Corner columns. Gass, Ronald S., *Case Notes Corner: When Arbitrators Resign: Second Circuit Affirms New Rule that a Substitute Arbitrator Should be Appointed Instead of Starting Arbitration Anew*, 17 *ARIAS•U.S. Quarterly* 25 (3rd Quarter 2010); Gass, Ronald S., *Case Notes Corner: Federal Court Rules that Party-Arbitrator's Resignation Due to Illness and Subsequent Recovery Does Not Require Arbitration to Start Anew*, 16 *ARIAS•U.S. Quarterly* 26 (3rd Quarter 2009); Gass, Ronald S., *Case Notes Corner: When an Arbitrator Dies: Federal Court Rules That the Arbitration Must "Begin Fresh,"* 11 *ARIAS•U.S. Quarterly* 30 (4th Quarter 2004). However, if an arbitrator is suffering from a serious medical condition during the hearing and decision-making process but does not voluntarily disclose it or resign, what are the implications? If the parties are unaware of the arbitrator's illness during the proceeding, could this constitute a denial of fundamental fairness under § 10 of the Federal Arbitration Act ("FAA") such that the subsequent award may be vacated? Just such a scenario arose in the context of a recent maritime arbitration governed by the Carriage of Goods by Sea Act ("COGSA"), ch. 229, 49 Stat. 1207 (1936) (codified as a note to 46 U.S.C. § 30701), and subject to a vacatur motion before a New York federal district court applying both the FAA and the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 202 (2014).

In this case, a dispute arose between the manufacturer/shipper of a chemical used in making plastics and the tanker company chartered to transport 3,500 metric tons of it from Houston to South Korea. The chemical was tested by independent surveyors to ensure compliance with the manufacturer's specifications both before it was loaded onto the tanker and when it was unloaded prior to being pumped into on-shore storage tanks at the tanker's destination. In both instances, the chemical showed no signs of contamination. However, when the chemical was tested again after six weeks in storage, it was found to be contaminated. The shipper alleged that the contamination occurred during the tanker's voyage as the result of being in contact with the residue of another chemical left in the ship's storage tanks from a prior charter. The tanker company denied this and contended that the contamination occurred *after* the shipper accepted delivery in South Korea and while it was being stored on shore. Because of the contamination and the coincidental sudden drop in the market price for this chemical, the shipper was forced to sell it at a considerable loss and then sued the tanker company for its contract damages.

The charter party agreement required the dispute to be resolved by the Society of Maritime Arbitrators ("SMA") under its rules. In April 2011, the two party-appointed arbitrators selected an umpire. Ten hearings were subsequently held, and in August 2013, the panel issued a 2-1 decision in favor of the tanker company. The majority found that the shipper had not shown by a preponderance of the evidence that the alleged contamination took place while the cargo was in the tanker company's custody nor had it proven that it was entitled to damages in light of the "plunging market" for the chemical

If the parties are unaware of the arbitrator's illness during the proceeding, could this constitute a denial of fundamental fairness under § 10 of the Federal Arbitration Act ("FAA") such that the subsequent award may be vacated?

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 Web site at www.gassco.com.

upon its arrival in South Korea. Sometime in 2012 during the pendency of this arbitration, the umpire was diagnosed with an inoperable brain tumor, but he never informed the parties about it. However, in April 2013, he did notify other counsel in a separate arbitration proceeding about his illness, and he ultimately resigned from that other panel. In January 2014, the umpire died.

Challenging the panel's award, the shipper (and its insurer) filed a motion to vacate in New York federal district court based on two theories: (1) the umpire's failure to disclose his medical condition constituted "corruption" under FAA § 10(a)(2) and "misconduct" under § 10(a)(3); and (2) manifest disregard of the law. The shipper's first argument was the most intriguing. Citing the SMA's maritime arbitration rules, it contended that the umpire was obligated to "disclose any circumstance which could impair [his] ability to render an unbiased award based solely upon an objective and impartial consideration of the evidence presented to the Panel."[2] Referencing a cancer medical journal, the shipper argued that malignant primary brain tumors cause profound changes in cognitive function; hence, the SMA's rule required the umpire to disclose that he suffered from such a tumor. Rejecting this argument, the court held that violations of arbitration rules or ethics codes are *not* grounds for vacating an arbitration award under the FAA as they lack the force of law, and neither they nor the parties' contract are capable of expanding a court's authority to vacate an award beyond the specific and limited grounds provided in the statute. As the court succinctly put it: "It is highly questionable whether the SMA rules require disclosure of a medical condition that might affect cognition but does not impair objectivity or cause bias or impartiality."

Changing tack, the shipper next argued that the umpire was "corrupt" for billing his time while allowing the parties to labor under the mistaken impression that "none of his subjectivities could interfere with his objective consideration of the evidence" and that, given his illness, the umpire "changed from a sound condition to an unsound condition," i.e., he became "corrupt." Rejecting this semantic argument, the court observed that while cancer may cause the "corruption" of healthy tissue in a brain, no one would regard that human being as a "corrupt" person in the sense intended by language of § 10(a)(2), "where there was . . . corruption in the arbitrators, or either of them."

As for the § 10(a)(3) "misconduct" allegation, the court found no indication that the shipper was actually prejudiced by the umpire's failure to disclose his illness. Over the course of the ten hearing days, the shipper conceded that it saw nothing that made it question the umpire's competence. Moreover, the tanker company's party-appointed arbitrator evidently reached the same conclusion as the allegedly impaired umpire. The shipper's after-the-fact contention that if it had known about the umpire's impairment, it would have asked him to resign still did not demonstrate that it suffered actual prejudice, particularly when under the SMA's rules there was no basis for compelling him to do so. In sum, the court concluded that the shipper's motion "seeks to transform a personal tragedy into a second chance for parties disappointed with the outcome of their arbitration" – a result running afoul of the twin goals of arbitration, settling disputes efficiently and avoiding long and expensive litigation.

Without delving into the technicalities of the parties' maritime charter party contract and related COGSA arguments here, suffice it to say that the court was unimpressed with the shipper's manifest disregard of the law theory, even though that FAA doctrine remains viable in the Second Circuit. It held that the panel majority did not misapply COGSA and that there certainly was a colorable justification for the outcome reached. In short, the shipper had not met its "extraordinary" burden of showing that the majority manifestly disregarded the law.

This case spotlights the difficulties inherent in dealing with arbitrators who become seriously ill during the course of an arbitration and do not disclose their medical condition or voluntarily resign. If the illness obviously impairs their competency to serve on the panel and they do not disclose it or resign, this case suggests that a tactful record should be made documenting the party's concerns for use in later proceedings. However, if the impact of the arbitrator's illness is undetectable, the arbitrator does not voluntarily disclose the medical condition, and the panel renders an adverse award, the losing party will need a lot more than just reliance on FAA § 10(a)(2) or (3) grounds to vacate it.[3]▼

Zurich American Insurance Co. v. Team Tankers A.S., No. 13cv8404, 2014 U.S. Dist. LEXIS 89260 (S.D.N.Y. June 30, 2014).

2 Society of Marine Arbitrators, Inc., Maritime Arbitration Rules § 9 ("Disclosure by Arbitrators of Disqualifying Circumstances") (rule in effect prior to Oct. 23, 2013), *available at* http://www.smany.org/doc1a-arbitrationRules.html. As the court observed, this SMA rule does not require an arbitrator to disclose a serious medical condition during the pendency of an arbitration. Compare this rule with the ARIAS•U.S. Practical Guide § 2.4 ("Disclosure Statements") and ARIAS•U.S. Code of Conduct, Canon IV, which also focus primarily on the disclosure of "real, potential, or apparent" conflicts and any interests in or relationships with the parties, counsel, and co-panelists. Note, however, that Canon IV, Comment 5 does offer some health-related guidance: "After the Panel has been accepted by the parties, an arbitrator should recognize the consequences to the parties and the process of a decision to withdraw and should not withdraw at his or her own instigation absent good reason, ***such as serious personal or family health issues***." [Emphasis added.] However, like the SMA rule, nothing in these ARIAS•U.S. guidelines compels disclosure of, or resignation due to, a "personal health issue."

3 In this vacatur proceeding, the court awarded the prevailing tanker company its attorney's fees and expenses as provided for in the charter party agreement; however, in doing so, the judge took the occasion to remind the shipper of his pre-motion conference warning that the court believed a vacatur motion based on the umpire's failure to disclose his medical condition was "baseless." The judge's initial and blunt reaction to the shipper's "corruption" and "misconduct" FAA arguments signals the inherent weakness of such a strategy and perhaps the likelihood that costs or sanctions against the moving party will be imposed even in the absence of a contractual "costs to the prevailing party" provision.

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NOVEMBER 12, 2014

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Whether you need to complete an educational seminar, or are just interested in improving your craft as an arbitrator, consider attending one of these seminars, both of which will be offered in New York City during the afternoon of November 12 – the day before the start of the 2014 Fall Conference.

The Programs

"Dealing with Discovery, Ex Parte, and Experts" – Basic Elements of Arbitration

This seminar for newer arbitrators will address frequently contested issues and provide a framework for how arbitrators can deal with them effectively and efficiently. The session will be split up into three segments. First, the panel will provide practical tips and examples for addressing discovery issues during the organizational meeting. Next, there will be a presentation about recent case law developments on ex parte communications, a discussion of traps for the unwary, and a discussion among all participants about how to set rules around ex parte communication to avoid potential pitfalls. Finally, the panel will address the use of experts in reinsurance arbitrations and provide perspectives of parties, lawyers and arbitrators, followed by a lively discussion among all participants about ways to deal with competing approaches to experts.

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This seminar will focus on the following three topics.

- **Dissent in the final award**. What to allow, what to discourage, how to manage it. Deciding who the audience is. Is the award written to explain to the loser? How should it be written? It ties to the need for reasons…in deliberations if not in the award. Giving reasons provides insight into the decision.
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- **Confidentiality**. Is it within the Panel's inherent authority to order it over the objection of one party? Does it affect arbitrator behavior? How does it relate to the question whether a reasoned award is desirable or necessary? What does it mean for subsequent arbitrations?

Location and Schedule

New York Hilton Midtown
Check-in: East Corridor, 2nd Floor
Lunch starting at 12:00 Noon
Meetings begin at 1:00 p.m. and end at 5:00 p.m.

Complete seminar information will be announced by email and on the website calendar in August.

Cost and Registration

Registration will begin on the ARIAS•U.S. website at 11:00 a.m. EDT on September 15.

The fee of $450 includes meeting costs, lunch, and mid-afternoon refreshment break. Information about staying at the Hilton is on the opposite page.

CLE Credit will be provided.

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 August 2014, ARIAS•U.S. was comprised of 295 individual members and 105 corporate memberships, totaling 805 individual members and designated corporate representatives, of which 205 are certified as arbitrators, 56 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.

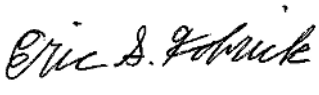
If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill 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

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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.

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Signature of Individual or Corporate Member Applicant

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