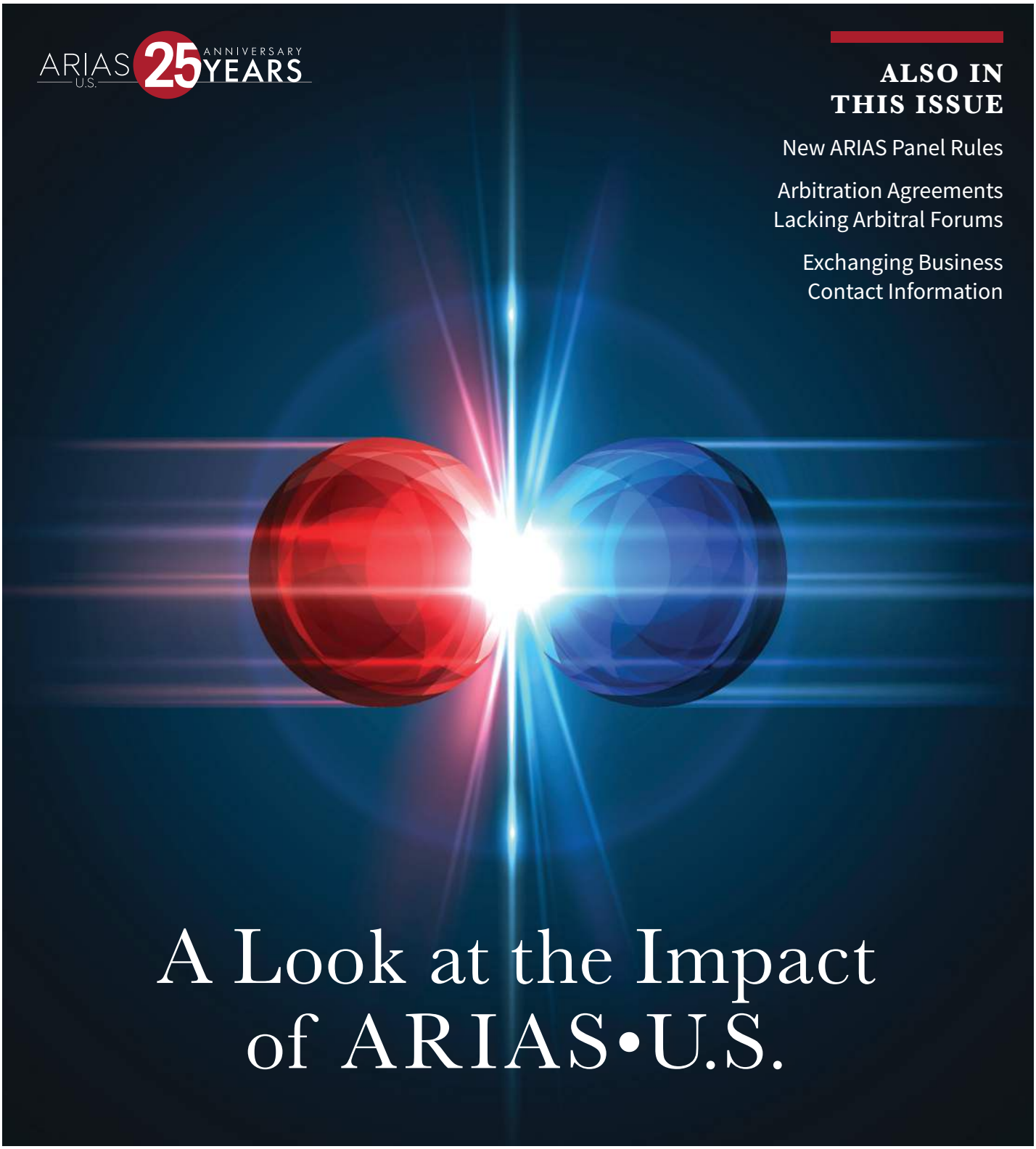
ARIAS U.S.

QUARTERLY



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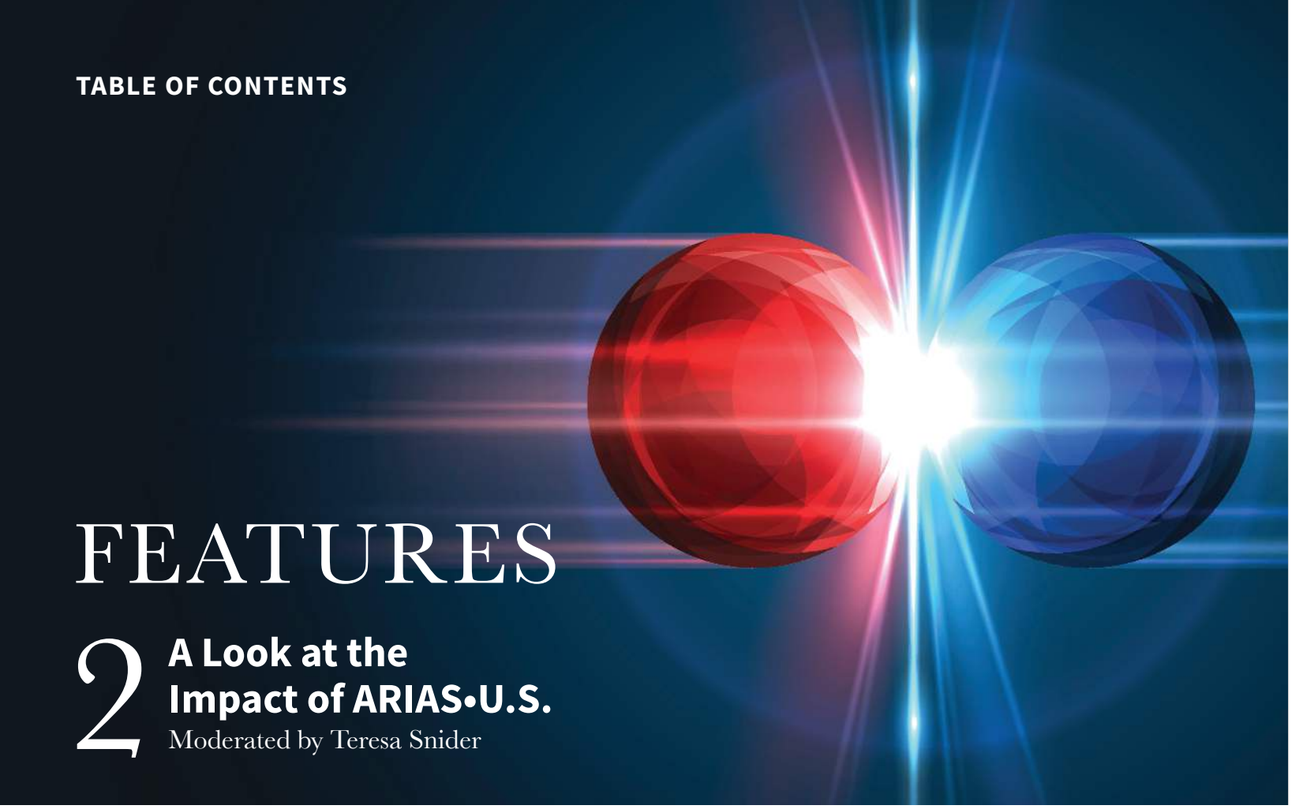


FEATURES

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 a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the Quarterly may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the Quarterly may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. 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.

COVER ARTWORK: KOTOFFEI/GETTY IMAGES

As our 25th anniversary year ends, we reflect on all that ARIAS•U.S. has accomplished since its founding. Many of the articles in the *Quarterly* this year have provided some perspective on the past, present and future of ARIAS. Some of that perspective has been controversial, especially about the value of arbitration.

Lest we forget, the second "A" in ARIAS stands for arbitration. This is an arbitration society, whose core mission is to make insurance and reinsurance arbitration better by educating and training arbitrators and certifying the best possible arbitrators. I believe ARIAS has done just that. Yes, it is an imperfect system, and yes, in my view, moving away from the party-appointed advocacy system and toward neutral panel arbitrations is the right way to go. But by developing a code of conduct, providing intensive training for arbitrators, and creating procedures, forms and rules, ARIAS has significantly enhanced the way arbitrations are conducted in the United States. Even the courts think so.

In this issue of the *Quarterly*, we continue our 25th anniversary celebration with another roundtable discussion, this one with some of the founders and early board members of ARIAS talking about what arbitrations were like back then and how they (and ARIAS) have changed. Moderated by Teresa Snider from Porter Wright Morris & Arthur LLP, the participants are Dan Schmidt, Susan Mack, Mark Gurevitz and Debra Hall. Their insights into the formation of ARIAS and its future are important for everyone.

The 25th Anniversary of ARIAS also brought to mind my "Forrest Gump" experience of being in and around the founding of ARIAS, although not necessarily "in the room" (as Hamilton

would sing, or was that Lin-Manuel Miranda?). That experience caused me to construct an article around the recollections and summaries of founding documents provided by Dan Schmidt, Debra Hall, Mark Gurevitz and Susan Mack. This information came along serendipitously while organizing the roundtable, so I ran with the idea and reached out for more information.

What resulted is "In the Beginning: Reflections on the Birth of ARIAS•U.S.," a sort of very unofficial history of the founding of ARIAS as best one can discern 25 years after the fact. I think it is a useful complement to the roundtable symposium, and I hope you enjoy it—and for some of you, I hope it prompts your own memories.

Earlier this year, I came across a case that gave me pause. It dealt with an arbitration provision that did not include an express designation of an arbitral forum and the court's decision that the arbitration could not go forward because of this. While it is usual NOT to designate an arbitral forum in reinsurance agreements, I thought we ought to research the issue and write an article.

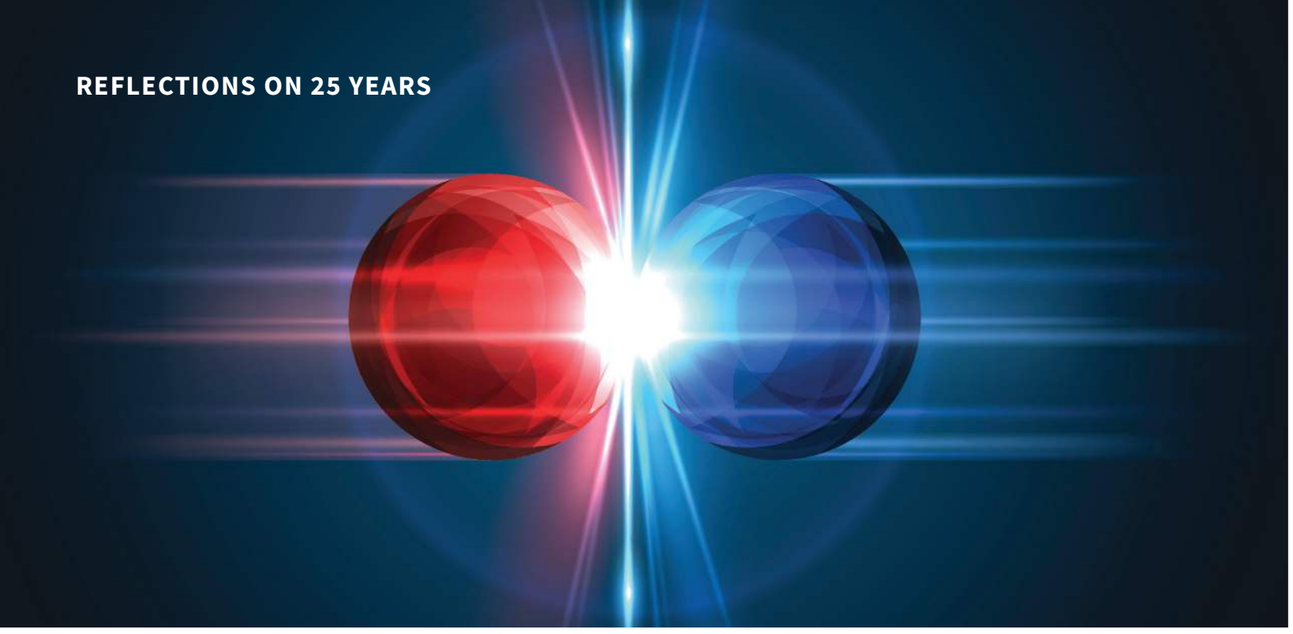
Together with my colleague Kelly Mihocik from the Columbus office of Squire Patton Boggs, we put together a short article, "Ensuring the Enforceability of an Arbitration Provision That Does Not Designate an Arbitral Forum," to discuss this case and its potential ramifications. We include some drafting suggestions to mitigate against any court using the lack of an arbitral forum to preclude arbitration.

For our Tech Corner, I pitched in again (obviously, too much time on my hands!) and wrote an article that I have been meaning to write for a while. In "No Business Cards? No Problem—Use Your Smartphone," I profile two cool ways to use your smartphone to exchange contact information. I hope you find this useful. I am also very interested in your feedback.

Finally, as you know, in September 2019, ARIAS launched the ARIAS•U.S. Panel Rules for the Resolution of Insurance and Contract Disputes ("Panel Rules"). These rules kick-start ARIAS' initiative to engage its members in arbitrations between insurers and policyholders and other insurance contract-based disputes. For those of you who could not attend the Fall Conference (and as a refresher for the rest), Peter A. Halprin from Pasich LLP and arbitrators/mediators David W. Ichel and Peter K. Rosen have written an article outlining how these rules came about and highlighting their most important aspects.

By the time you read this, our Fall Conference will have taken place. If you were on a Fall Conference panel, please turn your hard work into an article. If you lead a committee, please write something about what your committee is doing. If you've written a blog post or client alert, please turn it into an article for the *Quarterly*. We welcome your submissions for 2020.

Larry P. Schiffer
Editor



A Look at the Impact of ARIAS•U.S.

Moderated by Teresa Snider

Snider: In recognition of ARIAS•U.S.'s 25th anniversary, I've brought together four of the organization's founders to discuss the impact of ARIAS and how arbitration has changed in the past 25 years. Mark S. Gurevitz, Susan E. Mack, and Daniel E. Schmidt IV are founding directors of ARIAS, and Debra J. Hall is an original organizer of ARIAS on behalf of the Reinsurance Association of America. Between the four of them, they have served as arbitrators, umpires, or employee managers of more than 750 proceedings.

The first question is for all four of you: What are the most significant changes you have seen in arbitration over the past 25 years?

Schmidt: I would say the quality of the legal representation, especially the briefing. That is the first thing that hit me—also, of course, the amount of discovery, and the length of the hearing itself, and the amount of time it takes now to get to a hearing.

I go back to my first days as an arbitrator. I started in '87, and it was fairly simple, to such a point I remember Dick Bakka and I and another arbitrator were simply handed files by the parties. They asked us if we'd go in the back room and take a look, answer some questions, and come back and give them a decision. Pretty simple, pretty quick, pretty dirty. No lawyers involved.

It's gotten more sophisticated since then. It's gotten to such a point where I had one hearing involving a lot of money, a rescission, where we had 53 hearing days over a two-and-a-half-year period. Things seem to have settled down a bit, but I still have hearings that are over a month long.

Mack: I'm focusing on the major changes in the past five years. We have moved away in the past five years from property/casualty reinsurance alternative dispute resolution. I see a substantially growing number of life and health reinsurance disputes; I see a number of direct insurance matters between policyholders and insurers.

Of course, this is a big departure from where ARIAS started 25 years ago, when it was largely asbestos, pollution, and health hazard disputes between insurers and their reinsurers. So I think we have a prospect for bringing in more and different types of members. I don't think, with the life side of the reinsurance disputes, that we will see that happen immediately, because we do see a lot of life side of both reinsurers and insurers that also have a predominant property casualty business.

It's interesting that we don't see that much of a change in the identity of counsel in the life and health reinsurance disputes. I see the same counsel that I would in property casualty reinsurance disputes. Where you see counsel changing is between the reinsurance disputes and the insurance disputes; when you have a property casualty insurer versus their policyholder, it brings in a whole new dynamic and a change of characters among the attorneys.

Gurevitz: I agree with what both Dan and Susan have said. I would add a couple things.

Number one, I think one of the biggest changes is that the arbitration process itself has become fairly standardized and routine in a way that 25 years ago was simply not the case. I think it's not too far off to say that back around the time ARIAS was formed and in the years prior to that, there was a little bit of the wild west approach—there were no rules. Other than Dan and a few other people, there were very few arbitrators who had any real experience with arbitration, either as an arbitrator or as a company, and there were no expectations and no norms.

So one of the most significant changes is that the arbitration process itself has become normalized and much more routine and standard. I attribute a lot of that to ARIAS itself.

The other thing that is a big change—and Dan touched on this earlier—is that there's much more significant analysis of the issues, in a much more methodical approach to deciding the issues that are presented to an arbitration panel. Early on, and I think most people experienced the same thing, you would have an arbitration for a week or two weeks and sometimes that very afternoon you would get an award issued and it would be a one-line award. I think that has become, for the most part, an historical anomaly, and I think for the better.

The panels will spend time to go through all of the issues that are presented and the sub-parts of the issues to make sure there's a full discussion of those issues before deciding. Panels give a lot more detail. I won't say that it rises to the level of a reasoned decision, but we'll go through the issues that had to be decided and the thought process. And we'll give a lot more detail and explanation in the written award. That, I think, is more of a comfort to parties, to know that the panel really did spend a lot of time looking at their issues and weighing their issues before making a decision. So I think those are all improvements for the better.

Hall: First, I agree with everything that my three colleagues have said. One thing that I would add is that I think the arbitration umpire appointment process has changed quite a bit—a lot of procedures have changed, and sometimes for the better, as noted by Mark. I think that for umpire selection, though, it used to be that the arbitrators were much more involved than the lawyers, and it didn't take as long to get an umpire appointment. Of course, there's a lot of strategy, and all that goes into that decision. I understand why it happens, but that's been a big change.

Snider: If we could go back to something that Susan touched on, that she's seeing more life and health reinsurance disputes and more direct insurance matters. Has the pool of arbitrators expanded to accommodate these disputes, or are you seeing the same arbitrators as well as seeing the same reinsurance counsel?

Gurevitz: I think generally we're seeing the same arbitrators, and I don't think that's necessarily a bad thing. There are a fair number of arbitrators that, number one, have experience in the life sector, including Susan and myself; and others have had experience in dealing with life arbitrations even if they didn't have experience directly when they were with a company. In terms of the direct policyholder or non-reinsurance-type arbitration, again, I think that the ARIAS certified arbitrators and umpires are pretty capable of dealing with the disputes. The only thing that I would add is that, to the extent we handle more policyholder disputes and policyholder counsel want other arbitrators added to the mix, that would be a natural progression.

On the policyholder side, I think we see a lot of disputes around MGAs and other agency agreements, captives, and other type of things that are not the traditional reinsurance disputes. But I think that the arbitrators that are current ARIAS arbitrators are pretty well equipped to deal with that.

Schmidt: I would agree with that. Not that many certified arbitrators have that life or accident health credential, as Mark said. I'm fortunate that I just happened to luck out and have it, so I can technically qualify. But a lot of people whom I'm sure would do great on those panels don't have that credential.

Mack: You're probably right, Dan. I do agree with both you and Mark that in the majority of life cases, a very competent, highly seasoned arbitrator who is technically qualified can do a fine job. But there's a significant minority of life and accident and health disputes where I think it does help to have some significant life insurance or reinsurance history as an executive.

I, together with Dee Dee Derrig and the Life Subcommittee of the ARIAS Membership Committee, have a continuing mission to get life executives interested in becoming members and, later, arbitrators at ARIAS. In fact, I spoke with Tom Zurek at the American Council of Life Insurers annual meeting to get out the word that the pool could conceivably expand. And in October, Dennis Loring and I will be speaking at the Society of Actuaries annual meeting in Toronto. So I think there is room for expansion in the pool. That's not to detract from the existing qualities of those seasoned arbitrators that we already have.

Hall: At the formation of ARIAS, one of the perceived needs at that time among the company representatives when I was at the RAA was the lack of a sufficient pool of arbitrators. At that time, it was a lack of perceived experience in property and casualty arbitrators, when we were dealing with the RAA in its early days before it had life and health members. And I know that this has been a somewhat controversial topic at ARIAS, but I do agree with Mark and Dan—there are people who are experienced arbitrators who are, I think, very competent to deal with life matters. And there might be more of us than people realize in terms of having experience.

I had experience when I was a receiver in life matters; I was responsible for the administration and closure of life estates. Later, at the RAA, we established a life component within the RAA and addressed life matters. At Swiss Re, I also had life reinsurance involvement. I was asked to chair the international (IAIS) task force at the ACLI, and I was involved in policy and regulatory life reinsurance matters within Swiss Re. So some of us do have more life experience than some folks may know.

Right now, I'm an umpire in a very significant life reinsurance arbitration. I find the panel to be eminently qualified to deal with the issues that are presented, even though you might normally associate those panel members with P/C more than you would a life background.

Mack: I do think that it's very interesting that the four of us all have some significant life experience.

Hall: I also think it's interesting that the organization continues to evolve. And one of the aspects of that is the outreach process, in order to make sure that the members' needs are being served. It sounds like one of those things that is helpful is making sure that people's experience is out there and available so people are aware of it.

One thing that has been discussed in the past is how to make the umpire and arbitrator information on the website more accessible, because there's so much information there. But it's sometimes hard to gauge the experience that people have, because they end up putting 2 percent down for each category of substantive experience, which doesn't quite capture the quality of that experience.

Gurevitz: That's a really good point.

Mack: I like Debra's point about outreach. It reminds me that ARIAS is in the business of outreach to the parties who are the principal participants in the dispute. It is the parties' perspective, if they think a seasoned arbitrator who technically qualifies as a life-qualified arbitrator can adjudicate their dispute well. Some parties prefer someone who was deep in the industry and is a former traditional life insurance or reinsurance executive. So the parties control the arbitration. It's up to the parties to determine how best those disputes can be arbitrated.

Snider: We've talked about the pool of arbitrators who are available for disputes. Does anyone have a view on whether there's a more diverse group of individuals now who are involved as counsel, or has it been pretty consistent over the years?

Mack: I was approaching this particular question in terms of diverse representation among the presenting counsel in arbitrations from the gender perspective. And I do see many more women counsel who advocate for clients in reinsurance arbitration, but frankly, I don't see enough. I think there are many, many more reinsurance attorneys who are women, but not enough who are perhaps lead counsel in an arbitration. I think of you, Teresa; I think of Michele Jacobson of Stroock; and there are a few others. But I would like to see more gender parity and gender diversity in both the counsel ranks and the arbitrator ranks.

Gurevitz: But I do think it's a lot better than it used to be, for sure.

Schmidt: No question about that. Thankfully so.

Gurevitz: I was looking at this question more from the perspective of arbitrators. I think in terms of diversity of arbitrators, yes, in some ways it's more diverse. In some ways, it's not. Some of those points have already been addressed in terms of gender.

But in terms of background of arbitrators, as the number of arbitrators grew—I think we were up to 350 certified arbitrators at one point, at the zenith of this process—we had arbitrators from all facets of the industry. Not just people involved in dispute resolution, but actuaries, accountants, people not just from insurance companies, but brokers and law firms and things like that. But when we first started, there were quite a few chief executive officers and underwriters who were part of the arbitrator pool. And now I think it's shifted a little bit, in the sense that the vast majority of arbitrators are lawyers. I think there are very few underwriters, and a few actuaries, accountants, and brokers.

But my personal view of that is that it's a natural consequence of the fact that arbitrations have become quite complex, both procedurally and substantively. And outside counsel view that lawyers are generally—not entirely, but generally—better equipped and have better experience to deal with those issues. I'm not saying whether that's right or wrong, it's just a change that I've observed.

In terms of diversity, I've been disappointed, however—not in terms of gender, where I think we have made strides, but diversity in terms of how it applies to people of color. I think there's a lot more that we can do there. I don't mean this as a reflection on ARIAS per se, but on the industry as a whole. It becomes a problem for the arbitrators, who come from the industry. If the industry isn't more diverse, then we don't have the ability to find experienced people to add to the ranks of certified arbitrators.

Schmidt: I agree with everything Mark just said. When I first started, mainly it was senior executives that I served on panels with, not lawyers. Dennis Gentry, Bill Gilmartin, Rick Gilmore, Charlie Niles, Jim Phair, Ted Strenk—these are all giants, really. They were extremely knowledgeable and certainly needed no experts per se. And people like me, we learned, we learned. Earlier on, other general counsel like Darry Semple, Tim McCaffrey, and Jim Powers would be involved. But again, very, very few lawyers, other than in-house lawyers, were involved.

I guess there are a lot of reasons for it, but I wonder if one of the reasons is that not that many companies, whether ceding or assuming, have underwriters heading up their operations; so many of them are financial people. Maybe they just don't get involved or don't want to be involved in dispute resolution. These other guys did it as retirees. Some were still active.

Hall: The one group I would add to what Mark and Dan have said is there used to be a lot more claims professionals, senior VPs of claims, that were involved. In fact, when I was at the RAA, it was really the senior VPs of claims pushing for the expansion of the pool and also pushing to have, at that time, active senior executives be arbitrators, and pushing their companies to allow them to do a certain number of arbitrations, even if they were not compensated back in those days. But I agree with the observation of the proliferation of lawyers.

Schmidt: I might just add one other thing to what's been said. We talked about one of the primary goals: expanding the pool of arbitrators. Yes, there was an underlying rationale for that, because you might have heard stories of ultimate decisions being based on the flip of a coin, meaning the decision depended on which side's umpire candidate gets selected. And when you have a relatively small number, and presumably people on both sides knew how one tilted one way and one tilted the other, and there were no specific procedures on trying to reach an agreement—that was the perception, anyway. My involvement in ARIAS was generated in large part by the concern of that perception, the flip of a coin, being a reality. But I do know that's not the case now, for the most part.

Snider: One of the ways ARIAS has tried to address that perception is to promulgate a code of conduct, and that code of conduct continues to be updated and revised. Mark, I know you've been involved with that. What do you think the impact of having ethical canons has been?

Gurevitz: First of all, I would preface my comments by saying that I think all of our arbitrators at ARIAS are ethical, and I have no doubt they would be ethical whether we had canons or not. However, we decided early on that a world-class organization required canons of ethics. I think it's important that this be the case, for several reasons.

One is that outsiders who are going to be involved in the process in the first instance could have greater confidence in the process knowing that there was a canon of ethics that governed the arbitrators in the process. Second, arbitration was a second career for most

arbitrators. A lot of arbitrators had not been involved in the arbitration process while they were at companies, so this was new to them. They weren't sure how to behave and wanted to know what the standards were that applied. So one of our prime goals—and Dan was instrumental, being on the original Ethics Committee and developing the initial ethical guidelines that were developed, which I think have truly stood the test of time; Dan was involved, along with Jim Rubin and Richard Waterman—was to make sure that everybody understood what was proper behavior for arbitrators and knowing how the process would work.

It's been my experience that arbitrators take this very, very seriously. There have been countless times that I've had somebody call me, on an anonymous basis, in terms of what the underlying arbitration might have involved, but who said, if you had this type of circumstance, would you be able to accept an appointment or not? And then, in the course of an arbitration, if there was a concern, should I disclose this or not disclose this, or was my behavior appropriate? So people are very, very serious about making sure that they comport their behavior with what is expected of them. I think that is a credit both to the code that's been developed and to the certification and education of arbitrators that we do have.

Mack: I concur with Mark's comments. Like Mark, I'm currently on the Ethics Committee. What strikes me about the good work being done by that committee is how dynamic it is in trying to reinforce the code of conduct. What I mean by that is, when you have to recertify your credentials, you take an online ethics course that was produced as a collaborative process of the Ethics Committee, and which most recently has been spearheaded by Stacey Schwartz of Swiss Re. There's also the fact that every spring and fall there's a great ethics continuing education session that highlights pragmatic problems that may come up in arbitration that can be resolved by correct reliance on the code of conduct.

Snider: One of the things that was mentioned when we were talking about the ARIAS Code of Conduct is the certification procedures. Those go beyond the code of conduct to require training of arbitrators so that they understand the process. Over the course of these past 25 years, have those certification procedures changed industry arbitrations?

Gurevitz: I think certification, at least in my view, has had less of an effect on arbitration than some of the other changes. Remember, there was only a small group of identified arbitrators in the early '90s, and one of our primary goals was to increase the number of arbitrators. I think we did that fairly well, maybe too well. The standards were intentionally left at a level that was significant—10 years' experience in the industry—but still really a threshold entry level that many could meet. It was not considered to be too onerous a requirement.

There was talk later of making the requirement more difficult and coming up with a super-category of arbitrators. Instead, we created a subset of certified umpires that was based on the number of completed arbitrations. So I don't think that the certification process per se has had an effect.

But adding to what Susan said, the certification requirement includes educational components. And I think that's the area where the certification process has really helped to improve the arbitration process. It's enhanced the level of competency by explaining and teaching the process to those new to dispute resolution, and it has helped those who have been involved in arbitration but are new to the decision-making process of being on a panel. I would say personally that you don't realize how different it is, even when you've been involved in many different arbitrations from the viewpoint of a party, until you see for the first time how a panel operates.

Also, as Susan had mentioned, the educational requirement on ethics, requiring the ethics test every two years, is also important. It was not intended to see how ethical someone is and to judge that; it's really just to make sure that arbitrators familiarize themselves with the canons. It is important to do that because they are complex—may-be a little too complex, some might say, and I take some responsibility for that. But I do know it is important for people to read them every once in a while, because there are a lot of things that go on in the decision-making process where arbitrators are trying to decide whether to accept an appointment, or whether to make a disclosure. I do think the canons are tremendously helpful in ensuring that people are very sensitive to those types of issues.

Schmidt: Is the phraseology for certification still something like "10 years of specialized experience in insurance or reinsurance"? Is the word "specialized" still there? I remember when Bob Mangino and I were involved in looking at a lot of the initial applications, and there were some people who did not qualify. Not that many, obviously, because we had quite a few, ultimately. But there were some who did not qualify, and the focus was on "specialized."

Snider: Ten years of specialization in the insurance/reinsurance industry.

Schmidt: That's how I vaguely recall it. If somebody was, let's say, a VP admin only, it had to be questioned whether that person actually had specialized experience in the business of insurance and reinsurance. I can't think of anybody who fell into that particular category. But that was important to us.

And the other thing was, when I was no longer involved in reviewing applications, I remember hearing people talk about some who qualified because they had been with a law firm for 10 years and had been involved in some cases that didn't go a full 10 years, but might have started in 2007, and they had another one in 2011, and that qualified as well. So right, wrong, or indifferent, because I don't know what the actual technical standards were over time, but I do remember people speaking about, gee, it's not just being in a law firm, or even being in a company. You're supposed to be developing, over that time period, specialized knowledge and understanding of the business. I don't know if that is even a problem anymore, because it seems that the persons who are being certified are very experienced people. But for a while there, there was some question.

Hall: The certification process is important as part and parcel of what ARIAS does. In the beginning days before ARIAS, when I was at the RAA, we had the RAA arbitrators directory, which I don't even know, frankly, if it's in existence anymore. In that situation, all you had to do is submit your name, pay your money, be somewhat tangentially involved in reinsurance, and you could be in the arbitrators directory, because it was the RAA's point of view that we're not going to sift through who can and can't be in the directory, for good reasons, including legal reasons. So the differentiating factor between that and ARIAS was the certification process.

As other people on this call know as well as I do, in those early days of forming ARIAS, we had these discussions about whether or not you're certified based on your experience, as Dan alluded to, in the reinsurance business, or whether there should be some component of completed arbitrations. And there was a recognition that everybody has to have their first arbitration. So the specialization was there, I think, because the focus was really on the "experience related to." You may not be an experienced arbitrator, but you are experienced in the substantive reinsurance business, and you can obtain the necessary skills to be an arbitrator, the procedural part of it, through education and training. So that was the balance that those of us who were originally putting together ARIAS wrestled with quite a bit.

Mack: I do think the certification requirement has promoted and enhanced the professional reputation of ARIAS. I remember those early discussions about certification and whether you needed to have past arbitration experience. ARIAS long ago jumped over that hurdle, because there are a variety of different ways to become a certified arbitrator. Some include having past arbitration experience, and some are gaining expertise in other ways, such as attending webinars or fall and spring meeting events.

The basis for the admission process for individuals without past experience in arbitrations—I believe it's called Type C applications—is the amount of experience as a claims person, an underwriter, or an insurance attorney. So we've opened the door to folks who are experienced from an industry perspective and who have that, plus arbitration experience.

Schmidt: I want to go back a little bit to the diversity aspect, tying it in with certification. Right from the start—and I know that the rest of the people on the phone will remember—we decided that we're not going to limit it just to company people, that you can gain the specialized experience not just with law firms, but with regulatory agencies, actuarial firms, accounting firms, auditing firms, you name it. The focus was, as everyone has been saying, gaining that specialized experience over a 10-year period.

Snider: One of the nice things about the improvement in technology over the years is while I still have my RAA list of arbitrators in a drawer somewhere, with the Internet it's a much more transparent process with people who are certified with ARIAS, to see who they are and to have this big list of people. Before, you had to know the RAA had a list of arbitrators that you could go look at and review their bios in a book.

Hall: I agree with that, Teresa. I think ARIAS has expanded the information that's available, too. Keep in mind that at the RAA, we were limited to what company people wanted us to have on those RAA profiles. ARIAS has expanded that, and all for the better.

Gurevitz: Debra and the RAA in the early '90s did a great job of trying to fill this void and fill this need for having an arbitrator directory. And you're right, Teresa, that was the sole source

to go to for arbitrators at one point in time. But I will say that, as the discussions began about forming ARIAS, one of the great attractions that ARIAS had is that it brought forth all of the components in the industry, not just the reinsurance aspect of the triangle, to the table. And we created the opportunity for a lot of people to become certified arbitrators and provided different choices for people in terms of who they might want to use as arbitrators, and the information that was provided as to each person. Then the users could look at that. It was more transparent, and with technology it became even more transparent and easier to use, and people could decide what type of person they wanted for a particular dispute.

The other aspect—it's not really related to the question, but it's important to note in this discussion—is that one of the great achievements of ARIAS is that ARIAS became the forum for discussing all these issues relating to arbitration. It was representative of every segment of the business that was involved in insurance and reinsurance arbitrations. So the fact that it became the forum, the discussion point for all of the issues in terms of changes and improvements to the process, I think really should be stated as a very important concept.

Snider: Mark, you're absolutely right. One of the great things about ARIAS, from my perspective as a practitioner, is that I go to the ARIAS forms and the practical guide, and the list of certified arbitrators and the list of certified umpires, and the list of people who are neutrals. I'm on that website constantly in my day-to-day practice. And that, as Mark said at the outset, made the process more standardized and routine which, it could be argued, helps you get to the merits in a more efficient way. Do you have comments on the development of ARIAS forms and the practical guide, and what effect those have had on arbitrations over the years?

Mack: In particular, the development of the ARIAS hold harmless and confidentiality forms has gone a long way in promoting the professionalism of reinsurance arbitration. Certainly, the hold harmless agreements have served to make arbitrators more willing to serve. There's case law existing for the proposition that arbitrators acting in official capacities are immune from civil liability. But it's much more comforting with an ARIAS hold harmless agreement that assures you that both parties ascribe to that benefit.

Gurevitz: It is a broader protection, too.

Mack: It is a broader protection. What I'd really like to hear, though, is from Debra, who I think had a large part in developing the practical guide. Didn't you, Debra?

Hall: Back in the '90s, ARIAS developed the Practical Guide to Reinsurance Arbitration Procedure. These guidelines were really suggestive in nature. It was at an RAA conference when we realized that the construction industry had their own set of arbitration procedures. So that was the genesis of creating arbitration procedures to be incorporated into contracts, which became known as the U.S. Insurance and Reinsurance Dispute Resolution Procedures.

We tried to make this an industry-wide task force for the resolution of insurance and reinsurance disputes, incorporating procedures that had been in use out there in the industry. I was very deeply involved in that process, which really was the first time that we came up with specialized insurance/reinsurance procedures that could be referenced in a contract. Some who had been involved in that process were very instrumental in taking those industry procedures and incorporating them into an ARIAS effort that I was not involved in, that kind of molded those and borrowed from them in large part to become the actual ARIAS Rules.

Mack: The practical guide is wonderful because it really helpfully charts the entire procedure, from initiating the arbitration to post-hearing conduct with the panel. I was not involved in the writing of the practical guide, but I commend those at ARIAS who had a hand in it, because it really, truly is a wonderful resource.

Schmidt: I think that Charlie Foss was one of the leaders in the RAA industry procedures.

Hall: Charlie was involved in our process.

Gurevitz: I was involved in it, too, mostly in the initial process and in the revisions that were done at a later point in time. The RAA was gracious enough to print out the first set and help us with the publicity.

The practical guide was a whole different process; that was an ARIAS effort. It was really developed by Tom Allen and myself with the assistance of an associate at White and Williams who was helpful in putting the actual words together, once we had all the ideas. The purpose of it was to capture custom and practice in terms of arbitration procedure.

One of the goals of ARIAS—I'm not sure whether it's a formal goal or one that I thought was a necessary goal—is to try to level the playing field and take away the cloak of mystery of arbitration so that the process, and what happens in arbitration, was going to be more transparent to those who became involved in it. So the practical guide, where we didn't have actual procedural rules, was a way to create a universal understanding of the way things were typically done. I think it could also be described as best practices.

But I think, given the fact that the reinsurance bar today is much more sophisticated and the practice involved in doing arbitration within companies is much more developed as well, that there's probably less relevance today to the practical guide than there was for the first 10 or 15 years of ARIAS's existence. I think that's just a tribute to some of the other things we have been talking about, and the level of education and the amount of focus and attention that's been devoted to the arbitration process over the years.

Hall: We might be sort of mixing apples and oranges in terms of the actual titles of some of these documents. As Mark said, I think the practical guide is one that existed for quite some time, as he's described. I think it was through Eric Kobrick's [AIG] efforts in large part that they took what a lot of us had developed through that industry task force, a non-ARIAS effort that I described a little earlier, and then modified them, expanded on them, et cetera, to result in the actual ARIAS Rules that we have now that can be referenced in contracts, just as those industry procedures are incorporated into contracts.

Mack: Really, model arbitration clauses and procedures that could be incorporated into the contract, versus the practical guide, which was kind of the step-by-step, here is what usually happens at an arbitration.

Hall: Right.

Snider: One of the things to consider, as ARIAS continues to evolve over the years, is how these resources can be used to assist a whole other group of constituents with disputes, such as policyholders. ARIAS certainly has not been stagnant; it's always looking to evolve and to figure out how to make the arbitration process as useful as possible for its members.

Hall: When we put together the U.S. Resolution of Insurance and Reinsurance Disputes in this RAA-sponsored effort, we attempted to include insurance and reinsurance companies, brokers, people from different perspectives, to come up with those procedures. We had a number of people who represented direct primary insurance companies. ARIAS then brought those procedures forth into the ARIAS setting. I would think that a lot of those procedures are as applicable to insurance disputes as they are to reinsurance disputes. That was the intent, even in the title. I don't know how others feel, if they're successful in doing that.

Mack: The ARIAS procedures on how to run the best possible arbitration are equally applicable to policyholder versus insurer as they are to reinsurer versus insurer. It holds up a standard against which proceedings should be judged. In that respect, the policyholder disputes are no different from the more traditional reinsurer-versus-insurer disputes.

Gurevitz: I also think that we have a lot of expertise and experience and knowledge about arbitration, and we ought to find every opportunity to apply those in a broader sense.

Schmidt: I focused on the word "forms," and then what came to mind was my least favorite form, the umpire questionnaire form.

(Peals of laughter)

Snider: I knew that was going to be what you suggested.

Schmidt: I hope that the laughter gets added to the transcript. When I have a little bit of extra time, I'm going to try and come up with some sort of letter to the committee who deals with that and ask them to consider different approaches. I've been a AAA arbitrator even longer than with ARIAS. I think Mark and Susan, maybe you as well, Debra …

Mack: All four of us are AAA.

Schmidt: Then you know the questionnaire is a little bit less complex. I'm not saying that it would work well in our own system, but when it takes me a few minutes to do one and it takes me many hours to do the other, wow.

Gurevitz: Right.

Schmidt: I just leave that on the table.

Mack: I want to highlight what Dan just said. If you take the standard umpire questionnaire seriously, you are going to spend at least two hours completing it. Particularly for the four of us, who have known each other for years and years, it takes a major effort just to think of all the panels we've served on together. It's fine for the last five years; those come to mind and are on our records. Dan, you started in the late 1980s. I started in 2001. Mark, when was your first arbitration?

Gurevitz: Probably sometime in the late '90s.

Mack: So, to have detailed records going back 20 years is a lot to ask of an arbitrator or an umpire. I think what's important, though, is we really strive to do our best. Those people who take it seriously and spend two hours filling out the form, they're doing the right thing as far as the form is worded.

Hall: I agree with what you both said. I think that the current umpire questionnaire form is overkill. I do think there are ways it could be streamlined in a sensible way and still provide the parties with the necessary information and assurances about the potential umpire candidates.

Snider: It sounds like we've identified the next thing for one of the committees to address.

Gurevitz: Lots of volunteers.

Snider: Please give us your final thoughts on the role of ARIAS as we celebrate its 25th anniversary.

Mack: ARIAS is wonderful as an organization because it evolved as the needs of parties and needs of counsel presenting the disputes before arbitration panels evolved. The number and size of disputes, as both Dan and Mark alluded to, have changed vastly in the past 25 years. I mentioned life reinsurance disputes at the beginning of this call, and I know Debra mentioned she's currently an umpire in one of them. It's not unusual for one of those arbitrations to range between $50 million to $500 million. Of course, we've had a number of property/casualty disputes that have had many, many millions of dollars as well. So the importance of ARIAS to professional dispute resolution just continues throughout the decades, and I'm proud to be a part of it.

Gurevitz: The way I think about it is, if ARIAS no longer existed tomorrow, what would we do? And I'm not sure we'd have a good answer for that. That alone says that ARIAS continues to have great relevance in this area. I also want to go back to 25 years ago and more, when ARIAS was first being formed. We weren't sure there would be enough people interested in ARIAS that it would take off, so to speak, and become the viable organization that it has become. We weren't sure that we would get enough people to pay for membership in ARIAS so that we would be able to offer all of the things that we wanted to offer to the industry. So there are a lot of variables and a lot of unknowns. But the fact that we're looking back on 25 years, I think, by itself, says it all.

Schmidt: I think that all of us here, and those who aren't on this call who participated in creating ARIAS, should be proud parents. Yet, as all of us who are parents know, your responsibilities as a parent, your concerns and even worries as a parent, never end.

I think ARIAS has some challenges. Mark mentioned the high-water number of arbitrators certified—I think it was at 351. And now we're 150-something. I don't know what the membership is. I don't know who is a member, who's not, whether it's growing or not. I think the current board and the officers, they certainly have challenges ahead. And the people on this call, obviously, continue to try and help the organization in any way we can. But it's really the next generation or two that will be carrying it forward.

Hall: I agree with everything that all three of you said. I think it's great to look back after 25 years, and we should all be proud. A lot of people who are not on this call who worked very hard should be proud of the organization, because it's not only viable, it's essential to reinsurance arbitration as an organization. As Mark said, where would we be if it didn't exist?

Equally, as Dan says, the current board and staff do face some challenges ahead. I think that ARIAS has been very successful in accomplishing some of the most important things that the industry sought to do in establishing ARIAS, expanding the pool of arbitrators, providing education and transparency—all of which contributed to the credibility of the arbitration process within the industry.

This roundtable discussion was reported by Aline Akelis, Winter Reporting, and later edited for clarity and length.

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In the Beginning: Reflections on the Birth of ARIAS•U.S.

By Larry P. Schiffer

The 25th anniversary of ARIAS•U.S. has sparked memories among the remaining founders and early members of the organization as well as those who have been part of ARIAS for some time. As you know, to celebrate the 25th anniversary, the *Quarterly* solicited a variety of articles, including some from a few members who have moved on from active arbitration practice. We have also invited members to participate in various symposia looking back at ARIAS's history and forward to its future.

In the course of e-mail exchanges on the 25th anniversary and these various symposia and articles, some of the original architects of ARIAS looked into their files and their memories and passed along some interesting tidbits about the beginnings of this organization. I have compiled them here, and I hope you find this peek back into history interesting.

The following reflections derive from the files, notes and memories of Daniel Schmidt, Debra Hall, Susan Mack, and Mark Gurevitz. This article is not meant to be a definitive history of the founding of ARIAS, just an edited collection of anecdotes and recollections.[1]

Formation of ARIAS•U.S.

The Advisory Committee to the U.S. Chapter of AIDA, which is the group that actually created ARIAS•U.S., consisted of T. Richard Kennedy, Ronald Jacks, Edmond Rondepierre, Robert Mangino, Bert Thompson, William Gilmartin, Joseph Bambury, Daniel Schmidt, and Frank Nutter—who was replaced nearly immediately by Debra Hall (nee Anderson)—from the Reinsurance Association of America (RAA). The goal of the Advisory Committee was to determine whether an organization similar to ARIAS (UK) should be established under AIDA-US. The name morphed into the A.R.I.A.S. (U.S.) Advisory Committee. Eventually, the periods were dropped and the organization to be formed became ARIAS (US).

An October 26, 1992, fax from Dick Kennedy identified the agenda of the Advisory Committee's first meeting: (a) whether an organization similar to ARIAS (UK) is needed in the United States to improve reinsurance and insurance arbitration panels and procedures and, if so, what form should that organization take; (b) the possible focus of that organization on issues like certification of arbitrators, arbitration rules and procedures, and reinsurance contract wording; and (c) how should the organization be funded.

On November 5, 1992, the Advisory Committee met for the first time at the offices of Werner & Kennedy in New York City. Ron Jacks, Dick Kennedy, Frank Nutter, Debra Hall, Ed Rondepierre, and Daniel Schmidt attended. Joe Bambury, Bill Gilmartin, Bob Mangino, and Bert Thompson were unable to attend.

The Advisory Committee members agreed that there was a need for the organization and that the form of the organization would be decided at the next meeting. It was also agreed that the organization should certify "objectively qualified and experienced individuals to serve as arbitrators." Additional agreements included the need for training sessions for certified arbitrators, rules for arbitration proceedings, and a model arbitration clause. There was an emphasis on reducing cost and streamlining the arbitration process through curtailing discovery, assuring that the arbitration panel maintains control, and expediting procedures. The Advisory Committee worked on these and myriad other issues and met frequently for at least one year.

> "The Advisory Committee decided that the board should address the subject of certification."

The second meeting of the Advisory Committee was held on December 6, 1992, in Atlanta in the RAA Suite (in conjunction with the National Association of Insurance Commissioners meeting). Debra Hall recalled that the Advisory Committee discussed the composition of the Board of Directors and where to incorporate. The minutes reflect an agreement to form a not-for-profit corporation. Debra remembered the conversation centering on how to make ARIAS a company-driven organization, not a lawyer- or arbitrator-driven one. She also remembered a discussion about educational requirements.

The third meeting was held in in Boston on February 5, 1993, where the composition of the board was determined. The board was to have three representative groups: "three lawyers in private practice," "three representatives of ceding companies," and "three representatives of professional reinsurers." The fourth meeting was held in Nashville, Tennessee, on March 6, 1993. Subsequent meetings were held in Chicago on June 20, 1993, and at Werner and Kennedy in New York on August 6, 1993.

By August 1993, virtually everything needed to establish ARIAS•U.S. had been accomplished. The provisional board was identified at the August 6, 1993, Advisory Committee meeting. Dick Kennedy, Ron Jacks, and Charlie Havens represented law firms, while Bob Mangino, Ed Rondepierre, and Daniel Schmidt represented professional reinsurers. Six out of eight candidates for the three ceding company slots were contacted, which resulted in the selection of Mark Gurevitz, Charles Foss, and Susan Mack.

The first ARIAS•U.S. Board of Directors meeting was held on May 6, 1994, which is why 1994 is used as the founding year of ARIAS. Interestingly, a November 1, 1993, press release announced the formation of ARIAS. AIDA had approved the Advisory Committee's proposal for the formation of ARIAS on September 21, 1993, which allowed ARIAS to go forward. Dick Kennedy's last Advisory Committee letter, also dated November 1, 1993, offered that once three ceding company representatives for the interim board were confirmed, the board meeting could be scheduled (initially, the plan was to hold the first board meeting in October). According to the New York Department of State's Division of Corporations, ARIAS•U.S. Inc.'s incorporation papers were filed on December 21, 1994.

Arbitrator Certification

Arbitrator certification was and is a big topic for ARIAS. An August 6, 1993, memo to the Advisory Committee regarding certification reflected the view that certification should be based on experience and discussed how arbitrators with a certain number of arbitrations might be certified at the inception of ARIAS. The Advisory Committee decided that the board should address the subject of certification.

The founding board, once formed, picked up this charge and approached certification with great care and thought. One issue identified was how to "uncertify" someone who no longer met the standards, which eventually led to the bylaws requirement that continued certification required membership in good standing in ARIAS.

Because membership was required for certification, the process for attaining membership had to be developed—which, together with having to develop certification requirements/procedures, helped to create the "gap" between the formation of ARIAS and actual certification of arbitrators. Another issue was how to certify experienced executives who had little or no dispute resolution experience, which eventually led to a heavy focus on education and training and the educational component of certification in lieu of arbitration experience.

Debra Hall recalled that the Advisory Committee recognized that people needed to have their first arbitration, with the goal of expanding the pool of available arbitrators. Before anyone was certified, however, a certification committee had to develop the standards and procedures for nomination and board approval. Finally, there was great concern whether this fledgling organization would be able to generate enough income to keep itself going.

Arbitrator certification began in March 1996, with the following arbitrators certified: Dewey Clark, Eugene Wollan, Edmond Rondepierre, Daniel Schmidt, Robert Reinarz, Charles Niles and Richard Gilmore. The next group came in May 1996: Therese Arana-Adams, James P. White and Michael Issacson. Thomas Greene was certified in June 1996; in August 1996, Howard Anderson, Peter Malloy, and N. David Thompson were certified. The final 1996 certifications came in November: James Frank, Wayne Parker, Norman Wayne and Peter Tol.

From these humble beginnings, ARIAS took off and is now primed to expand further into insurance-related arbitration, including policyholder arbitrations. But for the vision and tremendous leadership of the man Dan Schmidt called "Sir Richard," together with the other Advisory Committee members and the initial board members, none of this would have been possible.

NOTES

1. For more formal articles on the history of ARIAS, see "ARIAS•U.S.: Twenty Years of Improving Ways to Resolve Insurance and Reinsurance Disputes," by Daniel L. FitzMaurice, *ARIAS Quarterly*, 3rd quarter 2014; "Building on the Beginnings: Re-Visiting the Formation of ARIAS•U.S.," by Susan E. Mack, *ARIAS Quarterly*, 4th quarter 2012; and "ARIAS·U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes, " by Mark S. Gurevitz and T. Richard Kennedy, *ARIAS Quarterly*, 2nd quarter 2002.

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Introducing the ARIAS•U.S. Panel Rules for the Resolution of Insurance and Contract Disputes

By Peter A. Halprin, David W. Ichel, and Peter K. Rosen

In April 2017, ARIAS•U.S. undertook a project to create arbitration rules for use in non-reinsurance disputes, including direct insurance disputes and those involving captives.[1] After many meetings, drafts, and revisions, the new ARIAS•U.S. Panel Rules for the Resolution of Insurance and Contract Disputes (the "Insurance Rules") are finally here, and went into effect as of September 16, 2019.

The Neutral Rules

The starting point for the Insurance Rules was the ARIAS•U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (the "Neutral Rules").[2]

As set forth in Article 1.6 of the Neutral Rules, "The object of these Rules is to obtain the fair resolution of disputes by an independent and impartial arbitration panel free of any bias or predisposition. The arbitration panel selected under these Rules is assigned the mandatory duty to act fairly and impartially as between the Parties."[3]

To that end, the Neutral Rules require that the arbitration panel consist of three neutral arbitrators who qualify under the ARIAS•U.S. Neutral Arbitration Panel Criteria (the "Neutral Criteria").[4] They also require that, "The arbitrators shall be persons who are current or former officers or executives of an insurer or reinsurer."[5]

The Neutral Criteria cover four potential areas of concern: (a) prior service as party-appointed arbitrator; (b) prior service as an umpire or neutral arbitrator; (c) prior expert or consultant service, and; (d) prior service as counsel for, or employment by, one of the parties. If, in the five years prior to the date of nomination, an arbitrator candidate has served in excess of the enumerated threshold amount associated with any area of conflict, the arbitrator shall fail to meet the Neutral Criteria.[6]

Given the neutrality of the arbitrators, the Neutral Rules prohibit *ex parte* communications between the arbitrators and a party or its representatives.[7]

Under Article 13.3, the arbitrators are not obligated to follow strict rules of law or evidence.[8]

The Instructions for Adoption and Application, which begin the Neutral Rules, offer "honorable engagement" language to include in the arbitration clause as follows:

The Panel shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of law or evidence. In making their Decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to effecting the general purpose of this contract.[9]

Addressing the Concerns of Policyholders

In working on a new rule set, it became apparent that policyholders had concerns about an organization that historically drew its arbitrators from the insurance industry. As set forth in one policyholder law firm blog post:

Insurance carriers are always concerned about the possibility that an arbitrator who they have not vetted properly will be appointed for an insurance coverage arbitration. To protect against this, insurers have formed specific trade associations disguised as arbitration tribunals. The most infamous of these is ARIAS. ARIAS arbitrators have experience working for insurers, and they translate this knowledge into finding for insurers in arbitration. An arbitration before ARIAS is like an arbitration with the insurance company claims adjuster who denied the claim acting as arbitrator. Policyholders should never agree to an arbitration with an ARIAS arbitrator.[10]

A June 2017 legal brief, echoing this sentiment, noted the following in relation to the eligibility requirements for becoming an ARIAS certified arbitrator:

To be eligible, one must have at least ten years of experience in the insurance/reinsurance industry, and obtain three sponsor recommendations from individual ARIAS members that the candidate has known for at least five years. This, reasonably, leaves a small pool of potential candidates who are likely well-acquainted with one another through business dealings, prior arbitrations, and other contacts, which could lead to a situation where the "neutral" umpire would be tempted to be sympathetic to the insurance company.[11]

Framework for the New Rules and Key Items of Note

Considering these concerns regarding ARIAS and the goal of making new rules that would attract direct insurance disputes, the new rules were designed to address these changes. This meant addressing concerns about the rules in relation to who could serve as an arbitrator and what law might apply to the dispute, as well as the means by which the pool of arbitrators could be expanded. In drafting the new rules, however, it became apparent that other innovations might be layered onto the foundation of the existing neutral rules, including the resolution of arbitrator challenges and the use of mediation while an arbitration was pending.

There are some key differences between the Neutral Rules and the Insurance Rules.[12] These differences are addressed in the order they appear in the Insurance Rules:

1. Although the Insurance Rules do not expressly label party-appointed arbitrators as "non-neutral" or "partisans," they do accept the notion that such arbitrators need not be considered neutral by background or general viewpoint.[13] In undertaking this approach, and consistent with the challenge provisions in the Insurance Rules, the intent was to limit challenges to those involving the umpire rather than to waste the parties' time and resources as to whether the party-appointed arbitrators have a truly neutral background.[14]

2. Relatedly, a challenge procedure—modeled on Article 13 of the UNCITRAL Arbitration Rules (as revised in 2013) with modifications—was adopted to address umpire challenges.[15] Key aspects of this procedure are discussed in more detail below.

3. The presumption regarding arbitrator authority is changed so that now, "The Panel is obligated to follow strict rules of law, unless otherwise agreed."[16]

4. An optional mediation procedure was

introduced that would temporarily stay the arbitration upon a joint application by the parties to mediate the dispute.[17]

As far as expanding the pool of arbitrators was concerned, there was also an intent to revise the qualification procedures to make it possible for those without experience as an insurance executive to qualify. Under the proposed changes, brokers, insurance counsel, and risk managers would all have qualifying insurance experience.

> "Considering these concerns regarding ARIAS and the goal of making new rules that would attract direct insurance disputes, the new rules were designed to address these changes."

The Umpire Challenge Procedure

ARIAS largely adopted, in pertinent part, the following challenge procedures (item 2 above):

1. Challenges are not permitted 90 days after the organizational meeting.[18]

2. The arbitration shall not be stayed pending a challenge unless agreed to by the parties or ordered by the Sub-Committee.[19]

3. Limited grounds are provided for challenges to be pursued.[20] The grounds are as follows:

   a. Failure of the umpire to meet the criteria set forth in the relevant contracts;

   b. Failure of the umpire to meet the Neutral Criteria;

   c. Violation of the standards set forth in Comment 3 to Canon 1 of the ARIAS•U.S. Code of Conduct[21]; or

   d. The alleged failure to make adequate disclosures as required by Canon IV of the ARIAS•U.S. Code of Conduct.[22]

4. A Sub-Committee chosen from the members of the ARIAS Ethics Committee and the Board of Directors will hear challenges.[23]

5. A fee structure will be utilized whereby a flat fee of $5,000 will be charged for a hearing on the papers while, for an in-person hearing, a daily rate of $2,400 plus reasonable costs and fees will be applied.[24]

6. The Sub-Committee will render a decision on the challenge within thirty (30) days of receiving the papers or completing a hearing on the merits.[25]

7. The prevailing party receives an award of fees and costs.[26]

8. If the umpire withdraws or the challenge results in the replacement of the umpire, the second-highest-ranked candidate will be the replacement umpire.[27]

Impartial Decision Making Remains Mandatory

The Insurance Rules recognize that arbitrators with insurance expertise may have a background that involves work primarily on behalf of either policyholders or insurers. As noted above, the choice was made to avoid disputes as to the neutrality of party-appointed arbitrator backgrounds and instead allow each side to a dispute to appoint an arbitrator they deem qualified.

Even if an arbitrator historically has worked primarily for one side or the other, the arbitrator is required to act neutrally in handling the case, deliberating, and reaching a decision. This is grounded in Section 1.5 of the Insurance Rules, which, as carried over from the Neutral Rules, provides as follows:

The object of these Rules is to obtain the fair resolution of disputes by a disinterested and arbitration panel free of any bias. The arbitration panel selected under these Rules is assigned the mandatory duty to act fairly and impartially as between the Parties.

Going Forward

The Insurance Rules addressed the most pressing of concerns of policyholders by removing neutral background requirements for party-appointed arbitrators, removing the requirement that arbitrators be former or current executives of insurance companies,[28] and requiring arbitrators to apply strict rules of law. In addition, a challenge regime was put in place that provides due process at minimal cost while deterring frivolous challenges, and a mediation procedure was added to permit parties to resolve disputes outside of arbitration while avoiding attempts to delay proceedings.

Now that the Insurance Rules are in place, the next steps will involve promoting the rules so they are incorporated into future dispute resolution provisions and used after disputes arise. In conjunction with these efforts, ARIAS arbitrator certification will be promoted to expand the pool of qualified arbitrators.

With rules perceived as fair and arbitrators perceived as neutral, the Insurance Rules should become a valuable tool for the resolution of direct insurance and insurance-related contract disputes.

NOTES

1. Some other examples of disputes which might be resolved under the new rules include cover-in-place agreements, those involving MGAs or brokers, and those involving specialty policies such as representations and warranties insurance. See, e.g., Peter K. Rosen, "Does ARIAS Have a Role to Play in Direct Insurance Arbitrations?" *ARIAS•U.S. Quarterly*, 2nd quarter, 2018.
2. Available online at https://www.arias-us.org/wp-content/uploads/2018/10/ARIAS-U.S.-Neutral-Panel-Rules-Tracked-Changes-Accepted-1.pdf.
3. Neutral Rules, Art. 1.6.
4. Id., Art. 6.1.
5. Id., Art. 6.2. Parties may contract out of this requirement. See, e.g., id., Instructions at 1-2 (offering alternative language to modify the standard arbitration clause to permit the selection of any ARIAS certified arbitrator).
6. Id., Art. 6.3.
7. Id., Art. 6.14.
8. Id., Art. 13.3.
9. Id., Instructions for Adoption and Application.
10. Miller, Mark. 2018. "Why Insurance Carriers Prefer Insurance Coverage Arbitration Over Litigation." Miller Friel PLLC Insurance Recovery Blog, 2 August. Available online at https://millerfriel.com/blog/insurance-carriers-love-insurance-coverage-arbitration/.
11. Respondents' Memorandum in Opposition to Petitioner's Petition for the Appointment of an Umpire in the Matter of the Arbitration between *National Union Fire Insurance Company of Pittsburgh, PA v. Beelman Truck Company, et al.*, Civil Action No. 1:17-cv-02946-VEC (S.D.N.Y.) (ECF No. 39, Filed June 16, 2019) at 14-15.
12. Although not included as a "key" difference, the Insurance Rules do require payment of a $1,000 administrative fee to be split by the parties. See Insurance Rules, Instructions for Adoption and Application. Available online at https://www.arias-us.org/wp-content/uploads/2019/09/FINAL-ARIASU.S.-PANEL-RULES-FOR-THE-RESOLUTION-OF-INSURANCE-AND-CONTRACT-DISPUTES-9-16-19.pdf.
13. See id., Rule 6.1 and 6.13 (permitting ex parte communications until the organizational meeting).
14. That said, the Insurance Rules carry over the existing Neutral Rules requirement that arbitrators make their decision fairly, impartially, and free from bias or predisposition. Id., Rule 1.5. This is addressed in more detail below.
15. Id., Rule 6.19.
16. Id., Rule 13.3.
17. Id., Rule 15.1.
18. Id., Rule 6.19(a).
19. Id., Rule 6.19(b).
20. Id., Rule 6.19(d).
21. "The parties' confidence in the arbitrator's ability to render a just decision is influenced by many factors, which arbitrators must consider prior to their service. There are certain circumstances where a candidate for appointment as an arbitrator must refuse to serve…" See https://www.arias-us.org/wp-content/uploads/2019/07/ARIAS-Code-of-Conduct-Canon-I-2019-Update.pdf.
22. "Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure." See https://www.arias-us.org/wp-content/uploads/2019/03/ARIAS-Code-of-Conduct-Canon-IV-2019.pdf.
23. Id., Rule 16.9(e).
24. Id., Rule 16.9(f).
25. Id., Rule 16.9(i).
26. Id.
27. Id., Rule 16.9(j).
28. Policyholders wanted to ensure that the selection procedures did not result in only insurance industry experienced arbitrators being selected.

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Peter Halprin, David Ichel, and Peter Rosen participated in the drafting of the Insurance Rules, along with Deirdre G. Johnson, Steven A. Rosenstein, Alysa B. Wakin, and many others.

The contents of this article were the subject of a panel at the ARIAS•U.S. Fall Conference, in which Peter Halprin, David Ichel, Deirdre Johnson, Peter Rosen, Steven Rosenstein, and Alysa Wakin participated.

No Business Cards? No Problem. Use Your Smartphone

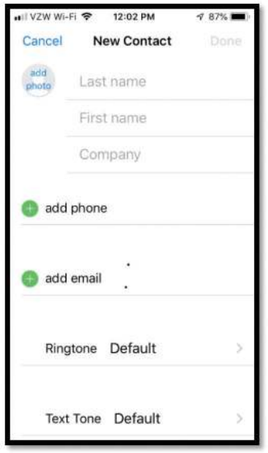
By Larry P. Schiffer

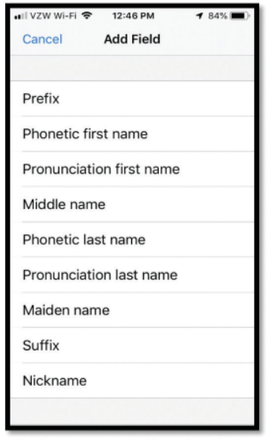
Ever show up at an ARIAS conference or other event and meet someone new? Of course, you want to share contact information with that person, right? And how do you do it? You exchange business cards.

Do you know that you can use your smartphone to share contact information without exchanging business cards? In this article, I will discuss how to use the AirDrop feature of iPhones to exchange contact information and how to use LinkedIn's "find nearby" feature to add contacts.

Smartphones today are mini computers that far surpass desktop computers from just a few years ago. They have all sorts of unused and underused features that make life easy. For example, every smartphone has a place to store your contacts. The "Contacts" function on the iPhone allows you to add typical information about contacts, including name, company, photo, phones, e-mail addresses, web addresses, physical addresses, birthdays, important dates, and notes about the contact. You can even add customized fields to the contact entry, from name pronunciation to job title.

One of the features that every smartphone offers is Bluetooth. According to Wikipedia, Bluetooth is a wireless technology standard for exchanging data between fixed and mobile devices over short distances using short-wavelength UHF radio waves in the industrial, scientific and medical radio bands, from 2.400 to 2.485 GHz, and building personal area networks (PANs). You know Bluetooth because you use it to listen with wireless headphones, print to wireless printers, use a smart speaker at home ("Alexa, play Stairway to Heaven"), and connect your smartphone to your car. Bluetooth is also the key feature in allowing smartphones to "speak" to each other.





AirDrop

AirDrop is the program within the iPhone operating system that allows wireless sharing of files between Apple products. For AirDrop to work, both Bluetooth and Wi-Fi need to be turned on in "Settings" on both iPhones (this works with Macs and other Apple devices, too).

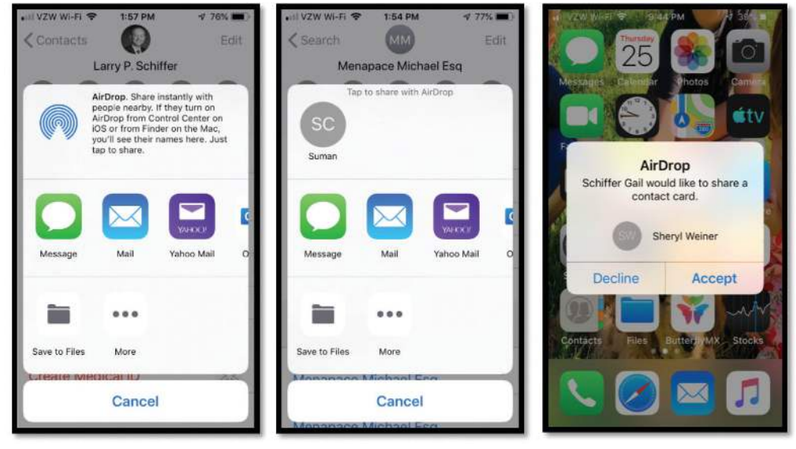
Next, make sure AirDrop is turned on. AirDrop is found in Settings ▶ General ▶ AirDrop. Set AirDrop so that it can receive from "everyone" unless the other person is already in your Contacts list (you should later turn it off or limit AirDrop just to your contacts).

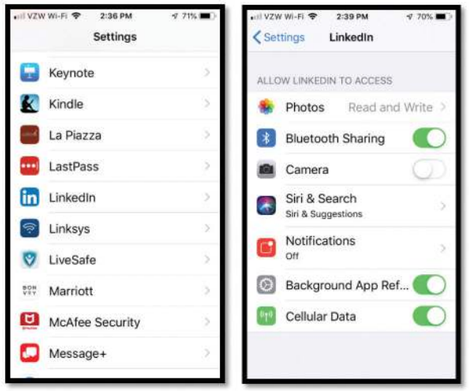
Next, open the contact (or file or picture) you want to share (yourself or someone else), scroll down, and select "Share Contact." A pop-up will appear.

The screenshot below shows what it looks like if you want to share your own contacts. The screenshot in the middle shows what it looks like if you want to share someone else's contacts from your contact list. In this screenshot, I am about to share Michael Menapace's contact information with Suman Chakraborty. If I tap Suman's icon, Michael's contact information will flow to Suman's iPhone. Suman would then accept the information transfer, and Michael's contact information would be added to Suman's contacts. The screen on the right shows what it looks like on the recipient's phone. As a recipient, you have the option to accept the file or decline it.

Make sure you know what information you have about your contacts (or other files) before you share them. When you share your file, only the basic contact information comes over. Any notes you have in your contacts should not transfer to the recipient, but it is better to be safe than sorry.

Also, do not leave AirDrop open to "Everyone" after you have completed your exchange. Viruses, unwanted photos





> The really cool thing is that if you are at a table at a business dinner or event, everyone at the table can turn on "Find Nearby" in LinkedIn and add contacts from the group at the table.

and other files can be sent to your iPhone by any random person near you if you leave AirDrop's "Everyone" setting on, so be careful. Turn it to "Contacts" or "Receiving Off" to be safe.

LinkedIn: Find Nearby

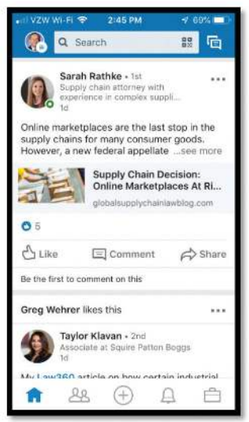
Another way to add and share contact information instead of business cards is with LinkedIn and its "Find Nearby" feature. You have to be a LinkedIn member and have the LinkedIn app installed on your smartphone, and Bluetooth has to be on (see above). In "Settings," scroll down to the LinkedIn icon (all your apps are in Settings in alphabetical order following the embedded apps on the iPhone). Make sure Bluetooth Sharing and Cellular Data are turned on (see the screenshots above). Once you are ready, open the LinkedIn app.

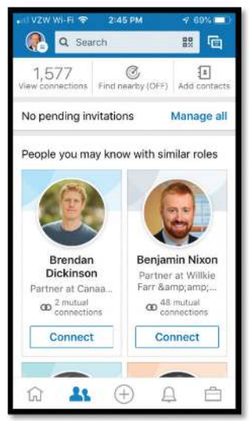
With the LinkedIn app open, tap the icon for "People" at the bottom of the screen. With the People screen open, tap "Find Nearby" at the top of the screen. This will open a live wireless/Bluetooth searching window and will display anyone near your phone with the same LinkedIn settings and using the "Find Nearby" feature. When you see someone with whom you want to connect, just tap them and they will be added as a connection on LinkedIn (see screenshots below).

The really cool thing is that if you are at a table at a business dinner or event, everyone at the table can turn on "Find Nearby" in LinkedIn and add contacts from the group at the table. That's how I found out about this feature—at a table at the Business Insurance U.S. Insurance Awards dinner. I told them I would steal it and share it. Permission was granted (since they don't own "Find Nearby").

By using these two tech tricks, you can easily and wirelessly share your contact information and add people to your iPhone contacts or your LinkedIn contacts without having to collect business cards or write information on a napkin. Try it out and see if it makes exchanging contact information just a little bit easier.

Larry Schiffer is editor of the *ARIAS Quarterly* and a partner at Squire Patton Boggs (US) in New York.





Ensuring the Enforceability of an Arbitration Provision That Does Not Designate an Arbitral Forum

By Larry P. Schiffer and Kelly Mihocik

The traditional method used for the resolution of reinsurance disputes has been arbitration. Unlike traditional commercial arbitration, however, the type of arbitration typically seen in arbitration provisions contained in reinsurance contracts is ad hoc arbitration.

Ad hoc arbitration is arbitration between two contracting parties without the use of an arbitral forum to administer the arbitration for the parties. In ad hoc arbitration, the parties self-administer. There is no filing of an arbitration demand with an arbitral forum, and no fees paid to an organization to administer the arbitration and provide the arbitrators.

More recently, arbitration clauses in reinsurance contracts have been specifying rules and, most typically, the rules specified are the arbitration rules formulated by ARIAS•U.S. While there were certainly reinsurance contracts in the past that specified other rules—like the American Arbitration Association (AAA) commercial arbitration rules, which by their text require that the parties allow the AAA to administer the arbitration[1]—older reinsurance arbitration clauses traditionally were silent as to any arbitral forum or rules.

Although parties may have contractually agreed to arbitrate, when a dispute arises, one of the parties, because of any number of reasons, may

want the dispute resolved in court. One way to bring an action in court, despite an agreement containing an arbitration provision, is to challenge the arbitration provision's enforceability. Whether a court will order the parties to arbitrate their dispute can depend on the language that the parties used in drafting the arbitration provision.

To overcome an arbitration provision, the challenging party must convince the court that the arbitration provision itself is unenforceable.[2] The enforceability of arbitration provisions can stand or fail depending on the language and the terms selected. Whether an arbitration provision is valid is typically reviewed under state contract law principles.[3]

There is no universally required arbitration provision for reinsurance contracts. As in other commercial contexts, parties to a reinsurance agreement are free to draft provisions that suit their needs. The parties may select the arbitral rules to apply (if any), identify the process for selecting an arbitrator, or, more rarely, identify a forum for holding the arbitration proceedings, such as JAMS or the AAA.

Likewise, there is no requirement that the parties include any of these terms. But if these terms are left open and a dispute arises, one of the parties may try to use these missing items to argue that the arbitration provision is unenforceable because there was no meeting of the minds when these "essential" terms were left out. This article focuses on whether there is a risk to parties to a reinsurance contract if the identification of an arbitral forum to hear the dispute is not contained in the arbitration provision.

> "Whether an arbitration provision is valid is typically reviewed under state contract law principles."

Are Forums Integral to the Arbitration Agreement?

Numerous state and federal courts have confronted the question of whether the unavailability of a designated arbitral forum affects the right to arbitrate. While the test used by the courts may vary slightly, the overwhelming majority of courts have held that an arbitration provision remains enforceable.[4] In many jurisdictions, the test used by the courts is whether the designated forum was integral to the parties' agreement to arbitrate.[5]

The failure of a designated forum, however, is not the same thing as failing to designate an arbitral forum. So, what happens when the parties fail to designate an arbitral forum? According to a recent New Jersey state court, the results could be disastrous for parties originally intending to arbitrate a dispute.

In *Flanzman v. Jenny Craig, Inc.*,[6] the court held that an arbitration provision was unenforceable because the parties failed to designate a forum to hear the dispute or designate a procedure for selecting a forum. The court recognized the general preference under state and federal law in favor of arbitration,[7] but then looked to state contract law to determine whether a valid agreement to arbitrate existed.[8] The court reasoned that arbitration is a waiver of one's right to pursue judicial relief and, thus, absent a clear mutual understanding and assent by the parties, the court was unwilling to compel arbitration.[9]

Flanzman likely has no application to reinsurance agreements. The contract in *Flanzman* was not a reinsurance agreement, nor was it subject to the Federal Arbitration Act (FAA). Rather, it involved an employment discrimination claim by an individual against her employer,[10] and thus the court seemed to express its concern about whether the individual understood and agreed to waive her right to a jury trial. Nevertheless, *Flanzman* is a warning that a court may not fully comprehend the lack of necessity of designating an arbitral forum in a reinsurance agreement's arbitration provision—and that educating the judge on reinsurance arbitration procedures may be necessary.

As the FAA is likely to apply to reinsurance agreements under U.S. law, where both parties involved are sophisticated entities, challenges to arbitration provisions based on the lack of a designated arbitral forum are unlikely to succeed. Indeed, the gap-filling provision of the FAA provides that:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.
9 U.S.C. § 5 (emphasis added.)

In *Queen's Medical Ctr. v. Travelers Casualty & Surety Co. of America*,[11] the defendant argued that the plaintiff's motion to compel arbitration should be denied because, among other reasons, it did not provide a method for selecting an arbitrator. The Hawaii federal court provided a thorough backdrop for understanding the role of the FAA when interpreting arbitration provisions. "With limited exceptions, the Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements in contracts involving interstate commerce."[12] Under the FAA, any doubts regarding the scope or enforceability of an arbitration provision should generally be resolved in favor of arbitration.[13]

Similarly, in *Robertson v. Mount Royal Towers*,[14] the court examined two arbitration provisions, neither of which designated an arbitral forum. The first arbitration agreement provided that medical malpractice claims "will be determined by submission to arbitration as provided by Alabama law . . .", and the second agreement provided that all other disputes "shall be submitted upon the request of either the resident or the facility to arbitration as provided by Alabama law."[15] Plaintiff argued that the arbitration provisions were unenforceable because, among other reasons, the arbitration agreements were too vague because they did not call for a method for selecting an arbitrator.[16] The court rejected this argument—the court assumed that the missing terms were not essential or integral to the parties' agreement to arbitrate and would use the FAA's gap-filling provisions to supply the missing terms.[17]

In light of the applicability of the FAA to contracts involving interstate commerce, the FAA should generally apply to reinsurance contracts, and courts should use the gap-filling provisions of the FAA to supply any missing terms in order to find an arbitration provision enforceable. Although there is a dearth of case law offering meaningful discussion of this particular issue in the reinsurance context, at least one court reached a similar conclusion in the reinsurance context when applying state law.

In 2003, a federal court sitting in diversity interpreted the parties' outline of negotiated terms. In the outline of terms, the parties included the phrase "arbitration clause." No further information was provided. One party argued that the clause was too vague to be enforceable. The court applied Pennsylvania law to determine whether a valid contract had been formed. The court determined that Pennsylvania courts favor enforcing agreements to arbitrate and concluded that the phrase was sufficient to create a binding and enforceable arbitration provision.[18]

State Arbitration Gap-Filling Provisions

Despite the preceding illustrative cases, there are a limited number of recent federal cases discussing the consequences of failing to identify a forum. There have been, however, a handful of relatively recent state courts that have come out the opposite way of *Flanzman* and have upheld arbitration provisions that did not designate a forum.

In *HM DG, Inc., v. Amini*,[19] the parties' contract provided several different methods for selecting an arbitrator. The court stated that under California's gap-filling procedure in Section 1281.6 of the California Code of Procedure, "the validity of an arbitration agreement is not contingent upon the agreement identifying a specific arbitrator or specifying a particular method for appointing an arbitrator."[20]

The parties to a contract in *Premier Real Estate Holdings, LLC v. Butch*[21] included an incomplete arbitration provision: "[a]ny controversy or claim arising out of or related to this Contract, or the breach thereof, shall be settled by neutral binding arbitration in Dade County, Florida, in accordance with the rules of ___ (Name of Organization) and not by any court action except as provided by Florida law for judicial review of arbitration proceedings . . . " The court needed to decide whether a binding arbitration agreement existed. Florida, like the FAA, has a statutory gap-filling procedure that sets forth the method for selecting an arbitrator and the rules that should be applied when the arbitration provision is silent:

If an agreement or provision for arbitration subject to this law provides a method for the appointment of arbitrators or an umpire, this method shall be followed. In the absence thereof, or if the agreed method fails for any reason or cannot be followed . . . the court, on application of a party to such agreement or provision

shall appoint one or more arbitrators or an umpire. An arbitrator or umpire so appointed shall have like powers as if named or provided for in the agreement or provision. Fla. Stat. § 682.04 (this statute has since been amended).

The party challenging the arbitration provision in *Premier* argued that the provision was not enforceable because it did not designate the applicable rules. The court determined that in light of the gap-filling provision, Florida law did not require the parties to designate the rules that would be applied, and thus the failure to designate the rules did not invalidate the arbitration provision.[22]

Based on these representative cases, in the reinsurance context, a court should not find an arbitration provision unenforceable simply because it does not designate an arbitral forum. This conclusion is based on the expectation that courts will look to the FAA for guidance when deciding whether a binding arbitration exists and apply the well-established preference in favor of enforcing even a bare-bones arbitration provision. Moreover, because reinsurance agreements normally involve interstate commerce, when the parties fail to designate an arbitral forum (which is nearly all the time), courts should be willing to use the FAA's gap-filling procedures to identify a method by which the parties may proceed to arbitration if a challenge to the arbitration is brought.

Drafting a Provision That Leaves the Forum Open

Based on this analysis, we have developed a short list of guiding principles for drafting a reinsurance arbitration provision.

If the parties do not want to designate a particular arbitral forum at the time of contracting but want to avoid the risk that a court could find the arbitration provision unenforceable, the parties should (1) clearly state that the parties intend the dispute to be arbitrated and (2) specify that the forum is a nonessential or non-integral term to the parties' agreement to arbitrate.

If the parties want to select a particular set of rules without designating a forum to conduct the arbitration, they should use language that leaves the forum open (such as, the arbitration proceedings should be conducted "in accordance with" a particular set of rules).

Because the FAA will typically apply to reinsurance agreements, if the parties do not (for some reason) want the FAA to apply, they should specifically state that the FAA will not apply and specify an objective method for selecting an arbitrator.

Ensuring That an Arbitration Provision is Enforceable

When parties include an arbitration provision in a reinsurance agreement, the parties—regardless of whether the arbitral forum is or is not designated—should do the following:

- State that the arbitration provision should be construed under the FAA;
- Affirmatively state that it is the parties' intent to arbitrate disputes arising under the agreement; and
- Specifically identify any types of disputes that should not be submitted to arbitration and clearly state whether the excepted disputes is an exhaustive list.

If the parties designate an arbitral forum, they should also do the following:

- Make sure that the chosen forum is available and will accept disputes arising from the particular agreement at issue;
- Provide a method for selecting an alternative forum should the chosen forum become unavailable; and
- Include a severability clause stating that, should the designated forum become unavailable, the parties intend that the remainder of the arbitration agreement will continue in force, and that the FAA will supply any missing terms.

NOTES

1. See AAA Commercial Arbitration Rules and Mediation Procedures, R-1 (https://www.adr.org/sites/default/files/Commercial-Rules_Web_FINAL_1.pdf)
2. See, e.g., *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 183-84 (4th Cir. 2013) ("party challenging the enforceability of an arbitration clause under Section 2 of the FAA must rely on grounds that relate specifically to the arbitration clause and not just to the contract as a whole.") (internal quotation marks and citation omitted); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006) (stating that "[w]hen the crux of the complaint is not the invalidity of the contract as a whole, but rather the arbitration provision itself, then the federal courts must decide whether the arbitration provision is invalid and unenforceable under 9 U.S.C. § 2 of the FAA.").
3. *Lockard v. EYM King of Kan., LLC,* No. 17-2181, JAR-JPO, 2017 U.S. Dist. LEXIS 146944, at *9, 13-14 (D. Kan. Sept. 12, 2017) (determining whether a valid agreement to arbitrate exists and looking to the FAA's gap-filling provisions in finding that "[t]he FAA contemplates that there may be agreements that do not provide for the appointment of arbitrator" and determining that a failure to designate a forum was a nonessential term).
4. *Constitution Reinsurance Corp. v. Republic W. Ins. Co.*, No. 98 Civ. 7208, 1999 U.S. Dist. LEXIS 2651 (S.D.N.Y. Mar. 10, 1999) (enforcing arbitration provision even though EPRAF, the exclusive forum chosen by the parties, had become unavailable). But see, *Ranzy v. Tijerina*, 393 F. App'x 174, 176 (5th Cir. 2010) (holding that parties' agreement to arbitrate before the NAF was integral to the parties' agreement and because the NAF was no longer available, arbitration could not be compelled).
5. See, e.g., *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12cv01562, 2013 U.S. Dist. LEXIS 46101 (S.D. Cal. Mar. 28, 2013) (distinguishing facts from those in *Ranzy* because the contract contained a severance clause and thus finding that agreement to arbitrate before a specified forum was not integral to the parties' agreement); *Levy v. Cain, Watters & Assocs., P.L.L.C.*, No. 2:09-cv-723, 2010 U.S. Dist. LEXIS 9537 (S.D. Ohio Jan. 15, 2010) (finding that the selected forum, which was no longer available, was not integral to the parties' decision to arbitrate).
6. 196 A.3d 996 (N.J. Nov. 13, 2018).
7. *Id.* at 1000.
8. *Id.* at 1001.
9. *Id.*
10. *Id.* at 999.
11. No. 17-00361, 2018 U.S. Dist. LEXIS 60137, at *7 (D. Haw. Apr. 2018).
12. *Id.* at *4 (quoting *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013)).
13. See id. at *5.
14. 134 So. 3d 862 (Ala. 2013).
15. *Id.* at 863.
16. *Id.* at 868.
17. *Id.* at 869.
18. *Guar. Trust Life Ins. Co. v. Am. United Life Ins. Co.*, No. 03 C 250, 2003 U.S. Dist. LEXIS 22777 (N.D. Ill. Dec. 18, 2003).
19. 219 Cal App. 4th 1100 (Cal. App. 2013).
20. *Id.* at 1107-08.
21. 24 So. 3d 708 (Fla. App. 2009).
22. *Id.* at 710.

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Kelly Mihocik is an associate at Squire Patton Boggs (US) LLP in the Columbus, Ohio, office. She has experience defending large complex commercial cases in state and federal court and class actions.

EIGHT CLYDE & CO. PARTNERS LAUNCH ATHERIA LAW

Attorneys and staff from Clyde & Co. have launched Atheria Law as a new firm of 35 attorneys with decades of experience in insurance and reinsurance law.

Atheria is led by eight partners, half of whom are women. The founding partners are Bill Casey, Joan D'Ambrosio, Eric Moon, Christina Terplan, Julie Hawkinson, David Jordan, Christina Marshall and Jamison Narbaitz. Terplan will serve as Atheria Law's president.

Atheria Law provides legal services to insurance and reinsurance clients, focusing on thetechnology, privacy and cyber, and professional liability sectors. With attorneys practicing in San Francisco, Los Angeles, Atlanta and New York City, the firm's lawyers represent insurers and reinsurers in the United States and globally.

PASICH LLP ADDS HALPRIN AS PARTNER

Insurance recovery and entertainment firm Pasich LLP is adding Peter A. Halprin, Esq., FCIArb, FAiADR, as a partner.

Before joining Pasich, Halprin was a shareholder in Anderson Kill P.C.'s New York office, where he focused on insurance recovery and served as deputy co-chair of the Cyber Insurance Recovery Practice.

Halprin represents commercial insureds in complex insurance coverage matters and has arbitrated, litigated, and mediated claims involving a broad range of insurance policies. He also counsels U.S. and foreign companies in domestic and international arbitrations, including both ad hoc (ARIAS, Bermuda Form, London) and institutional (AAA, ICC, ICDR, JAMS, LCIA) arbitration forums. He has served as a party-appointed arbitrator and as a sole arbitrator.

The 'Wholly Groundless' Exception to Arbitration

Since March 2006, the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and insurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases.

Case: *Henry Schein, Inc. et al. v. Archer and White Sales, Inc. , 139 S.Ct. 524 (2019)*

Court: U.S. Supreme Court

Date decided: January 8, 2019

Issue decided: Whether a court may decide the threshold issue of arbitrability where the contract provides that the question of arbitrability is a question for the arbitrator if the court finds the arbitrability claim to be "wholly groundless."

Submitted by: Cecilia Froelich Moss and Devin Hisarli

Archer & White Sales, Inc., a distributor of dental equipment, entered into a distribution contract with Pelton & Crane, a dental equipment manufacturer.

The contract's arbitration clause provided that disputes arising under the parties' agreement would be resolved by binding arbitration in accordance with American Arbitration Association (AAA) rules. Notably, the contract exempted actions seeking injunctive relief from arbitration.

After the relationship deteriorated, Archer & White sued Pelton & Crane's successor-in-interest and Henry Schein, Inc., seeking both monetary damages and injunctive relief. Schein moved to compel arbitration. Archer & White objected, arguing that the contract barred arbitration since the "complaint sought injunctive relief, at least in part."

Schein maintained that in accordance with the rules of the AAA, which the contract had expressly adopted, the threshold arbitrability question was one for the arbitrator to decide. Archer & White's response was that in situations where the defendant's argument for arbitration is "wholly groundless," an exception allowed the District Court to resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer & White and denied the motion to compel arbitration, holding that a "wholly groundless" exception did exist and that Schein's argument for arbitration was "wholly groundless." The Fifth Circuit affirmed.

Key Holding

The Supreme Court held that a "wholly groundless" exception is inconsistent with both the Federal Arbitration Act (FAA) and Supreme Court precedent. Instead, it held that "when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."

The Supreme Court emphasized that under the FAA, "arbitration is a matter of contract" and that courts must enforce agreements to arbitrate according to their terms, including the delegation of threshold arbitrability questions to an arbitrator. The court noted that this conclusion is consistent with the principle of *AT&T Technologies v. Communications Workers*, in which it held that a court may not rule on the merits of an underlying claim that the contract assigned to an arbitrator, even if the court concludes that the claim is frivolous. 475 U.S. 643, 649-650 (1986).

The court rejected Archer & White's contention that FAA §§ 3 and 4 require courts to resolve questions of arbitrability, noting that this argument had been rejected by *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995), which held that parties may delegate threshold arbitrability questions to the arbitrator. The court also rejected the argument that FAA § 10(a)(4)'s provision for "back-end judicial review of an arbitrator's decision if an arbitrator has exceeded his or her powers" supported a court's prospective review as well. The court reasoned that such an interpretation of the retrospective judicial review provided for in § 10 amounted to an impermissible "redesign of the statute," and conflicted with the Supreme Court's ruling in *AT&T Technologies*.

Finally, the court rejected Archer & White's policy argument that a "wholly groundless" exception would eliminate frivolous claims and reduce unnecessary arbitration costs to the parties. Instead, the court was unconvinced that the exception would in fact save time and money because it could "spark collateral litigation . . . over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless." In any event, the court concluded that it could "not engraft [its] own exceptions onto the statutory text."

Key Takeaway

A court may not override a contract that delegates the threshold arbitrability question to the arbitrator, even if the court finds that the argument for arbitration is "wholly groundless."

Cecilia Froelich Moss is a founding partner of Chaffetz Lindsey LLP, where her practice focuses on representing major insurance companies in reinsurance disputes and in coverage litigation.

Devin Hisarli is a law student at NYU and was a summer associate at Chaffetz Lindsey.

Newly Certified Arbitrators

Joseph M. (Joe) Goldberg has been confirmed as an ARIAS Certified Neutral Arbitrator. His umpire appointments have included reinsurance disputes and disputes between sophisticated insureds and direct insurers over terms of manuscripted CGL policies. During the first 29 years of his legal practice, Joe litigated and handled appeals of insurance defense and coverage matters, including asbestos bodily injury and property damage, and ground water contamination. He also served as a sole neutral arbitrator and as a mediator in direct insurance disputes ranging from catastrophic bodily injury claims to property damage to business disputes. For the final 13 years of his legal practice, Joe managed the Corporate Legal Department of Sentry Insurance and advised the Sentry Reinsurance Department in both cedent and reinsurer capacities. He retired from Sentry in 2016.

Eve Rosen retired from Great American Insurance Company as senior vice president, general counsel and corporate secretary. She has experience with corporate as well as insurance matters involving complex claims, bad faith, reinsurance, underwriting, insurance accounting, employment, and agent and broker relations. She has experience with corporate compliance in all 50 states, Bermuda, Ireland, Canada, Mexico and the United Kingdom. Prior to her employment at Great American, Eve worked for another national carrier and managed complex claims coverage litigation, primarily addressing asbestos, environmental, causation, occurrence and bad faith disputes. Eve was a civil litigation lawyer in private practice for several years before her employment in the insurance industry.

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▲ Fred Marziano, Jeffrey Weisel, Sarah Kutner, Judy Harnadek, and Mark Sheridan

▲ General Session: Rules for the Resolution of Insurance and Contract Disputes—Making an Expanded ARIAS a Reality

▲ Cindy Koehler, Lloyd Gura, Michael Frantz, Glenn Frankel, and Mark Gurevitz

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