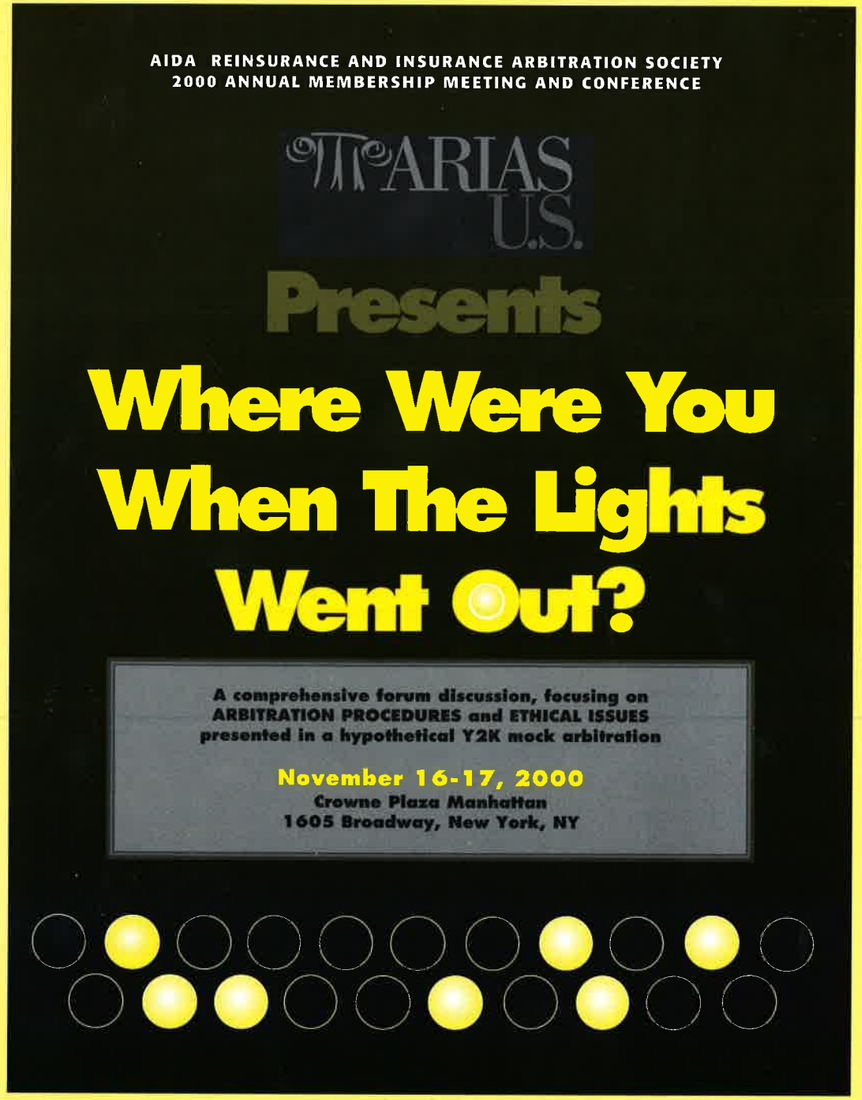
AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY

ARIAS U.S. QUARTERLY

SECOND/THIRD QUARTER 2000



INSURANCE LAW: DESPITE ITS SHORTCOMINGS, ARBITRATION OF REINSURANCE DISPUTES IS OFTEN STILL PREFERRED AS AN ALTERNATIVE TO LITIGATION.

THE PROS AND CONS OF THE ARBITRATION PROCESS

Eugene Wollan

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Although not always an option for settling a reinsurance dispute, arbitration presents itself to the parties involved often enough to seriously consider its pros and cons. In general, a properly worded arbitration clause in the reinsurance contract obligates adherence to the arbitration process if any part to the contract insists on it. In the absence of such a clause, all parties must agree to the arbitration. Nevertheless, it is a choice that some prefer to bypass, feeling that the complexities of the arbitration process have developed to the point that it offers little advantage over litigation. The author suggests here that, under the right circumstances, arbitration still has its merits and that greater use of it might be encouraged with certain improvements to the process.

Everyone in the business seems to agree that reinsurance controversies are proliferating nowadays at Malthusian rates. Most people would also agree that this is not necessarily a good thing. The subject has attracted considerable attention, but there is one tangential aspect of it that has gone largely unremarked: the expanded opportunities for the lawyers who handle these controversies to discourse upon them, in these pages and elsewhere, at an equally increased level of frequency and visibility.

One aspect of this discussion is the seemingly never-ending debate concerning the relative advantages and disadvantages of litigation and arbitration as methods of resolving such disputes. Discussions of this topic appear in print with some regularity, and this one can be added to the mix.

SELDOM A CLEAR-CUT CHOICE

The threshold point to be made is that choosing one method or the other is a luxury not usually available. If there is no arbitration clause in the contact, there can be arbitration only by agreement of *both* (or all) parties. If there is an arbitration clause (and assuming it is appropriately worded, as is true of the various boilerplate forms in common use), it is generally enforceable by law, and there will be arbitration if any party insists on it.

As a result, probably the most effective time for a party, whether cedent or reinsurer, to express its preference is when the contract wording is being put together, rather than afterwards when a controversy arises. "Should an arbitration clause be included or not?" calls for a rather different decision from "Should we arbitrate this particular dispute?"

That being said, there are still many occasions when a pedant or reinsurer must make a choice, or at least express a preference. In discussing the many considerations that enter into such a decision, let me make it very clear that, in my opinion, nothing is very clear: i.e., the relative advantages and disadvantages of litigation and arbitration as methods of resolving reinsurance disputes are more often than not matters of shading and nuance rather than clear-cut, dramatic differences. Moreover, what works best in one situation may not work best in a very similar or closely related situation, depending on the identities of the individuals, the history of their relationships, questions of timing, the current climate of the industry, and innumerable other intangibles.

Any such analysis will have certain factors in common. Some cut one way, some the other, but they all must be considered. If they all pointed in the same direction, it would be too easy, and there would be no occasion for this article.

In arbitrations, the entire discovery process lies very much within the discretionary judgment of the panel.

PRIVACY AND CONFIDENTIALITY

While it is certainly true that reinsurance arbitrations are more highly publicized now than they used to be, they remain by and large far more private than litigations. For one thing, in lawsuits there are pleadings, motion papers, briefs, and many other documents constituting the record of the case, all of which are required to be filed in court and perforce become part of the public record, available to any inquiring reporter, colleague, potential adversary, or otherwise interested party.

There is no comparable record in an arbitration. What is ordinarily reported in the trade journals is simply the general nature of the dispute and its outcome; and for even that much, the reporter must generally rely upon descriptions of the case furnished by counsel, which most readers would probably be sophisticated enough to recognize as more self-serving than objective.

As an interesting sidelight on this point, I had occasion a few years ago, for reasons irrelevant to this discussion, to conduct an informal survey among some 50 top reinsurance executives on the specific question of whether they would like to see some procedure established for the reporting and dissemination within the industry of reinsurance arbitration decisions. The response was more than two-to-one against the suggestion, and the primary reason given was the importance of preserving privacy and confidentiality.

It is not that the industry representatives wish to conceal the fact that disputes are taking place; they are far more realistic than that. They simply believe that the parties are entitled to have their disputes decided in relative privacy and that there is no industry-wide benefit to be derived from the public airing of dirty linen.

NON-CONFRONTATIONAL NATURE

The level of hostility in arbitrations is generally, although not necessarily, lower than that encountered in litigations. Of course, in either forum, the level of hostility may vary considerably. It depends on who the parties are and what their relationship is and has been, not on whether the current dispute happens to be before a court or an arbitration panel.

It is not at all uncommon, for example, for insurers to be litigating particular questions with each other, while at the same time maintaining an ongoing and even cordial business relationship; they have simply agreed to disagree on certain specific issues and have left them to the lawyers and the courts to resolve. Precisely the same thing can be said of many arbitration situations.

By the same token, there are some arbitrations, just as there are some litigations, in which the parties appear to have embarked upon World War III, and their feelings towards each other are in no way either exacerbated or modified by the nature of the arena in which the contest is being waged.

KNOWLEDGEABLE PANELS

There is certainly no doubt that reinsurance arbitrators are far more knowledgeable about the subject matter than even an unusually well informed judge or jury. Just try explaining reinsurance to a typical jury and watch their eyes glaze over. (The most effective way to date is short, sweet, and simple: "Reinsurance is the bookie laying off a piece of the action.")

The problem as far as arbitrations are concerned is that there is still only a relatively small number of experienced arbitrators and umpires available. By and large, those who have been active in recent years have been extremely competent, but the manpower pool is proving to be inadequate to meet the demands being made by the ever-increasing number of arbitrations being conducted. The obvious solution to this difficulty is to expand the manpower pool.

One way to do this is for a larger number of retired executives to make themselves available for this purpose and to publicize their availability. Another, and perhaps longer-range, solution is to expand the numbers of active, not-yet-retired, insurance and reinsurance executives available and willing to serve.

The difficulty in the past has largely been that active executives are too busy to take the time and are not encouraged by their companies to do so. Apart from the time demands themselves, there is always a fear that participation in any way in an adversarial proceeding might jeopardize a current or prospective business relationship. This fear is probably unwarranted in most instances, but it has proved to be a serious obstacle.

Some companies, on the other hand, encourage their executives to participate in the process, but within the constraints of no more than one or two such arbitrations a year. In this fashion, the companies make the experience and expertise of their executives available to the benefit of the industry as a whole, while at the same time avoiding undue interference with the executives' performance of their own duties. This seems to be an eminently sensible approach, and one to be encouraged.

From time to time, even the most competent and experienced arbitrators and umpires display bias and entertain unconscious predispositions in certain kinds of cases. The same thing is, however, true of judges. If I had to make the choice, I would rather deal with an arbiter whose predispositions are based on extensive personal experience in the industry than a judge whose knowledge of the industry is sketchy and whose prejudices are, therefore, much more likely to be predicated on ignorance.

SPEEDY RESOLUTION

Every profession has its pet horror stories. Just as there will occasionally be an arbitration that takes longer to resolve than *Jarndyce versus Jarndyce*, and just as there will occasionally be a lawsuit resolved in less time than it takes for the typical arbitration panel to hold its organizational meeting, so also is it clear that these are the exceptions and not the rule.

It is, of course, inadvisable and inaccurate to generalize too much, but I would estimate from my own experience (which does not quite extend back to the Wars of the Roses) that the typical reinsurance arbitration is resolved in something less than a year. To litigate the same types of issues would probably require two or three times as long in most situations.

Speed is not, of course, an end in itself, but is a significant means toward certain other desirable ends: that is, putting *finis* to the uncertainty generated by the existence of any unresolved dispute, and doing so with a relative minimum of expense.

CONTROL OF THE COURT

It is probably a safe and accurate generalization to say that most parties participating in reinsurance arbitrations, and most lawyers representing those parties, do not suffer from a death wish. They will therefore, in most instances at least, obey the rulings and requirements of the arbitration panel simply because they will recognize that failure to do so would hardly be likely to enhance their position before the panel or endear themselves to its members.

A court of law undoubtedly has more formal methods of enforcing its requirements but human nature being what it is, the methods available to an arbitration panel almost always suffice. In the event they do not, there are judicial fallback procedures available,

and that constitutes precisely one of the beauties of the arbitration system: Most of the time is operates smoothly enough without the formalities and encumbrances of judicial proceedings, but in the final analysis, those remedies are always available if required.

COMPLETE RELIEF

One weakness of the arbitration process is that there are times when it is impossible to bring all the involved parties into the same forum at the same time and place. Probably the most common example is the reinsurance intermediary, who is frequently a key player but is not a signatory to the contract and, hence, not bound by its arbitration clause.

Even in litigation, however, there are many situations in which it proves impossible to bring before the court all of the potentially involved parties if some of them are not subject to the jurisdiction of the court and are unwilling to participate voluntarily. Extremely protracted and relatively cumbersome procedures may eventually be necessary in order to make the judicial proceedings truly all-encompassing.

Similar problems certainly arise in arbitration, and undoubtedly with greater frequency. Even here, however, there are at least some occasions when a little imaginative strategy can accomplish much. For example, it is not at all unheard of for parties who were not themselves signatories to a contract containing an arbitration clause—and who, therefore, could not be compelled to arbitrate—to agree when confronted by litigation in an inconvenient jurisdiction to participate voluntarily in a tripartite or even quadripartite arbitration in return for a discontinuance of the unwelcome litigation. There is, as the saying goes, more than one way to skin a managing general agent.

LIMITATIONS ON DISCOVERY

This is far more of a variable in arbitration than it is in litigation. Discovery in a lawsuit is invariably broad. This means that the parties have the fullest opportunity to develop all of the facts—not only the relevant ones, but many irrelevant ones as well. It is a truism among litigators that the discovery process is frequently subject to abuse. Even so, the courts are reluctant to restrict discovery, and indeed that is one of the main reasons why litigations can go on and on, seemingly forever.

In arbitrations, on the other hand, the entire discovery process lies very much within the discretionary judgment of the panel. What strikes me most about the way these panels tend to exercise their discretion is the general level of common sensibility. It is extremely rare for an arbitration panel to restrict discovery so tightly as to deprive a party of any substantive rights, but in the other direction, arbitration panels are far readier than most courts to bring the discovery process to a halt when it shows clear signs of becoming abusive.

Discovery from third-party sources is a different and perhaps more serious problem. Unquestionably, a court is in a better position to compel the necessary discovery in this kind of situation. Sometimes in an arbitration the kind of creative strategy described earlier may help, and sometimes business relationships can be called into play, but the answers are not always that simple. Where discovery from third-party sources is concerned, the advantage clearly lies on the side of litigation.

RULES OF EVIDENCE

This is an area in which the differences between lawsuits and arbitrations seem to be vanishing rapidly. More and more judges nowadays appear to pay less and less attention to the technical rules of evidence; there is a prevalent tendency to admit almost any testimony or document that might possibly be relevant "for whatever it is worth." This is exactly what many reinsurance arbitration panels have been doing for years. The major difference is that experienced insurance and reinsurance executives are probably far better qualified to evaluate what the evidence "is worth."

OPPORTUNITY FOR APPEAL

Whether this is a plus or a minus depends largely on one's perspective. The statutory grounds on which an arbitration award can be appealed are certainly very restricted. By comparison, appeals from judgments in lawsuits as a matter of right are virtually unlimited.

To an aggrieved party who feels he has been wronged by the decision, the opportunity to have the whole case reexamined by an appellate body with a fresh point of view is obviously a godsend. The other side of the same coin is that, to the losing party who recognizes in his heart of hearts that his case has no merit but wishes to continue to obfuscate and delay, either in order to defer the inevitable or to engender enough frustration to bring about a favorable compromise, the appeal process is a heaven-sent opportunity to continue those tactics.

To the party who wins because he deserves to win (and what winning party does not believe he deserved to win?), the opportunity for his adversary to take an appeal is simply one more reason to agree with Dickens about the nature of the law.

Of course, the appellate process is essential to our judicial system; and, of course, the extremely limited grounds on which an arbitration award can be appealed may, in some instances, work an injustice. This is a matter for the parties to consider in the balance when they decide whether to enter into an arbitration agreement in the first place.

IMPROVING THE SYSTEM

There seems to be a current perception that arbitration has lost some of its allure as an alternative to litigation because it has become too much like litigation in miniature: more protracted, more expensive, more technical, and less pragmatic than it used to be. There is truth in this view, but whether or not that truth is extensive or profound enough to scrap the arbitration process is a very different question.

No commentator has ever suggested that our judicial system is perfect, and no insurance executive in his right mind would ever suggest that the arbitration system is perfect. Both have their advantages and disadvantages, and choosing between them is largely a matter of individual judgment.

It does seem to me, however, that some of the perceived drawbacks of the arbitration process can be remedied by measures that fall far short of the Draconian one of bypassing arbitration entirely and going directly to litigation. For instance, the discovery process in arbitration would be rendered less unpredictable by adherence to a series of guidelines that might be promulgated by some body such as ARIAS US or the Reinsurance Association of America. Such adherence could be specified in the arbitration clause or agreed to by the arbitration, or even simply adopted by the panel of its own volition.

Many other similar improvements could be explored in areas where agreement is thought to be necessary, and that might well constitute the subject of another article or series of articles. My point for the moment is simply that arbitration has far too much going for it to be written off as an anachronism left over from the ancient days of *uberrima fides*. If it needs fixing, let's fix it; but to suggest that it be supplanted by litigation seems to be tantamount to curing a headache by decapitation.

ARIAS U.S. 2000/01 Calendar of Events

SAVE THE DATE:

NOVEMBER 16-17, 2000

ARIAS•U.S.
Annual Membership Meeting & Conference
Crowne Plaza Manhattan Hotel
1605 Broadway
New York, NY

FEBRUARY 8, 2001

One Day Workshop
Co-sponsored by:
The Association of the Bar
of the City of New York
The Insurance Federation of N.Y.
44 West 44th Street
New York, NY

APRIL 16-28, 2001

2001 Spring Meeting
Hyatt Regency Hilton Head Resort
Hilton Head Island, SC

FOR FURTHER INFORMATION CALL:
ARIAS•U.S. 914-699-2020

AIDA REINSURANCE AND INSURANCE ARBITRATION SOCIETY
2000 ANNUAL MEMBERSHIP MEETING AND CONFERENCE

ARIAS U.S.

Presents

Where Were You When The Lights Went Out?

A comprehensive forum discussion, focusing on ARBITRATION PROCEDURES and ETHICAL ISSUES presented in a hypothetical Y2K mock arbitration

November 16-17, 2000
Crowne Plaza Manhattan
1605 Broadway, New York, NY

PROGRAM CHAIR

EUGENE WOLLAN
MOUND, COTTON & WOLLAN

Dear Colleagues...

It is, perhaps unfortunately, not especially challenging to invent hypothetical procedural problems that arise in the world of reinsurance arbitrations because even if the settings are hypothetical, the problems themselves are very real. They arise with great regularity and in infinite variations.

Use of the term "problem" does not by any means carry a negative connotation. It encompasses all the "close-call", "gray area" questions that many of us confront every day, on subjects ranging from legal rights and duties to business practices to ethical standards to simple (or not-so-simple) fairness. They are not problems in the narrow sense of a mathematical equation that can be solved with precision by identifying the numerical value of X. They are problems in the far broader sense of being important, debatable issues, on which there is ample room for legitimate, honorable disagreement.

One of the primary and most laudable purposes of this organization is to identify and explore these problems. Sometimes an entirely new problem area is exposed and debated; sometimes the discussion centers on a new spin to a familiar problem. In either situation, there is much to be learned. There is no end to the new insights that can be developed in our discussions of even the seemingly most talked-to-death topic.

This learning process is never-ending because we are constantly learning from each other. The membership of ARIAS•U.S. is a very high-powered group, exceptionally knowledgeable and experienced, and one of its great strengths is that there is always a diversity of opinion on any given question. Someone in the group is always ready with a fresh perspective, a new analysis, a different opinion, or an unconventional point of view.

The biggest challenge faced in developing the Scenario for this meeting lay, therefore, not so much in identifying the subjects to be ventilated and debated as it did in finding a new but appropriate hypothetical factual context. The membership has recently experienced an Oscar Wilde play and a heavyweight boxing match, so in the interest of cultural diversity the Scenario awaiting us this time springs from the world of grand opera. We have incorporated a considerable number of challenging procedural and ethical issues that we believe will provoke a level of discussion in keeping with ARIAS•U.S. tradition, and we have lined up a typically stellar group of participants.

We hope to see you on November 16th and 17th and look forward to your participation. We think you will find it to be a stimulating session, even if you are not a music lover.

Sincerely,

Gene Wollan
Program Chair

ARIAS U.S.

THE COSMOPOLITAN OPERA COMPANY

CAST OF CHARACTERS...

CALEB FOWLER Arbitration Consultant	THE UMPIRE
JAMES POWERS Arbitration Consultant	PARTY ARBITRATOR (CEDENT)
DENNIS GENTRY Gentry R/I Consulting Corporation	PARTY ARBITRATOR (REINSURERS)
DAVID SPECTOR Hopkins and Sutter	COUNSEL (CEDENT)
STUART COTTON Mound, Cotton & Wollan	COUNSEL (REINSURERS)

THE PROGRAM...

THURSDAY, NOVEMBER 16, 2000

12:00 p.m. - 1:00 p.m.	**REGISTRATION OPENS**
1:00 p.m. - 1:15 p.m.	Welcome by ARIAS•U.S. Chairman MARK S. GUREVITZ The Hartford Financial Services Group, Inc.

ACT I
(THE STAGE IS SET)

1:15 p.m. - 1:30 p.m.	**PROGRAM INTRODUCTION** EUGENE WOLLAN • Mound, Cotton & Wollan
1:30 p.m. - 1:50 p.m.	**ARIAS•U.S. Umpire Selection Process** CHARLES M. FOSS • Travelers Property Casualty Corp.
1:50 p.m. - 2:30 p.m.	**Oral Argument by Counsel for Cedent** DAVID SPECTOR • Hopkins & Sutter
2:30 p.m. - 3:10 p.m.	**Oral Argument by Counsel for Reinsurer** STUART COTTON • Mound, Cotton & Wollan
3:10 p.m. - 3:30 p.m.	**BREAK**
3:30 p.m. - 4:00 p.m.	**Was There Underlying Coverage?** *(Open Floor Discussion)* Moderator: EUGENE WOLLAN • ARIAS•U.S. Program Chair
4:00 p.m. - 4:05 p.m.	**ANNOUNCEMENTS**
4:05 p.m. - 5:15 p.m.	**ANNUAL MEETING** The State of the Organization MARK S. GUREVITZ • ARIAS•U.S. Chairman

	FINANCIAL REPORT JAMES P. WHITE • ARIAS•U.S. Treasurer
	NOMINATING COMMITTEE REPORT CHARLES M. FOSS • ARIAS•U.S. Vice President & Nominating Committee Chair
	ELECTION OF BOARD OF DIRECTORS DANIEL E. SCHMIDT, IV • ARIAS•U.S. President
	QUESTIONS & ANSWERS
5:15 p.m.	**MEETING ADJOURNED**
5:30 p.m. - 7:00 p.m.	**RECEPTION**

FRIDAY, NOVEMBER 17, 2000

7:30 a.m. - 8:30 a.m.	**REGISTRATION RE-OPENS** Continental Breakfast
8:25 a.m. - 8:30 a.m.	**ANNOUNCEMENTS**

ACT II
(THE TENSION MOUNTS)

8:30 a.m. - 10:15 a.m.	**Panel Deliberations including Ethical Consideration** CALEB FOWLER • Arbitration Consultant DENNIS GENTRY • Gentry R/I Consulting Corporation JAMES POWERS • Arbitration Consultant
10:15 a.m. - 10:45 a.m.	**BREAK**
10:45 a.m. - 12:15 p.m.	**BREAKOUT SESSIONS**
12:15 p.m. - 1:30 p.m.	**LUNCHEON**

ACT III
(THE DENOUEMENT)

1:30 p.m. - 2:15 p.m.	**BREAKOUT REPORTS**
2:15 p.m. - 2:30 p.m.	**Panel's Decision** CALEB FOWLER • Arbitration Consultant
2:30 p.m. - 3:15 p.m.	**Was the Panel's Decision Right?** • *(Open Floor Discussion)*
3:15 p.m. - 3:35 p.m.	**BREAK**
3:35 p.m. - 4:15 p.m.	**FLOOR DISCUSSION** (Continued)
4:15 p.m. - 4:30 p.m.	**FINALE: PROGRAM WRAP-UP** EUGENE WOLLAN • ARIAS•U.S. Program Chair
4:30 p.m. - 4:45 p.m.	**ENCORE: CLOSING REMARKS** Daniel E. Schmidt, IV • ARIAS•U.S. President

NYS CLE Credit: 10 Continuing Legal Education Credits are available to those who attend this conference which breaks down as follows: 2 CLE credits - Ethics; 8 CLE credits General. (General credits include categories in the area of skills, practice management and professional practice). This program is structured for both newly admitted attorneys and experienced attorneys. Application for Pennsylvania CLE credit will be made.

ARIAS U.S.

2000 ANNUAL MEMBERSHIP MEETING AND CONFERENCE

REGISTRATION INFORMATION

HOTEL ARRANGEMENTS:

For Reservations call: 1-800-243-6969 or 212-977-4000
Crowne Plaza Manhattan Hotel
1605 Broadway / New York, NY 10019
REFER TO: ARIAS•U.S. Conference

Sleeping Room
ARIAS•U.S. Group Rate . . . . . $289 per night Single/Double Occupancy

NOTE: To be guaranteed conference group rates all hotel reservations must be made no later than October 23, 2000. Accommodations available on a first-come, first-served basis. Local taxes not included.

CONFERENCE REGISTRATION FEES:

Members: *(Corporate or Individual)* . . . . . $ 580
Non-Members . . . . . $ 690

REGISTRATION FEE INCLUDES: Program materials;Thursday Coffee Breaks, Cocktail Reception; Friday Continental Breakfast, Luncheon, Coffee Breaks

Final Conference Registration Deadline: November 6, 2000

DIRECT ALL INQUIRIES TO:

Maria Sclafani - ARIAS•U.S. Corporate Secretary
ARIAS•U.S., 25-35 Beechwood Avenue, Mt. Vernon, NY 10553
Phone: 914-699-2020 Fax: 914-699-2025

Cancellation Policy: The cutoff date for refunds is November 6, 2000, 10 days prior to the conference. If you cancel less than 10 days prior to the conference, we will be pleased to issue a credit that can be used for any ARIAS•U.S. conference within a 12-month period. Requests for credit must be submitted in writing.

ARIAS U.S.

2000 ANNUAL MEMBERSHIP MEETING AND CONFERENCE

REGISTRATION FORM

NAME: _____

NAME FOR BADGE: _____

FIRM: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

PHONE: _____ FAX: _____

SPOUSE: _____

Cancellation Policy: The cutoff date for refunds is November 6, 2000, 10 days prior to the conference. If you cancel less than 10 days prior to the conference, we will be pleased to issue a credit that can be used for any ARIAS•U.S. conference within a 12-month period. Requests for credit must be submitted in writing.

REGISTRATION FEES:

Members: $ 580 ❑ Corporate ❑ Individual Non-member $ 690

❑ (ARIAS•U.S. Non-members may apply for membership and receive member rate by checking this box. A membership application will be sent to you.)

PAYMENT BY CHECK: Enclosed is my check in the amount of $ _____

Please make checks payable to

ARIAS•U.S. (Fed. I.D. No. 13-3804860) and mail with registration form to:
ARIAS•U.S., 25-35 Beechwood Avenue, Mt. Vernon, NY 10553

CREDIT CARD PAYMENTS:

Please charge my credit card: ❑ Amex. ❑ Visa ❑ Mastercard for $_____.

Account No.: _____ Exp. ___ /___

Name: (Please Print) _____

Signature: _____

FINANCIAL HARDSHIP POLICY STATEMENT: As required by the NYS Continuing Legal Education Board, if a member of the Bar of New York would like to attend an ARIAS•U.S. seminar, but finds that he or she would incur a financial hardship by doing so, an application for waiver of the registration fee may be made to the Board of Directors of ARIAS•U.S. through the offices of CINN Worldwide, Inc. Such application would be held in the strictest of confidence.

WHO'S LISTENING ANYHOW? THE EXPERT WITNESS AND THE ARBITRATION PROCESS

The following are remarks delivered by Frank F. Barrett at the ARIAS•U.S. Chicago Conference. Mr. Barrett is of Counsel at the Law Firm Lamson, Dugan + Murray, LLP in Omaha Nebraska.

The arbitration process, though not without faults, is in my opinion particularly well suited to accommodate the parties' wishes and needs with regard to multiple parties cases, cases involving highly technical issues, large dollar amounts, numerous witnesses and documents and complicated fact situations.

In such matters the involvement of expert witnesses on behalf of the parties is a given. Before the increased utilization of arbitrations in insurance and reinsurance matters, the courts dealt with the subject of utilization of expert witnesses, deciding the subject matter and the admissibility of such testimony. The courts, both state and federal, do indeed limit the use of expert witnesses. A majority of the courts have adopted the following principles defining the use of expert testimony: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine an issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. There are a variety of tests the courts use to determine admissibility of such testimony.

Judge Harvey Brown, writing in the *Houston Law Review*, Fall 1999, discussed admissibility of expert witness testimony. Some of the tests mentioned are:

1. The expert's testimony must assist the trier of fact.
2. The expert must have qualifications.
3. The expert's testimony must be relevant with a valid connection to the pertinent inquiry.
4. The expert's testimony must be reliable.
5. The trier of fact must insure that the expert's extrapolation from the basis of his or her opinion to his or her conclusion is sound.
6. There must be a showing that the foundation of the expert's opinion is reliable.
7. The testimony must be based on foundational data. By this it appears the courts mean the expert opinion is based on evidence that would be admissible.
8. The expert's opinion must pass the test that it is not unfairly prejudicial.

The admissibility of expert opinion testimony is most often based on the theory that experts have knowledge, training and experience enabling them to form a better opinion on a given state of acts than that formed by those not so well equipped. In the case of a trial, the trier of fact is the ordinary juror. In the case of a bench trial, the trier of fact and law is the judge. In the case of an arbitration, the panel is the trier of both fact and the application of the law.

In preparing for this article, I sought a response to an informal non-scientific survey from over 30 individuals who are active in the arbitration field as arbitrators, umpires or counsel. The response was most gratifying, the results diverse. The individuals I contacted have served in over 980 arbitrations, umpired over 449, were expert witnesses in 278 arbitrations, and participated as counsel in over 287 arbitrations. I was overwhelmed by the response. A vast majority of those who received the survey responded. I thank them for their enthusiastic and thoughtful cooperation.

QUESTION ONE:

Have you participated in an arbitration where an expert witness testified?

A substantial majority of the responses were "yes." No surprise here due to the complex, complicated issues that face insurance and reinsurance arbitrations.

QUESTION TWO:

What was the subject of the expert witness testimony?

Examples of responses were:

- custom and usage
- rating financial reinsurance
- number of occurrences
- loss adjustment experience
- interpretation of language contained in a written contract
- state law relating to environmental pollution
- continuation of defense obligation under CGL and umbrella when primary coverage is exhausted
- reasonableness of commutation
- allocation
- declaratory judgment coverage
- actuarial loss reserve evaluation
- underwriting standards applied to a specialized book of business
- retrospective rating standards for premium determination
- late notice
- relationship of a MGA to an insurer
- whether commutation language was global or only covered certain lines
- follow the fortune issue

QUESTION THREE:

Was the expert testimony helpful to the panel in making a decision?

A vast majority of the respondents indicated "no," with some remarks such as "not particularly," "helpful but not decisive," "not sure," "somewhat," with a few responding "yes" and one or two saying, "extremely helpful." Remember that many of those who responded have served in the role of expert witnesses.

QUESTION FOUR:

Is there a particular issue or subject where you feel an expert witness is helpful in the decision making process?

Again, the answers were quite varied. Examples mentioned in the responses where expert witnesses could be helpful:

- reviewing court decisions which may apply
- depends on the issue being arbitrated and the background and experience of panel
- In special instances where the panel could not or did not have experience
- where the panel had no scientific background in pollution
- very technical issues where the panel may have some general knowledge but little experience
- actuarial projections
- determining appropriate levels for IBNR reserves
- results of audits
- technical matters not part of everyday reinsurance operations; for example, actuarial analysis
- reinforcing custom and usage

QUESTION FIVE:

Was the expert helpful to the party who called him or her to testify?

The responses were lukewarm; most said no or marginally helpful. Some interesting remarks where both parties had experts — "one was helpful, one wasn't helpful;" "some were, some weren't;" "rarely." Two of the many thoughtful and articulate responses regarding expert witnesses were:

1. "The expert is often helpful to counsel in bringing in an authoritative voice on a particular issue rather than the attorney having to present the matter again and again as "counsel for the party."
2. "Experts are helpful because they tend to articulate a position in a non-legal manner that frequently does advance the party's arguments." That same respondent, however, cautioned that objectivity, though sought, is somewhat illusive in that "whose bread I eat, whose song I sing."

Finally, the following was a rather common response to the above question:

"Generally in complex cases there is not just one expert, there oftentimes are many, and thus the panel is presented with two positions on the same issue. Therefore, both sides oftentimes have an articulate "advocate" as opposed to just an expert witness.

Additionally, a number of respondents felt that the cross-examination by counsel oftentimes "dismembered the expert" and that the panel's questions quite often were such that the expert's position became less forceful and persuasive as he or she testified.

QUESTION SIX:

Have you participated as an expert witness in an arbitration?

As stated, many of them have and on a variety of subjects. A number of those issues upon which they testified are found in responses to Question Four. For example, custom and usage, results of audits and pollution issues.

As I view the results of the survey, they were rather illuminating in that many of the respondents did not feel that expert witnesses were particularly helpful in the decision making process by the panel. Also, many of the respondents felt that the expert witness was not helpful to the party for which they were called to testify.

CONCLUSION

My conclusion differs somewhat with many of my colleagues in the arbitration field. On a variety of technical and legal subjects, depending on the expertise and qualifications of the panel, I believe expert testimony can be helpful to the trier of fact and law.

In considering use of an expert witness, the parties should (1) take into account the experience and expertise of each of the panel members; (2) consider the nature of the testimony which is to be elicited from a qualified expert; (3) weigh the expected responses when cross-examined by opposing counsel and the experienced or, for that matter, inexperienced panel members; and (4) consider advising the panel members early in the proceedings as to whom the parties are considering as expert witnesses and the subject and nature of the testimony sought. I am not suggesting that counsel need seek the approval of the panel as he or she must prepare their case as they believe is in the best interests of the client. But the panel's early reactions could be helpful to counsel in the preparation of the case. Hopefully, the responses to this survey will provide each of us with a perspective, particularly the attorneys who must decide whether to use expert witnesses and how.

The courts have given those of us in the arbitration process an excellent blueprint for the use of expert witnesses. If the individual has knowledge, experience and training which can be clearly demonstrated to the panel on a subject matter that one or all the panel members may not have experience, then I believe such expert witness can be helpful to the panel in its decision making and, thus, serve the arbitration process.

H. Wesley Sunu, ESLR Chairman and Mark S. Gurevitz, ARIAS•U.S. Chairman at the Annual 2000 Spring Meeting held at the Ritz Carlton, Palm Beach, Florida.

Conference program Co-Chairs Thomas S. Orr, ARIAS•U.S. Board of Directors and Larry P. Schiffer, Past Chair – ESLR.

From Our Photo File...

ARIAS•U.S. 2000 SPRING CONFERENCE

May 18-20, 2000

The Ritz Carlton
Palm Beach, Florida

Co-sponsored by: ESLR The Excess, Surplus Lines & Reinsurance Committee of the American Bar Association's Section on Tort & Insurance Practice.

Arbitrator and Attorney panels square off in a no-holds-barred discussion of reinsurance arbitration and related ethical considerations.

More than 125 attended the Annual Spring 2000 Meeting...

...at the opening night cocktail reception

...golfers enjoy a buffet lunch prior to tee off time at the Emerald Dunes Golf Club

Photo left:
Golf Co-Chair Nick DiGiovanni and ARIAS•U.S. Chairman Mark S. Gurevitz pair up for 18 holes.

Photo right:
ARIAS•U.S. Board member Bob Mangino with his wife Ann.

THE ARIAS•U.S. UMPIRE APPOINTMENT PROCEDURE

By Charles M. Foss, Esq.

[Editor's Note: Charles M. Foss is General Counsel, Reinsurance Litigation, Travelers Property Casualty Corporation, a Vice President of ARIAS•U.S. and Chairman of its Umpire Appointment Procedure Committee. Mr. Foss is also a founding member of the ARIAS•U.S. Board of Directors.]

The umpire selection process is often the cause of additional expense, delay, mistrust, and general dissatisfaction in the arena of insurance and reinsurance arbitrations. Providing a workable approach to this difficult phase in the arbitration process has been a high priority for ARIAS•U.S. Since its founding in 1994, ARIAS•U.S. has worked to promote the integrity of the arbitration process in many important ways, including the recent publication of *A Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. Through its seminars and workshops, ARIAS•U.S. has provided in-depth training in skills necessary for effective service on arbitration panels and, as of this writing, has awarded the "Certified Arbitrator" designation to 76 men and women who have demonstrated their commitment to the arbitration process through their participation in ARIAS•U.S. seminars and prior industry experience.

This year ARIAS•U.S. is pleased to continue its service to the insurance and reinsurance industry with its promulgation of The ARIAS•U.S. Umpire Appointment Procedure*. The Procedure is free to members of ARIAS•U.S. and provided at nominal cost to non-members. A unique feature of the ARIAS•U.S. Procedure is its software program**, which randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Arbitrators or, alternatively, from a subset of the "Certified" list consisting of individuals who have completed service on at least three arbitration panels. This subset is referred to as the "Umpire List."

The procedure is straightforward and, with proper attention to its details, relatively simple for parties to administer. Depending on the availability of prospective umpire candidates, the process can be completed in less than ten days.

STEP ONE: The process is initiated by a written request directed to the ARIAS•U.S. Managing Director. A Form Letter is included with the Procedure for this purpose.

STEP TWO: The Managing Director generates a random list of twelve (12) names, which is forwarded to the parties.

STEP THREE: The parties contact the first ten(10) candidates on the list, providing details of the arbitration and a questionnaire (ARIAS•U.S. form unless otherwise agreed). If fewer than ten (10) of those candidates are available, the eleventh and twelfth candidates may be contacted and, if necessary, a new list requested. Once ten (10) available candidates have been identified, the process moves to Step Four.

STEP FOUR: From the list of ten (10) available candidates, each party picks five (5) and notifies the other party of its selections.

STEP FIVE: From the other party's list of five(5), each party picks three (3) and notifies the other party of its selections. A single individual on both lists of three (3) is appointed umpire. If more than one individual is on both lists, the parties choose by drawing lots or other acceptable means.

STEP SIX: If there is no name present on both lists, the parties each rank all candidates "1" (most favored) through "6" (least favored). The candidate with the lowest numerical ranking is appointed umpire. In the event two or more are tied, the parties choose from among those candidates by drawing lots or other acceptable means.

ARIAS•U.S. is pleased to make the Procedure available to the insurance and reinsurance industry at this time and believes that it represents a thoroughly workable alternative to what can be the most frustrating aspect of an insurance or reinsurance arbitration-umpire selection. For more information on the Procedure or ARIAS•U.S., please contact our Managing Director at the following address:

ARIAS•U.S.
CINN Worldwide, Inc.
P.O. Box 9001
25-35 Beechwood Avenue
Mt. Vernon, N.Y. 10553
Phone: (914) 699-2020
Fax: (914) 699-2025

*1. THE ARIAS•U.S. UMPIRE APPOINTMENT PROCEDURE IS THE COLLECTIVE WORK OF MANY INDIVIDUALS, INCLUDING THE MEMBERS OF THE ARIAS•U.S. BOARD OF DIRECTORS, ITS UMPIRE APPOINTMENT PROCEDURE COMMITTEE, AND MANY INDIVIDUAL MEMBERS OF ARIAS•U.S. WHO TOOK THE TIME TO SUBMIT THEIR INSIGHTFUL EDITORIAL SUGGESTIONS.

**2. ARIAS•U.S. WISHES TO THANK JIM LYONS AND BRUCE THORNER WHO ORIGINALLY DEVELOPED THIS PROGRAM FOR THEIR ARBITRATION PANEL SELECTION SYSTEM AND HAVE GENEROUSLY ASSISTED IN ITS CONVERSION FOR USE IN THE PROCEDURE. ■

UMPIRE LIST
AS OF FEBRUARY 15, 2000

RICHARD S. BAKKA
FRANK J. BARRETT
PETER H. BICKFORD
JOHN W. BING
JOHN M. BINNING
MARY ELLEN BURNS
R. MICHAEL CASS
PETER C. CLEMENTE
PAUL DASSENKO
DONALD T. DECARLO
JOHN B. DEINER
ANTHONY L. DIPARDO
CALEB L. FOWLER
JAMES H. FRANK
DENNIS C. GENTRY
WILLIAM J. GILMARTIN
A. EDWARD GSCHWIND
FRANKLIN D. HAFTL
ROBERT F. HALL
ROBERT M. HALL
PAUL D. HAWKSWORTH
ROBERT F. HUGGINS
RONALD A. JACKS
PETER F. MALLOY
ROBERT M. MANGINO
CHARLES L. NILES, JR.
JAMES J. POWERS
EDMOND F. RONDEPIERRE
DANIEL E. SCHMIDT, IV
RICHARD D. SMITH
THOMAS M. TOBIN
PETER J. TOL
BERT M. THOMPSON
N. DAVID THOMPSON
RICHARD G. WATERMAN
EUGENE WOLLAN

THE ARIAS•U.S. UMPIRE LIST IS COMPRISED OF ARIAS•U.S. CERTIFIED ARBITRATORS WHO HAVE PROVIDED ARIAS•U.S. WITH SATISFACTORY EVIDENCE OF HAVING SERVED ON AT LEAST THREE (3) COMPLETED (I.E. A FINAL AWARD WAS ISSUED) INSURANCE OR REINSURANCE ARBITRATIONS.

ARIAS U.S. CERTIFIED ARBITRATORS
AS OF FEBRUARY 15, 2000

ARIAS•U.S. CERTIFIED ARBITRATORS
(AS OF JUNE 22, 2000)

GEORGE F. ADAMS
HOWARD N. ANDERSON
THERESE ARANA-ADAMS
RICHARD S. BAKKA
NASRI H. BARAKAT
FRANK J. BARRETT
PETER H. BICKFORD
JOHN W. BING
JOHN H. BINNING
MARY ELLEN BURNS
MARVIN J. CASHION
ROBERT MICHAEL CASS
DEWEY P. CLARK
PETER C. CLEMENTE
WILLIAM CONDON
JAMES P. CORCORAN
DALE C. CRAWFORD
PAUL E. DASSENKO
DONALD T. DECARLO
JOHN B. DEINER
ANTHONY L. DI PARDO
CALEB L. FOWLER
JAMES H. FRANK
PETER FREY
CHARLES M. FOSS
WENDELL INGRAHAM
DENNIS C. GENTRY
WILLIAM J. GILMARTIN
GEORGE A. GOTTHEIMER, JR.
ROBERT B. GREEN
THOMAS A. GREENE
ALFRED EDWARD GSCHWIND
MARK S. GUREVITZ
MARTIN HABER
FRANKLIN D. HAFTL
ROBERT F. HALL
ROBERT M. HALL
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Although ARIAS•U.S. believes certification is a significant and reliable indication of an individual's background and experience, it should not be taken as a guarantee that every certified member is an appropriate arbitrator for every dispute. That determination should be preceded by a review of several factors, including but not limited to the applicable arbitration provision, potential conflicts or bias and the type of business involved in the dispute. In addition, ARIAS•U.S. wishes to acknowledge that its certified arbitrators are not the only qualified arbitrators. As noted above, the Society is gratified that many of the most respected practicing arbitrators sought and obtained certification from ARIAS•U.S. Others, who are similarly qualified and experienced, have not yet sought certification.

CAREFUL DRAFTING OF AN ARBITRATION CLAUSE CAN PRESERVE ARBITRATION RIGHTS AND AVOID COSTLY FORUM DISPUTES

Authored by

Damon N. Vocke and

Jennfier Kaplan Schott

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The federal courts have long had a strong policy in favor of enforcing a party's right to arbitrate where a valid arbitration agreement exists. Recent federal court decisions have further enshrined that policy. These decisions have also addressed another issue: whether the court or the arbitrator should decide the validity of defenses to arbitration, in particular the application of res judicata. Although the forum that will decide this question may be determined by a variety of factors (as the cases discussed below illustrate), parties can avoid the significant legal expenses associated with forum battles by simply expressing within the arbitration clause which forum (court or arbitration) should decide these issues.

The recent federal decisions have treated this issue somewhat inconsistently. In *Weaver v. Florida Power & Light Company*[1], Mary Weaver filed state and federal discrimination claims against her former employer, Florida Power, in Florida state court. Florida Power removed the case to the U.S. District Court for the Southern District of Florida, which dismissed certain claims and granted summary judgment in favor of Florida Power on others. The Eleventh U.S. Circuit Court of Appeals affirmed.

Before filing suit, however, Weaver had submitted grievances to her union, the International Brotherhood of Electric

...recent federal decisions have treated this issue somewhat inconsistently.

Workers ("IBEW"), in accordance with the dispute resolution procedures contained in the collective bargaining agreement. At the time the district court rendered its judgment on Weaver's discrimination claims, her collective bargaining claims were proceeding to arbitration. Florida Power then asked the district court to enjoin the arbitration on the grounds that: (1) the arbitration would involve the same claims presented in the litigation and thus should be barred based on res judicata, and (2) Weaver waived her right to pursue arbitration because she had already filed suit against Florida Power on the same claims. The district court agreed with Florida Power and enjoined Weaver and the IBEW from proceeding with the arbitration.

On appeal, the Eleventh Circuit reversed, holding that equitable relief of this kind was inappropriate because Florida Power had an adequate remedy at law—"it can raise the issues of res judicata and waiver in the arbitration proceeding and, if its arguments are valid, have the arbitration dismissed."[2] The appellate court relied on U.S. Supreme Court precedent[3] that the competence of an arbitration panel encompasses issues of waiver, res judicata, and other defenses. Further, the court observed, "a remedy available through arbitration, if adequate, constitutes an adequate remedy at law such that equitable relief is improper."[4] The court also disagreed with Florida Power's public policy argument that it would be more efficient and cost-effective to seek the injunctive relief in court, noting that it would be at least as economical to file a motion to dismiss in the arbitration.[5]

In a decision that arguably conflicts somewhat with *Weaver*, the Third U.S. Circuit Court of Appeals, in *John Hancock Mutual Life Insurance Comp. V. Olick*,[6] addressed the roles of both the court and the arbitrators in considering who has the power to decide the res judicata effect of both prior litigation and arbitration results. The plaintiffs had sued John Hancock Distributors and Thomas Olick, a former Hancock employee, for statutory violations and common law fraud in connection with some limited partnership transactions. During the pendency of the case, Mr. Olick instituted a NASD arbitration against Hancock relating (according to Hancock) to the same limited partnership transactions. The litigation concluded in 1994, and Mr. Olick's arbitration resulted in an award in his favor in 1995.

In 1996, Mr. Olick initiated a second NASD arbitration against Hancock alleging a variety of fraud, misrepresentation, and related tort claims. In response, Hancock asked the arbitration panel to dismiss this arbitration in light of the prior litigation and previous arbitration with Mr. Olick. While that motion was pending, Hancock filed a complaint in the U.S. District Court for the Eastern District of Pennsylvania, seeking a declaration that the second Olick arbitration was barred on res judicata grounds and asking the court to preliminarily enjoin the NASD from further proceedings in that arbitration. The district court dismissed Hancock's complaint, stating that courts should not rule on the validity of various defenses to arbitration (the arbitration panel in the second

Further, the court observed, "a remedy available through arbitration, if adequate, constitutes an adequate remedy at law such that equitable relief is improper."

...the court reasoned that the proper inquiry under the Federal Arbitration Act was to determine whether there was a valid arbitration agreement between the parties, and whether the dispute between them-here, the res judicata effect of a prior arbitration result-falls within the language of that agreement.

Olick arbitration also denied Hancock's motion to dismiss). The district court noted an absence of authority addressing what it viewed as a "hybrid" situation—whether an arbitrator or a federal court should determine the res judicata effect of both a prior arbitration and a prior federal court decision on an arbitration claim.

On appeal, the Third Circuit sought guidance from the Federal Arbitration Act, noting that the Act authorized district court involvement in two ways: (1) to enforce arbitration agreements and compel, or enjoin, arbitration as appropriate, and (2) to enforce an arbitration award. The court recognized the strong public policy in favor of arbitration and cautioned that courts must "resist the attempt to intrude upon arbitration proceedings where the statute does not explicitly authorize court involvement."[7] The court then explored the hybrid nature of the prior proceedings (arbitration and litigation), noting that "[a]pparently, no case to date has addressed this precise factual complex...."[8]

The Third Circuit held that the district court, not the arbitrator, has jurisdiction to decide the res judicata issue as it relates to a prior federal judgment, for institutional reasons, stating that "federal courts must protect the finality and integrity of prior judgments."[9] Turning to the res judicata effect of the prior arbitration, the court concluded that the implications of ensuring the finality of prior court decisions did not apply with equal force. Rather, the court reasoned that the proper inquiry under the Federal Arbitration Act was to determine whether there was a valid arbitration agreement between the parties, and whether the dispute between them—here, the res judicata effect of a prior arbitration result—falls within the language of that agreement.

The Third Circuit was influenced by the fact that the parties' arbitration agreement adopted the rules of the NASD Code of Arbitration Procedure. Those Rules provided, in relevant part, that arbitration awards are to be "final and not subject to review or appeal," and that "arbitrators shall be empowered to interpret and determine the applicability of all provisions under the NASD Code and to take appropriate action to obtain compliance with any ruling by the arbitrator."[10] The court concluded that this language showed an intent to adhere to the principle of finality in the arbitration award, and to resort to the NASD arbitration proceedings to determine any questions about the nature and extent of the finality of its awards. Therefore, the court reversed that portion of the district court decision requiring the arbitration panel to decide the res judicata effect of the prior federal court judgment, and affirmed that portion of the decision requiring the arbitration panel to decide the res judicata effect of the prior *arbitration*.

The outcome of *MCI Telecommunications Corp. v. Exalon Industries, Inc.*[11], a case of apparent first impression, underscores the need to ensure that a valid arbitration agreement exists at the outset of a commercial relationship if arbitration is in fact

When MCI sued to enforce the arbitration award, Exalon contended that the arbitration award was unenforceable and invalid on the alleged grounds that there was no written arbitration agreement between the parties.

preferred over litigation. The First U.S. Circuit Court of Appeals held that, in the purported absence of a written arbitration agreement, a party that does not participate in an arbitration may later challenge the validity of the award outside the three-month time restriction set forth in Section 12 of the Federal Arbitration Act for vacating, modifying, or correcting an award.

Under the provisions of a tariff regulation MCI filed with the Federal Communications Commission, certain disputes with customers involving long-distance services were expressly subject to mandatory arbitration. MCI had entered into an agreement with Exalon to provide telecommunication services. After Exalon contested MCI's first bill, MCI invoked the arbitration provision contained in its tariff. An arbitrator was appointed and an award was entered in favor of MCI. Exalon did not respond to the arbitration notice or otherwise participate in the arbitration, and also failed to ask the arbitrator to vacate, modify, or correct the award.

When MCI sued to enforce the arbitration award, Exalon contended that the arbitration award was unenforceable and invalid on the alleged grounds that there was no written arbitration agreement between the parties. MCI argued that Exalon was bound by the written, mandatory arbitration provision contained in the tariff, contending that Exalon was presumed by law to have knowledge of this provision. The magistrate judge denied Exalon's motion for judgment on the pleadings and confirmed the arbitration award. The district court judge adopted the magistrate's decision.

On appeal, the First Circuit specifically noted that MCI had made no claim that Exalon had agreed to arbitrate arbitrability, and therefore posed the question to be answered on appeal:

> *[C]an a person who in fact has not been a party to a written arbitration agreement but who is on notice that an arbitration proceeding has been invoked claiming to have binding effect against his/her interests, be obligated by the outcome unless an affirmative challenge is made against the award?*[12]

The First Circuit answered "no," holding that a person who contends he is not bound by an agreement to arbitrate can abstain from the proceeding and raise the non-existence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award. A party would, of course, assume a sizable risk in taking this approach if there were any chance that a

court might later find there was in fact a valid arbitration agreement in place. The court noted that this situation is analogous to a lawsuit proceeding against a non-appearing party as to whom there is no personal jurisdiction. Although that party can challenge a judgment when it is executed, that party would be barred from

The court concluded by warning that not "every procedural difference between a suit in court and an arbitration is enough to support a finding that a party did not waive arbitration by trying a lawsuit first."

collaterally attacking the merits of that judgment if personal jurisdiction were later determined to exist. Thus, in both the FAA context and the personal jurisdiction context, the court noted, "the non-appearing party can subsequently challenge the authority of the decision-maker, but not the merits of the decision."[13]

In *Iowa Grain Co. v. Brown*[14], the Seventh U.S. Circuit Court of Appeals confronted a conceptually similar arbitrability issue in the context of a class action. The court prefaced its opinion by stating that the case presented "several twists on an increasingly common problem: When should a court enforce an arbitration agreement that arguably covers a dispute between two parties?"[15]

Iowa Grain brought this action seeking a declaratory judgment that, because of a prior class-action suit filed by some of its customers, those customers had waived their contractual obligation to arbitrate claims relating to Iowa Grain's management of their commodity accounts. Iowa Grain based its waiver argument on a class-action suit these customers had filed against Iowa Grain in South Carolina "on behalf of a class of all persons who have or had an account with...Iowa Grain." Iowa Grain had successfully obtained a dismissal of that class action based on the forum-selection provisions of the customer agreements the named plaintiffs had signed. The customers then moved for reconsideration of the order dismissing their South Carolina case, and on the same day they filed a demand for arbitration against Iowa Grain in South Carolina. Iowa Grain then brought its declaratory judgment action.

The district court dismissed Iowa Grain's declaratory judgment action and ordered the parties to arbitrate the customer claims. In affirming, the Seventh Circuit rejected Iowa Grain's waiver arguments on the grounds that the arbitration agreement did not contain a consolidation clause or a provision for class treatment, and therefore the customers could not have waived what they had no right to demand in the first instance. The court noted that the filing of the South Carolina class action was really an effort to change the shape of the case "in a way fundamentally incompatible with arbitration."[16] In addition, the court found persuasive the fact that the customers had promptly pursued their arbitration rights by filing their demand soon after the South Carolina court dismissed the class suit. In a statement most likely directed at those parties who might seek to arbitrate after losing a lawsuit, the court concluded by warning that not "every procedural difference between a suit in court and an arbitration is enough to support a finding that a party did not waive arbitration by trying a lawsuit first."[17]

Each of the foregoing federal appellate court decisions reconfirms the federal courts' liberal construction of the Federal Arbitration Act in favor of arbitration, *provided* there exists a valid arbitration agreement between the parties, *and* the issue in dispute falls within the scope of that agreement. A party who contends that there is no valid arbitration agreement may wait until enforcement proceedings to challenge an arbitration award without regards to the time strictures of the Act, but that party does so at substantial peril if there is any risk that a court might later conclude there was a valid arbitration agreement.

As for which forum will decide the issue of res judicata when there is a prior federal court judgment, the federal appellate courts appear to be in conflict. As we discussed above, the Third Circuit Court of Appeals adopts the view that the federal district court should decide such issues because of the need to preserve the finality and integrity of federal court judgments.

The Eleventh Circuit concluded, however, that such issues should be decided by the arbitrators-at least when issues are presented in the procedural context of a complaint for injunctive relief. But the federal appellate courts generally appear to be in accord in concluding that arbitrators should decide the res judicata effect of prior arbitration decisions.

What can we learn from these recent decisions? In view of the strong federal policy of enforcing arbitration clauses as written, parties to an arbitration agreement may wish to consider expressly stating in the arbitration clause which forum should determine the validity of defenses to arbitration such as res judicata, as well as other issues. Careful drafting of such a clause to express the parties' intent can provide predictability and significant cost savings because it will avoid litigation over forum battles that in many cases can take on a life of their own.

1 1999 WL 211514 (11th Cir. (Fla.)) (April 13, 1999).
2 *Id.* at *1.
3 *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985).
4 1999 WL 211514 *1.
5 The *Weaver* Court recognized that its prior decision in *Kelly v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir. 1993) had upheld an injunction of an arbitration on res judicata grounds. *Id.* at *2, fn. 10. The *Weaver* Court distinguished *Kelly*, however, stating that it "addressed only the question whether the Federal Arbitration Act, of its own force, completely forbids a district court from enjoining an arbitration on res judicata grounds." *Id.*
6 151 F. 3d 132 (3rd Cir. 1998).
7 *Id.* at 137.
8 *Id.*
9 *Id.* at 139.
10 *Id.* at 140.
11 138 F. 3d 426, 431 (1st Cir. 1998).
12 *Id.* at 430.
13 *Id.*
14 171 F. 3d 504 (7th Cir. 1999).
15 *Id.*
16 *Id.* at 509.
17 *Id.* at 510.

ARIAS U.S.

DO YOU KNOW SOMEONE WHO IS INTERESTED IN LEARNING MORE ABOUT ARIAS•U.S.?

IF SO, PASS ON THIS LETTER OF INVITATION AND MEMBERSHIP APPLICATION.

AN INVITATION...

The rapid growth of ARIAS•U.S. (AIDA Reinsurance and Insurance Arbitration Society) gives testimony to the acceptance of the Society since its incorporation in 1994. Through numerous conferences, seminars and literature, and through the establishment of an ambitious certification process, the Association is realizing its goals. Today, ARIAS•U.S. is comprised of 220 individual members and 31 corporate members of which 83 have been certified as arbitrators.

In addition, ARIAS•U.S. is pleased to add to its list of accomplishments the launching of the ARIAS•U.S. Umpire Selection Procedure and the approval of CLE Accredited Provider Status by the New York State Continuing Legal Education Board.

The Umpire Selection Procedure is a unique software program created specifically for ARIAS•U.S. which randomly generates the names of umpire candidates from a list of ARIAS•U.S. certified arbitrators who have served on at least three completed arbitrations. The Procedure is free to members and available at a nominal cost to non-members.

The Accredited Provider Status allows those who attend ARIAS•U.S. conferences and seminars to earn CLE credits in the areas of professional practice, practice management, skills and ethics. ARIAS•U.S. is proud to be placed among the list of other prestigious Accredited Provider organizations.

ARIAS•U.S. also produced its *Directory, Practical Guide to Reinsurance* and *Guidelines for Arbitrator Conduct.* These publications, as well as quarterly newsletters, discounts to conferences and seminars and access to certified arbitrator training, are available to members without charge.

To date, ARIAS•U.S. has held conferences and seminars across the country including Chicago, San Francisco, San Diego, Philadelphia, Baltimore, Miami, Marco Island, New York City and Bermuda. The Society brings together many of the leading professionals in the field and serves as an educational and training forum.

We invite you to enjoy all its benefits by becoming a member of this prestigious program. If you have any questions regarding membership, please call Stephen H. Acunto, Vice President and Managing Director at 914-699-2020.

Join us and become active in ARIAS•U.S. - the industry's best forum for insurance and reinsurance arbitrations professionals.

Sincerely,

Mark S. Gurevitz
Chairman

Daniel E. Schmidt, IV
President

ARIAS U.S. MEMBERSHIP APPLICATION

AIDA Reinsurance
& Insurance
Arbitration Society
BOX 9001
MT. VERNON, NY 10552
PHONE: 914.699.2020
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ARIAS·U.S. is a not-for-profit corporation that promotes the improvement of the insurance and reinsurance arbitration process for the international and domestic markets. The Society provides continuing in-depth seminars in the skills necessary to serve effectively on an insurance/reinsurance panel. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance market place by:

- ▲ Training and certifying individuals qualified to serve as arbitrators and/or umpires by virtue of their experience, good character and participation in ARIAS·U.S.-sponsored training sessions;
- ▲ Empowering its members to access certified arbitrators/umpires and to provide input in developing efficient economical and just methods of arbitration; and
- ▲ Providing model arbitration clauses and rules of arbitration.

Membership is open to law firms, corporations and individuals interested in helping to achieve the goals of the Society.

▲ MEMBERSHIP BENEFITS

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2000 Calendar of Events

SAVE THE DATE:

NOVEMBER 16-17, 2000

ARIAS•U.S.
Annual Membership Meeting & Conference
Crowne Plaza Manhattan Hotel
1605 Broadway
New York, NY

FEBRUARY 8, 2001

One Day Workshop
Co-sponsored by:
The Association of the Bar
of the City of New York
The Insurance Federation of N.Y.
44 West 44th Street
New York, NY

APRIL 16-28, 2001

2001 Spring Meeting
Hyatt Regency Hilton Head Resort
Hilton Head Island, SC

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