VOLUME 20 NUMBER 4

ARIAS U.S. QUARTERLY

FOURTH QUARTER 2013

ARBITRATION CLAUSES IN SPECIALTY LIABILITY POLICIES

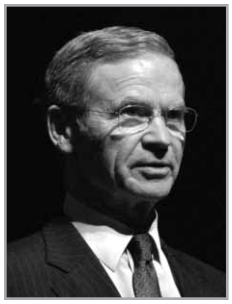
INSIDE...

ARIAS U.S.
VOL. 20 NO. 4
FOURTH QTR. 2014

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

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

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



William Yankus

managing editor's comments

While our Editor, Gene Wollan, is recovering from a recent illness, I will offer comments about the current issue.

Much has been written and discussed about the extent to which insurance and reinsurance contracts should require arbitration and the extent to which those requirements should be detailed in advance as part of the contract. In this issue's cover article, insurance industry veteran James Macdonald presents a thorough discussion of the use of such clauses and their nature, both in direct policies and reinsurance contracts.

A great deal of time and effort has been expended in the last several years to address meaningfully the concerns in the industry about whether fair arbitration results are being adversely affected by arbitrators accepting too many assignments from the same law firm or party. Finding ways to address the issue that are fair both to arbitrators and to companies has been featured in recent ARIAS•U.S. conferences, Board meetings, and committee meetings. Largely as a result of these efforts, the first finished results were revealed at the 2013 Fall Conference. The revised ARIAS•U.S. Code of Conduct and the new ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes were presented and explained in detail to attendees. In this issue, they are explained to all members with articles by the Ethics Discussion Committee and the sub-committee of the Arbitration Task Force that addressed the challenge of creating ARIAS•U.S. Rules for the first time. The new publications, themselves, are online at the ARIAS•U.S. website under the Resources menu.

This issue also reports on all of the activities at the 2013 Fall Conference and includes a transcript of Connecticut Insurance Commissioner Thomas B. Leonardi's keynote address.

Finally, on page 4, Dick Kennedy, founding Chairman of ARIAS•U.S., shares his recollections of Ed Rondepierre and reveals Ed's instrumental role in the creation of ARIAS•U.S., which contributed in a major way to its position as the leading organization in the industry today.

contents

VOLUME 20 NUMBER 4

Editorial Policy

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

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

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

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

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

Copyright Notice

in memoriam

Edmond Rondepierre

Ed Rondepierre

T. Richard Kennedy

I suppose the feeling is near universal. When a good friend unexpectedly dies, we wish death were not so final. If only we could talk to them one more time — to tell them how much we enjoyed times spent together, how much we admired and respected them, how our own life was made better just by knowing them. Such was my feeling when I learned of Ed Rondepierre's death in May of this year.

Ed and I became friends nearly 40 years ago when we both attended meetings of the NAIC, bar associations and industry groups. We discovered we both had a love of the law and business, the sea, good books, and fine restaurants. Ed's lovely wife, Nan, and my Catherine became good friends, and we had many happy times together. Over several summers, Ed and Nan would overnight with us at Fishers Island on their cruise up the New England coast with their yacht club. After I acquired my Sabre 36, we sailed together to Newport for some fun and relaxing times. With his maritime training and experience, Ed was an accomplished seaman. I knew better than to challenge him to a race — although I admit on a few occasions I nonchalantly tried to pass his boat, totally without success.

In the early 1990's, I asked Ed if he would be willing to join a select industry group to study the feasibility of establishing an ARIAS•U.S. At first, he was quite negative on the idea, saying he did not see the need for such an organization. However, he agreed to participate in the study, and over the course of two years, not only did he come to support the undertaking but also to offer some very good suggestions on such things as the legal structure of the Society.

In 1994, Ed agreed to serve on the founding Board. That Board elected him to be our first President. For me personally as Chairman, it was a great comfort to have sitting beside me a man as knowledgeable as Ed about business organization and procedures.

I remember in particular one of our first membership meetings where we were eager to make a good impression on the professionals in attendance. But It appeared we might not have a quorum, which raised the question of whether we could accomplish any business. I turned to Ed. In his own unflappable way, he quietly advised me how we could proceed. To the relief of us all, a quorum did show up, so we did not need to adopt a special procedure.

More importantly, Ed Rondepierre was widely respected throughout the insurance and reinsurance community for his ability, honesty and absolute integrity. His willingness to serve as our first President was a major factor in bringing about early recognition of ARIAS•U.S. as an important and credible industry organization.

I had not seen Ed in a few years before his death. At his funeral service, his widow Nan advised me that he had been battling among other things with Parkinson's disease. I wish I had seen him in those last few years. Sharing in the same battle, I am sure he and I would have found some humor in our situation. We surely would have had cause to laugh at our tremors and the idiosyncrasies of this idiosyncratic condition.

Farewell, Ed. Thank you for being part of my life as well as the lives of many others in our Society. May you rest in peace.

Dick Kennedy

feature

Arbitration Clauses in Specialty Liability Policies

James W. Macdonald

Arbitration clauses are becoming more common in direct insurance policies.[1] Although standard in reinsurance contracts since the 1800s, the use of broadly applicable binding arbitration wordings with very limited right to appeal is a relatively recent development in the realm of direct insurance.

There are advantages and disadvantages of including arbitration provisions in direct insurance policies. On the plus side, when compared to litigation, arbitration offers the prospect of quicker, more confidential, and more final resolutions to otherwise irreconcilable disputes, at least in theory. Arbitration also can offer the prospect of a more equitable and fair resolution than a normal jury trial, by requiring the arbitrators to be experienced and informed on insurance matters, allowing the final decision to consider the "custom and practices" of the business, and not requiring the arbitrators to strictly follow "judicial formalities" or the "rules of evidence." Finally, again, at least in theory, the cost of an arbitration proceeding should be less than the cost of litigating the same dispute, assuming only limited discovery is required.

Experience shows that many arbitrations do succeed in producing resolutions that are quicker, more final, and more confidential than comparable matters in litigation. The finality of most awards is owing to the fact that, under state and federal law, courts are not permitted to vacate arbitration awards except in limited circumstances. The relative speed of the arbitration process is the natural result of the freedom that the arbitration panel has to follow the timing it sets without interferences and delays that courts often experience. Confidentiality is assured by the nondisclosure agreements signed by all parties.

Unfortunately, not all the news is good. The surprisingly high cost of some arbitration proceedings is a frequent concern. Contributing factors include: (1) the additional cost resulting from the private parties paying for all the expenses of the proceeding (including the two arbitrators and the umpire), thus losing the benefit of the court costs paid by federal or state taxpayers; (2) the additional cost of specialty lawyers depending on the location of the arbitration and the governing law; and (3) the need for a protracted discovery process and the use of expert witnesses to determine the intent of the parties or the specific industry "customs and practices" that should be considered. In addition, there are concerns over possible arbitrator bias and questions about the fairness of the process, with many standard insurance policy wordings arguably creating a less than level "playing field" for insurance buyers.

Binding arbitration clauses may simply not be a good option for some insurance buyers. Some industry critics strongly question their presence in insurance policies, citing "abuses" in five main areas: cost, bias, class actions, discovery, and appeals. Reflecting these concerns, critics note that several states outlaw or limit the use of pre-dispute arbitration clauses in insurance policies.[2]

Opponents of binding arbitration provisions also argue that their normal "confidential and private" status makes them "two-edged swords." The obvious benefit is that privacy and confidentiality allow businesses to avoid negative publicity and reputational risk. The less apparent negative aspect is that the lack of any transparency to the media or the public may encourage insurers to pursue disputes that would not be considered if they were litigated. As one attorney has argued, "Insurance companies, sensing that no one is alert to their arguments, may take outrageous or frivolous legal positions concerning the interpretation of their insurance policies, thinking that such arguments cannot come back to haunt them...."[3] One could also argue that the lack

James W. Macdonald

Experience shows that many arbitrations do succeed in producing resolutions that are quicker, more final, and more confidential than comparable matters in litigation.

James Macdonald is an independent consultant specializing in insurance and reinsurance dispute resolution as an expert witness, consultant, or arbitrator. He is an ARIAS•U.S. Certified Arbitrator; his complete profile is available on the ARIAS•U.S. website. This article originally appeared as the June 2013 issue of The Risk Report, and is reproduced with permission of the publisher, International Risk Management Institute, Inc. (IRMI).

This article offers ten suggestions, shown in Figure 1, for negotiating changes to the wording of a pre-dispute, mandatory arbitration provision, with the goal of improving the cost and fairness of the arbitration process. As a word of caution, these suggestions are based on the perspective of an insurer, reinsurer, and expert witness in policyholder disputes. Therefore, this article does not include all of the issues that a policyholder should consider, and consulting with a qualified legal adviser is advised.

of the case precedent that litigation creates actually increases costs, with the same or very similar disputes being tried over and over again in separate arbitration hearings.

The best choice for many commercial insurance buyers may be to request the deletion of the arbitration clause. However, if it is determined that including an arbitration clause is beneficial for the policyholder, or if deleting the arbitration clause is not possible, there are a number of alternatives to the one-size-fits-all, insurer-friendly wordings that can level the playing field and reduce the costs for an informed commercial insurance buyer.

This article offers ten suggestions, shown in Figure 1, for negotiating changes to the wording of a pre-dispute, mandatory arbitration provision, with the goal of improving the cost and fairness of the arbitration process. As a word of caution, these suggestions are based on the perspective of an insurer, reinsurer, and expert witness in policyholder disputes. Therefore, this article does not include all of the issues that a policyholder should consider, and consulting with a qualified legal adviser is advised.

Exempt Disputes Contesting the Validity of Policy

Almost all direct liability insurance policy arbitrations wordings state that any and all disputes will be subject to arbitration. Figure 2 provides an example. Some, reinsurance agreements exempt any dispute contesting the validity of the agreement or arguing for rescission. It seems reasonable to avoid having the provisions of a contract govern a dispute that contests the validity of the same contract. In many cases, adding this exception to the arbitration provision could improve its fairness. Even with this qualification, the parties could elect to solve a dispute about the validity of the policy with binding arbitration.

Single Arbitrator for Smaller Disputes

The issue of cost is addressed in some reinsurance wordings by stipulating that a certain dollar threshold must be exceeded for the normal three-arbitrator approach to be required. The provision may state that if the threshold is not met, a single, "neutral" arbitrator or "umpire" will be used to resolve the dispute. In most cases, a prompt decision is expected on the basis of briefs by each party, with no discovery process or depositions and no formal hearing. Introducing this qualification can help reduce the cost of resolving disputes where the amount demanded makes the normal three-arbitrator panel uneconomical. Figure 3 shows sample reinsurance wording that combines this modification with the exemption for any rescission claims.

Some industry observers have noted that this approach may be counterproductive because it may reduce the incentive of the parties to negotiate settlements involving small amounts. However, it could be argued that this risk is more than offset by the benefit of

FIGURE 1
TOP 10 SUGGESTED REVISIONS TO ARBITRATION PROVISIONS

1. Request an exemption for disputes contesting the validity of the policy.
2. Make smaller disputes subject to resolution by a single arbitrator or umpire.
3. Include nonbinding mediation as an alternative or precondition to arbitration or litigation.
4. Clarify the qualifications for an arbitrator's eligibility.
5. Specify whether certain costs or damages are within the panel's authority.
6. Request a favorable location and favorable governing law.
7. Weigh the pros and cons of timing requirements for each phase of the arbitration process, including the final decision.
8. Carefully consider a "baseball" arbitration clause (discussed later).
9. Address the panel's right to consolidate arbitration proceedings.
10. Specify certain documents that the panel may consider to determine its decision.

FIGURE 2
SAMPLE ALL DISPUTES SUBJECT TO ARBITRATION WORDING

Any dispute, controversy, or claim arising out of or relating to this Policy or the breach, termination, or invalidity thereof shall be finally and fully determined in London, England, under the provisions of the Arbitration Acts of 1950, 1975, and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators....

Source: XL Insurance Company, Ltd. Form XL XS–004, Condition N

each party having a more affordable and practical alternative available to settle problems that are otherwise not reconcilable.

Include Nonbinding Mediation

Many direct insurance policies state that nonbinding mediation must be attempted prior to litigation or that nonbinding mediation is available as an alternative to arbitration. A nonbinding mediation option is a good alternative to one-size-fits-all arbitration wording, especially for policyholders with large and complex liability exposures. In many cases, nonbinding mediation can produce surprisingly positive results, even when an agreement initially seems hopeless.

Sample 1 in Figure 4 shows a nonbinding mediation provision that serves as an alternative to an arbitration provision in a professional liability insurance policy, leaving litigation as a possibility if the mediation is not successful. Some policies offer each party the choice of nonbinding mediation or arbitration, with the insured given the final say.

Sample 2 in Figure 4 provides sample wording from an employment practices liability (EPL) policy, in which the policyholder is given the flexibility to select the resolution process that is most suited for the size and complexity of any irreconcilable dispute.

It is also worthwhile to consider adding wording in the arbitration clause giving the panel the authority to stay the proceeding if, at any time, both parties want to attempt mediation. In coming years, this approach will likely become increasingly common either as a replacement of arbitration requirements or as an alternative.

Address Arbitrators' Qualifications

One reason for the perception of bias in arbitration provisions is the requirement that arbitrators be "former or current executives of an insurance or reinsurance company." This appears to unfairly exclude experienced risk managers, even if they are veterans of many decades with extensive legal and insurance training. Also, arbitrator bias concerns arise when a party-appointed arbitrator receives a large amount of work from the appointing law firm or insurer. The fear is that these arbitrators might always decide in favor of the law firm or insurer engaging them, effectively leaving the final decision up to the third arbitrator acting as "umpire." Yet another fairness concern results from the requirement found in many clauses that arbitrators be "disinterested," with no explanation of how this term should be interpreted.

Until recently, arbitration clauses have, at most, normally stated that the arbitrators be "disinterested" persons, have "no financial or personal interest" in the outcome of the dispute, have some prior experience as an insurance or reinsurance executive, and/or that they "have knowledge of the legal, corporate management, or insurance issues relative to the matters at issue." Many arbitration clauses stipulate no minimum qualifications or simply state the arbitrator must be approved or certified by the institution governing the preceding, such as American Arbitration Association (AAA) or the AIDA Reinsurance and Insurance Arbitration Society–U.S. (ARIAS—US).

Since the late 1990s, however, many insurers and reinsurers have attempted to clarify arbitrator qualifications. Figure 5 provides two examples. In the first sample, the reinsurance arbitration provision stipulates a minimum of ten years' experience for each arbitrator, with no arbitrator "under the control or management" of either party to the agreement. In the second sample, also from a reinsurance agreement, the arbitration provision expressly states that the umpire and the party-appointed arbitrators have the "same obligation" to make fair and unbiased decisions. It also includes an interesting final sentence that explains what these requirements do not mean.

Some direct insurance policies have introduced similar clarifications to arbitration provisions to improve the impartiality of the decision-making process. In one of the more detailed provisions, an AIG management liability

FIGURE 3
SAMPLE SINGLE ARBITRATOR LANGUAGE (with exemption for rescission claims)

The provisions of this Section of the Arbitration Article will only apply if the amount in dispute is less than $_____. The provisions of this Article will not apply if the arbitration notice includes a demand for rescission of this Agreement.

1. The dispute will be submitted for decision to a sole arbitrator. Notice requesting arbitration will be in writing and sent certified or registered mail, return receipt requested, or by a recognized overnight courier.
2. The sole arbitrator will be chosen by mutual agreement of the parties within fifteen business days after the demand for arbitration. If the parties have not chosen an arbitrator by that date, the arbitrator will be chosen in accordance with the Neutral Selection Procedures established by the AIDA Reinsurance and Insurance Arbitration Society–U.S. (ARIAS) and in force on the date of the arbitration is demanded.

FIGURE 4
SAMPLE NONBINDING MEDIATION WORDING

Sample 1 (Nonbinding Mediation Required Prior to Litigation)

All disputes with regard to coverage for a Claim under the Policy, including a dispute over whether any amounts constitute Loss under the Policy, will be submitted to nonbinding mediation to be administered as mutually agreed by the parties ... Neither the Insureds nor the Insurer will commence any civil proceeding until sixty (60) days after the conclusion of the nonbinding mediation.

Source: Genesis D&O Policy

Sample 2 (Nonbinding Mediation as an Alternative to Arbitration)

All disputes or differences which may arise under or in connection with this policy, whether arising before or after the termination of this policy, shall be subject to the alternative dispute resolution process (ADR) set forth in this clause. Either the Insurer or the Insureds may elect the type of ADR discussed below; provided, however, that the Insureds will have the right to reject the Insurer's choice of ADR at any time prior to its commencement, in which case the Insureds' choice of ADR will control.

The Insurer and Insured agree that there will be two choices of ADR: (1) Nonbinding mediation administered by the American Arbitration Association, in which the insurer and insured will try in good faith to settle the dispute by mediation under or in accordance with its then-prevailing Commercial Mediation Rules; or (2) arbitration submitted to the American Arbitration Association under or in accordance with its then prevailing commercial arbitration rules, in which the arbitration panel will be composed of three disinterested individuals....

Source: AIG Employment Practices Liability Form 67548 (4/97), Condition 17, "Dispute Resolution Process"

policy begins with the customary provision that the word "disinterested" means that an arbitrator or mediator has no "financial or personal interest, direct or indirect" in the outcome of the dispute. However, the insurer continues with the requirement that the arbitrator must confirm in writing that he or she has "not represented or been an adversary of any Insured or the Insurer in any civil, criminal, administrative, or regulatory or arbitration proceeding ... in the 5 years preceding his or her selection." These are examples of the constantly evolving, good-faith efforts by insurers and reinsurers to improve the perceived fairness of alternative dispute resolution proceedings.

Another possibility for anyone concerned with potential bias in the "party-appointed" approach is to use the alternative "neutral party" selection process normally used in England and other countries. Using this approach, the three panel members are chosen using the selection process procedures and services afforded by an independent party, such as the AAA or ARIAS—US. Although the "neutral party" approach cannot eliminate the perception of possible arbitrator bias, it does at least partially address the concerns of many stakeholders.

FIGURE 5
SAMPLE ARBITRATOR QUALIFICATION LANGUAGE

Sample 1 (Independent and Experienced)

All arbitrators will be neutral and disinterested active or former officials of insurance or reinsurance companies or Syndicates of Lloyd's or lawyers, *not under the control or management of either party to this Agreement, having at least ten (10) years of insurance or reinsurance experience*. (Emphasis added.)

Sample 2 (Impartial and Disinterested)

Unless otherwise mutually agreed, the members of the Panel shall be impartial and disinterested. The members of the Panel may not be: *(1) in the control of any Party or its parent affiliate or agent, (2) a former director or officer of any Party or its parent affiliate or agent, or (3) a likely witness in the arbitration*. The requirement of impartiality means that *all members of the Panel will have the same obligation* to approach the Panel's duties and decisions with fairness and *without consideration for the fact that panel members may have been appointed by one of the Parties*. The requirement of impartiality does *not mean that any arbitrator can have no previous knowledge or experience with respect to issues involved in the dispute or disputes*. (Emphasis added.)

Specify Costs within Panel's Authority

Almost all arbitration provisions state that each party will pay for its own costs and share the cost of the mediator or the third arbitrator (or umpire). However, many fail to state explicitly whether the panel has the authority to require payments in several recurring and potentially costly areas. The two most common are legal costs (including expert witnesses) and whether prejudgment interest can be awarded (and, if so, the basis for computation). Additional issues include punitive or exemplary damages, and the authority to require interim payments or collateral during the course of the proceeding.

Insurance and reinsurance arbitration clauses vary considerably on this issue. Some wordings are expansive, others are very limited, and still others at most refer to legal costs. For example, the first sample wording shown in Figure 6, from a reinsurance agreement, grants the panel broad authority. In a similar fashion, the Bermuda market excess policies grant the panel (or "board") the "sole discretion" to determine "any order as to the costs of the arbitration" and "to whom and by whom and in what manner they shall be paid." According to English law, this could include the right to require the losing party to pay what the board determines to be the "recoverable" amounts incurred by the successful party. It is also possible that

arbitration boards in Bermuda or London may be authorized to award interest, post collateral, and pay other costs. In sum, as noted by one authority, the total additional costs payable may come as a major surprise to unsuccessful parties not familiar with proceedings in these jurisdictions.[4]

Some recent policy wordings are more detailed, as exemplified in Sample 2 in Figure 6, from an AIG D&O policy. Unfortunately, very few insurance policies include this level of clarity in the arbitration wordings.

This is an area in need of improved consideration and negotiation. If these issues are not clarified, both costs and delays in the process can increase, as either party contests the breadth of what it feels should be included in the final award. A broad "loser pays" requirement may deserve some consideration, regardless of whether the panel selection process is "party appointed" or "neutral." At a minimum, it is important for commercial insurance buyers to assess the potential costs that could result from different insurance policy forms and venues.

FIGURE 6
AUTHORITY TO IMPOSE COSTS SAMPLE WORDING

Sample 1 (Joint and Several)

Each party will bear the costs of the arbitrator it selected and bear, jointly and equally with the other party, the costs of the third arbitrator. The Tribunal will allocate the remaining costs of the arbitration *and may, at its discretion, award such further costs, interest, and expenses as it considers appropriate including, without limitation, legal costs*. (Emphasis added.)

Sample 2 (No Punitive, Exemplary, or Multiple Damages)

In the event of arbitration, the decision of the arbitrator shall be final and binding and provided in writing to both parties, and *the arbitrators' award shall not include attorneys' fees or other costs. The award shall not include punitive, exemplary or multiple damages, or any similar form of damages designed to punish or penalize a party. Should the arbitrators include punitive damages, or attorneys' fees or other costs in the award, then the arbitrators' decision and award shall be automatically null and void and have no effect on the parties in this arbitration*, unless all such parties against whom such damages or fees or costs are awarded agree in writing, in their sole and absolute discretion, to waive the requirements of this paragraph. (Emphasis added.)

Request Favorable Location and Law

Many standard insurance policies arguably give the underwriter a "home field advantage" by stating that the location of arbitration (or "situs") will be their headquarters' city or state. A second advantage that is often embedded into the policy is the assignment of the governing law applicable to *substantive* decisions to a preferred, insurer-friendly jurisdiction. For example, European and Bermuda market excess policies normally state that New York law will govern the substantive legal issues (with English or Bermuda laws governing *procedural* rules), and that the situs of the hearing will be either Bermuda or London. One fairly common way to level the playing field is to give the policyholder the option to choose the situs and governing law.

At least since the late 1990s, some insurance policies have offered policyholders flexibility in the situs by granting a number of options, including the location of the policyholder, as exemplified in the two excerpts from a directors and officers (D&O) liability and an employment practices liability insurance (EPLI) policy, as shown in Figure 7.

The selection of New York as the preferred state for the "governing law" reflects the widespread belief that this state is particularly insurer friendly. As one coverage attorney stated in a 2007 article,[5] "New York is one of the few jurisdictions left (at least on this side of the Atlantic) where an insurance policy is still likely to be treated as the policy it is and interpreted accordingly rather than as an excuse for a court to distort traditional canons of construction in order to find coverage." However, the application of the selected law is normally superseded by an inconsistency with the expressed terms of the policy or as respects other specified concerns. For example, the standard Bermuda excess liability policy limits the application of New York's laws as respects any prohibition on the payment of punitive damages, or in the event the laws are "inconsistent with any provision" of the policy.

It is also important for commercial insurance buyers to note that, in the separate "Law of Construction and Interpretation" condition, the Bermuda forms state that, if the policy is considered "ambiguous or otherwise unclear," the matter will be resolved "in an evenhanded fashion" and without

FIGURE 7
SAMPLE INSURED CHOOSES SITUS LANGUAGE

Sample 1 (D&O Policy)

The mediation shall take place in either New York, New York; Cleveland, Ohio; Washington, DC; or the state indicated in Item 1 of the Declarations as the Insured Entity's address, unless the parties mutually agree upon another location.

Source: GENESIS D&O Policy

Sample 2 (EPLI Policy)

Either choice of ADR may be commenced in New York, New York; Atlanta, Georgia; Chicago, Illinois; Denver, Colorado; or in the state indicated in Item 1 of the Declarations page as the mailing address for the Named Entity.

Source: AIG EPLI Policy Form 67548 (4/97)

FIGURE 8
SAMPLE WORDINGS ON TIMING REQUIREMENTS

Sample 1 (EPLI Policy)

All disputes or differences which may arise under or in connection with this policy, *whether arising before or after termination of this policy* ... shall be subject to the alternative dispute resolution process (ADR) set forth in this clause....

Source: Lexington Insurance, EPLI, 1999

Sample 2 (Excess Policy)

The Board of Arbitration shall fix, by a notice in writing to the parties involved, a reasonable time and place for the hearing and may prescribe reasonable rules and regulations governing the course and conduct of the arbitration proceeding, including, without limitation, discovery by the parties.

Source: ACE Excess Excess Liability Form 005–3/96, Condition N2

Sample 3 (Medical D&O Policy)

Each party to this Policy shall submit its case with supporting documents to the arbitration panel within thirty (30) days after the appointment of the third arbitrator. However, the panel may agree to extend this period for a reasonable time.

Source: BCS Mutual Insurance Company, Condition N, Form 91.212G (01/07)

Sample 4 (Reinsurance Policy)

The claimant shall submit its initial brief within forty-five (45) days from the appointment of the umpire. The respondent shall submit its brief within forty-five (45) days thereafter, and the claimant may submit a reply brief within thirty (30) days after the filing of the respondent's brief.

Source: Broker and Reinsurer Market Association (BRMA), Arbitration Form 6B, item 3

reliance on two common policyholder assertions, i.e., the "reasonable expectations" of the insured, and any "*contra proferentum*" positions regarding the authorship of the policy (such as the "contract of adhesion" rule making any ambiguity the fault of the insurer). The issue of governing law can be further complicated by the presence of a separate governing law provision outside the arbitration clause.

A full discussion of the resulting issues exceeds the scope of this article, but it is clear that commercial insurance buyers should consider requesting the change in the governing law to its preferred jurisdiction. Although Bermuda markets have been reluctant to consider any such requests, several European and domestic markets have been willing to amend their standard forms. It is not uncommon for manuscript policies to state that both the situs and the governing law will be the home state of the policyholder. This reflects a common approach in many reinsurance arbitration clauses for both the procedural and substantive issues of the proceeding.

Consider Arbitration Timing Requirements

There are many timing issues to consider that affect the cost and fairness of the arbitration process. Perhaps most obvious is the question of whether the arbitration clause survives the life of the policy. In the current market, most wordings address this issue in the affirmative, as shown in Sample 1 in Figure 8.

A number of other important timing questions should be expressly stated, including how much time each party has to name its arbitrator (often 30 days), when these arbitrators need to agree on an umpire, and then how much time the panel has to hold its organizational meeting. In most cases, once the panel is formed, insurance policies permit considerable discretion to determine the subsequent schedule for discovery, depositions, and, if permitted, expert witness reports and testimony. The panel is also normally free to define the date and timing for the hearing. Sample 2 in Figure 8 shows an excerpt from a leading Bermuda excess insurer that exemplifies this approach.

In some cases, the opposite approach is used, with the arbitration wording requiring each party to submit arguments in a limited timeframe of as little as thirty days from the date the umpire is selected. Sample 3 in Figure 8, from a specialty D&O policy for medical insurers, reflects this approach.

Reinsurance clauses often contain similar limited time periods for the completion of the opposing briefs prior to the hearing. Sample 4 in Figure 8, from the Broker and Reinsurer Market Association (BRMA), provides an example of this approach.

Once the hearing is over, almost all arbitration wordings normally require that the decision be rendered in writing within thirty to ninety days. For example, the BRMA reinsurance form cited as Sample 4 in Figure 8 requires the arbitrators to provide a decision "within sixty (60) days unless the parties consent to an extension." Although all final decisions need to be "in writing," some provisions require that the decision be "reasoned." As explained in one insurance policy, a "reasoned" decision requires the panel to state "the facts reviewed, conclusions reached, and the reasons for these conclusions." Although it may seem logical that these issues are addressed, many reinsurance and insurance provisions do not require this degree of detail. The two reasons for not requiring a "reasoned award" are reportedly that not requiring a detailed written statement results in a faster decision at a lower cost, and a detailed written decision may increase the risk of an appeal by the losing party.

It is clear that there is a range of options for policyholder to consider. If large amounts are at issue, leaving the panel with a high degree of discretion regarding timing issues is generally considered to be the best course given

FIGURE 9
SAMPLE "BASEBALL" ARBITRATION WORDING

Within 60 days following the appointment of the umpire, the parties shall exchange their claims and underwriting files relating to the reinsurance contract. Within 60 days of each exchange, each party shall submit, in writing, a settlement offer to the arbitration panel including the terms that each party is willing to accept in final settlement of the dispute. Following receipt of each party's settlement offer, the arbitration panel may, at its discretion, conduct a hearing concerning each party's offer, at which each party may present evidence supporting its offer.

The arbitration panel, within 10 business days of the submission by the parties of their settlement offers or a hearing after such submission, shall make a final and binding award, and the arbitration panel, in making its final award, shall be limited to awarding only one or the other of the two settlement offers submitted by the parties.

the very wide range of issues and the possible need for extended discovery. For smaller disputes, however, a more predefined timeline for closure, with no written decision required, may be an option worth considering.

"Baseball" Arbitration Clause

Commercial insurance buyers concerned with the tendency of some panels to seek compromise solutions, or "split the baby," may want to consider a so-called baseball arbitration agreement. Under this approach, which reflects baseball salary negotiations, the arbitration panel is required to wholly accept the final position of one party or the other. The argument against this approach, as explained by one industry source, is that it is an "extreme approach" which takes the decision "out of the arbitration panel's hands."[6] It also arguably compromises the time and expense of retaining industry experts to try the case. Figure 9 contains sample baseball arbitration wording from a reinsurance agreement. Note the exceptionally short period allowed for the panel to make its final decision.

Baseball arbitrations clauses are rarely used in reinsurance agreements or insurance policies. However, much like the loser-pays approach discussed earlier, this approach may merit consideration, particularly for disputes involving relatively small amounts, or for those willing to bet it all, even if huge amounts are at issue.

Right To Consolidate Proceedings

One of the most complicated issues for all stakeholders involves the orderly and efficient resolution of disputes of a similar nature involving more than one underwriter on the same policy or reinsurance agreement. It is not uncommon for multiple underwriting years to be involved. For example, excess liability "towers" of insurance or reinsurance totaling $100 million or more often involve numerous underwriters, in some cases sharing the layers, and in others, writing excess layers.

In the direct insurance market, the complexities are increased by some policies agreeing to "follow form" on the terms of specified "controlling" underlying insurance, while others apply on a stand-alone basis above retained amounts, whether insured or not. It is also possible for one or more excess policies to include an arbitration clause while others are silent. Unless expressly clarified, this can result in some or all of the excess underwriters being granted the right to arbitrate any dispute.

Since the late 1980s, many reinsurance agreements have included some guidance on how the panel should address consolidation. The most detailed of these provisions frequently address three separate situations: (1) same reinsurance agreement, single subscribing reinsurer; (2) multiple agreements, single subscribing reinsurer; and (3) same agreement, multiple reinsurers.

Figure 10 provides an example of a reinsurance wording that attempts to clarify the rights and duties of the panel and the parties to the agreement when the "same dispute" arises.

Direct insurance policy wordings do not regularly address whether a panel can consolidate the same dispute with multiple underwriters. Yet there is little question that this is often a source of redundant and excessive dispute resolution costs. Translated to the realm of direct insurance, the three situations begging more detailed clarification include the right of an

There are many timing issues to consider that affect the cost and fairness of the arbitration process. Perhaps most obvious is the question of whether the arbitration clause survives the life of the policy. In the current market, most wordings address this issue in the affirmative, as shown in Sample 1 in Figure 8.

This article presents a sampling of some innovative approaches that have been developed by insurers and reinsurers, any combination of which could present a "right size" approach addressing a policyholder's specific needs. These approaches are summarized in Exhibit II, "Negotiating Cost-Efficient and Equitable Arbitration Clauses."

FIGURE 10
SAMPLE CONSOLIDATION REINSURANCE LANGUAGE

If more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party for the purposes of this Article, and communications shall be made by the Company to each of the reinsurers constituting the one party provided, however, that nothing therein shall impair the rights of such reinsurers to assert several rather than joint defenses or claims, nor be construed as changing the liability of the Reinsurer under the terms of this Contract from several to joint.

arbitration panel to consolidate a dispute when: (1) the same insurer writes primary and excess policies in the same year or multiple years; (2) multiple insurers share one or more excess layers in one or more affected policy years; and (3) multiple insurers write different excess layers. In addition, the impact of different arbitration clauses, or the absence of alternative dispute resolution clause on some but not all of the excess policies, needs to be considered.

A fairly recent decision by the U.S. Supreme Court, *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (U.S. 2010), has had a positive impact on the rights of arbitration panels to consolidate disputes involving multiple parties.[7] At minimum, consolidation is an important issue to consider. An expressed statement of intent inserted into the arbitration or mediation clause is worth considering and is rarely present in direct policies. If this is not possible, another route to consider (often used in foreign property insurance placements for large, global policyholders) would be to ask one insurer to act as the "lead underwriter" for all the other underwriters on a given program, with all of the other markets reinsuring the lead's policy. This approach is fairly rare in the domestic market and may be a practical option only for large, global businesses with a significant commitment to alternative insurance market approaches. However, it may be worth pursuing, as it does offer the policyholder the considerable advantages of having one set of policy terms and conditions for all potential losses, and one direct insurer to manage the claims and policy wording issues.

Specify Documents To Consider

One of the major differences between insurance and reinsurance arbitration clauses is that traditional reinsurance clauses normally require the panel to consider the agreement to be an "honorable engagement" rather than as a "strictly legal obligation." Many also expressly state the panel will consider "the custom and practice" or "usage" of the insurance and reinsurance industry and "the evidence presented by the parties." Still others focus the panel on the "original intent" of the parties.

Insurance policy clauses are significantly different, with few mentioning industry "custom and practice." Instead, the normal wording states that panel must "construe" the policy at issue "in an *evenhanded* fashion" between the parties. When the dispute involves the alleged ambiguity of the policy wording, excess liability policies targeting large corporate accounts often add the provision that "the issue shall be resolved in the *manner that is most consistent with the relevant provisions*, stipulations, exclusions, and conditions (*without any regard to the authorship of the language ... and without reference to parol or to other extrinsic evidence*)" (emphasis added). (*Source*: ACE Bermuda, Excess D&O Liability Policy 03/00, Condition I.)

Despite the differences in these approaches, the scope of the discovery process is a recurring challenge affecting the cost and fairness of both insurance and reinsurance disputes. In general, arbitration panels tend to give the parties a high degree of flexibility when it is necessary to consider oral or written evidence outside the "four corners" of the policy or the reinsurance agreement. In some cases, to clarify the intent of the parties, reinsurance arbitration clauses specify the forms of evidence that the panel has the right or the obligation to review. For example, one reinsurance arbitration clause states that, in addition to considering the "terms expressed in this Contract," the "original intention of the parties to the extent reasonably ascertainable," and the "customs and usage" of the insurance and reinsurance business, the board has the "*right and the obligation* to consider

Underwriting and Submission-related documents...." (Emphasis added.)

In another example, a reinsurance wording gives the panel the express right to hold a separate "evidentiary hearing, if one is necessary, within 6 months of the arbitration demand, unless the Parties otherwise agree." This wording also states that "the Panel shall have the authority to issue subpoenas and other orders to enforce its decisions."

These reinsurance examples could be worth considering, particularly if some of the other suggestions in this article are used. For example, if a full three-person panel proceeding is only applicable to disputes involving large amounts exceeding a stated dollar amount, it could save costs and expedite the process to clarify what underwriting and related documents the arbitrators should consider. In the coming years, as arbitration wordings continue to develop, there is a strong possibility that this issue will be clarified in arbitration provisions.

Conclusion

In closing, although including arbitration provisions in direct insurance policies is a relatively recent development, it is becoming more common to encounter them in specialty liability policies. Careful consideration should be given to whether having an arbitration clause in the policy is in the insured's best interest. If it is determined to be beneficial, or if deleting the arbitration clause is not possible, there may be alternatives to the one-size-fits-all, insurer-friendly wordings that can level the playing field and reduce the costs for an informed commercial insurance buyer. This article presents a sampling of some innovative approaches that have been developed by insurers and reinsurers, any combination of which could present a "right size" approach addressing a policyholder's specific needs. These approaches are summarized in Exhibit 11, "Negotiating Cost-Efficient and Equitable Arbitration Clauses." ▼

FIGURE 11
NEGOTIATING COST-EFFICIENT AND EQUITABLE ARBITRATION CLAUSES

Issue	Concern	Options To Consider
Applicability	"Any dispute," or is there a limitation? By monetary damages claimed By nature of dispute Option to mediate prior to or instead of arbitrate? Is the panel decision "final and binding"? Expressed waiver of right to appeal?	• Limit arbitrations to disputes greater than a certain amount. • Utilize mediation or sole arbitrator/umpire on disputes under dollar threshold. • Require nonbinding mediation as alternative to arbitration. • Exempt disputes demanding rescission.
Arbitrator Selection and Qualifications	Many direct wordings contain no minimum qualifications and implicitly rely on the rules of the governing institution. However, many include terms that could present bias in the arbitrator selection process.	• Neutral or party appointed? • Is the word "disinterested" defined? • Limited to "insurance or reinsurance" professionals? Is a former or current risk manager eligible? • Basis for third arbitrator (or umpire) selection if arbitrators unable to agree (courts, coin toss, lots drawing, institution governing process) • Consequences of arbitrator death or disability during proceeding
Location of Mediation or Hearing	Standard wordings often give insurers the advantage of the mediation or arbitration situs being their home state or city.	• Request a change to make the named insured's domicile the location for the hearing or mediation.
Governing Laws	Does the contract specify separate laws for the arbitration proceeding and the substantive issues? Is there a separate governing law clause outside the arbitration clause? Are the designated jurisdiction(s) acceptable?	*Domestic insurers:* • State laws • Federal Arbitration Act • Institutional procedural rules (e.g., AAA, JAMS, ARIAS—US or ARIAS—UK)

FIGURE 11
NEGOTIATING COST-EFFICIENT AND EQUITABLE ARBITRATION CLAUSES

Issue	Concern	Options To Consider
Governing Laws (cont.d)		*European or Bermuda markets (procedural only):* • London, England, under the provisions of the Arbitration Acts of 1950, 1975, and 1979 • Bermuda International Conciliation and Reconciliation Act of 1993
Costs	Does panel have authority or limitation in certain cost-related areas? The absence of specific guidance can result in avoidable delays and increased costs as each party argues these issues.	Specific costs/issues to consider: • Attorney's costs • Expert witness costs • Pre- and post-judgment interest • Punitive damages • Exemplary damages • Treble damages • Posting of security • Interim payments • Nonmonetary claims—injunctive relief
Consolidation	Disputes involving multiple policy years and/or more than one primary and excess insurer can raise complex questions regarding whether the disputes can be combined and the discretion of a panel to consolidate disputes as it deems appropriate. Many reinsurers address this issue, but it is not normally mentioned in standard direct policies.	• Request deletion of arbitration clauses. • Require all insurers to use the same wording on policies exposed to the same loss or claims. • Include a statement in the arbitration clause explaining what discretion the panel has to consolidate the same dispute involving multiple policies and/or insurers. • Determine whether the primary or first excess insurer is willing to act as the sole issuing insurer and "lead insurer" with other insurers reinsuring the policy.

This article originally appeared as the June 2013 issue of *The Risk Report*, and is reproduced with permission of the publisher, *International Risk Management Institute, Inc.* (IRMI). Further reproduction without permission of IRMI is prohibited.

Footnotes:

1. An arbitration clause is a provision in a contract that either authorizes or mandates the use of arbitration, rather than the judicial system, as a means of settling disputes under the contract. In an arbitration proceeding, typically the two parties each select an arbitrator and the two arbitrators select a third to act as an umpire; these three arbitrators, often referred to as the "panel," decide the dispute. In binding arbitration, the parties must abide by the outcome. In nonbinding arbitration, if either party does not agree with the outcome, the matter may be taken up in the court system. If the arbitration clause requires the parties to use binding arbitration to settle any disputes under the contract, it is referred to as a pre-dispute or mandatory arbitration provision.
2. Public Citizen, "Arbitration Clauses in Insurance Contracts: The Urgent Need for Reform," 2010, Available at: http://www.citizen.org/congress/article_redirect.cfm?ID=6561.
3. Joshua Gold, "Insurance Policy Arbitration Clauses: Perils and Considerations for Policyholders," 2007, The Corporate Counsel. Available at: http://www.andersonkill.com/webpdfext/corporatecounsel-december2007.pdf.
4. Richard Jacobs, Lorelie S. Masters, and Paul Stanley QC, Liability Insurance in International Arbitration: The Bermuda Form, Second Edition, Hart Publishing 2011, Chapters 19 and 22.
5. Eugene Wollan, "New York, New York (It's a Helluva State)," John Liner Review, Volume 21, No.1, Spring 2007.
6. James H. Foster, "Reinsurance Arbitration Clauses Through the Looking Glass: Practical Questions Raised by Newer Contract Terms," 2008 ARIAS—US. Available at: http://www.arias-us.org/mp_files/img_ftp/arias2008-Q3.PDF.
7. For a detailed discussion on consolidation issues and the impact of Stolt-Nielsen, see Charles H. Schoenberg and Brian O'Sullivan, "The Application of Stolt-Nielsen to the Issue of Arbitral Consolidation," ARIAS Quarterly, Fourth Quarter 2011, Volume 18, Number 4. Available at: http://www.arias-us.org/mp_files/img_ftp/4q-2011.pdf.

FIGURE 11
NEGOTIATING COST-EFFICIENT AND EQUITABLE ARBITRATION CLAUSES

Issue	Concern	Options To Consider
Timing	Deadlines for the completion of each task may ensure a speedy decision, but fairness may be compromised. Once the panel is formed, it normally has the discretion to determine what schedule for the pre-hearing and hearing is appropriate given the size and complexity of the matters in dispute. However, many reinsurance agreements and some insurance policies contain short time frames for each party to submit its final position. This can compromise the fairness of the proceeding.	• Does the arbitration clause apply after the policy has expired? (Normally stated in first sentence.) • Panel selection process—is timing reasonable? (30 days for each party-appointed and another 30 days for the umpire selection.) • Does panel have discretion to determine timing tasks, including whether experts may be used? • If not, is the stipulated time period realistic for possible large and complicated disputes? • Does the panel have a reasonable amount of time to issue the final decision? (60 days is normal.) • Does the panel decision need to be "reasoned" or "in writing"?
Risk of Compromise Decisions	Many critics of the arbitration approach have argued that panels too often seek compromise solutions or "split the baby."	• Consider a "baseball" arbitration wording requiring the panel to accept the position of either party in its entirety. • Consider a "loser-pays" requirement that certain costs (as listed above) will be added to any reward and be payable by the unsuccessful party. • Require the deletion of the insurer's arbitration clause.
Documents Subject to Discovery	Reinsurance agreements normally state that the panel will consider the agreement to be an "honorable engagement" and that "custom and usage" may be considered in determining the resolving the dispute. Some reinsurance agreements mention the specific underwriting documents and proposals that the panel may consider. Insurance policies emphasize an "even-handed" treatment of the issues with a focus on the specific matters at issue.	Consider the merits of adding a statement that the panel may consider documents other than the insurance policy itself needed to determine the intent of the parties. Examples include: draft versions of any relevant manuscript policy or endorsement; meeting and call notes; the underwriting application, any changes to the policy wording on renewal or during the policy year; all e-mail and other written communications between the buyer, broker, and/or the insurer; and the insurer's underwriting file.

new and notices

ARIAS•U.S. Requests Proposals for Management Services

The current contract between ARIAS•U.S. and CINN Worldwide, the company that has managed ARIAS•U.S. for the past 20 years, expires on December 31, 2014. The ARIAS•U.S. Board of Directors has elected to seek proposals for the organization's continuing management. CINN intends to submit a proposal.

The details of the bidding process are available on the website through a yellow button on the home page, www.arias-us.org. All proposals must be submitted by February 15, 2014.

ARIAS•U.S. Introduces New Umpire Questionnaire

The ARIAS Board recently approved a new Umpire Questionnaire that was prepared by the Forms and Procedures Committee. This updated questionnaire contains many improvements, including the following:

- Is user friendly - the recipient can tab through each question
- Is consistent with the new Code of Conduct
- Identifies all representatives to assist in the disclosures
- Provides a quick overview of a candidate's fee schedule
- Allows candidates to utilize their ARIAS web-site as a reference and/or in response to certain questions
- Provides guidelines or definitions for several areas such as the description of the case, affiliates, and business, professional, and social relationships
- Provides a high-level chart of the candidate's prior appointments and his/her relationship to the various parties and counsel involved
- Revises some questions to ensure clarity, and
- Allows the parties to add additional questions.

It is now located on the Forms page of the website. This "New Umpire Questionnaire" replaces the form called "Arbitrator and Umpire Disclosure Questionnaire."

If you have any questions or comments about the form, please contact Forms and Procedures Committee members.

John Parker is Certified Arbitrator

At its meeting on September 12, 2013, the Board of Directors approved John M. Parker as an ARIAS•U.S. Certified Arbitrator, bringing the total number to 222. Mr. Parker's sponsors were James Rubin, Daniel Schmidt, and James Sporleder. His biography is on page xx of this issue.

Commissioner Leonardi Was Fall Keynote

Thomas B. Leonardi, Connecticut Insurance Commissioner, gave the keynote address at the opening of the Fall Conference on Thursday morning October 31. Commissioner Leonardi's agency has jurisdiction over the largest life insurance industry in the United States and the second largest overall insurance industry in total written premium.

His address, focusing on the changing regulatory structure of the industry, in the U.S. and globally, was very well received by conference attendees. A transcript of the address is on page 40 of this issue.

Crowell & Moring Argued in Workshops

Crowell & Moring LLP fielded three teams of attorneys to present arguments before student arbitrators in the September 18 mock arbitration panels that were part of the day-long Intensive Arbitrator Training Workshop.

The workshop took place at the Crowne Plaza Hotel in White Plains, New York.

feature

The ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes

Daniel L. FitzMaurice
Stephen Kennedy
Thomas O. Farrish

One of six objectives listed in the By-Laws of ARIAS•U.S. is "[t]o propose model rules of arbitration proceedings."[ii] Unlike its English cousin,[iii] ARIAS•U.S. has nevertheless existed for nearly twenty years without proposing any arbitral rules.[iv] That all changed recently, when the Board of Directors adopted the *ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes* ("Rules"). The Rules originated as recommendations from the ARIAS•U.S. Arbitration Task Force[v] and were drafted by a panel consisting of **Stephen Kennedy** of Clyde & Co US LLP and **Thomas Farrish** and **Daniel FitzMaurice** of Day Pitney LLP (the "Project Team"). This article will describe the Rules, which are available on the website under the ARIAS•U.S. Resources menu.

The Practical Guide Preceded the Rules and Serves a Different Function

Before the Rules came the *Practical Guide to Reinsurance Arbitration Procedure* ("Practical Guide"). ARIAS•U.S. first published the Practical Guide in 1998, and it published a revised version in 2004. The Practical Guide currently spans six chapters covering the process from agreeing to arbitrate and initiating proceedings up through to the final hearing and award. The sixth chapter suggests streamlined procedures for smaller disputes.[vi] The Practical Guide consists of recommendations and commentary about the arbitration process. The Practical Guide also includes sample forms designed for use primarily in connection with arbitrator selection and the organizational meeting, including questionnaires, an agenda for the organizational meeting, hold harmless and confidentiality agreements, and a scheduling order. Parties, arbitrators, and practitioners have found the Practical Guide invaluable, and courts have used it as a reference.[vii] Despite its utility, however, the Practical Guide is not a set of arbitral rules.

The Practical Guide offers suggestions and advice; the Rules are prescriptive. For example, Rule 5.1 provides, in part, that after receiving an arbitration demand, the Respondent "*shall* respond, in writing, within thirty (30) days, and such Response should contain . . . [the] designation of the Respondent's Party-appointed arbitrator, . . . a short and plain response to the Petitioner's statement of the nature of its claims and/or issues . . . [and] a short and plain statement of any claims of the Respondent."[viii] By contrast, Section 1.3 of the Practical Guide states: "The respondent *should* submit a formal written answer to the demand within the appropriate time period by (1) designating an arbitrator and enclosing a copy of the arbitrator's curriculum vitae; and (2) specifically identifying any counterclaims."[ix] Thus, unlike the Rule 5.1 , Section 1.3 of the Practical Guide speaks in normative, rather than mandatory, terms and sets no deadline for the response. As discussed below, there are other examples of this same distinction between the Rules and the Practical Guide, which is characteristic of the differing roles these two resources play.

The Rules provide a set of procedures to govern the way in which the arbitration will take place. Where parties have not agreed to a set of governing rules, each arbitration in which they engage requires them to establish how that arbitration will proceed. Although this approach offers the flexibility of customizing each proceeding, it comes at the price of inefficiency and uncertainty. The Practical Guide and the collective experience of the parties, counsel, and the arbitrators help to identify choices and shape expectations. Nevertheless, the absence of prescriptive rules leaves significant issues open for negotiation and dispute. The Rules establish the basic protocols to frame the process, while allowing for some flexibility – particularly with respect to scheduling.

Daniel L. FitzMaurice

Stephen Kennedy

Thomas O. Farrish

This article will describe the Rules, which are available on the website under the ARIAS•U.S. Resources menu.

The parties may alter or embellish any or all of the provisions in the Rules. This section identifies as an alternative to the basic clause the addition of language directing the arbitrators to interpret the contract as an honorable engagement and to apply the custom and practice of the insurance and reinsurance industry.

Instructions for Adoption and Application

The Rules begin with prefatory remarks recognizing the consensual nature of arbitration and addressing the ways in which the parties may agree to adopt procedures governing their arbitrations including, but not limited to, the Rules. This section provides a sample of a basic clause under which the parties agree to arbitrate in proceedings conducted in accordance with the Rules. The parties may alter or embellish any or all of the provisions in the Rules. This section identifies as an alternative to the basic clause the addition of language directing the arbitrators to interpret the contract as an honorable engagement and to apply the custom and practice of the insurance and reinsurance industry. Other suggestions for possible additions include the following: specifying the location of the arbitration; choosing governing law; addressing consolidation; and directing survival of the arbitration agreement beyond the termination of the contract.

In drafting the Rules, the Practical Guide and many of the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (September 2008 Regular Panel Version) (the "Procedures") served as useful frames of reference. Accordingly, the authors extend their sincere thanks to all of those who contributed to the Practical Guide and to the members of Insurance and Reinsurance Dispute R---esolution Task Force for all of the time, hard work, and effort they devoted over the years.

Set out below is a description of the Rules, numbered to correspond to the sixteen sections of the Rules.

1. Introduction

The Introduction to the Rules identifies important, over-arching principles. Aside from stating the official name of the Rules, this section explains the relationship between the Rules and express, written agreements between the parties to alter the Rules. The Rules (where adopted by the parties) apply by default in the absence of any specific written alteration by the parties. The Introduction also explains the primacy of the Rules over the explanatory notes, and the authority of the arbitrators to resolve any issue concerning interpretation of the Rules. Lastly, the Introduction provides that the panel "shall have all powers and authority not inconsistent with these Rules, the agreement of the Parties, or applicable law."

2. Definitions

Section 2 contains several definitions of key terms used elsewhere in the Rules. For example, Paragraph 2.3 defines a "disinterested" arbitrator as one who is not "under the control of either Party," and who lacks "a financial interest in the outcome of the arbitration" – a definition which is consistent with the Practical Guide[x] and applicable case law on the topic. Paragraph 2.4 likewise defines a "neutral" arbitrator as one who is "disinterested, unbiased and impartial," but not necessarily as one who "has no previous knowledge of or experience with respect to issues involved in the dispute." Additionally, Paragraph 2.2 defines "decision" in a way that brings interim orders or awards within the ambit of the term.

3. Notice and Time Periods

The Rules spell out procedures for notices in more detail than the Practical Guide. In Paragraph 3.1, the Rules provide that notices – including arbitration demands or counter-demands – are deemed made if delivered to the address designated by the opposing party in the insurance or reinsurance agreement, or to the address on file with regulators in the opposing party's domiciliary jurisdiction. In Paragraph 3.2, the Rules provide that notices are deemed given upon the date on which they were received in the case of regular or certified mail, or on the date on which they were transmitted in the case of electronic mail. Finally, Paragraph 3.3 contains provisions for calculating the running of the time periods set forth elsewhere in the Rules, much like Federal Rule of Civil Procedure 6 contains provisions for calculating the running of the time periods in the other Federal Rules. Under Paragraph 3.3, time periods begin running on the day after the relevant notice is given, and are counted with reference to calendar days rather than business days. If the day on which the time period would otherwise expire is not a business day in the recipient's domiciliary jurisdiction, the period is deemed extended until the first following business day.

Section 3 differs somewhat from the corresponding section in the Procedures. The Procedures, for example, deem notices to be given if they are delivered to the recipient's

"principal place of business." The formulation used in the Rules reflects the fact that transmitting parties may have difficulty determining the "principal place of business" of the receiving party, particularly given the fact that courts have had trouble applying this concept.[xi] The Procedures also deem notices to be given if they are sent by fax, but the Rules do not adopt this provision in light of the increasing obsolescence of fax machines. The Procedures further provided that time periods were automatically extended if they otherwise lapsed on "a non-business day in the country of the recipient," potentially giving rise to disputes over the effect of state or local holidays in federal countries. The Rules change the formulation to "non-business day in the domiciliary jurisdiction of the recipient."

4. Commencement of the Arbitration

In Section 4, the Rules describe the procedure for commencing an arbitration. Under Paragraphs 4.1 and 4.2, an arbitration is commenced by the delivery of a written demand to the respondent. The written demand should set forth the petitioning entity's name, and also the contact information of the person to whom responsive communications are to be addressed. The demand should also identify the respondent entity against whom arbitration is sought, and also the contract or contracts under which arbitration is demanded.

Section 4 also discusses the circumstances under which an arbitration demand may be amended. Paragraph 4.1 provides that an arbitration demand may be amended as of right at any time before the opening of the organizational meeting. After that point, a demand may not be amended except by leave of the panel. These provisions recognize that, after the organizational meeting has taken place, a number of decisions have likely been made based on the scope of the demand (*e.g.*, scheduling orders, discovery plans) – decisions which should not be subject to change based on the unilateral action of one party.

Finally, Paragraph 4.3 requires the petitioner to name its party-appointed arbitrator in accordance with Section 6.3. Paragraph 6.3, in turn, requires that both party-appointed arbitrators be appointed within thirty days of the initial demand. Taken together, these provisions mean that as a practical matter, respondent and petitioner will each likely appoint one party-appointed arbitrator on the thirtieth day after the demand. This is something of a departure from the most common current practice. Under many historical contracts, the petitioner issues its demand; the respondent appoints a party-appointed arbitrator within thirty days of receiving the demand, and requests that the petitioner appoint an arbitrator within thirty days thereafter; and the petitioner appoints the second arbitrator by the sixtieth day after its demand. Under the Rules, the time spent in appointing the two party-appointed arbitrators will be reduced from up to sixty days, to up to thirty days.

Section 4 differs from the corresponding section in the Procedures in several respects. First, while both the Rules and the Procedures provide that the arbitration demand should discuss the nature of the petitioner's claims or issues, Section 4 of the Rules adds that this should be by way of a "short and plain statement." By importing the "short and plain statement" formulation from the Federal Rules of Civil Procedure – a term that arbitral parties are likely to be familiar with – the Rules provide guideposts for what is and is not a sufficient discussion of the petitioner's "claims and/or issues," thus reducing the potential for disputes over the sufficiency of the initial demand. Second, the Rules account for the fact that arbitrations are sometimes brought against entities (*e.g.*, brokers) that are not expressly named as parties in the relevant contract. Accordingly, the Procedures' requirement that a demand identify the "Respondent, as identified in the reinsurance contract," was replaced with a reference to the "Respondent against whom arbitration is sought." Finally, in recognition of the decreasing use of fax machines, the Rules do not require that the arbitration demand include the petitioner's fax number.

5. Response by the Respondent

In Section 5, the Rules outline the procedures for responding to an arbitration demand. Section 5 requires the respondent to respond to the demand in writing within thirty days of valid delivery. It identifies information that should be included in the response, in terms that mirror Section 4's requirements for initial demands. Specifically, Section 5 provides that responses should include the identity of the entities on whose behalf they are sent; the name and contact information

The written demand should set forth the petitioning entity's name, and also the contact information of the person to whom responsive communications are to be addressed. The demand should also identify the respondent entity against whom arbitration is sought, and also the contract or contracts under which arbitration is demanded.

of the person to whom communications are to be addressed; the identity of the respondent's party-appointed arbitrator; a short and plain response to the petitioner's statement of its claims and issues; and a short and plain statement of any of the respondent's claims.

The requirement of a short and plain response to the petitioner's statement of claims and issues is a departure from the Practical Guide and the Procedures. The requirement is designed to promote communication between the parties and to enhance the panel's ability to understand the issues at the earliest possible juncture. Like the corresponding portion of Section 4, the "short and plain statement" formulation in Section 5 is designed to minimize disputes over the sufficiency of the response by importing a term from the Federal Rules of Civil Procedure that is generally familiar to arbitral parties.

As Section 4 does with initial demands, Section 5 provides that responses may be amended as of right until the opening of the organizational meeting. After the organizational meeting, the response may be amended only by leave of the panel. Section 5 provides a non-exclusive list of factors for the panel to consider in deciding whether to grant leave to amend, which is identical to the corresponding list in Section 4.

6. Appointment and Composition of the Panel

Arbitration clauses in insurance and reinsurance contracts are notoriously brief and open-ended, often offering little guidance on exactly how the process will be conducted. Typical arbitration clauses do, however, define the number and qualifications of the arbitrators, often in terms of industry experience, and provide a selection process. The Rules call for three arbitrators – two party-appointed arbitrators and one umpire. They specify that all of the arbitrators shall be "current or former officers or executives of an insurer or reinsurer, and shall be ARIAS-certified as of the date of their appointment." Thus, the Rules add ARIAS certification to the common experiential component in the qualifications of the arbitrators.

The selection process in the Rules is detailed and scheduled. The parties name party-appointed arbitrators, presumably simultaneously, within thirty days of the commencement of the arbitration. If either party fails to appoint, the non-defaulting party appoints for the defaulting party. Within thirty days of the appointment of the party-arbitrators, they are to appoint the umpire. Party-appointed arbitrators may consult with their respective parties about the umpire selection. If the arbitrators cannot agree upon an umpire within the thirty-day period, they proceed within the next seven days to exchange lists of candidates, each identifying five individuals chosen from the list of ARIAS•U.S. certified umpires. In response to a joint request from the arbitrators, the umpire candidates are to complete and return questionnaires within twenty days. In the event that a candidate refuses to serve or fails to respond to the questionnaire, the nominating party replaces the candidate. Within seven days of the parties' receipt of completed questionnaires from ten candidates, each party strikes four names from the opponent's list and the umpire is chosen by lot from the remaining two candidates. The parties and arbitrators may not unilaterally contact any candidate.

The Rules also provide for a situation that most arbitration clauses do not address – namely, the process for replacing party-appointed arbitrators or umpires who are unable or unwilling to serve. In the case of a party-appointed arbitrator, the appointing party has fourteen days to name a replacement. For umpires, the party-appointed arbitrators have fourteen days to agree upon a replacement or resort to the process of exchanging lists of five candidates for each side.

The Rules also specify that, unless otherwise agreed in advance by the entire panel, all members of the panel will participate in reaching every decision. In addition, the Rules provide for majority rule in that each and every decision "shall be made by casting of at least two of three possible votes."

7. Confidentiality

The Rules establish confidentiality as a default. Unless the parties agree or the panel orders otherwise, all meetings and hearings are private and confidential to the parties. The Rules specify that only the authorized representatives of the parties and others participating in the hearing may attend.

The familiar form of Confidentiality Agreement included in the Practical Guide[xii] is not necessary under the Rules. Rule 7.2 sets forth the general rule of confidentiality and identifies five exceptions: "(a) as necessary in connection with judicial proceedings relating to the arbitration or any Decision; (b) as otherwise required by law, regulation, independent accounting audit or judicial decision; (c) if the arbitration proceedings relate to a direct insurance dispute, then to support the insurer's reinsurance recoveries; (d) if the arbitration proceedings relating to a reinsurance dispute, then to support the reinsurer's retrocessional recoveries; or (e) as otherwise agreed by the parties." These reasons are similar to those in the Confidentiality Agreement in the Practical Guide, though they are worded in a somewhat different manner.[xiii] This Rule also obligates the parties to use their best efforts to maintain confidentiality when pursuing any of the exceptions.

8. Interim Decisions

The Rules expressly confirm the panel's authority to issue Decisions for interim relief and to impose sanctions for failure to comply with any interim Decision or for a discovery-related abuse. Without limiting the types of sanctions a panel may order, the Rules offer the following examples: striking a claim or defense; excluding evidence on an issue; drawing an adverse inference against a party; and imposing costs, including attorneys' fees.

9. Location of the Proceedings

Section 9 provides that all arbitration proceedings shall take place at the location specified in the arbitration agreement, or at the location otherwise agreed to by the parties. Where the parties have failed to specify a location in their agreement – and cannot agree otherwise – Section 9 provides that the panel shall choose the location. In contrast to the Procedures, which were silent on the point, the Rules provide a

non-exhaustive list of factors for the panel to consider in deciding where to hold the arbitration proceedings. Those factors include the convenience of the panel and the parties, and the avoidance of unnecessary expense or delay. Additionally, in recognition of some of the Federal Arbitration Act case law limiting the scope of the panel's subpoena powers,[xiv] Section 9 directs the panel to consider "the availability of process to compel attendance by (or the production of materials from) non-parties" in choosing an arbitral location. Section 9 also instructs the panel to consider "the effect of the proceedings' location on confirmation or vacation proceedings," as well as "such other factors as the panel may deem relevant."

10. Prehearing Procedure

Under the Rules, the precise components of the prehearing process remain to be determined in each arbitration – much as pretrial conferences and orders in litigation set the particular approach that will apply in a given case.[xv] The Rules provide an organized and timely process for setting the pretrial procedure in each case. They first require that, in advance of the organizational meeting, the parties confer and seek to agree on all of the issues expected to be addressed. The organizational meeting may be conducted in person, by telephone, or video conference based either on the agreement of the parties or by direction of the panel. The organizational meeting under the Rules follows a familiar format, beginning with disclosures by the arbitrators of any connections to the parties, counsel, other arbitrators, and the issues. The disclosure by the party-appointed arbitrators include the existence – but not the content – of any *ex parte* communications and furnishing of any documents examined, followed by acceptance of the panel by the parties. The umpire is also directed to augment any past disclosures, including indicating whether either party or counsel have offered the umpire any other work for compensation. The Rules emphasize the ongoing nature of the duty to disclose and include any offers made for any arbitrator to serve on an arbitration panel in another matter.

The Rules allow the panel to require each party to submit a concise written statement of position at least seven days before the organizational meeting. The position statement may include the issues each party anticipates, the facts and evidence the parties intend to present, and the basis for the relief requested. The Rules provide further that, regardless of whether the panel required position statements, it may allow the parties to address these same matters in a brief overview at the organizational meeting. The Rules also specify that there should be a written transcription of the organizational meeting, with the costs split between the parties.

Rule 10.7 provides an extensive list of topics to be resolved at the organizational meeting. Aside from the customary hold harmless agreement, this section calls for the panel to address a confidentiality agreement, a deadline for cutting off *ex parte* communications, procedures for interim Decisions, the nature and extent of discovery to be allowed, and the extent to which the panel will permit expert evidence. The final portion of this rule sets forth eleven specific issues to be covered in the arbitration schedule, including: discovery deadlines; status reports; a deadline for resolving discovery issues; deadlines for discovery relating to experts; deadlines for disclosing witnesses and designating hearing exhibits; the briefing schedule; and the length, dates and location of the final hearing. This rule also specifies that, unless there is some reason otherwise, the agenda for the organizational meeting should include the topic of mediation.

11. Discovery

The costs, burdens, and delays of discovery have been a frequent source of criticism and proposed reform in arbitration.[xvi] The Rules provide that, in advance of the organizational meeting, the parties are to confer and seek to agree on an exchange of all relevant documents and the confidentiality to apply to the documents. Paragraph 11.2 grants the panel the power to order the disclosure of "such documents or class of documents relevant to the dispute as it considers necessary for the proper resolution of the dispute." Likewise, Paragraph 11.3 grants similar authority to the panel with respect to depositions or "other discovery." This power, however, hinges upon the panel's assessment of what "is reasonably necessary in light of the issues in dispute as well as the nature and size of the dispute." Thus, the Rules expressly direct the panel to evaluate necessity not just in terms of relevance but also in reference to the nature and

Under the Rules, the precise components of the prehearing process remain to be determined in each arbitration – much as pretrial conferences and orders in litigation set the particular approach that will apply in a given case.[xv] The Rules provide an organized and timely process for setting the pretrial procedure in each case.

In recognition that mediation may be a valuable tool for the resolution of disputes, Section 12 requires the panel to include mediation as a subject to be discussed at the organization meeting unless there is an explicit reason not to raise it such as either party's objection to its inclusion. This is a change from the Practical Guide, which has attached to it a sample organizational meeting agenda that does not include mediation as a proposed topic.

size of the dispute. Rule 11.5 elaborates on the panel's discretion over discovery. This rule allows the panel to limit discovery "on various grounds, including burdensomeness, expense, duplication, privilege, work product or lack of relevance." Furthermore, this rule provides that nothing in the Rules may be construed as a waiver of privilege or of several other objections to discovery, nor as a waiver of any position available to any party respecting the authority of the panel to order the production of attorney-client privileged or work product information.

12. Mediation or Settlement

In recognition that mediation may be a valuable tool for the resolution of disputes, Section 12 requires the panel to include mediation as a subject to be discussed at the organization meeting unless there is an explicit reason not to raise it such as either party's objection to its inclusion. This is a change from the Practical Guide, which has attached to it a sample organizational meeting agenda that does not include mediation as a proposed topic.

Section 12 also provides that the panel should consider raising mediation with the parties at later stages in the arbitration proceeding, such as at the close of discovery, when pre-hearing briefs are exchanged, or upon motion for summary disposition (but before commencement of the hearing). Additionally, the Section states that the Parties may agree to submit to mediation at any point in the arbitration.

13. Summary Disposition and *Ex Parte* Hearing

Rule 13.1 provides that the panel may decide a motion for summary disposition concerning any claim or issue upon reasonable notice and opportunity to respond. The Note to this Rule makes clear that neither party waives its right under the Federal Arbitration Act or other applicable law to challenge a panel's decision on summary disposition.

Under Paragraph 13.2, if a party fails to participate in the pre-hearing proceedings and the panel reasonably believes that the party will continue not to participate, the panel – on thirty days' notice – may proceed with a hearing on an *ex parte* basis, or may summarily dispose of some or all of the issues in dispute consistent with Section 13.1.

14. Arbitration Hearing

Section 14 sets out the rules concerning the arbitration hearing. Many of the provisions of this Section memorialize powers and practices of the panel familiar to experienced arbitration practitioners and panel members, including: (1) the panel's discretion to disregard strict rules of law and evidence; (2) the panel's ability to question witnesses at the hearing; (3) the panel's authority to issue witness and document subpoenas; (4) the panel's latitude in permitting hearing witnesses to attend the entire hearing as company representatives or to review hearing transcripts prior to giving testimony; and (5) the panel's authority to limit testimony that would be immaterial or unduly repetitive with the caveat that all parties be given the opportunity to present material and relevant evidence.

Other powers of the panel set forth in Section 14 include the panel's authority to accept into evidence, on good cause shown, testimony of a party's witness whom the other side does not have a chance to cross-examine. The panel may also accept testimony by telephone, affidavit, transcript, videotape or other means. Section 14 requires that when the panel decides that it has heard all relevant evidence and arguments, it must declare that the evidentiary hearing is closed. At the conclusion of the evidentiary hearing the parties must submit a proposed order that specifies the relief it seeks from the panel. After the panel hears closing arguments and/or considers post-hearing briefs, it is required to close the arbitration hearing.

15. Final Award

Unlike the Practical Guide, Section 15 of the Rules mandates that a final award be rendered within a specified time – namely, thirty days from the close of the hearing or, if there was no hearing, after the panel has received all submissions on the merits by the parties. Section 15 states that a final award shall consist of a written statement signed by a majority of the panel and require the panel to furnish a written rationale if both parties request one. If only one party requests a written rationale, the panel may issue one in its discretion.

Under Section 15, the panel is authorized to award any remedy permitted by the agreement of the parties and, if not prohibited by the parties' agreement, any remedy allowed by applicable law. These may include, but not necessarily be limited to, monetary damages, equitable relief, pre-or

post-award interest, costs of arbitration, and attorneys' fees.

With respect to *ex parte* communications with the panel, they are prohibited until the panel issues a final award or, if a written rationale is issued separately, until the panel renders both. Section 15 also provides that neither party nor its representatives should request that the arbitrators reveal the contents of the panel's deliberations.

16. Severability

Finally, the Rules contain a severability provision in Section 16. That section provides, in substance, that if any provision of the Rules is held to be invalid, that holding will not alter any other provisions of the Rules that can still be given effect in the absence of the invalid portion.

Conclusion

By prescribing model rules of arbitration proceedings, the Rules fulfill one of the longstanding objectives of ARIAS•U.S. The drafting project is not over, however. The Board of Directors has approved or is considering a number of other elements that may be added as other modules for the parties to consider. These include: a set of expedited procedures for smaller disputes; a process of industry mediation; an industry guidance panel to provide non-binding advice to parties; and a private process for arbitral appeals. Like the Rules themselves, the potential additions reflect the vibrancy and diligence of the ARIAS•U.S. Arbitration Task Force, the leadership of the Board of Directors, and the contributions and suggestions of many members of ARIAS•U.S.

i Stephen Kennedy is a partner with Clyde & Co. LLP. Thomas Farrish and Daniel FitzMaurice are partners with Day Pitney LLP. Any commentary in this article should not be attributed to these law firms or their clients.

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

iii ARIAS (UK) published model arbitration rules in 1994 and revised those rules in 1997. The ARIAS (UK) arbitration rules can be downloaded at http://arias.org.uk/arbitration-rules-and-clause/.

iv As described in this article, the ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure differs in several respects from model rules.

v See D.L. FitzMaurice & E.C. Brady, *ARIAS•U.S. Announces Company Project to Improve Arbitration*, ARIAS•U.S. Quarterly, Vol. 18, No. 2 (3d Qtr. 2011) at 2. A list of the current members of the Arbitration Task Force appears at http://www.arias-us.org/index.cfm?a=8.

vi The Arbitration Task Force has also recommended some expedited procedures for smaller disputes which the Board will consider in early 2014.

vii *See, e.g., Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 872-73 (7th Cir. 2011) (citing to the definition of "disinterested" in §2.3 of the Practical Guide (rev. ed. 2004) as reflecting the "[n]orms of insurance-industry arbitration"); *Ario v. Cologne Reinsurance (Barbados), Ltd.*, No. 1:CV-98-0678, 2009 U.S. Dist. LEXIS 106133, 2009 WL 3818626 (M.D. Pa. Nov. 13, 2009) (citing to the definition of "disinterested"); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01 C 5226, 2004 U.S. Dist. LEXIS 3494, 2004 WL 442640 (N.D. Ill. March 8, 2004) (citing the Practical Guide's description of a position statement).

viii Rule §5.1 (emphasis added).

ix Practical Guide §1.3 (emphasis added).

x *See* Practical Guide §2.3; *Trustmark Ins. Co.*, 631 F.3d at 872-73; Ario, 2009 U.S. Dist. LEXIS 106133.

xi *See, e.g., Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

xii *See* Practical Guide §3.8, Comment D, ARIAS•U.S. Sample Form 3.3 (a link to the Confidentiality Agreement is available at: http://www.arias-us.org/index.cfm?a=40)/.

xiii See Practical Guide §3.8, Comment D, ARIAS•U.S. Sample Form 3.3 (the exceptions in the Sample Form 3.3 are as follows: "(a) to the extent necessary to obtain compliance with any interim decisions or the final award herein, or to secure payment from retrocessionaires; (b) in connection with court proceedings relating to any aspect of the arbitration, including but not limited to motions to confirm, modify or vacate an arbitration award; (c) as is necessary in communications with auditors retained by any party, or federal or state regulators; (d) as is necessary to comply with subpoenas, discovery requests or orders of any court; and (e) to the extent Arbitration Information is already lawfully in the public domain.").

xiv *See, e.g., Dynegy Midstream Servs., L.P. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

xv *See* Fed. R. Civ. P. 16(a).

xvi *See, e.g.*, P. Scarpato, *Let's Break the Mold . . . or at Least Reshape it a Bit, ARIAS•U.S. Quarterly*, Vol. 19, No. 1 (1st Qtr. 2012); C. J. Moxley, *Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration, ARIAS•U.S. Quarterly*, Vol. 16, No. 1 (1st Qtr. 2009).

By prescribing model rules of arbitration proceedings, the Rules fulfill one of the longstanding objectives of ARIAS•U.S. The drafting project is not over, however. The Board of Directors has approved or is considering a number of other elements that may be added as other modules for the parties to consider. These include: a set of expedited procedures for smaller disputes; a process of industry mediation; an industry guidance panel to provide non-binding advice to parties; and a private process for arbitral appeals.

members on the move

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

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

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

Recent Moves and Announcements

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

Eric S. Kobrick's new address is American International Group, Inc., 80 Pine Street, 35th Floor, New York, NY 10005, phone 212- 458-8270,
fax 866-371-7209, email eric.kobrick@aig.com.

Caleb Fowler has relocated to 6 Queen Street, Onancock, VA 23417, phone 443.735.5554, email caleb@calebfowlerarbitrator.com, website www.calebfowlerarbitrator.com.

Glenn J. Waldman has relocated his office to Broward Financial Center, Suite 1700, 500 East Broward Boulevard, Fort Lauderdale, FL 33394. His office telephone/fax numbers and email remain the same.

John Walsh has relocated to John Hancock Life Insurance Company, 601 Congress Street, Z-8, Boston, MA 02210, phone 617-572-4638.

Email Changes

James W. Macdonald's new email address is jameswmacdonald@comcast.net

To the Editor...

The ARIAS-U.S. Fall Meeting and Conference was in many ways a historic point in the life of the organization and in U.S. reinsurance arbitration. The Board, leadership, and relevant committees should all be thanked and congratulated. At the meeting, the new ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "ARIAS Rules") and the new ARIAS-U.S. Code of Conduct (the "Code")were revealed and presented. Both these developments, along with proposals about neutral arbitration, mediation, private rights of appeal and others, demonstrate that ARIAS-U.S. is moving in the direction of enhancing and strengthening the arbitration process.

While many people have many comments about various aspects of the new Rules and Code, the point is that after 20 years of just having a Practical Guide and Ethical Guidelines, ARIAS-U.S. now has actual rules, including mandatory rules for arbitrators (which should be adhered to by parties and counsel) on whether to decline appointments. The debates will continue and the Rules and Code will be modified, enhanced, and refined. Neutral procedures may be approved and other processes may come about.

But now with real rules, parties can write the ARIAS-U.S. Rules into arbitration clauses. Now with a real Code, the appearance of impropriety and bias hopefully will be lessened. To my view, these are good developments for the process and for ARIAS-U.S.

Larry P. Schiffer
Patton Boggs LLP

Letters to the Editor may be sent to Eugene Wollan at ewollan@moundcotton.com

feature

The Revised ARIAS•U.S. Code of Conduct

By The Ethics Discussion Committee

I. Background and History

The Ethics Discussion Committee ("EDC") completed the first ever comprehensive review of the ARIAS•U.S ("ARIAS") Guidelines for Arbitrator Conduct (Code of Conduct) ("Code of Conduct" or "Code"). The revised Code, as approved by the ARIAS Board of Directors, was presented to the membership at the 2013 Fall Conference. The changes in the revised Code take effect January 1, 2014, and apply to conduct taking place after that date. It has been installed on the ARIAS•U.S. website for availability to members and the industry.

The ARIAS Code of Conduct was first adopted in June 1998. An objective of ARIAS since its inception has been to promote the integrity of the arbitration process in insurance and reinsurance disputes. To that end, shortly after its formation the ARIAS Board established an Ethics Sub-Committee to draft a model Code of Conduct. The Sub-Committee, consisting of **James Rubin**, **Daniel Schmidt,** and **Richard Waterman**, Chair, developed a set of ten Canons with explanatory comments. There were no mandatory rules at that time.

The Canons and Comments remained in place unchanged for many years. Over the years, various initiatives, articles and discussions explored whether developments in custom and practice over time should cause modifications to the Code to add additional clarity. For example, in 2005 Rhonda Rittenberg and David Thirkill reported on the results of a survey that explored industry positions on the hotly debated issues at the time. Moreover, various conferences devoted time to issues such as the extent to which multiple appointments from one party should be restricted, and whether a sitting umpire should be prohibited from accepting party arbitrator appointments from either of the parties in that matter.

In 2010, the Long Range Planning Committee ("LRPC"), consisting of **Mark Gurevitz** (Chair), **Paul Dassenko, Ann Field, Daniel FitzMaurice, Eric Kobrick, Mark Megaw** and **Eugene Wollan** recommended, and the ARIAS Board of Directors approved after making some revisions, several new guidelines that elucidate and expand upon the ethical considerations embodied in the existing Code of Conduct. These additional guidelines related to: 1) the party-appointed arbitrator pre-appointment interview; 2) arbitrator disclosures; 3) whether to accept an appointment as arbitrator or umpire; and 4) ex parte communications (collectively "Additional Guidelines"). These Guidelines contained some mandatory prohibitions, including, for example, a prohibition on accepting an appointment if a prospective panel member has a material financial interest that could be substantially affected by the outcome of the dispute. The LRPC also recommended the formation of a standing ethics committee.

The EDC was created by the Board in 2011, consisting of **Eric Kobrick** (Chair), **Mark Gurevitz, Ed Krugman**, **Mark Megaw, James Rubin, Larry Schiffer**, and **Daniel Schmidt**. The EDC was charged with providing information and education about ethical issues and concerns, tasked with incorporating the Additional Guidelines into the Code of Conduct, and asked to consider any other updates that may be warranted. The process involved the integration of text and concepts from the Additional Guidelines into the Code of Conduct, an overall update of the Code with further significant updates and amendments to the original Code and the Additional Guidelines, and revision of the Introduction and Purpose sections of the Code. As described below, the changes are both stylistic and substantive. They include updates, clarifications and elimination of redundancies across the Code of Conduct and the Additional Guidelines. Canons 3, 7, 9 and 10 are unchanged except for stylistic changes.

The process involved the integration of text and concepts from the Additional Guidelines into the Code of Conduct, an overall update of the Code with further significant updates and amendments to the original Code and the Additional Guidelines, and revision of the Introduction and Purpose sections of the Code.

The deletion of this disclaimer is consistent with the requirement since 2010 that all ARIAS arbitrators "agree to abide by and be subject to" the Code of Conduct. The changes here reflect the mandatory nature of certain provisions and the clear intent of the EDC and the Board to make the new Code binding on all certified arbitrators going forward from January 1, 2014.

II. The New Code Changes

Introduction

The new Introduction states:

> ARIAS·U.S. is a not-for-profit corporation organized principally as an educational society dedicated to promoting the integrity of the arbitration process in insurance and reinsurance disputes. Through seminars and publications, ARIAS·U.S. trains knowledgeable and reputable professionals for service as panel members in industry arbitrations. The ARIAS·U.S. Board of Directors certifies as arbitrators individual members who are qualified in accordance with criteria and procedures established by the Board.
>
> The continued viability of arbitration to resolve industry disputes largely depends on the quality of the arbitrators, their understanding of complex issues, their experience, their good judgment and their personal and professional integrity. In order to properly serve the parties and the process, arbitrators must observe high standards of ethical conduct and must render decisions fairly. The provisions of the Code of Conduct should be construed to advance these objectives.

The Introduction was changed to reflect the fact that the changes impose new mandatory rules as to when an arbitrator or umpire candidate must refuse to serve. As such, the Committee deleted the following from the old Introduction:

> Nothing in these Guidelines is intended to or should be deemed to establish new or additional grounds for judicial review of arbitration appointments or arbitration awards nor establish any substantive legal duty on the part of arbitrators.

The deletion of this disclaimer is consistent with the requirement since 2010 that all ARIAS arbitrators "agree to abide by and be subject to" the Code of Conduct. The changes here reflect the mandatory nature of certain provisions and the clear intent of the EDC and the Board to make the new Code binding on all certified arbitrators going forward from January 1, 2014. Moreover, the EDC and Board did not believe that they could or should meaningfully influence whether or how the changes might impact the courts as they interpret the Code of Conduct.

Purpose

Beyond the stylistic changes, the Purpose section was amended to add the following:

> Though these Canons set forth considerations and behavioral standards only for arbitrators, it is expected that the parties and their counsel will conform their own behavior to the Canons and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

This was added by the EDC to prevent manipulation of the process and to address the concern that in some cases the harm to be prevented, *i.e.*, the improper influence of arbitrators, could still occur without a Code of Conduct violation. For example, Paragraph 3 of Canon I provides that a candidate for appointment must refuse to serve where the candidate sits as an umpire in one case and is solicited to serve as a party-appointed arbitrator by one of the parties in the first action. In this example, the Canon prevents the arbitrator from accepting the second appointment, but does not preclude the offer from being made in the first instance. The additional wording is designed to address this concern by informing the parties and their attorneys that they should not put arbitrators in a position to violate the Code. While the Code does not directly control the conduct of lawyers and parties, as it does certified arbitrators, the lawyers, at the least, have ethical obligations to respect the rules of tribunals before which they appear.

Definitions

A new definitions section was added:

1. Affiliate: an entity whose ultimate parent owns a majority of both the entity and the party to the arbitration and whose insurance and/or reinsurance disputes, as applicable, are managed by the same individuals that manage the party's insurance and/or reinsurance disputes;
2. Arbitrator: a person responsible to adjudicate a dispute by way of arbitration, including the umpire on a three (or more) person panel of arbitrators;

3. Party: the individual or entity that is named as the petitioner or respondent in an arbitration, as well as the affiliates of the named party;

4. Umpire: a person chosen by the party-appointed arbitrators, by an agreed-upon procedure, or by an independent institution to serve in a neutral capacity as chair of the panel.

The definition of Affiliate was designed to address the reality that multiple books of business may be owned and managed within a single corporate holding structure – even though they are separate corporate subsidiaries. The touchstone of the definition requires common ownership, and does not extend – for these purposes (and at this time) – to management or reinsuring relationships that do not include common ownership.

Canon I – Integrity

Paragraph 2 was amended to expand on the duties of arbitrators and to clarify that these duties extend to procedural and interim decisions, not only the final award:

Arbitrators owe a duty to the parties, to the industry, and to themselves to be honest; to act in good faith; to be fair, diligent, and objective in dealing with the parties and counsel and in rendering their decisions, including procedural and interim decisions; and not to seek to advance their own interests at the expense of the parties. Arbitrators should act without being influenced by outside pressure, fear of criticism or self-interest.

New Paragraph 3 sets out circumstances where a candidate for appointment must refuse to serve. These circumstances are substantially expanded beyond the Additional Guidelines. Unlike other rules that highlight factors for the candidate to consider, but are subject to the discretion of the candidate, these are mandatory rules that require the candidate to decline the appointment.

The six circumstances where a candidate must refuse to serve are set forth in Canon I, Comments 3 a) – f):

a) where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings;

b) where the candidate does not believe that he or she can render a decision based on the evidence and legal arguments presented to all members of the panel;

c) where the candidate currently serves as a lawyer for one of the parties (where the candidate's law firm, but not the candidate, serves as lawyer for one of the parties the candidate may not serve as an arbitrator unless the candidate derives no income from the firm's representation of the party and there is an ethical wall established between the candidate and the firm's work for the party);

d) where the candidate is nominated for the role of umpire and is currently a consultant or expert for one of the parties;

e) where the candidate is nominated for the role of umpire and the candidate was contacted prior to nomination by a party, its counsel or the party's appointed arbitrator with respect to the matter for which the candidate is nominated as umpire; or

f) where the candidate sits as an umpire in one matter and the candidate is solicited to serve as a party-appointed arbitrator in a new matter by a party to the matter where the candidate sits as an umpire.

Paragraphs 3 a) and b) were the only two mandatory prohibitions included in the Additional Guidelines on Whether to Accept Appointment as Arbitrator or Umpire. Paragraphs 3 d) and f) were not mandatory prohibitions under the Additional Guidelines. Rather, they were included in the list of factors of potential influence for a candidate to consider in deciding whether to accept an appointment. They are now mandatory prohibitions under the new Code. Paragraphs 3 c) and e) were not addressed in the Additional Guidelines, but were newly developed by the EDC.

The Additional Guidelines also identified a list of factors and circumstances a candidate should consider before accepting an appointment to determine if any of the factors would likely affect his or her judgment, and thus cause a candidate to decline the appointment. New Comments 4 a) – k) of Canon I incorporate these considerations into the new Code as follows:

4. Consistent with the arbitrator's obligation to render a just decision, before accepting an appointment as an arbitrator the candidate should consider whether any of the following factors would likely affect their judgment and, if so, should decline

Though these Canons set forth considerations and behavioral standards only for arbitrators, it is expected that the parties and their counsel will conform their own behavior to the Canons and will avoid placing arbitrators in positions where they are unable to sit or are otherwise at risk of contravening the Canons.

Several of the changes to Paragraph 4 require additional discussion. First, while the existence of a material financial interest in a party, as described, requires a candidate to decline the appointment, the existence of any financial interest remains a factor for a candidate to consider as to how it may affect his or her objectivity under Paragraph 4 a).

the appointment:

a) whether the candidate has a financial interest in a party;

b) whether the candidate currently serves in a non-neutral role on a panel involving a party and is now being proposed for an umpire role in an arbitration involving that party;

c) whether the candidate previously served as a consultant (which term includes service on a mock or shadow panel) or expert for one of the parties;

d) whether the candidate has involvement in the contracts or claims at issue such that the candidate could reasonably be called as a fact witness;

e) whether the candidate has previously served as a lawyer for either party;

f) whether the candidate has previously had any significant professional, familial or personal relationships with any of the lawyers, fact witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether the candidate could render a just decision;

g) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a party involved in the proposed matter;

h) whether a significant percentage of the candidate's appointments as an arbitrator in the past five years have come from a law firm or third-party administrator or manager involved in the proposed matter;

i) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a party involved in the proposed matter;

j) whether a significant percentage of the candidate's total revenue earned as an arbitrator, consultant or expert witness in the past five years has come from a law firm or third-party administrator or manager involved in the proposed matter; and

k) whether one of the circumstances set forth in paragraph 3 above applies to an affiliate of a party not within the definition of "party," or to an entity having the same third-party administrator or manager as a party, in which event the arbitrator should presumptively decline to serve unless it is clear that the other entity's relationship to the party is sufficiently attenuated that the policies underlying paragraph 3 are not implicated.

Several of the changes to Paragraph 4 require additional discussion. First, while the existence of a material financial interest in a party, as described, requires a candidate to decline the appointment, the existence of any financial interest remains a factor for a candidate to consider as to how it may affect his or her objectivity under Paragraph 4 a). Second, Paragraph 4 c) clarifies for the first time that service as a consultant includes work on a shadow panel. Third, Paragraph 4 k) is entirely new. Even if acceptance of an appointment is not precluded under Paragraph 3, Paragraph 4 k) provides that the candidate consider "whether one of the circumstances set forth in paragraph 3 above applies to an affiliate of a party not within the definition of "party," or to an entity having the same third-party administrator or manager as a party, in which event the arbitrator should presumptively decline to serve unless it is clear that the other entity's relationship to the party is sufficiently attenuated that the conceptual ideas behind paragraph 3 are not implicated." Here, the new definition of "affiliate" in the Definitions section of the Code should be consulted.

Comment 5 to Canon I is also new and provides that parties, by agreement and without the knowledge, involvement or participation of the umpire or candidate for arbitrator, may waive the provisions of Canon I, Comments 3 c), d), e) or f) and 4 k). Comment 5 provides: "The parties to a proceeding in which an individual is sitting as an umpire or is being proposed as umpire may, by agreement reached without the involvement, knowledge, or participation of the umpire or candidate, waive any of the provisions of paragraphs 3 (c), (d), (e), or (f) above and 4 (k). The umpire or candidate shall be informed of such agreement."

Finally, new Comment 6 further incorporates concepts from the Additional Guidelines regarding expert testimony:

> Consistent with the arbitrator's obligation to render a just decision, an arbitrator should consider whether accepting an appointment as a consultant or expert in a new

matter by a party to the arbitration where the person sits as an arbitrator would likely affect his or her judgment in the matter where he or she sits as an arbitrator.

Canon II - Fairness

The amendments here essentially reflect the changes necessary to incorporate the Additional Guidelines for Party-Appointed Arbitrators in the Context of the Pre-Appointment Interview.

New Comment 1 to Canon II is based on the Additional Guidelines and reflects the admonition that candidates should acquire sufficient information to determine that no conflicts exist before accepting an appointment:

> Persons contacted to serve as an arbitrator should ascertain before accepting an appointment the identities of the parties, including as appropriate and to the extent known, present and former affiliates, predecessors and successors; identities of counsel; identities of other arbitrators; identities of witnesses; general factual background; and the anticipated issues and positions of the parties.

Also based on the Additional Guidelines, a new first sentence is added to Comment 2 (previously Comment 1): "Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue." The original Comment is further modified to admonish arbitrators that all decisions, not just final judgments, should be made only after both sides have presented their arguments and the panel has deliberated: "[arbitrators] should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues."

New Comment 3 is based on the Additional Guidelines and provides: "Party-appointed arbitrators should not offer a commitment to dissent or to work for a compromise in the event of a disagreement with the majority's proposed award. Party-appointed arbitrators may advise the party appointing them whether they are willing to render a reasoned decision if requested."

Comment 4 is old Comment 2.

Canon IV – Disclosure

The changes here incorporate concepts from the Additional Guidelines for Arbitrator Disclosures as well as the Additional Guidelines for Party-Appointed Arbitrators in the Context of the Pre-Appointment Interview, as well as new changes developed by the EDC.

Comment 1 to Canon IV expands on the concept in the Additional Guidelines that the disclosures also apply to the candidate's company (intending to include Lloyd's Syndicates) if the candidate is a current employee and adds specific wording formulated by the EDC to require, for an active company arbitrator, disclosure of information about the candidate's employer that others could reasonably believe would be likely to affect the candidate's judgment:

> Such disclosures should include, where appropriate and known by a candidate, information related to the candidate's current employer's direct or indirect financial interest in the outcome of the proceedings or the current employer's existing or past financial or business relationship with the parties that others could reasonably believe would be likely to affect the candidate's judgment.

Comment 1, at the suggestion of the EDC, also makes clear that the effort to disclose all relevant interests and relationships should be a "diligent" one.

Comment 2 reinforces concepts, developed in the Additional Guidelines, that the specifics of prior expert testimony, prior appointments with the parties or law firms, and past involvements with the specific contracts or claims at issue must be disclosed:

2. A candidate for appointment as arbitrator shall also disclose:

   a) relevant positions taken in published works or in expert testimony;

   b) the extent of previous appointments as an arbitrator by either party, either party's law firm or either party's third-party administrator or manager; and

   c) any past or present involvement with the contracts or claims at issue.

The original Comment is further modified to admonish arbitrators that all decisions, not just final judgments, should be made only after both sides have presented their arguments and the panel has deliberated: "[arbitrators] should avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues."

New Comment 4 (old Comment 3) adds the underlined clarifying language: "Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered."

It should be noted that Comment 2 b) includes TPAs, reflecting the proliferation and involvement of TPAs in arbitrations today. This emphasis was identified and added by the EDC.

Comments 3 and 4 incorporate concepts from the Additional Guidelines for Arbitrator Disclosures:

3. No later than when arbitrators first meet or communicate with both parties, arbitrators should disclose the information in paragraphs 1 and 2 above to the entire panel and all parties. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile the two objectives by providing the substance of the information requested without identifying details, if that can be done in a manner that does not breach confidentiality and is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld.

4. It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration, or, alternatively, obtain the informed consent of both parties before accepting the assignment.

Comment 5 to Canon IV expands on original Comment 2 addressing arbitrator withdrawal from a panel and adds additional wording newly developed by the EDC to caution against voluntary withdrawal absent good reason:

> 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. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one or more of the following circumstances exist.
>
> a) when procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal;
>
> b) if the arbitrator, after carefully considering the matter,- determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or
>
> c) if required by the contract or law.

Comment 6 expands on original Comment 3 to Canon IV recognizing the continuing obligation to update disclosures. The main addition is that the arbitrator should add a statement to explain why a new disclosure was not made earlier.

Canon V – Communication with the Parties

Changes here generally involve incorporation of the Additional Guidelines for Party-Appointed Arbitrators in the Context of the Pre-Appointment Interview and Additional Guidelines on Ex Parte Communications.

Comment 1 is unchanged.

Old Comment 2 is split into new Comments 2 and 3. A new sentence is added to new Comment 3: "A party-appointed arbitrator should not review any documents that the party appointing him or her is not willing to produce to the opposition."

New Comment 4 (old Comment 3) adds the underlined clarifying language: "Except as provided above, party-appointed arbitrators may only communicate with a party concerning the dispute provided all parties agree to such communications or the Panel approves such communications, and then only to the extent and for the time period that is specifically agreed upon or ordered."

Comment 5 is old Comment 4 and is unchanged.

Expanding on The Additional Guidelines, new Comment 6 reads:

> Where communications are permitted, a party-appointed arbitrator may (a) make suggestions to the party that appointed him or

her with respect to the usefulness of expert evidence or issues he or she feels are not being clearly presented; (b) make suggestions about what arguments or aspects of argument in the case to emphasize or abandon; and (c) provide his or her impressions as to how an issue might be viewed by the Panel, but may not disclose the content or substance of communications or deliberations among the Panel members. An arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

Comments 7 and 8 (previously Comments 5 and 6) are changed for consistency to reflect new definitional references but are substantively unchanged.

Canon VI – Confidentiality

The changes here are in Comment 3 only and are mostly stylistic, except to create an exception for an arbitrator dissent as underlined:

> Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings, except as is required by law. Except as may be necessary in order to dissent from a majority decision, an arbitrator shall not (a) inform anyone concerning the contents of the deliberations of the arbitrators or (b) disclose written or electronic communications among the arbitrators.

However, following member comments at the Fall Conference, this underlined change has been removed and will not take effect in January while its potential implications are studied further. The Code of Conduct, effective January 1, 2014, on the ARIAS•U.S. website does not contain the underlined language, leaving the second sentence of this section with the mandatory prohibitions set forth in (a) and (b).

Canon VIII – Just Decisions

The sole change here is the addition of a new sentence to Comment clarifying that an arbitrator may use a clerk or assistant to review the record in the first instance. The full text of Comment 3 (with the new sentence underlined) reads as follows:

> Arbitrators should not delegate the duty to decide to any other person. Arbitrators may, however, use a clerk or assistant to perform legal research or to assist in reviewing the record.

Next Steps

The new changes take effect January 1, 2014, and have prospective effect for conduct taking place after that date. It is not intended that an existing Panel constituted in a manner that would not be permitted under the Code be disbanded, but the Code provisions dealing with the conduct of arbitrations will affect existing Panels. The EDC will consider suggestions for further changes to be made in the future. Members asked several questions and made several comments at the Fall Conference. These have been noted for consideration by the EDC as it continues its work. As previously noted, one comment did cause the EDC and Board to take immediate action. Under Canon VI, an exception to the confidentiality of panel deliberations was created in Comment 3 to allow an arbitrator to disclose such deliberations as may be necessary to support a dissent. Having considered the concern that this exception could have a chilling effect on panel deliberations and create potential unintended exceptions to the sanctity of panel confidentiality, the EDC has agreed to table this change to the Code while it considers the issue further. The EDC also plans to take up the issue of changes to the Ethics Course in light of the Code changes and development of a form for signature by arbitrators confirming knowledge of and intent to be bound by the Code changes as well as any later modifications as may be adopted.

The new changes take effect January 1, 2014, and have prospective effect for conduct taking place after that date. It is not intended that an existing Panel constituted in a manner that would not be permitted under the Code be disbanded, but the Code provisions dealing with the conduct of arbitrations will affect existing Panels. The EDC will consider suggestions for further changes to be made in the future.

Nearly 400 Turn Out for Jeweler's Eye Examinations

ALTERNATIVE NEUTRAL ARBITRATION PROCESS

Jeffrey M. Rubin

Scott Birrell

David M. Raim

Peter J. H. Rogan

In spite of the first day of the 2014 Fall Conference falling on Halloween, 392 ARIAS•U.S. members arrived at the New York Hilton Midtown to learn what a "fine-lens examination" was. Before Hurricane Sandy cancelled last year's event, there were 401 registered. Considering that there were many reports of members passing up the event for "trick or treating," the turnout was excellent. Next year, the conference will be well away from such distractions on November 13 and 14.

The conference took place on Thursday and Friday, October 31 and November 1. Entitled "**Through a Jeweler's Eye: Fine-lens examinations of emerging, critically important procedural, ethical, and substantive issues facing arbitrators and arbitration**," the conference was billed as primarily featuring a probing review of an alternative neutral arbitration process with proposed criteria for service by arbitrators and umpires. And it was featured! Three of the sessions were dedicated to the neutral process, with an opening morning explanation of the new proposal, an afternoon breakout of separate groups of arbitrators, company representatives, and attorneys, and a Friday morning report on how the different groups reacted to the concept.

Before any of that began, attendees received an update on the efforts being made by U.S. regulators who are working to achieve greater global stability in financial fields, especially insurance. Connecticut Insurance Commissioner **Thomas B. Leonardi** is also chair of the National Association of Insurance Commissioners International Committee. In his several roles, he has been deeply involved, among other initiatives, in efforts to establish comprehensive reporting procedures, both inside the U.S. and outside, that can give early warnings about potentially "too-big-to-fail" companies that are increasing their risk levels. A transcript of his address follows this report.

In the opening session on the alternative neutral arbitration process, members of the Arbitration Task Force, **Jeffrey M. Rubin, Scott Birrell, David M. Raim, and Peter J. H. Rogan** laid out in

KEYNOTE ADDRESS

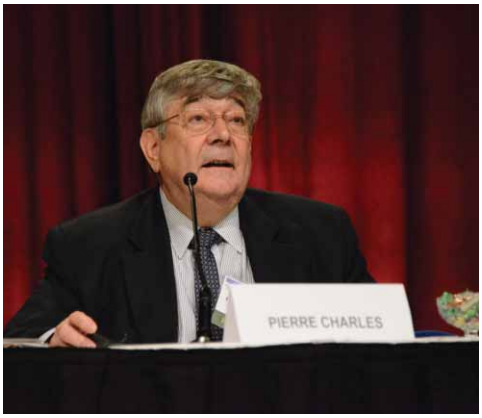
Mary Kay Vyskocil introduces keynote speaker.

Commissioner Thomas B. Leonardi

INTERNATIONAL ARBITRATION ISSUES

Moderator Debra J. Roberts

Nasri Barakat



Pierre Charles

Detlef A. Huber

Eridania Perez

great detail the criteria that panelists would be required to meet to be eligible for an appointment under the neutral process. The criteria were different for arbitrators and for umpires, but in both cases, their past involvements with parties, law firms, and other arbitrators are closely defined as to number of occasions and time periods involved. The Friday morning results from the breakouts revealed widely-shared opinions among the groups that the criteria were too restrictive, especially for party appointed arbitrators.

Also on the opening morning, the International Committee provided a

ALTERNATIVE NEUTRAL ARBITRATION PROCESS BREAKOUTS

Alexandra D. Furth

Lawrence S. Greengrass

Elizabeth M. Thompson

Breakout attendees were divided into two rooms each of arbitrators, attorneys, and company representatives, each with a leader to focus the discussion

Thomas L. Forsyth

Andrew P. Maneval

Michael A. Knoerzer

comprehensive update on developments throughout the global reinsurance markets, with specific emphasis on reinsurance business and dispute resolution in Europe, Asia, Latin America, and the Middle East. Debra Roberts moderated the discussion by committee members **Nasri Barakat, Pierre Charles, Detlef A. Huber, and Eridania Perez**.

Thursday afternoon brought a heavy schedule of smaller group discussions. After lunch, the neutral process breakouts lasted 65 minutes; then in five minutes, attendees had to get to the first workshop session, which meant some quick stepping if that room was on the other side of the second floor (especially for those who had to sign in and out of each session for CLE credit). Later, the transit between the two workshop sessions was easier, since the refreshment break came in between.

Reactions to the six workshops was very positive. A varied offering with much substantive discussion ranged across these topics: **Res Judicata / Collateral Estoppel, Legislative and Regulatory Developments, Life (Re)insurance Issues, Arbitrator Authority,** and two sessions with **Experienced Arbitrators** who gave their ideas for enhancing and improving the arbitration process.

Closing out the day, at the 2013 **Annual Membership Meeting**, outgoing Chairman Mary Kay Vyskocil explained the new nominating process and, as

WORKSHOPS

Attendees were assigned to the two workshops that they had chosen in advance.

***Res Judicata / Collateral Estoppel** – Benjamin L. Hincks, Mark G. Sheridan, Mary Ann D'Amato*

***Experienced Arbitrators I** – Jonathan Rosen, Diane M. Nergaard, Lawrence O. Monin*

***Experienced Arbitrators II** – Thomas M. Tobin, Mary Ellen Burns, Paul E. Dassenko*

Chairman of the Nominating Committee, announced the nominees. Members then elected one new Board member, **Deirdre G. Johnson**, and re-elected one, **Eric S. Kobrick**. Ms. Vyskocil also informed the meeting that the management services contract with CINN was set to expire in 2014 and that ARIAS•U.S. was opening the account up for competitive bids. The ARIAS•U.S. financial results for the last fiscal year (ended June 30, 2013) were presented by Treasurer **Peter Gentile**. He pointed out that the cancellation of the Fall Conference had seriously impacted last year's results. For the year, there was a net loss of $1,970, instead of a budgeted net contribution to the reserve of $132,000. The slides from this presentation are available in the Members Area of the website, accessed through the Membership menu.

Friday morning brought a myriad of new ideas to attendees. Not only did the six Alternative Neutral Process discussion leaders report back, but also two completely new elements of ARIAS•U.S. were presented. From the early days of the Society, the *ARIAS•U.S.*

***Legislative & Regulatory Developments** – Daniel B. Schelp, Robert A. Whitney, Stephen Schwab*

WORKSHOPS

Life (Re)insurance Issues *– Thomas M. Zurek, Denis W. Loring, Thomas D. Cunningham*

Arbitrator Authority *– Jonathan Sacher, John T. Andrews, Robert Sweeney*

ANNUAL MEETING

Eric Kobrick called the meeting to order.

Mary Kay Vyskocil summarized a productive year as Chairman.

A grateful membership applauded her efforts.

Treasurer Peter Gentile revealed the impact of Hurricane Sandy.

REPORT FROM NEUTRAL PROCESS BREAKOUTS

Alexandra D. Furth, Thomas L. Forsyth, Andrew P. Maneval, Elizabeth M. Thompson, Lawrence S. Greengrass, Michael A. Knoerzer, Moderator Cynthia Koehler

Guidelines for Arbitrator Conduct document has provided the essential framework for ethical behavior of arbitrators. However, the Ethics Discussion Committee has been working with the Board to bring ethics to a new level. The new *ARIAS•U.S. Code of Conduct* presents a stricter set of parameters that address issues people in the industry have complained about as well as others that just make sense today. The website now provides the details. They were explained during the session by the panel of Committee Chairman **Eric S. Kobrick and members James I. Rubin, Larry P. Schiffer, and Daniel E. Schmidt, IV**.

Also, a subcommittee of the Arbitration Task Force has worked for well over a year to discuss, draft, consult with the Board, and re-draft new *ARIAS•U.S. Rules for Resolution of Insurance and Reinsurance Disputes*. These rules are offered to the industry to use to the extent that parties choose to use them. They are more prescriptive than The *ARIAS•U.S. Practical Guide to Reinsurance Arbitration*. That guide offers a more flexible alternative approach that some may prefer. They are both available on the website. Either the Rules or the Guide may be specified in a contract or at the initiation of arbitration.

Other Task Force initiatives were also presented in this Friday morning session, namely, an alternative procedure for resolution of "small arbitration" disputes, a private right of appeal, and an industry referral process. Moderated by task force Co-Chair Daniel L. FitzMaurice, the panel consisted of ATF members **Glenn A. Frankel, Michael A. Frantz, Aluyah Imoisili, and Beth Levene**.

In his closing comments of the conference, new Chairman **Jeffrey Rubin** presented a meritorious service award, a crystal trophy, to retiring Chairman **Mary Kay Vyskocil**. The award was in recognition of her outstanding leadership, support, and guidance as a member of the Board of Directors, President, and Chairman of the Society.

The clothing drive for disadvantaged job seekers was continued this year. Volunteers from **Mound Cotton Wollan and Greengrass** staffed the collection station on Thursday morning. A significant number of contributions were made by attendees. Five large boxes of clothing were sent to Dress for Success (women) and CareerGear (men).▼

RECEPTION

David Thirkill, Olga Thirkill, Max Chester, Yelena Chester

Jim Schacht, Jim Corcoran, John Cashin

Tom Wamser, Cliff Hendler, Ryan Russell

Larry Greengrass, Dennis Loring, Peter Scarpato

Wesley Sherman, Alison Shilling, Linsey Routledge, Peter Cridland

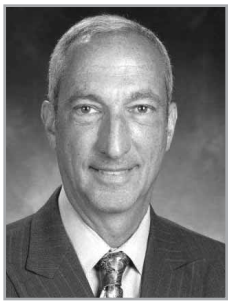
Steve Acunto, Bill Yankus, Peter Gentile

feature

Fall Conference Keynote Address

By Thomas B. Leonardi

Thomas B. Leonardi



Connecticut Insurance Commissioner Thomas Leonardi gave the keynote address at the opening of the 2013 Fall Conference on Thursday morning October 31. Commissioner Leonardi's agency has jurisdiction over the largest life insurance industry in the United States and the second largest overall insurance industry in total written premium. His address focused on the changing regulatory structure of the industry in the U.S. and around the World. A transcript is included here with his permission.

Although insurance companies and consumers fared reasonably well, the financial crisis lead to a recognition that we as regulators need to do a better job in how we collaborate, cooperate, and coordinate our efforts in the supervision of IAI and RGs.

Transcript

Thank you, Mary Kay, for that very kind introduction and thanks also to all of your colleagues at ARIAS for inviting me to be here with you this morning. Many of you are probably not aware that I was actually a member of ARIAS for several years and attended a number of events and educational sessions. So I am very familiar with just how fantastic this organization is. You have been and continue to be leaders in the alternative dispute resolution arena on a global basis, and I am proud to have been a part of such a fine organization.

I must confess though, that I would have been astounded if you told me as recently three years ago that I would be here before you this morning, returning to this organization and giving a keynote address, speaking as a worldwide expert on the issues of global insurance regulation. But while very unexpected, I can assure you that I am delighted that I am here. And I have to thank you all for my current position as Insurance Commissioner. You're probably thinking, what is he talking about? Well, you see, my success rate of being selected as an ARIAS arbitrator was less than stellar. I was only selected one time...and by the time the appointment notice letter reached me, the case had already been settled! So if I had been wildly successful doing arbitrations in my retirement, I would probably never have given a moment's thought to becoming an Insurance Commissioner! But it really is a great thrill to be back amongst all of you, some of whom I have known for a long time.

I have been asked to speak for about 30 minutes, and the number of topics that I could choose to speak about is nearly unlimited. PBR, TRIA, NFIP, Reinsurance collateral, the role of FIO, Solvency 2 and Equivalence, and on and on. But since I am the chair of the NAIC's International committee, and due to the fact that there is so much going on in the world of international insurance regulation, I thought what I would do is focus my remarks on the very recent developments that are ongoing in the international arena.

Before I get started however, I thought I would share with you a little bit about who I am and how I got here to provide some context to my comments.

I am now in my third year as Insurance Commissioner for the state of Connecticut. The likelihood that I would be chosen certainly appeared to have long odds. I had never met the Governor; never contributed to any of his campaigns, and although Connecticut is very much a Blue state, Governor Malloy was the first Democrat elected governor in 24 years, while I have been a registered independent for nearly three decades; and if that wasn't enough to create very long odds...I was no longer a Connecticut resident, having retired to our vacation home on the shores of LL in the Adirondack Wilderness of Upstate NY almost six years earlier. Yet in spite of all of that, after a two-hour meeting with his chief of staff, followed three days later by a two-hour meeting with the Governor himself, he offered the job to me on the spot, and I immediately accepted.

Many of my family and friends, including my 25-year-old daughter, asked somewhat incredulously: Why in the world would you come out of retirement and leave the perfect

lifestyle behind to go work for the government? In fact, it was one of Governor Malloy's first questions to me as well. Sure, living in the wilderness, traveling at will and having my time and schedule entirely my own all had their benefits. But the need for a new and exciting challenge had an irresistible allure. Plus, in my 30 years in this industry, I couldn't think of a time when the regulatory environment has ever been this fluid and dynamic.

The backdrop of course was that we had just barely made it through the harrowing experience of the meltdown of the financial services industry and the biggest economic dislocation in our lifetimes. In addition, Congress passed, and the President signed into law, perhaps the two most ambitious pieces of federal legislation since the 1960s. Both PPACA and Dodd-Frank have had, and will continue to have, a significant impact on the insurance industry and those tasked with insurance industry regulation. And if that wasn't compelling enough, add in the fact that the Insurance Commissioner in Connecticut regulates the second largest insurance industry of any state in the nation...one that if it were a standalone country, would put Connecticut as the 8th largest insurance producer in the world. This was far too compelling for me not to want to do it.

Our industry, as you all well know, has become increasingly global and interconnected

This trend towards globalization is accelerating. And will affect not only those companies with significant international presence, but ultimately all companies. They will impact the cost of capital, product offerings, market vibrancy, solvency, liquidity, have an impact on a groups' worldwide employees, on the economies of the jurisdictions in which those groups operate, and most importantly, on consumers everywhere.

Although insurance companies and consumers fared reasonably well, the financial crisis lead to a recognition that we as regulators need to do a better job in how we collaborate, cooperate, and coordinate our efforts in the supervision of IAI and RGs. All the regulations in the world mean nothing if you don't have effective enforcement and adequate supervision. As a U.S. regulator, I need to be able to look across a wide landscape - beyond our borders - to understand the risks in a group that affect our domestic companies, wherever those risks may originate and to make sure there are no gaps in supervision. During the crisis, AIG became the poster child for these risks...that a small Financial products group operating out of an office in London, not regulated by any insurance regulator in the U.S. or the U.K., could write a large number of credit default swaps that when they went bad, not only took down the largest insurance company the world has ever known, but threatened to take down the entire world economy with it is almost inconceivable! But it did happen....and we...regulators and industry...can't let something like that happen again.

As a result of the financial crisis, there are a number of initiatives ongoing throughout the world that are critically important to our insurance and reinsurance companies. These issues take up about 75% of my working hours meeting with policymakers and regulators, discussing openly and candidly our goals, objectives, similarities and differences, in an attempt to reach a common ground of understanding that will ultimately benefit all of our companies and consumers. These include discussions about international accounting standards, market consistent valuation, Solvency II and Equivalence, ComFrame, Global Capital Standards, the use of Supervisory Colleges, and the role of the lead supervisor. But I want to focus the remainder of my remarks here this morning on what I believe is the most important driver of the rapid regulatory changes we are seeing today, both here and abroad, and that is Financial Stability.

Systemic Risk – G-SIFI Process

Over the past three years-there has been an enormous amount of effort expended on what we call the G-SIFI process, G-SIFI meaning globally systemically important financial institution. As a result of the financial crisis, the G20 countries asked the Financial Stability Board, (the FSB) to embark on a project to identify companies whose failure would present a substantial risk to the world economy. It tasked the Basel Committee on Banking Supervision to do this work on Banks and the International Association of Insurance Supervisors (IAIS) to assess insurers. There have been multiple data calls, confidentiality agreements, public consultations and enormous amount of technical analysis. The process consisted of a two pronged approach. The first was to determine a methodology, i.e. what questions to ask, what data to collect and what metrics to apply when evaluating the systemic risk posed by an institution, and the second was to determine the measures that a company designated as a G-SIFI will be subject to. Regarding the former, the IAIS's Financial Stability Committee (FSC) arrived at five key attributes with varying weights of importance that include: Size, Global Reach, Substitutability, Interconnectedness, and Non-Traditional Non-Insurance (NTNI)...these last two having the most significance and highest weighting. I am convinced that the results of the FSC's efforts to evaluate and rank the 49 companies on the original list resulted in an excellent work product. Unfortunately, the IAIS was not afforded the time to complete what I believe is a critical part of the process, and that is the Comparability Study. The comparability study would have looked at the most risky insurer on the list and compared it to the 29th or least systemic bank SIFI. If the most risky insurer would have been #31 on the list of 29 G-SIBs, then a fair conclusion would be that none of the insurers is systemic. Without completing that comparability study however, the FSB's decision to designate any insurers as SIFIs is like throwing darts on a dartboard...let's see what number we landed on and that will be the number of companies we designate as SIFIs.

The Second prong of this approach was to determine what measures to apply to companies designated. These include 1) Greater Prudential oversight; 2) a resolution plan – or what is commonly referred to as a living will; and 3) additional capi-

The primary mission of the Connecticut Insurance Department and virtually every other state insurance department is to protect Policyholders...not shareholders, not bondholders and not counterparties. This doesn't mean we don't care about these other constituents. But our focus on Policyholder protection demands that we exercise great caution not to sacrifice this, our primary mission.

tal requirements, what we are referring to as HLA or higher loss absorbency. It does not include, however, a requirement that companies work to eliminate those activities that make them systemic. And that gives me great concern as well, because I thought the most important lesson learned from the Financial Crisis is that we cannot afford to allow TBTF companies to exist. Another cause for concern is that designating some companies as SIFIs is likely to create an unlevel playing field between those companies that are deemed SIFIs and those that are not. Let me explain what I mean here. If you are a customer, particularly of a life insurance company, and you see that a company has been deemed systemic, you might very well conclude that you want to do business with that company because 1) enhanced prudential regulation:, even if the customer is not sure what that means, they know that enhanced is better than not enhanced; 2) more capital is better than less, so that's a good thing; and 3) systemic means that it is Too Big To Fail (TBTF), which means there is an implied government guarantee as we witnessed in 2008/2009, so that is really good also. All of this suggests a competitive benefit to the SIFI. On the other hand, a strong argument can be made that it is a negative to the SIFI, since higher costs of regulation and capital charges, if passed along to the customer, may make the company non-competitive. If however, it decides to eat the cost, its ROE will decline which will then make it less attractive to investors and increase its capital cost or require the company to exit certain lines of business to remain competitive. No one can say for sure which of these will happen, but in many ways that is the key point...that there are unintended consequences. What we do as regulators and policy makers has a real world impact...and as with physicians, our primary goal should be: Do no Harm!

Now let me say that I have had the privilege of being the sole US regulator on the Financial Stability Committee for the past three years, and so no one appreciates more than I the amount of hard work and intelligence that has been devoted to this important issue by so many individuals from so many jurisdictions. It has been and continues to be one of the highest priority objectives for the IAIS. Having said that, let me share a few words of caution as we move forward with the process and the policy measures.

A. **Policyholders vs. Counterparties**

The primary mission of the Connecticut Insurance Department and virtually every other state insurance department is to protect Policyholders...not shareholders, not bondholders and not counterparties. This doesn't mean we don't care about these other constituents. But our focus on Policyholder protection demands that we exercise great caution not to sacrifice this, our primary mission.

As a result, we need to insure that funds that are set aside as payments to Policyholders for obligations and liabilities decades in the future, are not sacrificed to absorb the losses incurred by the counterparties of TBTF companies. Our goal should be to identify, reduce, and, where possible, eliminate systemic risk, not institutionalize it by creating TBTF companies.

And as we consider the various policy options necessary for the accomplishment of our financial stability goals, we need to rely on the supervisor's expertise and knowledge of the group's activities, the regulatory playing field in which they operate, and then try to find the appropriate measures that present the least harmful option to Policyholders.

Any failure to be thoughtful in our approach might end up not only reducing our current Policyholder protections, but could actually create unintended consequences that might lead to " runs on the bank" that have not previously existed in our industry, or destabilize insurance markets, or create product unavailability and ultimately, weaken financial stability. That would be most unfortunate.

B. **We also need to be mindful of the significant improvements in prudential regulation as a key factor in reducing systemic risk...or to say in another way, it's not all about capital.**

We need to continue to focus on lessons learned in the aftermath of the financial crisis to help prevent another. It's not just HLA...capital is important but is not the silver bullet. Let's go back to my earlier comments regarding AIG. If there had been a 3% capital surcharge applied to AIG in early 2008, it would have done nothing to prevent the liquidity crisis and eventual failure of the company. But enhanced and effective prudential regulation might very well have done so.

In the US, we have discussed the Solvency Modernization Initiative, or SMI, on many occasions over the past several years. Often we have used long, complicated PowerPoint presentations that are very comprehensive but often leave the audience wondering what really is SMI and why is it important. So here is the 60 second version...the key components of SMI as it relates to systemic risk:

1. Revisions to the Model Holding Company Act (MHCA)

These revisions are among the most important aspects of the SMI. They provide the lead regulator with the following new tools:

a. Access to information about the entire enterprise-not just insurance, or NTNI or other financial activities...but all of the group's operations no matter where they are located. So if an insurance holding company domiciled in Connecticut owns a railroad in South Africa and a mining company in Taiwan, I have the ability to demand information on those operations, even though they are outside the U.S. and not insurance activities.

b. Equally important is that the information we receive from the holding company is protected as confidential, just as state law protects information obtained under the insurance entity financial exam statutes;

c. You may ask "what does a financial regulator know about chemical companies or railroads"? The answer is "not very much!" But the MHCA provides the regulator with the ability to hire outside experts to assist the department in assessing risks in areas we are not expert in, and to do so at the insurance holding company's expense;

d. It also allows the lead US regulator to examine all intragroup transactions. And we already have the ability to limit the sums that can be dividended up from the legal entities to the holding company; and

e. It codifies the use of Supervisory Colleges, including confidential information sharing with other group regulators and expense reimbursement.

These are all substantial improvements that enable us to conduct meaningful group wide supervision that is equal to and possibly greater than that of most other jurisdictions in the world.

2. Enterprise Risk Reports (ERR). In addition, the ERR requires a group to file its assessment of its overall enterprise risk. Again, not just its insurance or financial businesses, but risks for the entire enterprise at the Group level.

3. Own Risk Solvency Assessment (ORSA) requirement and the ability to conduct stress testing under various scenarios; and finally,

4, Enhanced Corporate Governance practices at the holding company and board level.

Unlike the capital surcharge, all of these significant measures, had they been in place in 2006 and 2007, may very well have enabled supervisors to prevent the AIG debacle from having occurred. Let me give you a specific example of why I say this:

In addition to the Financial Products Group (AIGFP), another area that contributed to the demise of AIG, though in a much more modest way, were the securities lending programs of the AIG insurance subsidiaries. These were approved by the various domiciliary state insurance regulators. At the time of approval however, these programs were conservative; reinvesting the cash collateral in short-term U.S. Treasury securities.

The Bottom line: there was no maturity mismatch. At some point in time prior to 2007, AIG changed the nature of its securities lending program, reinvesting the cash collateral in mortgage-backed securities with long maturity dates, thereby creating maturity mismatches. While AIG was obligated to inform its home state regulator of this change, it failed to do so. Instead, Texas regulators were doing an onsite examine of one of their AIG domestics, and discovered this change in 2007. This critical info was shared with other state regulators with jurisdiction over other legal entities in the group, and the regulators, acting in concert, immediately directed the company to begin winding down this "new" program and returning to the original program. The state regulators also communicated this information to other involved regulators during an AIG supervisors' meeting (a precursor to today's supervisory colleges) held by the Office of Thrift Supervision, a now defunct federal regulator that served as AIG's group wide supervisor at the time.

As a result of the collective action by state insurance regulators, prior to the crisis in 2008, the securities lending program had already been significantly reduced. Unfortunately the crisis prevented further winding down of the program as a result of the blow up in the AIGFP division, which, as I said earlier, was not regulated by an insurance regulator in the US or in the UK where the AIGFP division was located.

As a lesson learned from this situation, the state regulators, acting through the National Association of Insurance Commissioners, our standard setting organization, instituted new reporting requirements for securities lending activities so that now we can easily identify any maturity mismatch or other concerns with these programs and not have to rely upon the company to inform us of any changes. These are concrete examples of the lessons learned and important steps taken to prevent systemic risk that do not rely on capital surcharges.

Fighting the last war

And finally, we need to be mindful that as supervisors we have to be vigilant in the early identification of new trends and new risks that may affect financial stability in the future. Climate change and the prolonged low interest rate environment are two recent examples. There are undoubtedly many other potential challenges lurking out there. Shame on us if, while spending so much time closing the barn door after the horses are all out, we don't see that a fire is about to burn down the whole barn.▼

Thank You.

feature

Jeffrey Rubin and Eric Kobrick Chosen as ARIAS•U.S. Chairman and President for 2014

Elizabeth Mullins Elected Vice President (President Elect)
James Rubin Is Vice President
Deirdre Johnson Is New Board Member

Jeffrey M. Rubin, Senior Vice President, Director Global Claims of Odyssey Reinsurance Company, was elected Chairman of ARIAS•U.S. at its 2013 Annual Conference in New York City. He succeeds **Mary Kay Vyskocil,** a Partner at Simpson Thacher & Bartlett LLP, who has retired from the Board. **Eric S. Kobrick**, Vice President, Deputy General Counsel, and Chief Reinsurance Legal Officer at American International Group, Inc., was elected President succeeding Mr. Rubin.

Also at the conference, **Elizabeth A. Mullins**, Managing Director and head of Global Dispute Resolution & Litigation at Swiss Re America Holding Corporation, was elected Vice President and designated as President Elect. **James I. Rubin**, head of the reinsurance litigation and arbitration practice at Butler Rubin Saltarelli & Boyd LLP, was elected Vice President.

In addition, ARIAS•U.S. members re-elected one Board member and elected one new member. Eric S. Kobrick was re-elected to a second term. **Deirdre G. Johnson**, a partner in the Washington, DC office of Crowell & Moring LLP, was elected to a first term. Ms. Johnson replaced Ms. Vyskocil as a law firm representative.

As Senior Vice President, Director Global Claims of Odyssey Reinsurance Company, the new ARIAS•U.S. Chairman, Jeffrey Rubin, is responsible for oversight of group-wide claims. He is a graduate of Cornell University Law School and State University of New York, Oneonta College.

At ARIAS•U.S., Mr. Rubin serves as Co-Chair of the Arbitration Task Force, Chair of the Executive Committee, and Chair of the Finance Committee.

As Vice President, Deputy General Counsel, and Chief Reinsurance Legal Officer at American International Group, Inc., Mr. Kobrick oversees reinsurance dispute resolution, as well as reinsurance contract wording and regulatory and transactional issues. He received a B.A. in Government from Cornell University and a J.D. from Columbia Law School. Prior to joining AIG, he was associated with the law firm of Simpson Thacher & Bartlett LLP.

Mr. Kobrick is an ARIAS•U.S. Certified Arbitrator, had served on the ARIAS•U.S. Long Range Planning Committee, and serves as Chairman of the ARIAS•U.S. Ethics Discussion Committee and a member of the Finance Committee.▼

Jeff Rubin

Eric Kobrick

Elizabeth Mullins

Jim Rubin

Deirdre Johnson

Recently Certified Arbitrators

in focus

John M. Parker

John Parker is recently retired from RiverStone US where he served as Senior Vice President and Reinsurance Counsel. During his 19 years at RiverStone, Mr. Parker managed well over one hundred reinsurance arbitrations and litigations in addition to his operational responsibilities for assumed and ceded reinsurance. Prior to his role in Reinsurance, he served as General Counsel for the insurance companies owned by RiverStone US. In this role, in addition to his reinsurance dispute responsibilities, he was responsible for acquisition due diligence, a substantial restructuring, and compliance initiatives.

Prior to his time at RiverStone, Mr. Parker was in private practice at Sidley Austin LLP, where he represented assumed and cedent clients in reinsurance disputes.

In addition to his law degree from John Marshal Law School, Mr. Parker has a Bachelors degree in Accounting from Dominican University and a Masters in Business Administration from DePaul University. He is also a Chartered Property Casualty Underwriter and has an Associate in Reinsurance.

John M. Parker

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

Coming Soon...
ARIAS•U.S. Webinars!

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

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

Details (*subjects, dates, and costs*) will be announced in January.

Watch your email and the website *Current News* for the announcement!

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 December 2013, ARIAS•U.S. was comprised of 313 individual members and 113 corporate memberships, totaling 884 individual members and designated corporate representatives, of which 223 are certified as arbitrators and 58 are certified as umpires.

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

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

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

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

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure*, *The ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, and *the ARIAS•U.S. Code of Conduct*. These online publications … as well as the *ARIAS•U.S. Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, are among the benefits of membership in ARIAS.

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at director@arias-us.org or 914-966-3180, ext. 116.

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

Sincerely,

Jeffrey M. Rubin
Chairman

Eric S. Kobrick
President

ARIAS U.S. Membership Application

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

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

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

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

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/13

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$425	$1,300
FIRST-YEAR DUES AS OF APRIL 1	$283	$867 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$142	$433 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

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

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

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $425 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

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

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

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

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

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

_____

Signature of Individual or Corporate Member Applicant

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

ARIAS U.S. Board of Directors

Administration

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

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