Protecting Information:

New Guidance for Arbitrators

ARIAS US

QUARTERLY

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Q1 • 2017

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FEATURES

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EDITOR'S LETTER

Questions, questions, questions. Have we got questions. Welcome to 2017 and another year of the ARIAS *Quarterly*. We open this year with a question to our arbitrator community: What was the most difficult or unique situation you've faced in your career as an arbitrator, and how did you handle it?

Why, you may say, do we ask? It's simple. We're always on the lookout, not only for articles from our membership but for suggestions for articles as well. To phrase it a bit more baldly, I'm always out there shilling for the *Quarterly*, and such is our need that I never stop. So it was natural that during the course of a panel dinner that I made my pitch to one of my co-panelists, Elaine Caprio, who was thoughtful enough to suggest the *Quarterly* ask the question I'm putting to you now. My further question: Why not share your experiences? If they were interesting to you, you can bet they'll be interesting to our membership, as well. So no excuses, get out there and answer the question. Write! You have nothing to lose, and nothing but fame and fortune to gain.

Onward! But as long as we're asking questions, here are several more: Is there anybody out there who wishes we didn't have to be concerned with information security? That's the easy one. Most people in any walk of life would wish that data was secure, breaches not existent, and "to hack" meant "to clear away brush." Unfortunately, as we're reminded everyday by headlines, that's not the world in which we live, with arbitration being no different. The unauthorized release of the information we handle every day in our disputes results in very real consequences.

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So here's another question: Is there anyone out there among our membership who believes that they—company representatives, lawyers, or arbitrators—are not obligated to take steps to safeguard such information? For those who don't, it's time to recognize that the obligation is real and inevitably, they must take action. In an article, in which he plants his tongue firmly in his cheek, David Winters, a member of the ARIAS Task Force on Information Security, analogizes the process of accepting the necessity of actually doing something to the well-known Five Stages of Grief. With that in mind, David and his Task Force colleagues, Tom Cunningham and Michael Menapace, have developed "Guidance for Data Security in Arbitrations," which is posted on the ARIAS•U.S. website at https://www.arias-us.org/wp-content/uploads/2017/02/2017-01-10-ARIAS-US-Data-Security-Guide.pdf. They invite all who are interested to send their comments to the ARIAS

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Board for consideration before a final version is adopted.

Squabbling over the selection of umpires has become increasingly common, if not necessarily successful. Courts continue to turn down invitations to become involved prior to entry of a final award. A report from Sylvia Kaminsky of the ARIAS Law Committee provides an in-depth look at a recent decision on the subject, *John Hancock Insurance Company v. Employers Reinsurance Corporation,* that held that the FAA did not authorize a court to remove an arbitrator whose appointment was challenged for noncompliance with the contract mandated qualifications prior to the entry of an award.

An article by Bill Sneed demonstrates that raising a challenge to an umpire in the good old fashioned way, *i.e.,* after the conclusion of the proceedings on a motion to vacate under the FAA, won't necessarily be any more successful than raising a challenge beforehand. So discovered Brazilian cedent IRB, which unsuccessfully sought vacatur of an adverse award on the grounds that the umpire failed to disclose his appointment as party arbitrator for Equitas in a separate dispute during the two-year interval between his nomination and selection as umpire. The motion was premised on the timing of the disclosure, itself, and on his concurrent service as an arbitrator in the Equitas proceeding and umpire in the *NICO-IRB* arbitration. In denying vacatur, the court took note of the *ARIAS Code of Conduct* and *The ARIAS Practical Guide to Reinsurance Arbitration Procedure*. The case is now on appeal to the 2d Circuit. The ARIAS *Quarterly* is edited well before it is printed. By the time you receive this issue, the Court of Appeals will likely have ruled on the appeal.

Another question: If you're going to squabble, then which state's law do you squabble under? Many treaties contain a "service of suit" clause. Perhaps they provide the answer. In fact, some courts think they do. In an article on the subject Pieter Van Tol takes us through the case law.

Moving from the case law of states to that of nations, what are the odds of an English court reversing an arbitration award in a reinsurance dispute on a point of law? "Fuhggetabout it," says Jonathan Sacher writing from across the pond. It's happened but once in 20 years. The bewigged bench takes the view that if arbitration awards are easily challenged, there's a danger that the whole arbitration process becomes little more than a costly and time-consuming preliminary stage.

Tired of griping about reinsurance arbitrations? Interested in how the industry might implement more efficient and cost-effective procedures for arbitrating comparatively small and straightforward reinsurance disputes? Perhaps it's time to take a page from another dispute resolution regime. Rob Badgley is high on the way cybersquatting disputes are resolved. For those few of our readers who aren't aware of its meaning (and they should be ashamed that they aren't among the "in" crowd) "cybersquatting" means the act of registering and using a domain name that resembles someone else's trademark for improper purposes. The disputes are resolved quickly and economically under the Uniform Domain Name Dispute Resolution Policy (UDRP). Rob explains how it works.

Concluding with one of our regular features, a report from the Arbitrators Committee, we thank Sylvia Kaminsky for a second contribution to this issue of the *Quarterly*, a compendium of the many things our arbitrators have accomplished during the last year, including a successful effort to add two of their number to the ARIAS Board.

Questions, questions, questions, we've got questions but at the ARIAS *Quarterly* we've also got answers, answers, answers. We hope you've found our articles useful to your practice and you've enjoyed reading them.

By now we hope you know that the *Quarterly* depends exclusively on submissions from the ARIAS membership. That means we depend on each of you. Please do your part and send in an article today. •

— Tom Stillman

IN THIS ISSUE








NOW AVAILABLE

The ARIAS•U.S. Guidance for Data Security in Arbitrations

Arbitration involves the collection and exchange of an enormous amount of information. This information may include personal, medical, or other information that is subject to state and/or federal privacy regulations. Insurance companies have an obligation to protect such information from disclosure, which extends to their use of third-party service providers. Failure to safeguard such data can result in significant repercussions for all involved.

To help mitigate that risk, ARIAS•U.S. created a task force and working group to provide guidance on how all participants in the arbitration process—arbitrators, outside counsel, and company representatives—can better manage the risks of exchanging private information in arbitration. The current draft of this guidance, called the ARIAS•U.S. "Guidance for Data Security in Arbitrations," covers best practices for—

- identifying and minimizing private information in arbitration;
- incorporating information security procedures from the organizational meeting onward;
- protecting private information at rest;
- protecting private information in motion;
- disposing of private information;
- special privacy concerns in life and health or international arbitrations; and
- what to do if private information is disclosed.

Before the guide is finalized, the ARIAS•U.S. Board welcomes any comments on this document, which is published in its entirety online at https://www.arias-us.org/wp-content/uploads/2017/02/2017-01-10-ARIAS-US-Data-Security-Guide.pdf.

The Year in Review: A Letter to ARIAS•U.S. Members

A look back at 2016 and a look ahead at what 2017 has in store for ARIAS.

By Jim Rubin

With the publication of this first issue of 2017, I thought it a good opportunity to take a look back at 2016 and a look ahead at what 2017 has in store for ARIAS.

Under the very successful chairmanship of Betty Mullins, 2016 began with more webinars, a seminar in Chicago in March and the Spring Conference in May, including a keynote speech from Lt. General Edward Cardon, Commander of Army Cyber Command. Cyber security and data protection are on everyone's minds, and the Lt General was an outstanding speaker. He gave our members insight into some of what the Army is facing which foreshadowed a new emphasis within ARIAS on data protection within arbitrations.

In addition to our ongoing programs, ARIAS also accomplished a number of new initiatives in 2016 including the initiation of a new networking series, sponsored by the Member Services Committee, offering members the chance to learn about emerging issues and at the same time, mingle with colleagues, company reps and counsel. Our first event, in June, on Concussion Litigation and related insurance coverage issues, featured David Roach, the Athletic Director at Fordham University, and was a big hit with attendees. A second event in Chicago on New Products, New Languages and New Approaches coordinated by Ann Field, Mary Ellen Burns and Catherine Isely took place with very positive reviews. ARIAS also held webinars sponsored by the Education Committee on topics including Accumulation & Aggregation of Claims/Clash Covers, D&O Insurance Issues and Sureties & Financial Guaranty.

While the organization continues to be in solid financial health, the Board actively sought opportunities in 2016 to expand ARIAS's reach. Informational events were held with representatives from Aon and Carpenter to introduce the brokers to the ARIAS Neutral and Streamlined Rules in the hope that as the brokers become more familiar with the Rules they will recommend them to their clients. The brokers were engaged, asked good questions and appeared receptive to these conversations. Presentations to brokers will continue in 2017.

Additionally, volunteer leaders from the ARIAS membership presented an "Arbitration 101" session at the Casualty Actuarial Society's Loss Reserving Seminar in the fall. Board members Scott Birrell and Mike Frantz along with former ARIAS Chairman Dan FitzMaurice and ARIAS-certified arbitrator Barbara Nie-

hus also participated in a panel discussion at the Annual Meeting of the Society of Actuaries (SOA). The panel introduced the SOA to ARIAS•U.S., providing an overview of the arbitration process and how it compares to litigation. Attendees at these and other functions were added to the ARIAS database and have become part of a larger group to receive information about upcoming events, programs and services that ARIAS offers and the opportunities to network and engage with colleagues throughout the year.

In an effort to address the financial burden on our individual members, individual dues were kept at the same level for the third year in a row and the cost of the online Ethics Course was decreased by 60% beginning in 2017. Similarly, as the industry has seen more mergers and acquisitions take place on the company side and a subsequent decrease in our company membership, the Board approved a new dues structure increasing the number of representatives a corporate member may designate but also increasing the minimum corporate fee for membership. The Board's goal is to encourage the engagement of more staff participation from our corporate members in the hope that this will produce more opportunities for members.

All of the ARIAS Committees, led by volunteer members, were hard at work this past year generously giving of their time and expertise to ARIAS and its mission to improve the arbitration process. From updating forms and procedures, generating recent case law summaries, adding new features to the *Quarterly* journal, helping to shape the new website and recruiting speakers for the rich content ARIAS provides throughout its webinars, seminars and conferences, I cannot say thank you enough to our committed and engaged members.

One of the last big endeavors of 2016, aside from the Fall Conference of course, was the amendment of the ARIAS Bylaws to add two additional directors, more specifically, two ARIAS-certified arbitrators as directors. This change required a vote of two-thirds of the ARIAS membership and achieving this level of turnout was a challenge. Thanks to the members of the Arbitrators' Committee for their outreach efforts, Sylvia Kaminsky and Peter Gentile joined the Board in November and have already been tremendous contributors to Board activities.

The Year Ahead

Now that 2016 has come to an end, what is underway in 2017? The Board held a daylong meeting in early February at which it addressed new webinars on topics such as The Increasing Relevance of Runoff, Privilege and Intermediaries, Retaining Jurisdiction, Primary Insurance Arbitrations and "CAT" Bonds. April will bring about a joint effort between the Member Services and Education Committee with more networking events and a half day seminar.

The Member Services Committee has also reinvigorated the Arbitrator Mentor Program for newer arbitrators who seek advice and assistance directly from experienced ARIAS•U.S. Certified Arbitrators. More than ten of our tenured arbitrators have already volunteered to serve as mentors and we have heard from a number of arbitrators interested in this new opportunity.

The Spring Conference Committee chaired jointly by John Nonna, Larry Schiffer, Sylvia Kaminsky and Deedee Derrig reviewed with the Board the lineup of exceptional topics and outstanding speakers planned for May,

with new formats and, as you know, a new location: the Ritz-Carlton, Naples. It sounds like there will be plenty of time to relax in the warmth of the Florida sun just not during the Conference sessions which will be sure to keep everyone interested.

In addition to the ongoing work of the various committees, the most recent meeting of the ARIAS Board focused much of its time on increasing opportunities for our members. As I mentioned at the close of the Fall Conference, the Board is exploring the possibility of expanding ARIAS' reach to policyholder disputes. While no one on the Board believes persuading policyholders to use ARIAS rules and arbitrators will be easy, the Board is convinced that ARIAS can do a better job than competing organizations. Accordingly, the Board is considering how best to approach the policyholders to join ARIAS in creating new procedures designed specifically to address policyholder disputes.

There will certainly be more to come and I look forward to sharing all that we are doing as the year progresses. If you have not already joined a committee, written an article for the *Quarterly* or taken advantage of the many in-person events throughout the year, I encourage you to do so soon! I welcome your ideas and thoughts and I look forward to seeing you all in the coming weeks in Florida! •

The Five Stages of Grief, the ARIAS•U.S. Guide to Data Security in Arbitrations, and You

A new guide to information security has some ARIAS members in denial, but many are accepting it.

By David Winters

In 1969, Swiss psychiatrist Elisabeth Kubler-Ross introduced a model identifying a set of five emotions experienced by people facing traumatic experiences. The so-called "five stages of grief" are: (1) denial, (2) anger, (3) bargaining, (4) depression, and (5) acceptance. The five stages of grief are not a linear series of emotional experiences; some people go through all of the stages in order, some experience only a few, and some experience none at all. The "five stages of grief" model was originally intended to describe emotions experienced by people anticipating a serious and traumatic future event. I've noticed that it is also common to see people experiencing the same emotions when dealing with information security issues.

The anticipated traumatic experiences relating to information security are twofold. First, there is the actual threat of a breach of confidential information, whether by hacking, a lost laptop, a rogue employee, or any number of threats that exist today. Second, and perhaps equally as concerning, there is the stress of mandatory compliance with the legal and regulatory regimes that require individuals and organizations to take particular steps to protect against breaches of confidential information.

Having been involved with efforts to improve information security in various different contexts, I can say that the most difficult challenge does not lie in figuring out what the ethical and regulatory regimes require, writing new rules and guidelines, or even ensuring that the proper structural protections are in place, but, rather, in selling the effort to the people within an organization. The difficulty of "selling" better information security is compounded by the emotional reactions of those people.

I've seen people go through the five stages of grief when dealing with any push to improve information security. One common reaction is denial—manifesting as a refusal to believe that information security requires the affected individual to do things differently

I've seen instances in organizations where people who were initially skeptics later professed to be happy about the focus on information security.

than previously. ("I don't work with personal health information, so none of this applies to me, right?") Anger is another common reaction—very common, in fact. It always amazed me how frequently people took offense at proposed new information security protocols. I have seen grown-ups resort to name-calling with respect to perfectly reasonable rule proposals ("That rule is stupid."), and I've seen people get annoyed at being told that they have to regularly change their passwords. Still others use bargaining as a coping mechanism. For example, I worked with an organization that mandated that a locking screen saver, which activated after five minutes, be installed on all employees' computers, and which required entry of the password to continue work. When the organization rolled out the new "locking" screen saver, one senior employee actually tried to negotiate that his screen saver would only lock after an hour. And yes, there is depression—I know, because I've experienced it. At my own law firm, I was part of a team charged with designing and implementing new information security protocols, and it was depressing to me that people seemed to like me less because I was associated with the those protocols.

The good news is that one generally sees an "acceptance" phase as well, and that shift happens relatively quickly. A few exceptional folks get there on day one, but most people do not. To be clear, no organization can ever "finish" the job of securing information—information security is a dynamic process that is ever-evolving as technology changes and new challenges arise. But once you have people on board with the concept of information security, facing future challenges becomes easier. I've seen instances in organizations where people who were initially skeptics later professed to be happy about the focus on information security and felt that learning more about information security and applying that knowledge was "the right thing to do."

The ARIAS•U.S. 'Guidance for Data Security in Arbitrations' and the Fall 2016 ARIAS•U.S. Conference

Now that I've talked about the five stages of grief, it's time to introduce the ARIAS • U.S. "Guidance for Data Security in Arbitrations." A draft version of the guidance and the broader topic of information security were among the focuses of the 2016 Fall ARIAS • U.S. Conference in New York.

The reaction to the guidanceat the Conference was not unusual. There was a small level of denial. ("Information security is only a problem for arbitrations that involve the exchange of personal information, right?") And there was anger. ("You propose to do what to the 'hold harmless' forms?") There was bargaining. ("Can't this problem be solved using internet deal rooms?") There was evidence of depression (but, again, this was mostly me). But most of all, and on a far more accelerated timetable than I have seen within other types of organizations, there was acceptance. I was struck by how most attendees, including arbitrators, outside counsel, and company representatives, understood that information security was something that needed to be addressed, that the problem was not going away, and that the best thing to do was to take reasonable and prudent steps to address the threat of confidential information.

The drafters of the "Guidance for Data Security," myself included, are particularly grateful for the insightful comments and suggestions for improvement offered by attendees at the conference. The revised document, which is posted on the ARIAS • U.S. website, incorporates those comments and suggestions. As Dan FitzMaurice stated in his article, "Cybersecurity and Data Security: What are the Risks for Insurance and Reinsurance Arbitration?," the document does not "dictate behaviors," but "offers many helpful suggestions for the parties and arbitrators to evaluate and possibly adopt."

You

It all comes back to you, of course. Whether you are an arbitrator, outside counsel, or a corporate representative, please review the "Guidance for Data Security." Think about the steps that you can take to improve information security in any arbitrations in which you are involved. Consider whether there are additional or different steps that might be required given the unique circumstances of any arbitrations in which you are involved. Be a skeptic if you must. Get angry if it helps. Bargain. Cry out in despair. But when you are done, accept that we must change with the times, read the document, and do your part to make arbitrations more secure. •

Nico V. IRB: Court Rejects Conflict of Interest Claim Based on Overlapping Service

A 2016 court decision sheds light on the law governing conflict of interest challenges in selecting umpires.

By William M. Sneed

Umpire selection can be a real headache. Squabbling over disclosures and challenges to candidates seem to be proliferating in the reinsurance arbitration world. As nothing happens in an arbitration until a full panel is in place, breakdowns in the process can derail ultimate resolution of the dispute, sometimes indefinitely. For counsel, getting through this phase of an arbitration requires persistence and skill. A solid understanding of what qualifies as a material conflict of interest on the part of an umpire is essential.

A 2016 decision by the U.S. District Court for the Southern District of New York (*National Indemnity Company v. IRB Brasil Resseguros S.A.*, or *"NICO v. IRB"*[1]) dissects a contentious reinsurance dispute and sheds light on the law governing conflict of interest challenges. This article discusses the case and identifies its lessons, which are noteworthy for lawyers, parties, and arbitrators.

NICO v. IRB: The Arbitration

The case starts with a Brazilian mining/steelmaking conglomerate, CSN, which insured a coal terminal it owned in Rio de Janeiro. The direct insurers were local Brazilian companies (Sul America and Mapfre Seguros), and there were three coverage periods: January 21, 2007-November 21, 2007 ("the Original Period"); November 21, 2007-February 21, 2008 ("the Extension Period"); and February 21, 2008-February 21, 2009 ("the Renewal Period"). IRB, a Brazilian reinsurance company, reinsured the policies.

IRB facultatively retroceded the risk on the Extension Period to National Indemnity Company ("NICO").

A solid understanding of what qualifies as a material conflict of interest on the part of an umpire is essential.

This was undisputed. NICO claimed that IRB also retroceded the risk on the Renewal Period to NICO (for a premium of $9.14 million), but IRB eventually disputed that. Both parties agreed that NICO had no involvement on the Original Period.

CSN reported a business interruption loss at the coal terminal. There was a dispute over the date of loss and how many occurrences were involved. IRB eventually settled with CSN, paying about $168 million. IRB took the position that there was a single occurrence with a date of loss of December 1, 2007, and it billed NICO $41.364 million. An earlier date of loss (in the Original Period) would have meant no NICO exposure.

Multiple arbitrations ensued between NICO and IRB in New York and London, with disputes over arbitrator appointments and resignations, as well as consolidation.[2] Eventually, there was one arbitration in the United States. NICO and IRB appointed arbitrators, and each side nominated umpire candidates. NICO nominated Daniel E. Schmidt IV, and IRB nominated William Trutt. The arbitration clause called for the arbitrators to be active or retired officers of insurance or reinsurance companies "not under the control of either party to this certificate."

Mr. Schmidt filled out and returned an umpire questionnaire in December 2009. At that time, he disclosed service in more than 345 reinsurance arbitrations, including 25 prior cases involving General Re Corporation, an affiliate of NICO, including 11 as umpire, 13 as party-appointed by Gen Re, and 1 as party-appointed by Gen Re's opponent. IRB took the position that Mr. Trutt was not required to fill out a disclosure questionnaire, arguing that disclosures should be made after the umpire was appointed. However, the Court disagreed and directed that IRB have Mr. Trutt fill out the same questionnaire as Mr. Schmidt.[3] Interestingly, in the briefing before the Court in 2011, NICO suggested that supplemental disclosures be obtained from Mr. Schmidt. The Court did not address this subject in its 2011 order.

Mr. Schmidt was eventually appointed umpire after a lot drawing, but not until January 2012, a delay occasioned by developments in different forums and procedural wrangling. Two days after being informed of his appointment, he updated his disclosures from December 2009, reporting 15 more arbitrator and umpire appointments overall, including a party-arbitrator appointment by "Lloyd's/Equitas," which was represented by Clyde & Co. He also disclosed an expert witness assignment from the law firm representing IRB.

IRB argued that the Equitas appointment disqualified Mr. Schmidt as umpire because (a) NICO reinsured Equitas, (b) a NICO affiliate, Resolute Management Services Limited, managed the Equitas runoff, and (c) Clyde & Co represented NICO and Equitas in the two arbitrations. Mr. Schmidt took briefs on the disqualification request and then declined to withdraw, explaining that he was not under the control of either party or their counsel and adding that he did not view himself in his appointments as "employed" or "hired" by the appointing party or its counsel or as a hired gun. He stated that he functions independently in every case, and every case is handled independently from every other case. He assured both sides they could expect and would receive a fair and just process and result.[4]

After an agreed stay pending developments in Brazil, the arbitration proceeded to the merits, which concerned the reasonableness of the December 1, 2007, date of loss and the single occurrence determination. An additional issue arose respecting whether IRB retroceded the risk to NICO during the Renewal Period. IRB eventually contested that, and there was evidence that IRB had agreed to assist CSN in an effort to recover the premium paid to NICO for the Renewal Period retrocession coverage.

The arbitration involved briefs and a hearing in late 2014, followed by the issuance of three panel-majority awards in January, April, and May 2015. Those awards addressed the date of loss, the retrocession of the risk during the Renewal Period, and fees and costs. Each of those awards was in favor of NICO by a majority vote.

After the April 2015 award, the arbitrator appointed by IRB emailed a six-page dissent to the other panel members and counsel. Based on the dissent's content and writing style, the umpire surmised in an email to counsel that the dissenting arbitrator was not the sole author. NICO's counsel then asked IRB's counsel to confirm it had no role in preparing the dissent.

If service in a party-appointed role renders an arbitrator partial toward the appointing party, does that mean service in the same role for an adverse party cancels that partiality out?

IRB's counsel admitted in response that it had communicated with the dissenting arbitrator on an ex parte basis and had provided him with a template draft dissent.[5] That counsel soon after withdrew from the case, which by that time was also pending in the Southern District of New York on competing motions to confirm and to vacate.

NICO v. IRB: The Motion to Vacate

IRB's principal argument for vacating the awards was "evident partiality" on the part of the umpire based on the timing of his disclosure respecting the Equitas party-appointed arbitrator role and his refusal to withdraw after being challenged.[6] According to IRB, Mr. Schmidt should have disclosed the Equitas assignment before he was chosen as umpire, and he should have withdrawn after being challenged.

After announcing that the evident partiality standard in the Second Circuit was whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration" and that IRB bore the burden of proof, the Court examined the two challenges separately.[7]

With respect to the timing of disclosure, the Court noted that all of IRB's authority dealt with non-disclosure of material relationships and none of it dealt with a supposedly untimely disclosure: "And IRB has not cited, and the Court has not found, a case holding an arbitrator's disclosure of a potential conflict after his or her selection, rather than before, to be grounds for vacatur."[8] The Court criticized the impracticalities that flowed from IRB's position: namely, that an umpire candidate who submits a written disclosure must continually update that disclosure during the time he or she is waiting to hear about the ultimate selection—a time frame that can span years and actually did in the case before it. "A continuous pre-selection disclosure obligation as envisioned by IRB could easily add up to hundreds of supplemental disclosures, and failure to make any of them would be grounds to vacate any award ultimately issued."[9] The Court also highlighted the "irony" of IRB's position, since it had argued in 2011 that the umpire candidate it had nominated (Mr. Trutt) should not be required to fill out the written disclosure questionnaire because post-selection disclosure of potential conflicts was the norm.[10]

The Court held that the timing of the 2012 disclosures (which involved one previously undisclosed connection relating to the NICO side and one relating to the IRB side) would not lead a reasonable observer to conclude that the umpire was biased in favor of NICO.

The Court turned to heart of the challenge, which was that Mr. Schmidt could not serve in the NICO/IRB arbitration because he had an overlapping party-appointed assignment from Equitas. This was an evident partiality claim based on conflict of interest. IRB argued that Mr. Schmidt's service as arbitrator appointed by Equitas meant he was "NICO's arbitrator" and a "hired gun" with a "material commercial or financial relationship with NICO," rendering him evidently partial in the NICO/IRB arbitration.[11]

The Court identified the premise of the argument, which was that NICO and Equitas were affiliated parties, which was not the case. According to the Court, while Equitas and NICO had a substantial financial relationship, "NICO and Equitas are separate companies with separate boards of directors, and NICO has no ownership interest in Equitas."[12] Nevertheless, even if it were presumed that NICO and Equitas were affiliates, the Court found no material conflict of interest in Mr. Schmidt's overlapping roles. The Court emphasized that it was undisputed that the Equitas arbitration and the NICO/IRB arbitration were factually unrelated.

IRB's argument focused on payment to Mr. Schmidt for his services as arbitrator in the Equitas case, which supposedly came from NICO, and the claim that future work (and payment) would come from NICO, which would allegedly cause him to favor NICO in the case with IRB.

The Court started its analysis with two observations: (1) unlike litigation, in private arbitration, the parties select and pay the arbitrators; and (2) when arbitrators are required to have specialized experience in a certain field (and reinsurance certainly qualifies),

the available number of arbitrators will be limited and they are more likely to have come into contact with the parties in their field.

The conclusion drawn from the first observation was that "it cannot be that selection and payment for a person's services as party-arbitrator or umpire, without more, produces a 'material or commercial financial relationship.'"[13] Thus, payment as an arbitrator in a past matter is "insufficient to produce a conflict in a later matter." The conclusion drawn from the second observation was that specialized arbitrators are likely to know one another, and repeated or overlapping service by the same arbitrators in different arbitrations is bound to occur. The Court quoted the Second Circuit's decision in *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*: "Such overlapping service is not only not a circumstance inherently indicative of bias; it is also not unusual. In specialized fields such as reinsurance, where there are a limited number of experienced arbitrators, it is common for the same arbitrators to end up serving frequently together."[14]

On the payment point, the Court referred to the ARIAS·U.S. Practical Guide to Reinsurance Arbitration Procedure (Chapter II, ¶ 2.3), which exempts payment as an arbitrator or umpire from the type of remuneration that would render an arbitrator "under the control" of a party. The Court stressed that the Practical Guide was "non-binding here," but noted that both parties had cited the ARIAS·U.S. ethical canons in their papers.[15]

Significant to the Court was IRB's failure to raise any issue respecting Mr. Schmidt's disclosure of assignments in 25 prior cases involving Gen Re, a true affiliate of NICO. IRB claimed the distinction was the concurrent nature of the Equitas assignment. The Court was not persuaded:

It nevertheless remains unclear why the cross-role appointments in unrelated arbitrations constitute evident partiality in the second arbitration. In particular, the Court sees no principled distinction between an umpire having served as a party-arbitrator for an affiliated party in a settled, or completed, or otherwise dormant arbitration appointment and doing so in two arbitrations pending simultaneously. The fact of overlapping service does not change that in each context, payment is for services as arbitrator, and is not tied to the result of either arbitration. Nor are there present any of the types of biased relationships identified by the case law. Moreover, whatever motivations may exist to obtain future appointments do not change because of the existence of simultaneous assignments on unrelated matters.[16]

Other facts in the record noted by the Court were (1) the award in the Equitas arbitration made it into a public court file, and Mr. Schmidt "ultimately voted against Equitas, resulting in a large award to Equitas' adversary," and (2) Mr. Schmidt had also accepted party-arbitrator appointments on behalf of parties adverse to other NICO-reinsured parties whose claims were handled by a NICO affiliate.[17] The Court's ultimate conclusion: "Viewed in context, Schmidt's entire record could not lead a reasonable observer to believe Schmidt was a 'hired gun' for Equitas or NICO."[18]

The Court commented on the "motivation to obtain future work" argument.

[C]onsiderations of future work are not limited to simultaneous arbitrations. Even if it is assumed that Schmidt desired future umpire engagements from Equitas, NICO, or their counsel, a reputation of bias would prove counterproductive to that endeavor. See Amerisure Mut. Ins. Co. v. Everest Reins. Co., 109 F. Supp. 3d 969, 989 (E.D. Mich. 2015) ("The selection of a neutral umpire often requires the consent of both parties (as it did here), and thus a neutral who earns a reputation as favoring insurers over reinsurers (or, indeed, a reputation of playing it any way other than 'straight down the middle') would quickly find himself with less work, not more.").[19]

The Court closed the evident partiality subject by commenting on IRB's contention that Mr. Schmidt's simultaneous assignments violated certain ARIAS Canons: "[E]ven if applicable, the ARIAS ethical standards leave the recusal decision to the arbitrator's reasoned discretion, and Schmidt's consideration of the issue is not impeachable." Here, the Court termed IRB's resort to ethical standards "particularly ironic given the impressive array of less than ethical conduct by IRB and its former counsel in this case that have gone undisputed."[20]

Charges of 'evident partiality' or bias or ethical lapses are serious and should not be considered just another opportunity for posturing and gamesmanship.

The Court granted NICO's petition to confirm all three awards and denied IRB's cross-petition to vacate, entering judgment in favor of NICO.

IRB appealed. After this article was submitted for publication, the U.S. Court of Appeals for the Second Circuit issued a Summary Order affirming the District Court's judgment in favor of NICO "for the reasons stated by the District Court in its thorough and well-reasoned opinion."[21]

Lessons

The entire record is important. IRB was repeatedly hoist with its own petard. It was complaining about post-selection disclosures, but it had previously told the court that disclosures should be post-selection because that was the norm. It attacked NICO's counsel for not itself disclosing the Equitas appointment of Mr. Schmidt, but IRB's own counsel had engaged Mr. Schmidt as an expert between the questionnaire and appointment and had not disclosed that. Its charges of ethical violations lacked credibility in light of the appalling ghost-written dissent episode.

How coherent is the conflict of interest challenge? The disconnect between IRB's complaint about a single appointment involving Equitas (a NICO-reinsured) and the non-complaint about 25 assignments involving Gen Re (a true NICO affiliate) was obvious to the Court. Mr. Schmidt's party-arbitrator appointments by companies adverse to NICO-reinsured entities (the mirror-image of the Equitas appointment) also caught the Court's attention. If service in a party-appointed role renders an arbitrator partial toward the appointing party, does that mean service in the same role for an adverse party cancels that partiality out? At some stage, the court has to take into account the professionalism of arbitrators: they are paid to render services in a particular case, not to adopt a permanent, roving bias.

And what to make of this vague (but increasingly ubiquitous—see *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*[22]) charge that an arbitrator will act in certain ways to obtain future work? Couldn't that charge be leveled against everyone: arbitrators, umpires, and lawyers? Exactly how is that alleged motivation exacerbated by overlapping service? Isn't that motivation more likely to lead to competence and professionalism than bias and unethical behavior? The court in *NICO v. IRB* certainly saw it that way, and frankly courts have been seeing it that way for decades.[23]

Know the ARIAS rules. Courts will usually note that they do not govern, but they have proved persuasive. They can help a court sort through distinctions that might not be evident to someone inexperienced in reinsurance arbitrations. The ARIAS Practical Guide to Reinsurance Arbitration Procedure and the Code of Conduct Canons (and accompanying comments) are worth becoming proficient in for this reason. Also, as *NICO v. IRB* illustrates, there can be room for debate concerning exactly what the Canons require.

Do not assume overlapping service is an automatic disqualifier. That has not been the result in court. In *Ario v. Cologne Reinsurance (Barbados) Ltd.*[24], the losing party in an arbitration claimed evident partiality because (a) the umpire took on another umpire assignment in a second case where one of the party-appointed arbitrators in the first case was also a party-appointed arbitrator in the second case (though the parties were different in the two cases), and (b) the party-appointed arbitrator for the losing party took on an umpire assignment in a case involving an affiliate of one of the parties in the first arbitration. The court rejected the challenges:

We also conclude that there is no evident partiality from an arbitrator's accepting a position as an umpire in another, unrelated arbitration while the current arbitration is still ongoing, even if that position was partially obtained by the action of a party-appointed arbitrator, or is a position in an arbitration where one of the parties is an affiliate of a party to the current arbitration. Reinsurance is a field sufficiently specialized that those with expertise can be expected to serve on multiple arbitration panels.[25]

This was the same observation the court made in *NICO v. IRB*. And the same one the Second Circuit made in *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*, a case involving overlapping service by an umpire and a party-appointed arbitrator in what were arguably related cases.[26] In fact, in *Andros Companhia Maritima, S.A. v. Marc Rich & Co.*[27], the Second Circuit confirmed an arbitration award even though the umpire had failed to disclose that he had served on 19 prior arbitration panels with the president of a company involved in the arbitration at issue, and in 12 of those 19 cases, the president had been one of the arbitrators who had selected him as the umpire. The court found no evident partiality because the relationship was a professional one, growing out of their service as arbitrators. The court in *NICO v. IRB* cited favorably to this case.

Updated disclosures. If there has been a significant time lapse between receipt of an umpire questionnaire and the actual umpire selection (whether

by draw, ranking, or court appointment), the attorneys should ask the umpire candidates to update their disclosures. Don't blame the umpire candidate who returns a questionnaire and hears nothing for months or years for not thinking about that questionnaire he filled out a long time ago. It's your case, not the umpire candidate's.

A suggestion. Litigators are prone to forum shopping, and some aspects of forum shopping are perfectly legitimate. Deciding whether to file a complaint in state or federal court comes to mind. When it comes to tri-partite arbitration, some parties and counsel treat umpire selection as an opportunity for forum shopping. And there are legitimate and illegitimate aspects here, too. Certainly, parties should carefully consider umpire nominees, and they should expect adequate disclosures of contacts with counsel, the parties, and the other arbitrators. But charges of "evident partiality" or bias or ethical lapses are serious and should not be considered just another opportunity for posturing and gamesmanship. They impact real people who have built their reputations over the course of a career. This is not to say that misconduct never occurs or that parties should forego their legal remedies under the Federal Arbitration Act when they encounter it. But charges of bias, partiality, and ruling based on financial considerations and not the evidence should not be made lightly. That should be the lasting lesson of *NICO v. IRB*. •

ENDNOTES

1. 164 F. Supp. 3d 457 (S.D.N.Y. 2016).
2. See, e.g., *National Indem. Co. v. IRB Brasil Resseguros, S.A.*, No. 11 Civ. 1965 (NRB), 2011 U.S. Dist. LEXIS 136640 (S.D.N.Y. Nov. 29, 2011).
3. *Id.* at * 20.
4. The facts respecting the arbitration record are set forth in the District Court's decision on the motions to confirm and vacate (164 F. Supp. 3d 457 (S.D.N.Y. 2016)), as well as in the submissions to the District Court, which are unsealed and available on PACER.
5. The parties and the Panel had agreed that ex parte contact between counsel and the respective party-appointed arbitrators would end with the submission of the pre-hearing briefs.
6. 9 U.S.C. § 10 (a)(2).
7. 164 F. Supp. 3d at 475.
8. *Id.* at 477.
9. *Id.*
10. *Id.*
11. *Id.* at 478.
12. *Id.*
13. *Id.* at 479-480.
14. 668 F.3d 60, 74 n.20 (2d Cir. 2012).
15. *Id.* at 481 n.27.
16. *Id.* at 482.
17. *Id.* at 482-483.
18. *Id.* at 483.
19. *Id.* at 483.
20. *Id.* at 484.
21. *National Indemnity Co. v. IRB Brasil Resseguris, S.A.*, No. 16-1267 (2d Cir. Jan. 31, 2017).
22. 109 F. Supp. 3d 969, 987 (E.D. Mich. 2015).
23. See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673. 681 (7th Cir. 1983).
24. No. 1:CV-98-0678, 2009 U.S. Dist. LEXIS 106133 (M.D. Pa. Nov. 13, 2009).
25. *Id.* at * 31.
26. 668 F.3d 60, 74 n.20 (2d Cir. 2012).
27. 579 F.2d 691, 700 (2d Cir. 1978).

Service of Suit Clauses: Do They Also Dictate the Applicable Law in Reinsurance Disputes?

What effect (if any) do SOS clauses have on the law governing contracts?

By Pieter Van Tol

As insurance and reinsurance professionals, we frequently run across contracts with "Service of Suit" (SOS) clauses stating that, in the event of a failure to pay amounts claimed under the policy, the insurer/reinsurer submits to the jurisdiction of any U.S. court of competent jurisdiction. These provisions have been the subject of litigation involving several important issues, such as whether SOS clauses preclude removal of a case from state court, constitute mandatory choices of forum or affect arbitral rights.[1] One contentious and often overlooked question is what effect—if any—SOS clauses have on the law governing contracts.

Many courts have adopted the view that SOS clauses do not include choice-of-law provisions. However, a few decisions from federal district courts sitting in New York (among others) are to the contrary and they have held that bringing an action in New York under an SOS clause results in the application of New York substantive law. This minority approach has major implications for companies and their advisors because claimants often resort to the New York courts as their forum of choice, especially for contracts involving foreign insurers or reinsurers.

Background on SOS Clauses

SOS clauses have been around since at least the 1940s.[2] The London market developed the provision as a response to "competitors' arguments that Lloyd's [of London] was not amenable to process in the United States and that

potential customers thus should place their business with a domestic company."[3] There are also various regulatory reasons for including SOS clauses in contracts. For example, state laws and regulations provide that ceding insurers cannot take credit on their financial statements for reinsurance issued by unlicensed or unauthorized reinsurers unless (among other things) the reinsurers consent to service of suit.[4]

In one of its earlier iterations, the typical SOS clause states as follows:

It is agreed that in the event of the failure of [the insurer/reinsurer] hereon to pay any amount claimed to be due hereunder, [the insurer/reinsurer] hereon, at the request of the [insured/reinsured], will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.[5]

The underlined portion of the above SOS clause has given rise to the choice-of-law debate. As discussed below, the courts and commentators disagree about whether the reference to the "law and practice of such Court" mandates the use of a particular state's substantive law.

In order to address questions under the old SOS clauses concerning removal or transfer, the London market developed the NMA 1998 form.[6] The NMA 1998 form states as follows:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.[7]

The NMA 1998 form omits the phrase from the earlier clause stating that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court." However, the NMA 1998 form does not resolve the choice-of-law issues under contracts with the older clause and, in recent years, the courts have continued to face those questions.

Majority Approach on Choice of Law in SOS Clauses

The majority of courts have held that SOS clauses are not choice-of-law provisions and do not dictate the substantive law applicable to the contract.[8] Collectively, these courts have relied on three main arguments in reaching their conclusion.

First, they point out the overarching purpose of SOS clauses, noting that the provisions are designed to provide the insurer's or reinsurer's consent to the chosen forum. The *Allianz Insurance* court stated that: "The plain language of the clause shows a consent to jurisdiction of any court of plaintiff's choice; it does not address the law to be applied."[9] Both the *Singer* and *Chesapeake* courts stated that the parties would have more clearly provided for a choice of law in the SOS clauses (or elsewhere in the agreements) if they had intended to select a particular law.[10]

Second, in response to the argument that SOS clauses do in fact reflect a choice of the forum law as the substantive law governing the contract because they state that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court," the courts have focused on the precise language in that phrase. In *Singer*, the court stated that the phrase "the law and practice of such Court" refers only to the *choice-of-law principles* of the forum court and thus it means that the forum court will apply those principles to determine the substantive law applicable to the contract.[11] The *Chesapeake* court expanded on this argument: "The clause alludes to the 'law and practice of such *Court*.' It does not say 'such *state*' or 'such *forum*.' The law and practice of this Court, in diversity cases, is to apply the law (*including the choice of law rules*) of the forum state."[12] Therefore, in *Chesapeake*, the court did not apply the substantive law of Delaware because the suit had been brought there; instead, it applied the Delaware choice-of-law principles and held that the applicable law depended on the location of the insured risk, here the pollution site involved.[13]

The majority of courts have held that SOS clauses are not choice-of-law provisions and do not dictate the substantive law applicable to the contract.

The courts in New York, along with a few courts in other jurisdictions, interpret SOS clauses differently.

The *Chesapeake* decision has been very influential, and other courts have likewise construed the reference to the "law and practice of such Court" to mean the choice-of-law principles, not the substantive law, of the forum. In *Carrier*, for example, the court stated: "The court treats the expression 'such court' as meaning this court for the purposes of this analysis. This court does not have any substantive law. The state of Connecticut has substantive law. All this court may do is apply the law of this state to the choice of law question."[14]

Third, the courts have supported their findings with public policy considerations. The primary concern is forum-shopping. As the Supreme Judicial Court of Massachusetts stated in *W.R. Grace*, the application of the forum's substantive law would mean that "an insured seeking a declaration of its rights to indemnity and defense could select any United States jurisdiction in which service could be obtained on the insurer and compel it to decide the case [under the forum's law], even though the insured, the risk covered, the injured underlying claimant, the alleged wrongful act and resulting harm, and all witnesses had no connection whatsoever with the selected jurisdiction."[15] The *James River* court added that relying on the forum's choice-of-law principles—rather than applying the substantive law of the forum under the SOS clause—"promotes clarity and certainty in contracting" because Florida (like many other states) follows the *lex loci contractus* rule that focuses on where the contract was negotiated and concluded.[16]

New York Courts Choose a Different Path

The courts in New York, along with a few courts in other jurisdictions, interpret SOS clauses differently. In two cases (both of which are federal cases from the Southern District of New York), the courts held that SOS clauses include choice-of-law provisions mandating that the substantive law of the forum will apply to the contract.[17] Neither decision contains an extensive analysis on the choice-of-law issue. In *Lexington*, the court cited the language in the SOS clause stating that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" and described it as a "valid choice of law provision" making New York law applicable.[18] In the other case, *Core-Mark*, the court relied on the same language and the Lexington decision.[19]

Other courts have reached the same result as in *Core-Mark* and *Lexington*.[20] In *Century Indemnity* (which is a reinsurance case), the Third Circuit raised the choice-of-law issue *sua sponte*. After noting that both parties cited Pennsylvania state court cases (without explicitly arguing that Pennsylvania law applied), the court noted that "the retrocessional agreements' service-of-suit clause contains a choice-of-law provision stating that 'all matters arising [from disputes brought pursuant to the service-of-suit clause] shall be determined in accordance with the law and practice of [the] Court' where the action is brought."[21] The Third Circuit then stated: "This provision suggests that to the extent that federal law does not control this action, we should resolve this dispute over payments under the retrocessional agreements in accordance with the substantive law of Pennsylvania, the state in which Century filed suit."[22]

As in *Core-Mark*, *Lexington*, and *Century Indemnity*, the other cases following the minority approach do not engage in a detailed discussion of the choice-of-law issues. However, in two of those cases (*Fossil Creek* and ISLIC), the courts found that the language in the SOS clauses is clear. The *Fossil Creek* court cited the phrase "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" and concluded:

Cook's argues that pursuant to this language in the insurance contract, "Admiral has agreed for this matter to be determined in accordance with the laws of and practice of Oklahoma." Giving effect to this language according to its ordinary and popular meaning, we agree. We find that these words clearly and definitely express the parties' intent to have this case determined in accordance with the law of any court of competent jurisdiction including the District Court of Cimarron County, Oklahoma, chosen by Cook's. Therefore, pursuant to the agreement of the parties, we find that Oklahoma law governs this dispute.[23]

In *ISLIC*, the court construed a similar SOS clause and found that "[i]t is clear from this section that ISLIC anticipated suits in courts of States other than Illinois, and that ISLIC agreed that all matters relative to the disputes concerning the policy were to be interpreted within the law and practice of the courts of those States."[24]

There are also several unpublished

(and not readily available) decisions to the same effect that the California and Washington courts issued in the late 1980s and early 1990s. These decisions are discussed in the well-known *Insurance Coverage Litigation* treatise.[25] The treatise refers to those cases (along with *Lexington* and others) as the "better-reasoned decisions" because the courts considered evidence on the drafting history of SOS clauses and the intent of the London market in adding the reference to the "law and practice of such Court." [26]

The extrinsic evidence cited by the *Insurance Coverage Litigation* treatise includes, among other things: (1) a 1944 circular from the NMA to the London market noting that the amendment to the SOS clause adding the phrase "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" was necessary because the previous version of the SOS clause did not state that the underwriters were prepared to be governed by "American law"; (2) a 1944 letter from Lloyd's U.S. counsel similarly noting that the new clause specifically provides for "the application of American law"; (3) a 1971 letter from the NMA explaining that the SOS clause enables insureds in the U.S. "to pursue their remedies against Underwriters in a local court under local law"; and (4) expert testimony from Julian M. Flaux (then a QC and now a judge on the High Court of England and Wales) in which he stated that the SOS clause allows the policyholder to choose the substantive law of the forum.[27] In general, the treatise is an excellent source for those who wish to argue that the intent of the parties supports the minority approach on choice-of-law under an SOS clause.

As a note of caution, however, a few courts have not been persuaded by extrinsic evidence regarding the SOS clauses and choice-of-law.[28] In *Hoechst*, the court considered expert evidence from Michael Jackson, the 1944 NMA circular and letter from Lloyd's counsel noted above, and the 1971 letter from the NMA. With regard to the 1944 materials, the *Hoechst* court found that their reference to "American law" includes "American choice of law principles" and "the drafters' intent that American law apply would still be upheld even in a situation where a state's application of choice of law principles leads to an application of British law."[29] The *Hoechst* court also rejected the reliance on the 1971 NMA letter referring to "local law." One of the parties in *Hoechst* argued that the letter supports the proposition that SOS clauses are choice-of-law provisions because, pursuant to the RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. h, "the reference to local law is a term of art which means substantive law of a jurisdiction, not its conflict-of-laws principles." The court stated, however, that Section 187 only applies where the parties have agreed at the time of contracting which state's law will apply; "[s]uch a situation is not presented here where the insurance contracts at issue were void of any indication of the state in which litigation would be pursued."[30] Thus, *Hoechst* and other cases demonstrate that the citation to extrinsic evidence is not a guarantee of success.[31]

Other commentators have offered a rebuttal to the majority view that is based on the plain language of the SOS clauses as opposed to extrinsic evidence regarding intent. In a 1994 article, for example, the authors criticized the holdings in *Chesapeake* and similar cases that the "law and practice" portion of the SOS clause is a reference to the forum's choice-of-law principles, but not its substantive law.[32] They noted that "[a] construction of the language as excluding the application of the *substantive* law of the forum would render that language surplusage since the court always will apply its own procedural law and choice-of-law principles to all actions before it."[33] The authors further pointed out that "the provision plainly states that 'all matters' arising under the contract will be governed by the forum court's law."[34]

Why Does It Matter and What Is Next?

New York is often a forum for insurance and reinsurance disputes, and the presence of an older SOS clause in the contract(s) may provide an opportunity for a party to urge the arbitrators or

Given the less restrictive nature of evidence in arbitration, panels may be more amenable to considering extrinsic evidence—particularly from new sources with knowledge of the history or market practice—regarding the interpretation of SOS clauses.

court to apply the substantive law of the forum. As noted above, there are several arguments for and against the interpretation of such SOS clauses as choice-of-law provisions. It appears, however, that the case law is still developing and counsel should keep an eye out for new cases on this issue, especially any decision from the Second Circuit or the New York Court of Appeals. In addition, given the less restrictive nature of evidence in arbitration, panels may be more amenable to considering extrinsic evidence—particularly from new sources with knowledge of the history or market practice—regarding the interpretation of SOS clauses. •

ENDNOTES

1. In a 1997 case, the court listed the issues that had arisen in connection with SOS clauses. *Allendale Mutual Insurance Co. v. Excess Insurance Co.*, 970 F. Supp. 265, 273-74 (S.D.N.Y. 1997) (citing cases), vacated on other grounds, 172 F.3d 37 (2d Cir. 1999). The controversy over SOS clauses has persisted, and parties are still debating the effects of such a provision on a variety of legal issues. *See, e.g., Pine Top Receivables of Illinois, LLC. v. Transfercom, Ltd.*, No. 15-CV-8908, 2015 WL 8780611 (N.D. Ill. Dec. 14, 2015) (determining whether an SOS clause is a waiver of the right to remove).
2. *See Travelers Insurance Co. v. Keeling*, 91 CIV. 7753 (JFK), 1993 WL 18909, at *1 (S.D.N.Y. Jan. 19, 1993) (noting that casualty excess reinsurance treaties dating back to 1947 contained SOS clauses); *General Phoenix Corp. v. Malyon*, 88 F. Supp. 502, 502 (S.D.N.Y. 1949) (construing SOS clause). *See generally* L. Masters, J. Stanzler & E. Anderson, INSURANCE COVERAGE LITIG., § 6.03[B][1] at 6-27 (2d ed. 2013 Supp.) (describing pre-1944 SOS clauses).
3. *Chubb Custom Insurance Co. v. Prudential Insurance Co. of America*, 948 A.2d 1285, 1290 (N.J. 2008); see also *Columbia Cas. Co. v. Bristol-Myers Squibb Co.*, 635 N.Y.S.2d 173, 176 (N.Y. App. Div. 1995); *Appalachian Insurance Co. v. Union Carbide Corp.*, 208 Cal.Rptr. 627, 629 (Cal. Ct. App. 1984).
4. *See, e.g.*, R. Hall, Does a Service of Suit Clause in a Reinsurance Contract Bar Removal of a Dispute to Federal Court?, available at: http://www.robertmhall.com/articles/ServiceSuitRemovalArt.pdf.
5. *See, e.g., Dinallo v. Dunav Insurance Co.*, 672 F. Supp. 2d 368, 370 (S.D.N.Y. 2009) (SOS clause in reinsurance context) (emphasis added); L. Masters, *et al.*, INSURANCE COVERAGE LITIG., § 6.03[B] at 6-25 (SOS clause in excess insurance context). The phrase "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" was added to the SOS clause in 1944. *See Hoechst Celanese Corp. v. Nat'l Union Fire Insurance Corp. of Pittsburgh, Pa.*, Civ. A. No. 89C-SE-35, 1994 WL 721651, at *2 (Del. Super. Ct., Mar. 28, 1994). *See generally* L. Masters, *et al.*, INSURANCE COVERAGE LITIG., § 6.03[B][1] at 6-27 to 6-28.
6. See Lloyd's Market Bulletin, June 7, 2004, Y3327, available at: http://www.lloyds.com/~/media/files/the%20market/communications/market%20bulletins/market%20bulletins%20pre%2005%202010/2004/y3327.pdf. "NMA" refers to the "Non-Marine Association."
7. *See* https://ebview.com/pdfgenerator/ViewPdf/EPLI/SERVICEOFSUITCLAUSE.pdf. NMA 1998 was also cited in *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 284-85 (3d Cir. 2010).
8. *See James River Insurance Co. v. Fortress Sys., LLC*, No. 11-60558-CIV., 2012 WL 760773, at *3-6 (S.D. Fla. Mar. 8, 2012); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 780 F. Supp. 2d 514, 523 (E.D. La. 2011); *Weitz Co., LLC v. Lloyd's of London*, Civil No. 4:04-CV-90353-TJS, 2008 WL 7796651, at *5-6 (S.D. Iowa, Mar. 31, 2008), *rev'd on other grounds*, 574 F.3d 885 (8th Cir. 2009); *Norfolk Southern Corp. v. California Union Insurance Co.*, 859 So. 2d 167, 182-83 (La. Ct. App. 2003); *Allianz Insurance Co. v. SSR Realty Advisors, Inc.*, No. CIV.A. 02-7253, 2003 WL 21321430, at *6 (E.D. Pa. June 5, 2003); *Burlington Northern Railroad Co. v. Allianz Underwriters Insurance Co.*, Civ. A. No. 90C-07-108, 1994 WL 637011, at *2-4 (Del. Super. Ct. Aug. 25, 1994); *Carrier Corp. v. Home Insurance Co.*, 648 A.2d 665, 668 (Conn. Super. Ct. 1994); *Hoechst*, 1994 WL 721651, at *1-3; *Revco Drug Stores, Inc. v. Government Employees Insurance Co.*, 791 F. Supp. 1254, 1262 (N.D. Ohio 1991), aff'd, 984 F.2d 154 (6th Cir. 1992) (per curiam); *W.R. Grace & Co. v. Hartford Accident & Indemnity Co.*, 555 N.E.2d 214, 218-19 (Mass. 1994); *Monsanto Co. v. Aetna Casualty & Surety Co.*, 1990 WL 9496, at *3-4 (Del. Super. Ct. Jan. 19, 1990); *Chesapeake Utilities Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 557-58 (D. Del. 1989); *Singer v. Lexington Insurance Co.*, 658 F. Supp. 341, 344 (N.D. Tex. 1986); *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F. Supp. 138, 148 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982).
9. 2003 WL 21321430, at *6 (citing *Singer*, 658 F. Supp. at 344); see also *James River*, 2012 WL 760773, at *4; *Chesapeake*, 704 F. Supp. at 557.
10. *Chesapeake*, 704 F. Supp. at 557; *Singer*, 658 F. Supp. at 344.
11. *Singer*, 658 F. Supp. at 344.
12. *Chesapeake*, 704 F. Supp. at 557 (emphasis in original).
13. *Id.* at 557-58.
14. 648 A.2d at 668; *see also* James River, 2012 WL 760773, at *4 ("Nothing in the Service of Suit provision directs the application of the 'law of this *State*'; the provision merely specifies the 'law and practice of such *Court*.'") (emphasis in original).
15. 555 N.E.2d at 582 n.14; *see also James River*, 2012 WL 760773, at *5; *Norfolk*, 859 So. 2d at 182; *Burlington*, 1994 WL 637011, at *4.
16. 2012 WL 760773, at *6.
17. *Core-Mark International Corp. v. Commonwealth Insurance Co.*, No. 05 Civ. 183 (WHP), 2005 WL 1676704, at *3 (S.D.N.Y. July 19, 2005); *Lexington Insurance Co. v. Unionamerica Insurance Co.*, No. 85 Civ. 9181 (MJL), 1987 WL 11684, at *4 (S.D.N.Y. May 28, 1987).
18. 1987 WL 11684, at *4. The *Lexington* court cited two cases, *General Phoenix* and *Perini Corp. v. Orion Insurance Co.*, 331 F. Supp. 453 (E.D. Cal. 1971), but those decisions involved removal and did not discuss whether SOS clauses are also choice-of-law provisions.
19. 2005 WL 1676704, at *3.
20. See *Fossil Creek Energy Corp. v. Cook's Oilfield Servs.*, 242 P.3d 537, 542 (Okla. 2010); *Century Indemnity Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 533 (3d Cir. 2009); *TH Agriculture & Nutrition, LLC v. ACE European Group Ltd.*, 488 F.3d 1282, 1293-94 (10th Cir. 2007); *International Surplus Lines Insurance Co. v. Pioneer Life Insurance Co. of Ill.*, 568 N.E.2d 9, 12 (Ill. Ct. App. 1991) ("*ISLIC*"); *Capital Bank & Trust Co. v. Associated International Insurance Co.*, 576 F. Supp. 1522, 1525 (M.D. La. 1984). As noted in *James River*, *TH Agriculture* presents an unusual situation because, in that case, the SOS clause explicitly provided the application of the law of The Netherlands as opposed to just the "law and practice of such Court." *James River*, 2012 WL 760773, n.2. *Capital Bank* is also problematic because the court, in dicta, seems to have misconstrued two other cases (*General Phoenix* and *Perini*) as relating to the choice-of-law issue when it fact they dealt with removal. Norfolk, 859 So. 2d at 183.
21. 584 F.3d at 533 (alterations in original).
22. *Id.*
23. 242 P.3d at 542 (internal citations omitted). *Fossil Creek* also cited *TH Agriculture*, but its holding is based on the language in the SOS clause.
24. 568 N.E.2d at 12 (emphasis in original). In dicta, the *Chubb* court also stated that the SOS clause "essentially guarantees the application of United States law." 948 A.2d at 1291.
25. *See* L. Masters, *et al.*, INSURANCE COVERAGE LITIG., § 6.03[B] at 6-25, 6-32 to 6-34. Some of the California decisions are also discussed in another treatise, J. Oshinsky & T. Howard, PRACTITIONER'S GUIDE TO LITIGATING INSURANCE COVERAGE ACTIONS.
26. *See* L. Masters, *et al.*, INSURANCE COVERAGE LITIG., § 6.03[B] at 6-25 to 6-26.
27. *See id.*, § 6.03[B][1] at 6-27 to 6-30, 6-33.
28. See *Hoechst*, 1994 WL 721651, at *2; *Burlington Northern*, 1994 WL 637011, at *3-4; *Edinburgh*, 479 F. Supp. at 148.
29. 1994 WL 721651, at *2 (emphasis in original).
30. *Id*. The *Burlington Northern* decision (which came after *Hoechst*) took a different approach on the "local law" issue. The court stated that "had the parties intended to apply the local law of the forum state chosen by the insured, the parties would have said 'local law,' not 'law,' in the SOS clause." 1994 WL 637011, at *4. In other words, the *Burlington Northern* court believed that the parties would have not left such an issue to implication and would have expressly referred to "local law" in the SOS clause itself.
31. Another issue is that extrinsic evidence often involves expert testimony, which can be expensive, time-consuming and contradictory. *Compare* Expert Report of Robert N. Hughes in *Newmont U.S.A. Ltd v. American Home Assurance Co.*, No. CV-09-033-JLQ (E.D. Wash. July 2, 2010), 2010 WL 4392835 (stating that SOS clauses "serve a dual purpose" in that they allow for the selection of a forum and "also provide that the law of that court shall apply") *with* Expert Report and Opinion of John Holford in *Teck Metals Ltd. v. Certain Underwriters at Lloyd's*, No. CV-05-0411-LRS (E.D. Wash. Sept. 7, 2010), 2010 WL 8981708, ¶ 35(2) (stating that ("[t]he Service of Suit Clause is not a Choice of Law Clause").
32. P. Kalis, J. Segerdahl, and J. Waldron, The Choice-of-Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Institute Complex Litigation Project?, 54 *Louisiana Law Review* 925, 927 n.6 (1994).
33. *Id*. (emphasis in original).
34. *Id.*

2016 Brings Another Unsuccessful Attempt to Appeal An English Reinsurance Award

A decision in a dispute between two Lloyd's underwriters reaffirmed the court's reluctance to interfere in arbitrations.

By Jonathan Sacher and David Parker

Despite the English Arbitration Act's right of appeal on a point of law, such an appeal is virtually never successful in reinsurance cases. The courts are clearly determined to maintain the sanctity of the Arbitration Tribunals' awards, even if an award is, apparently, quite flawed in law.

The recent dismissal of a reinsurer's appeal against an arbitration award (claims for industrial disease following the attacks on the World Trade Center in September 2001 and disputed aggregation) underlines the English court's determination to uphold English awards and the extreme difficulty a potential appellant faces in reopening an award or having it set aside on a point of law.

In arbitrations with a seat in England, unless otherwise agreed, a losing party has a right to appeal to the English court arguing that the arbitration tribunal has made an error of law. Despite the right to appeal (which is not common in other jurisdictions), the English courts have always tended to take the view that if arbitration awards are easily challenged/appealed, there is a danger that the whole arbitration process becomes little more than a costly and time-consuming preliminary stage in resolution of a dispute in the courts.

The decision in a dispute between two Lloyd's underwriters on business in run off (*Simmonds v. AJ Gammell*[1]), following a hearing before the Court on 10 October 2016, once again, reaffirms the court's reluctance to interfere in arbitrations. There remains only a single reinsurance arbitration award which the English court has overturned in twenty years since the English Arbitration Act came into force (and only a handful of reinsurance awards that have secured leave to appeal).

The Reinsurance Dispute

The dispute in *Simmons v. Gammell* concerned whether a reinsured Lloyd's

English courts have always tended to take the view that if arbitration awards are easily challenged/ appealed, there is a danger that the whole arbitration process becomes little more than a costly and time-consuming preliminary stage in resolution of a dispute in the courts.

syndicate could recover an aggregated single loss from its reinsurers under an excess of loss reinsurance contract governed by English law.

Claims (the "Respiratory Claims") were made on the Port Authority of New York (PONY) for respiratory diseases/illnesses contracted by individuals engaged in the clean-up operations that followed the terrorist attacks on the World Trade Center on 11 September 2001. Thousands of individuals (including first responders) were employed to assist in the clean-up operation over the months that followed the attacks. Many of those later said they had suffered respiratory disease as a result of PONY's allegedly negligent failure to properly equip them during the clean-up operation.

PONY's insurers settled the Respiratory Claims in 2010 and claimed an indemnity from their reinsurers.

The question that the English arbitration tribunal (three non-lawyer arbitrators with vast London market experience were appointed) had to consider was whether the Respiratory Claims could be aggregated together under the terms of the reinsurance contract to form a single "loss" on the basis that they "arose from an event" (i.e., the reinsurance contract only permitted aggregation of multiple losses "arising from an event"). If not, the Respiratory Claims would not be recoverable from reinsurers as none of the claims was large enough to breach the excess on its own.

The Award

Following an arbitration hearing in late 2015, the arbitration tribunal (by majority) found in favor of the reinsured, determining that the Respiratory Claims arose from one event, namely the attacks on the World Trade Center on 9 September 2011.

There is considerable judicial authority/ guidance on how to assess whether multiple losses arise from an event. The reinsurer had argued, on a proper application of the relevant English law, that—

> (a) the Respiratory Claims arose as a result of a continuing state of affairs[2] that followed the WTC terrorist attacks, namely the clean-up operation, which lasted for the many months and years that followed 9/11; and
>
> (b) the attacks of 11 September 2001 did not have any causative effect on the Respiratory Claims (let alone being a significant cause[3] of those claims); the Respiratory Claims arose as a result of exposure to hazardous materials over an extended period of time and at different locations resulting from the ongoing and repeated failure by PONY to supply each Respiratory Claimant with adequate safety equipment. Had there been no alleged negligence on PONY's part, there would have been no Respiratory Claims in the aftermath of 9/11.

The reinsurer applied to the English court for leave to appeal the majority award on the grounds of an error of law.

Leave to Appeal

A party has to overcome a number of hurdles just to secure permission to appeal on a point of law.[4] Most applications for leave are refused.

An English court will only grant leave if the statutory criteria are satisfied, namely: (1) the determination of the question will substantially affect the rights of one or more of the parties, (2) the question is one which the tribunal was asked to determine, (3) on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (4) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The Court granted the reinsurer leave to appeal in March 2016 considering that the award was open to serious doubt and was of general interest to the reinsurance market.

Reinsurer's Appeal Dismissed

The issue on appeal to the English Court was whether the attacks on the World Trade Center on 9/11 were, properly, an "event" from which the Respiratory Claims arose. Principally, the focus was on whether the terrorist attacks caused the Respiratory Claims or, at least, were significantly causative. If not, the Respiratory Claims could not be aggregated under English law.

The Court considered the test for assessing the position taken by a tribunal.[5] It concluded that the majority arbitrators had considered the correct test/guidelines when addressing the question they were asked and, on that basis, there could be no error of law:

In my judgment it is clear that the Arbitrators fully understood the test that they had to apply in deciding on the question of aggregation in relation to the wording at issue, namely "loss, damage, liability or expense or a series thereof arising from one event". It is clear … that they considered what guidance could be obtained from the cases to which they had been referred and the different factual circumstances in each, which, in their view, made it impossible to draw clear parallels with the matter with which they were concerned. They stated that they were influenced by their commercial experience and by common sense… The determination of the strength of the causal link fell into the category of assessment/decision making that arbitrators, exercising their judgment, are required to make and involves no error of law where the correct test is applied.

As the decision on this question was not "purely mechanical"[6] and involved the arbitrators assessing the facts (as they determined them) as against the law, and reaching a decision, the award could not be appealed successfully. Ultimately, only if it could have been shown that no reasonable tribunal could have reached the decision the arbitrators did, would an appeal have been possible and issues of fact cannot be appealed.

BLP Comment

Some may see the dismissal of the reinsurer's appeal in *Simmons v. Gammell* as confirmation that the English court's approach to appeals of arbitration awards is too skewed toward protecting the sanctity of arbitration rather than focusing on the proper application of the law. It certainly is a stark demonstration of how difficult it is to convince a court that no reasonable tribunal could have reached a particular decision in circumstances where the tribunal has considered the law/guidelines properly and the decision requires exercising some judgement/discretion. So even if applying a strict legal text the court would come to a different decision, the arbitrators' majority decision was not wrong in law as they perceived it properly considered.

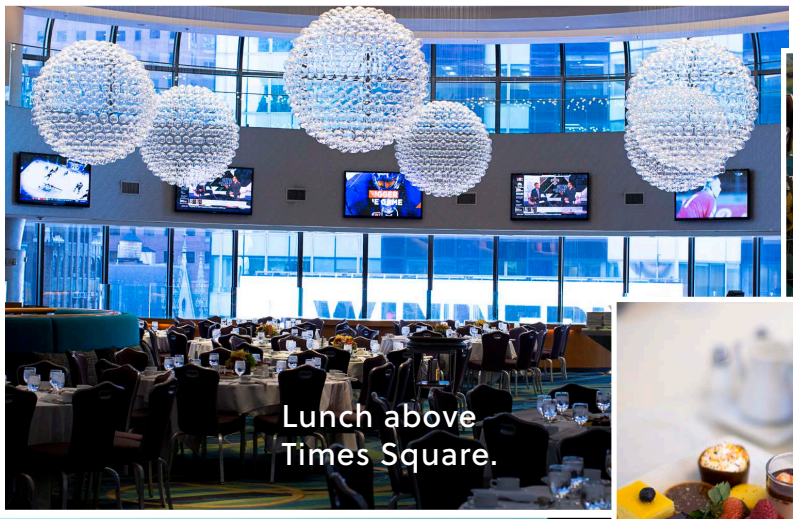
Some may lament what they see as another failure by the English Court to seize an opportunity to help develop the law and add to the jurisprudence on important and recurring issues. This might be particularly so for those involved in the reinsurance market where, traditionally, most disputes are resolved by way of arbitration and rarely come before a court. Indeed, the Lord Chief Justice of England and Wales recently suggested that, in order to support the rule of law in England, he would like to see English judges allow more jurisprudence to develop through appeals from arbitrations.[7]

This is, perhaps, even more pertinent in the insurance/reinsurance market with the recent fundamental changes to English law introduced by the Insurance Act 2015.[8] The terms of that statute sweep away provisions that are over a century old and change the duties on parties at the pre-contract stage (introducing a new obligation of "fair presentation") and also automatic remedies available to insurers/reinsurers (particularly avoidance). The reinsurance market would no doubt benefit from judicial guidance/comment on the new regime should the court have a chance to deliver any.

It is a little disappointing that the English Court did not grasp a chance to add to the law on aggregation as arising from one event under English reinsurance policies, an extremely common area of dispute in the reinsurance market. This is more frustrating given the court's earlier decision to grant the reinsurer leave to appeal was, in part, owing to the issue being of general importance to the reinsurance market as a whole. •

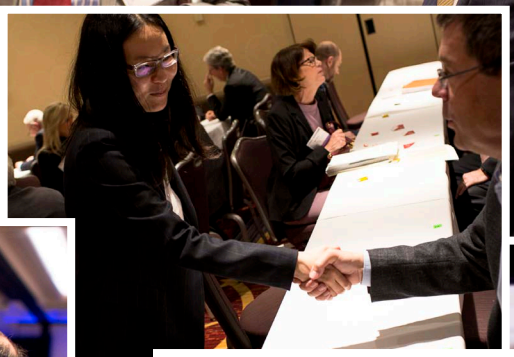
ENDNOTES

1. Mic Simmonds (on his own behalf and on behalf of all Members participating in *Lloyd's Syndicate* 994 for the 2001 year of account) *v. AJ Gammell* (on his own behalf and on behalf of all Members participating in *Lloyd's Syndicate* 102 for the 2001 year of account) [2016] EWHC 2515 (Comm).
2. *Axa v. Field* [1996] 1 WLR 1027: "... an event is something which happens at a particular time, at a particular place, in a particular way"; a state of affairs cannot be an event.
3. An "event" has to be significantly causative of the losses in question for those losses to have "arisen from" that event: *Scott v. Copenhagen Reinsurance Co UK Ltd* [2003] Lloyd's Law Rep 696.
4. In the absence of agreement of the parties to the arbitration award that the award be appealed, the court has to give permission to appeal.
5. *Vinava Shipping Co Ltd v. Finelvet AG* (The 'Chrysalis') [1983] 1 Lloyds Rep 503.
6. Mustill J (as he then was) in The 'Chrysalis' (ibid).
7. Lord Thomas lecture to the British and Irish Legal Information Institute (BAILII) in March 2016: "Developing Commercial Law through the courts: rebalancing the relationship between the courts and arbitration."
8. The Insurance Act 2015 came into force in England in August 2016.



Lunch above Times Square.

Meeting new associates and catching up with colleagues.



Sean Maloney, Julie Pollack, Marnie Hunt and Bryce Friedman discuss ways to improve arbitration through better wording in contracts.

Aimee Hoben, Dan Fitzmaurice, Thomas D. Cunningham, David Winters and Michael Menapace talk Data Security in Arbitration.

Andrew Gifford, Ann Field, and Michael Menapace.

Syed S. Ahmad, Andrew Maneval, Glenn A. Frankel and Royce Cohen share their thoughts from new discovery rules and how to employ them in arbitrations.

A quick break in between sessions to catch up and discuss!

Importing a Cyber-Arbitration System to the Reinsurance World

Could the cyber-arbitration regime used in Internet domain name custody disputes be applied to reinsurance?

By Robert A. Badgley, Esq.

We ARIAS types have been discussing for years how we might implement more efficient and cost-effective procedures for arbitrating comparatively small and straightforward reinsurance disputes. Some excellent ideas have been advanced in recent years, and perhaps we have exhausted all of the good ideas. Even so, I have been wondering for a year or two whether another arbitration regime in which I am deeply steeped might be capable of importation and translation into the reinsurance context.

I refer to the cyber-arbitration regime implemented in 1999 to deal with Internet domain name custody disputes. Over the past 15 years, I have decided nearly 200 domain name disputes[1], serving as a panelist for the World Intellectual Property Organization ("WIPO"[2]). Since 1999, upwards of 50,000 domain name disputes have been resolved (mostly by WIPO panels) via the Uniform Domain Name Dispute Resolution Policy (oddly but universally referred to as the "UDRP"[3]).

The UDRP, by almost all accounts, has been a tremendous success in terms of resolving quickly and cheaply cases of alleged cybersquatting—defined loosely as the act of registering and using a domain name that resembles someone else's trademark for improper purposes. The UDRP has kept American (and other) courts relatively free of a slew of disputes between trademark owners and domain name owners. Some domain name disputes are complex, and the complaints in many such cases often do not succeed for that reason. But

I offer this brief summary of the UDRP process to the ARIAS community to see if someone in our midst can tweak the model and make it an acceptable arbitration mechanism for certain types of reinsurance disputes.

every year thousands of fairly simple disputes are resolved, from beginning to end, in less than three months. No one—parties, counsel, panelists—has to leave his or her desk throughout the UDRP proceeding. There is no discovery, no live witness testimony (via deposition or otherwise), no hearing, and no oral argument. The entire UDRP case takes place on a handful of computer screens.

I am not sure that the UDRP model could be successfully imported into the reinsurance world, and I am sure that many reinsurance disputes are simply too complex, or involve too much money, to lend themselves to a cyber-arbitration regime of the UDRP type. Even so, I offer this brief summary of the UDRP process to the ARIAS community to see if someone in our midst can tweak the model and make it an acceptable arbitration mechanism for certain types of reinsurance disputes.

Substance and Procedure of the UDRP

Substantively, the UDRP operates as follows. The complainant (alleged trademark owner) must satisfy three elements in order to secure a transfer of the disputed domain name from the respondent (domain name owner):

> (1) the Domain Name is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and
>
> (2) Respondent has no rights or legitimate interests in respect of the Domain Name; and
>
> (3) the Domain Name has been registered and is being used in bad faith.[4]

If a UDRP complainant succeeds in persuading the panel—who essentially applies a "balance of probabilities" standard of proof—that it has satisfied the foregoing three elements, the panel will order a transfer of the domain name to the complainant. This is the only remedy available to a UDRP panel.

The transfer of a domain name pursuant to a UDRP panel order occurs easily. It must be noted that the respondent agrees contractually, at the time he registers the domain name, to submit to the "jurisdiction" of the UDRP in the event a complaint was lodged by a purported trademark owner. The domain name is purchased by the respondent from one of the numerous ICANN[5]-accredited domain name registrars (e.g., GoDaddy). The registrars are required by ICANN to implement a transfer order by a UDRP panel within ten business days of the panel's order. The only way a registrar may decline to transfer the domain name is if the respondent files a lawsuit (and serves a copy on the registrar) during the ten-day window following the transfer order.[6] Thus, enforcement of the relief ordered in a UDRP case is quite efficient. Very few UDRP decisions result in subsequent court proceedings.

Procedurally, the UDRP operates essentially as follows (with some nuance omitted here). The complainant submits a complaint to an accredited UDRP dispute-resolution provider (e.g., WIPO). The complaint is submitted electronically, and any exhibits ("annexes") to the complaint are likewise submitted electronically.

Upon receipt of the complaint, WIPO confers with the registrar (the entity from whom the respondent purchased the domain name) regarding the ownership details surrounding the disputed domain name.[7] When the domain name registration details are in order, WIPO e-mails the complaint and annexes to the respondent. The respondent has 20 days to respond to the complaint, and the respondent may submit annexes to the response.

After the response is received, WIPO appoints a panel to decide the case. (The invited panelist must run a conflicts check.) The typical panel is comprised of a single panelist. Either party may request (for an additional fee) a three-member panel, and there are procedures whereby each party has some input into the selection of one of

From the filing of the complaint to the final decision and enforcement of the remedy, a UDRP case is usually done in less than three months.

the panelists, who is ultimately selected by WIPO. The presiding panelist is selected by WIPO with no input from the parties.

On occasion, the complainant will seek leave to submit a supplemental paper with additional argument and/or evidence, typically by way of rebutting something said in (or annexed to) the response which was not anticipated and which could not reasonably have been anticipated. The panel has complete discretion whether to accept such unsolicited supplemental submissions, and practical considerations usually guide the panel's decision in this context.

All communications are made through WIPO; the parties may not address the panel directly and the panel may not address the parties directly.

The panel has 14 days from its appointment to hand down a decision. (Extensions occur from time to time, particularly in cases where there are three panelists located in three countries.) The panel may, however, decide in its discretion to issue a procedural order to the parties, whereby the panel seeks additional information or documentation from one or both of the parties. In such cases, the panel often allows the other party to comment upon or otherwise respond to the new information provided.

There are no hearings, phone conferences, discovery disputes, or motion practice in a UDRP case. The panel renders its decision based entirely on the basis of the written submissions and documentary evidence submitted electronically. The panel may refer to court decisions and/or prior UDRP decisions (either suggested to the panel by the parties or derived from the panel's own knowledge and research) to support the decision.

The panel prepares a reasoned decision (unlimited in length, but usually 4-6 pages), discussing the factual background of the dispute, summarizing the parties' respective arguments, and setting forth the panel's reasoning on all three substantive elements of the UDRP. After some formatting, WIPO issues the decision to the parties, and the decision is subsequently published at WIPO's website (www.wipo.int).

The foregoing process, from the filing of the complaint to the issuance of the panel decision, usually takes about two months. In the event the panel orders the transfer of the domain name, an additional two weeks may be required for the registrar to implement the transfer. Hence, from the filing of the complaint to the final decision and enforcement of the remedy, a UDRP case is usually done in less than three months.

Importation of UDRP Model to Simple Reinsurance Disputes

As suggested above, some reinsurance disputes are simply too complex or involve too much money to lend themselves to an expedited resolution via a UDRP-style cyber-arbitration. Still, there are some relatively simple and small reinsurance disputes that could be arbitrated in a simple cyber-proceeding.

Among the advantages of a cyber-arbitration is the fact that the expense of the proceeding would be rather modest. One deterrent to taking small reinsurance disputes to arbitration is the reality that the expense of the arbitration (legal fees, arbitrator fees, travel costs, hearing expenses, etc.) can often approach or even surpass the amount of the disputed reinsurance claim.

Another advantage of a UDRP-style process is that the dispute can be resolved shortly after the initiation of the arbitration. Indeed, the UDRP model would appear to fulfill the spirit of many reinsurance arbitration clauses which contain the old, quaint provision that each side will submit its case to the panel within 30 days of the formation of the panel, or words to that effect.

I submit that a multi-prong test, similar to the UDRP's three-element test, could be adopted in order to delineate the reinsurance arbitration panel's task. One suggestion is as follows:

The Panel shall address and decide the following questions:

> (1) Is the Cedent's underlying claim settlement reasonable or within the "follow-the-settlements" deference afforded by the Reinsurance Contract?
>
> (2) Is the Cedent's presentation of the Reinsurance Claim consistent with the underlying settlement rationale or otherwise proper?

(3) Is the Cedent's Reinsurance Claim within the scope of the business covered and the coverage grant of the Reinsurance Contract.

(4) Are there no other bases (such as, without limitation, Reinsurance Contract exclusions, breaches of Reinsurance Contract terms and conditions, legal or equitable defenses) to deny or reduce the Reinsurance Claim?

(5) Is the Cedent entitled to simple interest (not to exceed 5% per annum), and in what amount?

(6) Is either Party entitled to have its costs for this Arbitration (limited to the Arbitrator's fee) reimbursed by the other Party?

I have framed the issues in this manner in order to capture the essence of most simple reinsurance coverage disputes. I have deliberately excluded from the panel's consideration issues of a cedent or reinsurer taking inconsistent positions from one claim to the next, and issues of cedent or reinsurer bad faith. These issues may be a legitimate component of a particular reinsurance dispute, but they often complicate a simple dispute beyond recognition and invite expansive document and witness discovery. As such, they do not lend themselves to resolution under a cyber-arbitration process à la UDRP.

Assuming the foregoing substantive elements are a suitable model for a good number of simple reinsurance disputes, there remain numerous procedural hurdles to address. Some of these issues are set forth below.

First, how do the parties even agree to a UDRP-style format? As noted above, domain name owners have no choice but to submit to the UDRP, since they click their agreement to the UDRP's "jurisdiction" at the time they register their domain name.[8] Absent the incorporation of a "reinsurance UDRP" (we may provisionally call it the "RIDRP") into a reinsurance contract, perhaps as part of a larger arbitration clause, parties would have to agree to the RIDRP as and when a dispute emerges.

Second, what kind of time limitations and page limitations should be imposed? The RIDRP might need slightly longer deadlines, and slightly larger page limitations, than the UDRP. One possible timeframe would be, after the filing of the complaint (simultaneously served on the reinsurer[9]), a two-week period of panel selection, then a four-week period for the respondent reinsurer to submit a response, then a two-week period for the cedent to submit a reply, and a two-week period for the reinsurer to submit a sur-response. The panel would then have three weeks to render a decision, or issue a procedural order seeking additional written material from one or both parties.

As for page limitations, WIPO imposes a limitation of 5,000 words for the substantive portion of the complaint (i.e., the content other than the required boilerplate), and a 5,000-word limit for the substantive portion of the response. In the RIDRP, bearing in mind the fact that simple cases are contemplated, we may consider a 20-page limit for the main briefs and a 15-page limit for the reply and sur-response. Similarly, we may consider a limit on exhibit pages. If exhibit pages are to be unlimited, or to exceed a certain amount, we may consider requiring a "key exhibit" package identifying the essential parts of the documents to which a party wishes to draw a panel's attention, while providing the full documents for the sake of context and completeness.[10]

I submit that a multi-prong test, similar to the UDRP's three-element test, could be adopted in order to delineate the reinsurance arbitration panel's task.

Third, how is the panel selected and what is ARIAS's role in the panel selection? Those of us in the ARIAS community know how much debate has been waged over the years about panel-selection issues. All I do here is flag it as a topic that would have to be addressed under the RIDRP regime, and leave the debate for another day.[11]

Fourth, what should the fee structure be? Under the UDRP, WIPO charges a complainant a $1,500 fee for filing an UDRP complaint involving one panelist and only one domain name (or a handful of domain names; cases involving numerous domain names are priced accordingly). Most of the complainant's fee goes to the panelist who decides the case. The respondent does not have to pay a fee unless he is the party who elects a three-member

panel, in which case he and the complainant have to pony up some additional fees to pay for the extra panelists.

WIPO panelists do not get rich from UDRP fees. Rather, we accept the relatively modest flat fee and gladly serve as panelists for myriad reasons, including the professional interest we all have in the arcane world of trademarks and domain names. In a similar spirit, it might be suggested that arbitrators in the RIDRP world agree to accept these relatively small cases on some type of flat-fee basis rather than charging by the hour. It bears repeating here that one of the reasons the UDRP has been so successful through tens of thousands of cases is because the streamlined proceeding is inexpensive.

There are probably thousands of small unpaid (and perhaps disputed) reinsurance claims each year which linger without resolution because the cost of pursuing them is not worth it. Of course, many small reinsurance claims are commercially compromised each year, and at even less cost than an RIDRP resolution. In such cases, though, the parties enjoy closure but do not enjoy the benefit of any neutral insight about the merits of the claim. A reasoned award by an RIDRP panel might provide some useful insight into the merits of a cedent's or a reinsurer's position, thereby facilitating future settlements or the establishment of protocols for similar claims.

Fifth, should the panel issue a reasoned award? If so, I would suggest that the proposed six substantive RIDRP elements set forth above lend themselves to a fairly easy outline for a reasoned award. The RIDRP panel would simply recite the six elements and then lay out a brief discussion of reasoning and key facts pertinent to each element.

Sixth, should the panel award be confidential? This is a controversial issue that lies beyond the scope of this article. The only observation I would offer here is that the body of UDRP precedent has helped to put the "U" (for Uniform) in the UDRP. Of course, the reinsurance world is traditionally a far more discreet world, and hence the idea of precedent within the RIDRP may not work so well.

Seventh, how do we ensure that the RIDRP award is legally binding? It bears noting that UDRP decisions, because they are the fruit of such a streamlined proceeding, are not accorded the extreme deference of arbitral awards under United States federal law.[12] Put another way, the winning party in a UDRP case cannot run into court and get the award confirmed under the Federal Arbitration Act ("FAA").

Because the RIDRP is also contemplated as a streamlined proceeding (no discovery, no live witness testimony, no oral argument or hearing), it may not enjoy the deference of the FAA. Some type of mechanism is necessary to ensure that the RIDRP award is more than a mere advisory opinion. One possibility would be a contractual agreement at the outset of the case that the parties will abide by the decision of the RIDRP panel and waive the right to challenge the award in court. With such a contractual provision in place, enforcement would take the form of a fairly straightforward breach of contract action.

Conclusion

The foregoing is yet another exercise in suggesting a decidedly imperfect arbitration model to the ARIAS community. Perhaps as an idea it is foredoomed. On the other hand, with a bit of thoughtful tweaking, it might serve as a tolerably fair and efficient mechanism for putting smaller reinsurance disputes to rest. •

ENDNOTES

1. In more than 150 of these cases, I was the sole panelist. In three dozen or so cases, I served on a three-member panel, usually as presiding panelist ("umpire" in the reinsurance world).
2. WIPO, based in Geneva, Switzerland, is an agency of the United Nations. WIPO, which handles more UDRP cases than any other dispute-resolution provider, has a roster of hundreds of panelists from countries throughout the world. UDRP disputes can be waged and resolved in numerous languages.
3. The UDRP may be found at https://www.icann.org/resources/pages/policy-2012-02-25-en.
4. UDRP ¶ 4(a).
5. ICANN refers the Internet Corporation for Assigned Names and Numbers. In a nutshell, ICANN governs the Top-Level Domains ("TLDs"), such as .com, .biz, etc., which are in use throughout the world. From its formation in 1998 until October 2, 2016, ICANN was under the control of the United States Department of Commerce. Since October 2, 2016, control of ICANN has been in the hands of a group of international stakeholders.
6. UDRP ¶ 4(k).
7. A UDRP case may involve multiple domain names. Indeed, I decided a case in September 2016 involving 101 domain names.
8. UDRP ¶ 4(a).
9. In this discussion, I envisage the complainant as the cedent and the respondent as the reinsurer, which tracks the reality of most reinsurance arbitrations. It is of course possible that a reinsurer might initiate the formal dispute.
10. The case file in most UDRP cases I have decided is somewhere between 100 and 300 pages. At times, the annexes exceed 500 pages or even more. Most of these pages are not essential to the decision, but the parties submit complete documents for the sake of good order. At times, the volume of documents is simply overkill.
11. Relatedly, the issue of who may serve as RIDRP panelists would have to be addressed, as would conflict issues.
12. See 9 U.S.C. § 10.

Expand your Professional Networks by Joining an ARIAS•U.S. Committee!

Volunteer for an ARIAS•U.S. committee and tap into a vibrant network, share your expertise, and help shape the organization's activities. ARIAS•U.S. committees are served by current dues-paying members of the association who express particular interest in or possess relevant skills attributable toward the objectives of the committee. Below is a list of current ARIAS•U.S. committees.

Arbitrator's Committee
Education Committee
Ethics Discussion Committee
Finance Committee
Forms & Procedures Committee
International Committee
Law Committee
Mediation Committee
Member Services Committee
Quarterly Editorial Board
Strategic Planning Committee
Technology Committee

Please note that volunteer spots are limited and the committee you apply for might not be available. Opportunities for involvement do open up throughout the year; email info@arias-us.org if you are a member and interested in joining a committee.

ARIAS•U.S. *Quarterly*
— Call for Article Submissions —

ARIAS•U.S. welcomes articles written by its members addressing issues in the field of insurance and reinsurance arbitration and dispute resolution. The page limit for submissions is 5 single-spaced or 10 double-spaced pages.

Deadlines for Submission:

2017 3rd Quarter: June 1
2017 4th Quarter: September 1
2018 1st Quarter: December 1

Want to earn MCLE Credits for your article submissions?

MCLE credit may be earned for legal-based writing directed to an attorney audience upon application to the New York CLE Board. Guidelines for obtaining MCLE credit for writing, as well as a Publication Credit Application, are available on the NY courts website at www.nycourts.gov/attorneys/cle/apppubcredit.pdf.

If you're interested in penning an article or have suggestions for topics you'd like to see addressed, please contact Tom Stillman at tomstillman@aol.com.

Law Committee Case Summaries

A court weighs whether it can remove a party arbitrator before a final award has been issued.

By Sylvia Kaminsky

Since March 2006, in a section of the ARIAS•U.S. website titled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and reinsurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases, legislation, statutes, or regulations for potential publication by the committee. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions.

John Hancock Insurance Company v. Employers Reassurance Corporation, No. 15-cv-13626, 2016 U.S. Dist. LEXIS 80592 (D. Mass. Jun. 21, 2016)

Issue Discussed: Pre-award removal of party arbitrator

Issue Decided*:* Whether the Federal Arbitration Act authorizes the Court to remove a party arbitrator before a final award has been issued based upon a challenge directed at the arbitrator's alleged failure to comply with contract-based qualifications.

Submitted by: Sylvia Kaminsky, Esq.

Background

John Hancock Insurance Company ("Hancock") requested the District Court for the District of Massachusetts (the "Court") to order Employers Reassurance Corporation ("Employers") to name a replacement arbitrator in accordance with the terms of the parties' arbitration agreement ('agreement"). The agreement required that the arbitrators be officers of life insurance companies excluding officers of the two parties to the agreement and their affiliates or subsidiaries or past employees of any of these entities. Hancock demanded that Employers withdraw its designated arbitrator on the basis that he could not serve having been employed by one of Hancock's affiliates. Employers contended that its appointed arbitrator complied with the agreement in that he worked for Hancock's affiliate before it was affiliated with Hancock and the two companies are no longer affiliated.

Hancock argued that the Court had authority to provide the relief requested pursuant to Section 4 of the FAA, which allows a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition [the district court] for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Section 5 of the FAA also grants courts the authority to appoint an arbitrator in certain specified circumstances. Hancock did not seek to compel arbitration as there was no contention that Employers was refusing to arbitrate and did not invoke the Court's power to appoint an arbitrator. Instead Hancock asked that the Court remove Employer's timely-appointed arbitrator as being unqualified. Hancock argued that pre-award removal of an arbitrator is permitted where there is a failure to meet the agreement's criteria.

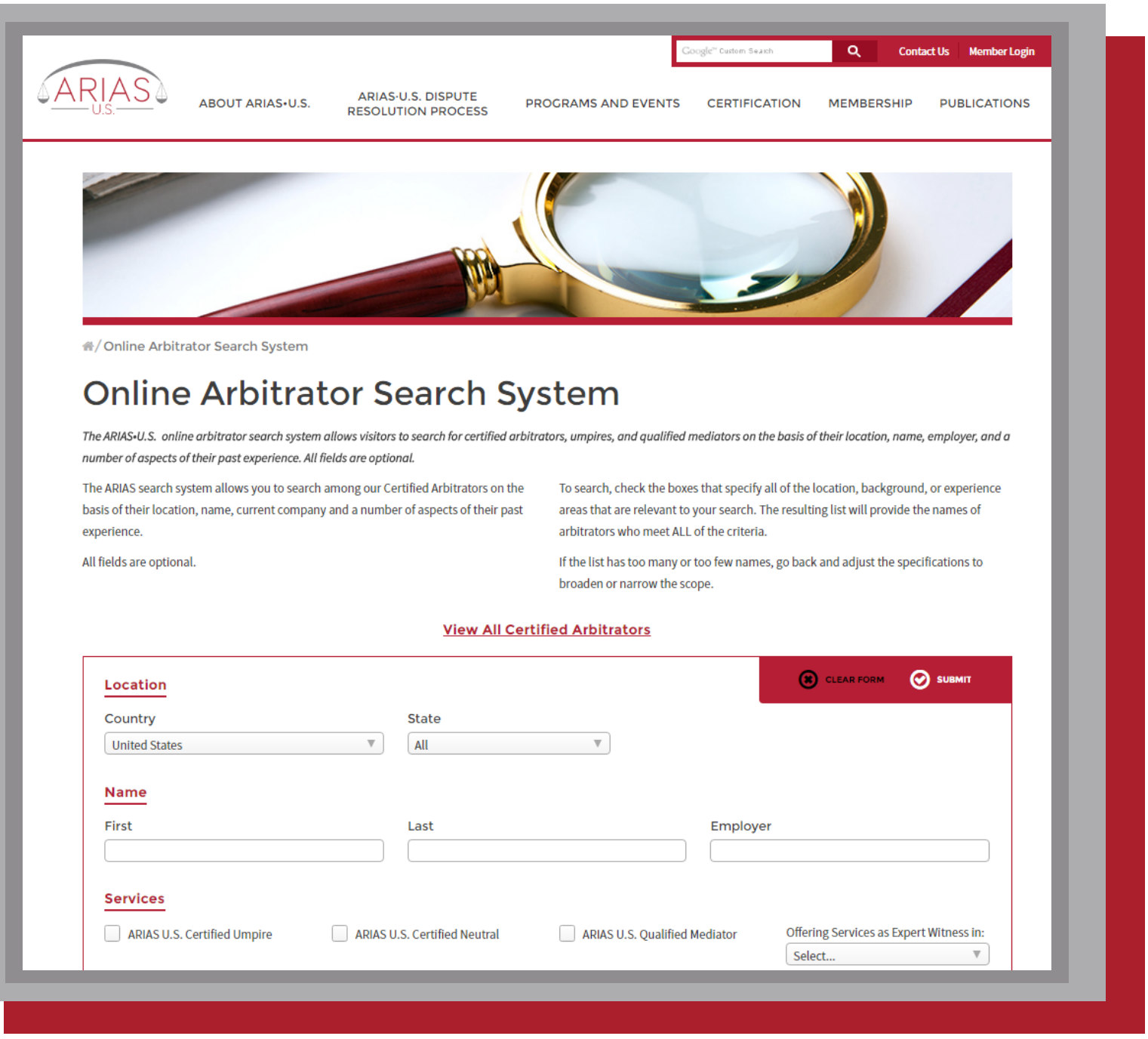
Holding

The Court ruled that the FAA contains no provision expressly granting courts the authority to remove a party-appointed arbitrator prior to the conclusion of the arbitration. The Court cited to Section 10 of the FAA as the remedy available to a party that claims violations of contract terms regarding arbitrator qualifications. Section 10 sets forth the grounds to vacate an award including if the award was procured by undue means, evident partiality or corruption and/or arbitrator misbehavior and/or if the arbitrators exceeded their powers.

The Court rejected Hancock's argument that there is an exception to the body of case law requiring that the award be final before a challenge to an arbitrator can be made, citing to the 5th Circuit case of *Gulf Insurance Guaranty Life Insurance Co. v. Connecticut General Life Insurance Co.,* 304 F.3d 476, 490-91 (5th Cir. 2002). In *Gulf,* the Court of Appeals held that "a court may not entertain disputes over the qualifications of an arbitrator to serve merely because a party claims that enforcement of the contract by its terms is at issue." *Gulf* relied upon the Second Circuit decision, *Aviall, Inc. v. Ryder Systems, Inc.*, 110 F.3d 892, 893-895 (2d Cir. 1997), wherein the Court of Appeals held that the FAA does not provide for pre-award removal of an arbitrator. The Court agreed with the reasoning of the Second and Fifth Circuits and other district courts that have rejected the argument that courts have jurisdiction to remove an arbitrator pre-award simply because the challenge to the arbitrator invokes a qualification set out in the arbitration agreement. The Court specifically found that Hancock's interpretation that the FAA allows pre-award removal where the challenge is based upon qualifications and turns upon the express requirements of the Agreement to be unfounded in that the there is no express authorization for pre-award judicial intervention regardless of the grounds for removal; whether an arbitrator satisfies a provision of the arbitration agreement is a question of the arbitrator's capacity to serve just as much as a challenge regarding the arbitrator's bias is a question of capacity to serve. Relying on *Gulf*, the Court held that Hancock's attempt to cast its request for pre-award judicial intervention as a matter of contract enforcement was unconvincing.

The Court also found its ruling promotes the goals of arbitration and the FAA in not interfering into arbitrator appointments as a general matter and in not creating a separate rule based upon the nature of the challenge to the arbitrator. Finally, the Court found that the case law did not support Hancock's position and the out-of-district opinions upon which Hancock relied to be unpersuasive in not reflecting a close reading of the FAA that is consistent with the policy aims of the FAA in promoting the speed and efficiency that arbitration and the FAA are supposed to foster. •

Finding an Arbitrator Just Got Easier!



2016: An Eventful Year for the Arbitrator's Committee

Board seats and changes to questionnaires and the Code of Ethics were among the committee's priorities in 2016.

By Sylvia Kaminsky and Eric Kobrick

Continuing our tradition, now in its second year, this article will report on the Arbitrators Committee projects, goals and objectives which it has been working on during the past year. The Committee's purpose is to advance the concerns of arbitrators in seeking to promote, improve and foster the arbitration process as a means for the efficient, economic and just resolution of insurance and reinsurance disputes. Since our year-end report of activities, which appeared in the Fourth Quarter 2015 ARIAS *Quarterly,* the work of the Committee in 2016 is set forth in summary fashion below. If anyone is interested in more detailed information, please contact any of the Committee members.

In the year 2016, the Committee took the following actions:

Board seats for arbitrators. Through the efforts of the Committee in initiating and then mounting an enthusiastic and thorough campaign for a change to the Bylaws that would add two additional Board seats for arbitrators, who are not currently employed by companies, reinsurers or law firms, an amendment was passed by more than a two-thirds majority vote increasing the Board from 9 to 11 members. This change led to the nomination of Sylvia Kaminsky and Peter Gentile as the arbitrator representatives to the ARIAS Board of Directors for the November 2016 election.

Changes to Code of Conduct. At the request of members of the arbitrator community, a detailed review of the Code of Ethics was undertaken by our subcommittee, Mark Wigmore, Fred Marziano, Jim Sporleder and former Committee member Andrew Rothseid. After considerable work and many in-depth discussions with the entire Committee, and after a two-thirds majority vote of the Committee, the proposed changes to the Code of Conduct were agreed upon and submitted to the Ethics Committee for its review and consideration. One of the more material proposed changes provided that the Code specifically apply to not only arbitrators but to parties and law firms as well. In May, 2016, Mark Wigmore on behalf of the Committee presented the suggested changes to the Ethics Committee. The Arbitrators Committee's perception of the Ethics Committee's response to the suggested changes is as follows: In addressing the totality of the suggested revisions, the Ethics Committee viewed the changes as falling into two buckets: 1) Applying the Code to all constituencies of ARIAS; and 2) other miscellaneous changes. After discussion and consideration of the issues presented, the Ethics Committee voted to reject all recommendations by the Arbitrators Committee. As for the first bucket, the Ethics Committee did not view the different constituencies as similarly situated. The Ethics Committee was of the opinion that arbitrators, who are the decision makers providing a service to the parties and counsel, be governed by a separate code of conduct. The Ethics Committee also was of the view that lawyers are subject to their own rules of conduct and that the Code

provides that lawyers and companies will not put arbitrators in compromising positions thus covering the concerns expressed by the Committee. As for the second bucket, the Ethics Committee's position was that recent amendments had been made to the Code and since the miscellaneous category of issues in its view was not material, it did not see the need to make further changes at this time. The Ethics Committee felt the Code should be stable and not be subject to continual revision. In August 2016, the Ethics and Arbitrators Committee had a joint meeting in which neither group was able to convince the other of its position. The Ethics Committee did agree to explore drafting an additional set of rules of conduct that would apply to the entire membership. The two Committees also discussed ways to educate the membership on Code issues at conferences and/or in other educational training programs. While the Ethics Committee acknowledged that the Arbitrators Committee could bring its suggestions directly to the Board, it would not have the Ethics Committee's support in doing so. After considerable discussion by the Arbitrators Committee, the majority of its members agreed at this time that it would not press forward to the Board.

Changes to questionnaires. Another subcommittee, consisting of Charles Erhlich, Lydia Kam Lyew and Aaron Stern, following the work of former Committee members Marty Haber and Peter Gentile, finalized proposed changes to the umpire questionnaire and the neutral arbitrator questionnaire. Suggestions revisions were founded in part on the Committee's view that the Code of Conduct should apply to all constituencies and should require parties to provide critical information in their possession to facilitate completion of the questionnaires. The Committee recognized that disclosure is a critical component of an arbitrator's obligations and added language regarding the obligation to respond to questions from earlier time periods that should involve the parties to the extent they have knowledge or access to information that would enable a complete and full response. The Committee further highlighted those questions that it considered too broad and/or were unfeasible or difficult to answer without more definitions. Along with other changes, the Committee proposed consistent time limitations of 5 years (as opposed to 10 years) for questions with respect to any question that asked for a time period or had an unlimited time frame. In addition, the Committee suggested some type of language be incorporated in a preface to the questionnaire in an attempt to limit motions to vacate awards. It proposed as a starting point the following wording: "the Parties and Counsel waive any failure to disclose information that is not of material importance with respect to filing a motion to vacate or challenge a panel's award with the loser of any such challenge agreeing to pay the winner's attorney's fees." In April 2016, these suggested revisions were submitted to the Forms Committee for review and comment. In October 2016, the Arbitrators Committee was advised that the Forms Committee had rejected the suggested revisions. There was only one change regarding the agreement—to refuse to accept appointments as an expert or party arbitrator on behalf of or against either of the parties—that the Forms Committee found non-objectionable and eliminated the "or against" language. The Arbitrators Committee will continue to discuss future plans, if any, with regard to its recommendations to the questionnaires.

Certification cost, fees, and requirements. The arbitrator community has expressed considerable concern over the cost, fees, and requirements to maintain ARIAS certification. The Committee believes that a formal, comprehensive review is needed. ARIAS statistics reflect that over the last five year period there has been a 10% decline in the number of arbitrators who renew or are certified from year to year. In the last 5 years there has been a total overall decline in the number of arbitrators by 30%. One factor suggested by the Committee was to extend recertification requirements beyond 2 years. This was rejected by ARIAS. The suggestion that the conferences include an ethics training course as part of the program, which would eliminate the need and the additional expense of the Ethics Course, has not gained traction. The Ethics Committee is working on revamping the required ethics course. With respect to fees, ARIAS has restructured the fees for law firms and company members. It is the Committee's perception that the new fee structure effectively results in a per person reduction in membership for law firm and company dues but maintains the same dues for arbitrators which is at a proportionately higher rate. It is the Board's view that not only has it kept arbitrator dues the same, but that the revised fee structure will have increased benefits for arbitrators. With an increase in the minimum fees for law firms and companies accompanied with an increase in the number of members allotted to firms and companies, the Board hopes the new fee structure will encourage companies to send more participants to ARIAS events who will be persuaded to use ARIAS procedures and arbitrators.

Market conditions related to the use of arbitrators. In line with the Committee's discussions on certification and the decline in arbitrator membership, there were considerable thoughts expressed on the topic of market conditions relating to the use of arbitrations as an ADR mechanism. The general consensus of the Committee is that there seems to be a decline in the number of reinsurance arbitrations over the past few years. While the Committee considered many different reasons for the decline, it is uncertain if the views of the Committee members are accurate or if a decline does, in fact, exist. If true, the Committee agreed that it would be helpful to understand why, and if such a decline is due to disillusionment with the arbitration process, where ARIAS members feel arbitrations are falling short and not meeting the expectations of the companies. With this information, the Committee believed ARIAS could better understand problems surrounding the process and directly focus on ways it could address them. The Committee, led by Roger Moak, prepared a survey to provide insight into this issue, the results of which it thought would provide a benefit to the entire ARIAS community. The Board reviewed the survey and decided at this time that it would not circulate it among the membership. Instead, it will be reviewing past surveys in an attempt to ascertain if there are overlaps with information that ARIAS has collected that address or are similar to the survey questions proposed by the Committee. It will then reconsider the Committee survey. It was suggested that the results of past surveys be made known and available to the membership.

Arbitrator tool kit. The Committee members continue to work to provide Arbitrator Tool Kit updates. Members are also contributing articles to the Quarterly. A subcommittee (Roger Moak and Connie O'Mara) are working to compile a guideline of "best practices" for use by arbitrators during the arbitration process.

Resource directory. At the Spring Conference, Committee members Sylvia Kaminsky and Lydia Kam Lyew participated in a breakout session with a past Committee member and Certified Arbitrator, Andrew Rothseid, and Royce Cohen, Esq., focusing on resources for researching legal matters and updated industry news developments that are available to the ARIAS community. The panel members prepared an extensive resource directory that appears on the new ARIAS website. The Technology Committee will maintain and update the resource directory. It is requested that if arbitrators, law firms or other company members have websites containing industry information or are aware of other resources not listed, that they provide the information to Joyce Arawole to be included on the website.

Mentoring. The Member Services Committee asked the Committee to consider the use of the mentoring program and bringing it "back to life." The Committee is working on this and if any arbitrators are interested in being a mentor, please advise Joyce Arawole.

Some key issues going forward that the Committee will discuss include the following:

- Modifying required continued attendance at educational seminars to maintain certification by taking into account and allowing credit for arbitrator experience; and
- Ethics training built in as part of educational programs rather than as a stand-alone test requiring additional fees.

The Committee will also be working with the Education Committee to work on arbitrator education and training programs. Connie O'Mara worked with the Education Committee and submitted a proposal for a training session that will be designed to be part of the spring and winter conferences. The Committee will continue discussions on how this may be utilized to fulfill ethics training requirements for arbitrators as well as result in a greater consensus on critical issues that surround challenges to arbitrations awards.

The Committee urges all arbitrators as well as ARIAS' other constituencies to let us know of any matters it believes this Committee should address. We need your ideas and feedback in order to best address your issues. Please let us know if you think we are doing a good job or where we may be falling short. We urge you to participate in this opportunity to address arbitrator issues so that together we can meet the goals of ARIAS and promote improvements in the arbitral process. •

Sylvia Kaminsky's two-year term and Eric Kobrick's one-year term as co-chairs of the Arbitrators Committee have expired. They want to extend their great appreciation and thank each of the Committee members for all their hard work as outlined in this report. •

(In 2016 the Arbitrators Committee met on six occasions to discuss various issues impacting the arbitrator community. The Arbitrators Committee prepares an agenda and transcribes minutes for each of its meetings. These minutes are available for anyone interested and can be obtained by contacting Joyce Arawole, ARIAS assistant director of education and certification, at jarawole@arias-us.org.)

ARIAS Out & About

On October 6, 2016, Scott M. Seaman and Edward K. Lenci of Hinshaw & Culbertson LLP discussed "Drafting Effective Dispute Resolution Clauses" at a lunchtime meeting of the Reinsurance Networking Group, organized by the **Intermediaries and Reinsurance Underwriters Association (IRUA)**. Among the areas Seaman and Lenci addressed were the use of ARIAS•U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes and Streamlined Rules for Small Claim Disputes. A lively question-and-answer session followed their presentation. Sylvia Kaminsky and Jeremy Wallis, executive director of the IRUA, organized the event, which was held at Hinshaw's New York office. ABC News legal analyst and Hinshaw partner Royal F. Oakes, of the firm's Los Angeles office, introduced the program, which was recorded for Hinshaw Insurance Law Radio and is available at: http://www.blogtalkradio.com/hinshawinsurancelawradio/2016/10/17/reinsurance-arbitrations-effective-arbitration-clauses.

Seaman is the co-chair of Hinshaw's National Insurance and Reinsurance Services Practice Group and works in the firm's main office in Chicago. Lenci is the chair of the Reinsurance Section of that practice group and works in the firm's New York office.

On October 25, 2016, Scott Birrell, Mike Frantz, Barbara Niehus, and Dan FitzMaurice gave a panel presentation titled “Insurance and Reinsurance Arbitrations: The Basics” at the annual meeting of the **Society of Actuaries** in Las Vegas. The presentation included a primer on arbitration as well as a discussion of the role of ARIAS•U.S. The panel discussed the advantages of arbitration over litigation as well as criticisms of the arbitral process. In addition, the presentation included a discussion of the steps that ARIAS•U.S. has taken to address some of the criticisms of arbitration, including training and certifying arbitrators, conducting ethics programs, and developing the ARIAS•U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, the ARIAS•U.S. Neutral Panel Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, and the ARIAS•U.S. Streamlined Rules for Small Claim Disputes.

Newly Qualified Mediator

Ann L. Field is an ARIAS•U.S. Certified Arbitrator and a licensed attorney with over 22 years of significant experience in reinsurance and insurance coverage issues, arbitration and litigation. ARIAS U.S. Certified since 2007, Field has served as an arbitrator or umpire on more than 30 insurance and reinsurance arbitrations. She is also a Northwestern University trained and Certified Mediator.

Field is a Senior Vice President and Executive Director of Client Services with Willis Re, Inc. Prior to her role at Willis Re, Field worked at Zurich Insurance Group as the Global Head of Reinsurance Recoveries, Claims and Asset Management as well as other prior reinsurance executive roles. While at Zurich, Field directed over 125 reinsurance arbitrations handled by external and in-house counsel. Field oversaw a large multi-functional team and she was responsible for Zurich's $20 billion global reinsurance asset, including all assumed and ceded global reinsurance claims across all lines of property and casualty business. Accordingly, Field has a diverse and extensive background in all lines of property and casualty business involving treaty and facultative reinsurance contracts dating from 1945 through 2016.

Field is a member of the Executive Board of Directors of the ARIAS•U.S. organization, currently serving as President. She is one of the Co-Chairs of the Member Services Committee. Field is a frequent speaker at various industry conferences. In 2015 and 2016, *Intelligent Insurer* honored Field as one of the "Top 100 Women in Reinsurance."

Newly Certified Arbitrators

David Raim has been involved with reinsurance matters for more than 35 years and has handled hundreds of reinsurance arbitrations as counsel, many of which went to hearing. He started his legal career as an associate at LeBoeuf, Lamb, Leiby & MacRae and has also worked at Hughes Hubbard and Reed and Chadbourne & Parke LLP. He joined Chadbourne as a partner in January 1989 and founded the reinsurance arbitration practice at the firm. He has also written and spoken extensively on reinsurance and arbitration issues.

Over the years, he has handled arbitrations in many different areas, including property and casualty, life and health, catastrophe, finite risk, retrocessional issues, rescission, surety, APH, and workers' compensation claims.

In 2015, he became general counsel of one of his longstanding clients, Alabama Life Reinsurance Company. In January 2016, he transitioned from partner to senior counsel at Chadbourne & Parke. While he has gleefully relinquished his administrative responsibilities at the firm, he remains active handling reinsurance arbitrations and counseling clients on reinsurance matters.

Erik Rasmussen has worked on both the insurance and reinsurance sides of the business, with extensive experience in the life, accident and health, and workers' compensation arenas. In his role as Vice President for Voya Financial, he is responsible for a team of 45 underwriters who assess the risk for medical stop loss, group life insurance, and voluntary products. He is also responsible for managing the run-off of the Group Reinsurance business and for the management of Voya's Affinity Group Life business.

AN INVITATION

Do you know someone who is interested in learning more about ARIAS•U.S.?
If so, pass on this letter of invitation and membership application.

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process.

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

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

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

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

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

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the **Membership** area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Sara Meier, executive director, at director@arias-us.org or 703-506-3260.

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

Sincerely,

James I. Rubin
Chairman

Ann L. Field
President

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

MEMBERSHIP APPLICATION

AIDA Reinsurance & Insurance Arbitration Society
7918 Jones Branch Dr., Suite 300 • McLean, VA 22102
Phone: 703-506-3260 • Fax: 703-506-3266
Email: info@arias-us.org

NAME & POSITION

COMPANY OR FIRM

STREET ADDRESS

CITY/STATE/ZIP

PHONE CELL

FAX EMAIL

FEES AND ANNUAL DUES

Membership Type	Dues Amount
ARIAS Company Type (Number of Members)	
(A) Law Firms, Consulting & Actuarial Firms (1 - 5)	$1,850
(B) Law Firms, Consulting & Actuarial Firms (6 - 10)	$2,500
(C) Law Firms, Consulting & Actuarial Firms (11 +)	$5,000
Insurance/Reinsurance Companies (1 - 15)	$1,850
Individual Membership	$450

Names of designated corporate representatives must be submitted on corporation/ organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

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AGREEMENT

By signing below, I agree that I have read the ARIAS•U.S. Code of Conduct and the Bylaws of ARIAS•U.S. and agree to abide and be bound by the *ARIAS•U.S. Code of Conduct* and the By-Laws of ARIAS•U.S. The Bylaws are available at www.arias-us.org under the "About ARIAS" menu. *The Code of Conduct* is available under the "Resources" menu.

SIGNATURE OF INDIVIDUAL
OR CORPORATE MEMBER APPLICANT

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