

A I D A   R E I N S U R A N C E   &   I N S U R A N C E   A R B I T R A T I O N   S O C I E T Y

# ARIAS U.S. QUARTERLY

FIRST QUARTER 2000

ARIAS•U.S.  
SETS UMPIRE  
SELECTION  
PROCEDURES  
ASSOCIATION  
PROGRAM IS  
**FIRST OF ITS TYPE.**

BY CHARLES M. FOSS



GUREVITZ  
&  
SCHMIDT



*to lead  
ARIAS•U.S.  
for 2000*



*New Directors  
Elected*

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 ARIAS•U.S. UMPIRE APPOINTMENT PROCEDURE

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."

Attached to this article are the following materials:

- The ARIAS•U.S. Umpire Appointment Procedure and Form Letter;



- The ARIAS•U.S. Certified Arbitrator List (as of February 15, 2000);
- The ARIAS•U.S. Umpire List (as of February 15, 2000).

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. ■

# THE ARIAS•U.S. UMPIRE APPOINTMENT PROCEDURE

EFFECTIVE  
1/1/2000

## A. GENERAL

The ARIAS•U.S. Umpire Appointment Procedure ("Procedure") is available for use in insurance or reinsurance arbitrations. Under the Procedure, umpires will be selected from the ARIAS•U.S. Umpire List, unless the parties to the arbitration specifically request selection from the ARIAS•U.S. Certified Arbitrator List. The ARIAS•U.S. Umpire List consists of those ARIAS•U.S. Certified Arbitrators who have provided ARIAS•U.S. with satisfactory evidence of having served as a panel member on at least three (3) completed (i.e. a final award was issued) insurance or reinsurance arbitrations. The Procedure has been designed by ARIAS•U.S. to be administered by the parties.

## B. RANDOM SELECTION FROM THE ARIAS•U.S. APPOINTMENT DATABASE

1. To initiate the Procedure the parties to the arbitration must jointly notify ARIAS•U.S. in writing (via its Managing Director; see attached form letter) that they have elected to have their umpire selected in accordance with the Procedure. The notice shall specify whether the selection should be made from the ARIAS•U.S. Umpire List or the ARIAS•U.S. Certified Arbitrators List. Upon receipt of this notification, the ARIAS•U.S. Managing Director's office will make a random selection of twelve (12) names from the designated list and will forward the list of twelve (12) names to the parties.
2. The parties will jointly contact (by mail or fax) the first through the tenth candidates on the list of twelve names to determine their availability, identifying the parties, their counsel and their appointed arbitra-

tors. The parties must also notify the umpire candidates of any specific terms set forth in their arbitration agreement that might affect a candidate's eligibility to serve in the matter (e.g. active officer, years of experience, area of specialty, etc.). The parties will also furnish each of the ten (10) candidates with a Questionnaire (ARIAS•U.S. form, unless otherwise agreed) to be promptly completed and returned if the candidate wishes to be considered for appointment. Any candidate who does not return a completed Questionnaire to both parties within (10) days of receipt of the form will be considered unavailable for appointment. The parties should encourage the candidates to submit their Questionnaires via simultaneous fax transmission to ensure receipt by both parties within the ten (10)-day period.

3. In the event fewer than ten (10) candidates are available for appointment, the parties shall, unless they agree to the contrary, contact the eleventh and, if necessary, twelfth candidates on the original list of twelve (12) names in the same manner as prescribed in Paragraph B(2). For example, if only eight (8) of the original ten (10) candidates are available, the parties will contact the eleventh and twelfth candidates on the original list of twelve (12) names. If only seven (7) or fewer of the original ten (10) candidates are available, the parties will contact the eleventh and twelfth candidates on the original list of twelve (12) names and will request the ARIAS•U.S. Managing Director's office to provide an additional random list of twelve (12)

names. From the additional random list, the parties will contact, in numerical order and in the manner prescribed in Paragraph B(2) above, the number of candidates required to achieve a slate of ten (10) available candidates. This process shall be repeated until ten (10) available candidates are identified.

## C. CANDIDATE RANKING AND UMPIRE SELECTION

1. Within seven (7) days after timely receipt of completed Questionnaires from ten (10) available candidates, each party shall select five (5) names from the list of available candidates and simultaneously notify the other party of its selections. The parties should agree on the date, time and method for this simultaneous exchange.
2. Within seven (7) days of the receipt of these initial selections, each party shall select three (3) names from the other party's list and simultaneously exchange these three (3) names with the other party. The parties should agree on the date, time and method for this simultaneous exchange. If the name of a single individual is present on the list of three (3) names of both parties, that individual will be appointed as umpire. If the name of more than one individual is present on both lists, the parties shall select their umpire from among those individuals by drawing lots or by another method acceptable to both parties.
3. If there is no name present on both lists of three (3) names, the parties shall, within three (3) days after receipt of the lists, rank each of the six (6) candidates in order of preference from "1" through "6" with "1"

CONTINUED ON PAGE 4

# The ARIAS•U.S. Umpire Appointment Procedure Effective 1/1/2000

CONTINUED FROM PAGE 3

being the most preferred. The candidate with the lowest combined numerical ranking shall be appointed as umpire. In the event two or more candidates are tied, the parties shall select their umpire from among those candidates by drawing lots or by another method acceptable to both parties.

4. When an umpire has been selected, the parties should notify all responding candidates who were not selected that the selection process is complete.

## D. NOTICES

All notices and responses required under the Procedure should be given in a manner that produces a proof of receipt (via fax, certified mail, or courier). Time periods shall be calculated to run from the first day after a notice or response is received. If a time period expires on a Saturday, Sunday, or legal holiday (i.e. a non-business day), the time period shall be deemed extended to the end of the first following business day. The parties are encouraged to establish a date-and-time-specific schedule at the start of each selection phase, especially if counsel, parties or umpire candidates are located in different countries or time zones.

Notices to the ARIAS•U.S. Managing Director should be addressed as follows:

Stephen H. Acunto, Managing Director  
ARIAS•U.S.

P.O. Box 9001

25-35 Beechwood Avenue

Mt. Vernon, N.Y. 10553

FAX: 914-699-2025

PHONE: 914-699-2020

## D. FEES

The fee for using the Procedure will be the responsibility of the parties to the arbitration and must accompany the initial notification required in Paragraph B(1). If either party, its counsel, or its party-appointed arbitrator is a

member of ARIAS•U.S., there shall be no fee for using the Procedure. If neither party, their counsel, nor their party-appointed arbitrators is a member of ARIAS•U.S., the fee to those parties is \$100.00 each and checks in that amount, payable to "ARIAS•U.S.", must accompany the notice to the ARIAS•U.S. Managing Director required by Paragraph B(1). ARIAS•U.S. reserves the right to adjust the fee for this Procedure.

## E. INDEMNIFICATION

1. The parties' request for a random list and/or notification to ARIAS•U.S. of their intention to have their umpire selected in accordance with the Procedure shall constitute the agreement of each party to the arbitration not to assert any claim, file any suit, or initiate any action against ARIAS•U.S., its Managing Director or their

officers or directors, in connection with the Procedure.

2. The parties' request for a random list and/or notification to ARIAS•U.S. of their intention to have their umpire selected in accordance with the Procedure shall also constitute the agreement of each party to the arbitration to jointly and severally protect, defend, indemnify and hold harmless ARIAS•U.S., its Managing Director and their officers and directors, against any and all expenses, costs and fees of any kind in connection with any claim, action, or lawsuit involving the Procedure.

## F. MODIFICATION

ARIAS•U.S. reserves the right to modify or terminate the Procedure at any time.





VIA FACSIMILE  
914-699-2025

Stephen H. Acunto  
Vice President, Managing Director  
ARIAS•U.S.  
P.O. Box 9001  
25-35 Beechwood Avenue  
Mt. Vernon, N.Y. 10553

**SAMPLE**

RE: UMPIRE SELECTION

Dear Mr. Acunto:

On behalf of \_\_\_\_\_ (Petitioner) and \_\_\_\_\_ (Respondent), parties to a pending arbitration, we request that your office forward to the undersigned a list of twelve (12) names selected at random from the ARIAS•U.S. Umpire List (specify ARIAS•U.S. Certified Arbitrators List, if that list is preferred). This request is made pursuant to the ARIAS•U.S. Umpire Appointment Procedure ("Procedure").

The parties to the arbitration and their representatives understand that their request for a random list and/or use of the Procedure constitutes their agreement not to assert any claim, file any suit, or initiate any action against ARIAS•U.S., its Managing Director, or their officers or directors, against any and all expenses, costs and fees of any kind in connection with any claim, action or lawsuit involving the Procedure or a random list.

The undersigned also understand there is no fee for use of the Procedure because at least one of the parties, counsel, or arbitrators involved in this arbitration is a member of ARIAS•U.S. In this arbitration that ARIAS•U.S. member is \_\_\_\_\_

ALTERNATIVE CLAUSE:

A check in the amount of \$100.00 from each party is enclosed as payment of the ARIAS•U.S. fee for use of the Procedure.

The foregoing is submitted on behalf of the Petitioner and Respondent by their undersigned representatives.

FOR PETITIONER

FOR RESPONDENT

By \_\_\_\_\_  
Name:  
Firm:

By \_\_\_\_\_  
Name:  
Firm:

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



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.

HOWARD N. ANDERSON	THOMAS A. GREENE	ROBERT J. O'HARE, JR.
THERESE ARANA-ADAMS	A. EDWARD GSCHWIND	DR. HERBERT PALMBERGER
RICHARD S. BAKKA	GEORGE A. GOTTHEIMER, JR.	JAMES P. POWERS
NASRI H. BARAKAT	MARTIN D. HABER	J. DANIEL REILY
FRANK J. BARRETT	FRANKLIN D. HAFTL	DEBRA J. ROBERTS
PETER H. BICKFORD	ROBERT F. HALL	EDMOND F. RONDEPIERRE
JOHN W. BING	ROBERT M. HALL	FRANKLIN D. SANDERS
JOHN H. BINNING	JAMES S. HAZARD	DANIEL E. SCHMIDT, IV
MARY ELLEN BURNS	CHARLES W. HAVENS, III	RICHARD D. SMITH
MARVIN J. CASHION	PAUL D. HAWKSWORTH	JACK M. STOKE
R. MICHAEL CASS	ROBERT M. HUGGINS	BERT M. THOMPSON
DEWEY P. CLARK	IAN HUNTER QC	N. DAVID THOMPSON
PETER C. CLEMENTE	WENDELL INGRAHAM	JOHN JACOB TICKNER
DALE C. CRAWFORD	RONALD A. JACKS	THOMAS M. TOBIN
PAUL E. DASSENKO	FLOYD H. KNOWLTON	PETER J. TOL
DONALD T. DECARLO	ANTHONY M. LANZONE	THEODORE A. VERSPYCK
JOHN B. DEINER	MITCHELL L. LATHROP	PAUL WALTHER
ANTHONY L. DIPARDO	PETER F. MALLOY	RICHARD G. WATERMAN
CALEB L. FOWLER	ANDREW MANEVAL	NORMAN M. WAYNE
JAMES H. FRANK	ROBERT M. MANGINO	EMORY L. WHITE
PETER FREY	MERTON E. MARKS	JAMES P. WHITE
CHARLES M. FOSS	ROBERT A. MILLER	RICHARD L. WHITE
DENNIS C. GENTRY	LAWRENCE MONIN	MICHAEL S. WILDER
WILLIAM J. GILMARTIN	GERALD F. MURRAY	EUGENE WOLLAN
RICHARD F. GILMORE	THOMAS NEWMAN	
ROBERT B. GREEN	CHARLES L. NILES, JR.	

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.



# ARIAS•U.S. APPROVED FOR ACCREDITED PROVIDED STATUS BY THE NEW YORK STATE CONTINUING LEGAL EDUCATION BOARD

**W**e are pleased to announce that on December 14, 1999, The New York State continuing Legal Education Board approved ARIAS•U.S.'s application for "Accredited Provider Status" for the period of December 6, 1997 through December 6, 2002. All courses and programs given from August 1, 1997 up to the date of notification, December 14, 1999, were granted retroactive approval as well.

In the upcoming weeks, all ARIAS•U.S. members and non-members who have attended any ARIAS•U.S. conference, from the start of the retroactive period, will be receiving certificates of attendance indicating the number of CLE credits provided by each conference.

ARIAS•U.S. is proud to be approved as an CLE Accredited Provider and is pleased to be placed among the list of other prestigious Accredited Provider organizations.



## ERRATA

For the benefit of our readers, Nick Pearson, who authored the cover title "Why Reinsurance Arbitrations?" in our last quarterly newsletter is a partner in the law firm of Edwards & Angell, LLP where he is a member of the Insurance and Reinsurance Practice Group.



# New ARIAS•U.S. Officers and Directors

## ANNUAL MEETING & CONFERENCE

November 4, 2000

New York, NY



**Mark S. Gurevitz (R) and Daniel E. Schmidt, IV** are newly elected by the ARIAS•U.S. Board of Directors to assume the positions of **Chairman and President, respectively**. Mr. Gurevitz succeeds **Robert M. Mangino**, who served as ARIAS•U.S. Chairman, and Mr. Schmidt succeeds Mr. Gurevitz, who served as President.



**Thomas Orr of General Reinsurance and Eugene Wollan of Mound, Cotton and Wollan**, are elected by the ARIAS•U.S. membership at the November 4, 1999 Annual Meeting to fill the three-year terms being vacated by **Edmond F. Rondepierre and Charles W. Havens, III**.



**Mary A. Lopatto of LeBoeuf, Lamb, Greene & MacRae LLP** is elected by the membership at the November 4, 1999 Annual Meeting to fill the two-year remaining term being vacated by **T. Richard Kennedy**.



**The ARIAS•U.S. Board of Directors** announces the creation of two new titles, **Chairman Emeritus and Director Emeritus** to founding Board members. Shown L-R with newly-elected Chairman **Mark S. Gurevitz (center)** are: **Edmond F. Rondepierre, Ronald A. Jacks (Directors Emeritus)**; **T. Richard Kennedy (Chairman Emeritus)**; **Charles W. Havens, III and Susan Mack (Directors Emeritus)**.



**Mark S. Gurevitz presents plaques of appreciation on behalf of the membership to (clockwise from left) retiring Chairman Robert M. Mangino and retiring Directors T. Richard Kennedy, Edmond F. Rondepierre and Charles W. Havens, III, for their tireless dedication and leadership on the ARIAS•U.S. Board of Directors.**

From Our Photo File...

# 1999 ANNUAL MEETING & CONFERENCE

November 4-5, 1999

The Empire Hotel

New York, NY



**The ARIAS•U.S. 1999 Annual Meeting and Conference held at the Empire Hotel in New York City was the largest meeting since the inception of ARIAS and was attended by over 150 professionals in the field of insurance and reinsurance.**



**T. Richard Kennedy (Top Center), Caleb Fowler (Bottom Right) and Narinder Hargun (Bottom Left) moderate breakout sessions where members had an opportunity to explore the international arbitration process and exchange ideas with other attendees on various issues.**

# From Our Photo File...

CONTINUED FROM PAGE 10

**Colin Croly of Barlow Lyde & Gilbert is the featured luncheon speaker. Mr. Croly compared and contrasted arbitration procedures in his home country of England with those of the United States.**



**Members have the opportunity to meet and greet their fellow professionals at an opening night cocktail reception.**



**Mikel Rosenmeyer, President of AIDA Worldwide (International Law Society), joins ARIAS-U.S. members for the two-day program which focused on International Aspects of Reinsurance Arbitration Practices and Procedures.**

# ARIAS U.S. PUBLICATIONS AVAILABLE...

## GUIDELINES FOR ARBITRATOR CONDUCT

## ARIAS•U.S. DIRECTORY

Includes listing of ARIAS•U.S. Certified Arbitrators

## GUIDELINES FOR REINSURANCE ARBITRATION PROCEDURES



All members will be receiving these three vital documents FREE as part of their membership.

Non-members can purchase these documents for:

### ARIAS•U.S. DIRECTORY

(Price includes copy of **Guidelines for Arbitrator Conduct** FREE). . . . . \$100.00

### GUIDELINES FOR REINSURANCE ARBITRATION PROCEDURES

(Price includes copy of **Guidelines for Arbitrator Conduct** FREE). . . . . \$50.00

**TO ORDER**... submit your request in writing and mail or fax to:

ARIAS•U.S. c/o CINN Worldwide, Inc

PO Box 9001, 25-35 Beechwood Ave

Mount Vernon, New York 10553

Phone: 914/699-2020 • Fax: 914/699-2025

Please make checks payable to: ARIAS•U.S. Check should accompany all requests.



# ARBITRATION LAW: THE CHOICE IS YOURS - OR IS IT?

## INTRODUCTION

Many reinsurance contracts include a “choice of law” provision which specifies that a particular state’s or country’s laws be used in interpreting the reinsurance contract. Reinsurance contracts also typically include arbitration provisions which require that disputes between the parties be resolved through arbitration. Although the Federal Arbitration Act generally applies to these agreements to arbitrate, the parties are nonetheless free to agree to arbitrate under a different legal framework, including arbitration under a specific state’s arbitration law. The relationship between the contract’s choice of law provisions and the arbitration provisions can raise legal questions which materially affect a party’s rights once a dispute arises and lead to litigation the parties originally sought to avoid by providing for arbitration of disputes in the first place.

If the parties’ “choice of law” provisions is not specifically incorporated in the arbitration provision, a question can arise as to whether that general choice-of-law provision determines the procedural law applicable to the arbitration proceeding. The answer to this question can have a significant effect on an arbitration because state and federal arbitration laws vary widely in the procedures and rights provided to the parties, including whether non-admitted reinsurers must post pre-hearing security, whether arbitrators are allowed to award punitive damages, and the extent to which discovery is permitted. This article will discuss whether a choice-of-law provision that does not specifically refer to arbitration can override the general applicability of the Federal Arbitration Act.

Within the past decade the United States Supreme Court has, on two separate occasions, addressed the issue of whether the par-

ties choice of a particular state’s law overrides the general applicability of the Federal Arbitration Act in the arbitration of disputes arising under the agreement. However, the Supreme Court came to opposite conclusions in these cases, and the lower federal courts have had some difficulty in applying and reconciling these decisions.

The first time the Supreme Court addressed this issue was in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), where the construction contract at issue contained an arbitration clause and a separate choice-of-law clause which simply provided that the construction contract at issue contained an arbitration clause and a separate choice-of-law clause which simply provided that the construction contract would be governed by the law of “the place where the Project is located,” i.e. California. The California Court of Appeals held that the choice-of-law provision in the construction contract, which did not specifically refer to applicable arbitration law, nonetheless incorporated the California rules of arbitration into the parties’ arbitration agreement. The United States

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*The United States Supreme court  
affirmed, holding that there “is no  
federal policy favoring arbitration  
under a certain set of procedural  
rules; the federal policy is simply to  
ensure the enforceability, according  
to their terms, of private agreements  
to arbitrate.”*

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Supreme court affirmed, holding that there “is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” The Supreme Court adopted the California courts’ finding that under California contract law, the parties intended their choice-of-law provisions to adopt California’s arbitration rules, and therefore held that although the arbitration agreement in the construction contract fell within the general scope of the Federal Arbitration Act, the choice-of-law clause in that contract required the application of California, and not federal, arbitration law. The result of the Supreme Court’s holding was that the arbitration was stayed pending this resolution of litigation against related parties - a result which would not have occurred under the Federal Arbitration Act.

The United States Supreme Court next addressed this issue in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 155 S. Ct. 1212 (1995), in which the plaintiffs brought an arbitration action against their stock broker, alleging that Shearson Lehman mishandled their account and seeking compensatory and punitive damages. The brokerage agreement at issue contained an arbitration clause and a separate choice-of-law clause designating the law of the State of New York as controlling with respect to the agreement. The arbitration panel awarded the plaintiffs compensatory and punitive damages, and Shearson Lehman moved to vacate the award of punitive damages as being contrary to new York law, which provided that only judges, and not arbitrators, could award punitive damages. The district court agreed with Shearson Lehman, and vacated the award of punitive damages. The Court of Appeals affirmed this ruling, but the Supreme Court reversed.

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# Arbitration Law: The Choice is Yours—or is it?

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The Supreme Court held that the choice-of-law provision in the brokerage agreement did not require the arbitration to be conducted under New York law, but instead only required the arbitration panel to use New York law to interpret the brokerage agreement. The Supreme Court reached this conclusion by applying two common-law principles of contract construction: (i) “the court should construe the ambiguous language against the interest of the party that drafted it;” and (ii) “a document should be read to give effect to all its provisions and to render them consistent with each other.” 115 S.Ct. at 1219. Under the first principle, the Supreme Court held that the choice-of-law clause was ambiguous and should there be construed against Shearson Lehman, the party that drafted it. Therefore, the choice-of-law clause was construed to not incorporate New York’s laws limiting the powers of arbitrators. Under the second principle of contract construction, the Supreme Court held that:

*We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read “the laws of the State of New York” to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.* 115 S.Ct. at 1219.

The Supreme Court distinguished its earlier ruling in *Volt* on the ground that in that case, it had deferred to the California court’s construction of the choice-of-law provision.

Most federal courts faced with the task of resolving the contradictory holdings in *Volt* and *Mastrobuono* have distinguished the holding in *Volt* on the fact that the *Volt* decision merely relied upon the California court’s construction of the arbitration agreement, and have held that a generic choice-of-law provision does not incorporate a specific state’s arbitration law, e.g. *Paine Webber Inc. v.*

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*The lesson to be learned from the Volt and Mastrobuono decisions is that when it comes to arbitration agreements, it is dangerous to assume that the contract’s choice of law provision will also govern the arbitration.*

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*Elahi*, 87 F.3d 589 (1st Cir. 1996).

Understandably, this distinction has not been universally accepted and several courts have been unable to reconcile *Volt* and *Mastrobuono*. For example, in *Lanier v. Old Republic Insurance Company*, 936 F. Supp. 839 (M.D. Ala. 1996), the plaintiffs filed a petition to confirm an arbitration award and the defendants filed a motion to remand the arbitration award to the arbitration panel, in part, to clarify ambiguous provisions in the award. The contracts at issue contained an arbitration clause and a separate choice-of-law clause which provided that Alabama law would govern. The plaintiffs argued that under the Supreme Court’s holding in *Volt*, the choice-of-law clause required the district court to apply the Alabama Arbitration Act which, the plaintiffs contended, precluded remanding the award to the panel for clarification. The defendant argued that the Supreme Court’s holding in *Mastrobuono* required the court to apply the Federal Arbitration Act, which permitted remanding the award to the panel for clarification. Although invited to resolve the difference between these two cases, the district court did not, stating that it would not:

*Undertake unnecessarily the difficult task of deciding whether the circumstances presented here fall within the holding of Mastrobuono (federal law controls). The court must admit that the difference between the two cases, while there, is difficult to grasp.* 936 F. Supp. at 844.

Instead, the court analyzed both federal and Alabama law and held that both permitted remand of arbitration awards to the arbitration panel to clarify ambiguous portions of the award.

## CONCLUSION

As the holding, or lack thereof, in *Lanier* shows, *Mastrobuono* is not the last word on whether choice-of-law provisions incorporate state arbitration laws into arbitration agreements. The *Mastrobuono* court did not rule that, as a matter of law, the Federal Arbitration Act will apply to contracts involving interstate contracts regardless of any general choice of law provision. Rather, the analysis employed by the Supreme Court in *Mastrobuono* is an exercise in contract construction which is dependent upon the particular contract wording, the nature of the parties, and the particular court making the interpretation, and could lead to widely divergent and uncertain results.

This uncertainty is anathema to the predictability expected by parties to contracts, including reinsurance agreements. This uncertainty can be significantly reduced by clearly providing in the reinsurance contract which law the parties want to apply to any arbitration under that agreement. An example of such a statement is: “Notwithstanding anything in this Agreement to the contrary, the Federal Arbitration Act, 9 U.S. § 1 *et seq.*, shall apply to and govern all aspects of any arbitration conducted hereunder.”

If application of a particular state’s arbitration law or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is desired, specific reference to that law should be included in place of the Federal Arbitration Act. This type of specific reference to the law applicable to the arbitration should prevent a court from finding any ambiguity as to the applicable law, since *Volt* and *Mastrobuono* concur that agreements to arbitrate under a specified set of rules, either federal, state or foreign, is “entirely consistent with the federal policy to ensure the enforceability according to their terms, or private agreements to arbitrate.” *Volt*, 489 U.S. at 476; *Mastrobuono*, 115 S.Ct. at 1216.

The lesson to be learned from the *Volt* and *Mastrobuono* decisions is that when it comes to arbitration agreements, it is dangerous to assume that the contract’s choice of law provision will also govern the arbitration. A keen attention to this detail in the drafting stages can save the parties unnecessary (and unwanted) litigation.

- by Albert E. Fowerbaugh, Jr.

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## FINAL NOTICE FOR LATE REGISTRATION

# MARCH 10, 2000 SEMINAR

### ARIAS U.S. ARBITRATION PRACTICE SEMINAR SERIES

On behalf of the Board of Directors it gives us great pleasure to invite you to participate in the upcoming arbitration practice seminar. This program was designed as a half-day seminar focused on arbitration practice and procedures.

Over the years arbitration practice seminars were co-chaired by Luce, Forward, Hamilton & Scripps, San Diego; Lord Bissell & Brook, Chicago; ACE USA and White and Williams LLP, Philadelphia, PA and co-sponsored by the New York City Bar in New York.

To date, more than 150 ARIAS•U.S. members and non-members have attended these seminars and earned credit towards their ARIAS•U.S. Certification. And now, we are pleased to announce the offering of CLE credits to those who attend ARIAS•U.S. programs.

On March 10, 2000 ARIAS•U.S. will be offering its first seminar program for 2000 in Chicago. This program will focus on "DISCUSSIONS ON THE USE OF EXPERT WITNESSES AND THE SCOPE OF CONFIDENTIALITY IN ARBITRATION" and will be moderated and co-chaired by James Sporleder of Allstate and David Spector of Hopkins & Sutter.

The program begins at 9:00 a.m. and concludes following a luncheon being held at 1:00 p.m. The seminars will be held at the offices of Hopkins & Sutter, Three First National Plaza, 4th Floor Conference Room, Chicago, IL. Attached is late registration information for your convenience. Take a moment to fill out the registration form to secure your place at this seminar.

WE LOOK FORWARD  
TO SEEING YOU  
IN CHICAGO ON  
MARCH 10<sup>TH</sup>, 2000.

ARIAS  
U.S.

# 2000 Calendar of Events

## SAVE THE DATE:

### MARCH 10, 2000

ARIAS•U.S. One Day  
Seminar held at the  
office of  
Hopkins & Sutter  
Three First National Plaza  
4th Floor Conference Room  
Chicago, IL

### MAY 18-20, 2000

ARIAS•U.S.  
Spring Conference  
Ritz Carlton  
Palm Beach, Florida

## CO-SPONSORED BY: ESLR

NOVEMBER, 2000  
ANNUAL MEMBERSHIP  
MEETING & CONFERENCE  
NEW YORK, NY  
FOR FURTHER  
INFORMATION CALL:  
ARIAS•U.S. 914-699-2020

**FINAL  
NOTICE  
FOR LATE  
REGISTRATION**

## March 10, 2000 Chicago Seminar

# REGISTRATION INFORMATION

### HOTEL ACCOMMODATIONS

Hotel Burnham  
1 West Washington Street  
Chicago, IL

### ROOM RATES

Standard Rate      \$155 per night  
Suite Rate          \$225 per night  
Overnight Parking (Optional) \$29.00 per day

*Accommodations available on a first-come, first-served basis. Local taxes not included.*

### FOR HOTEL ACCOMMODATIONS

Call: 1-877-294-9712  
Refer to: ARIAS•U.S. Seminar

### MEETING REGISTRATION FEES:

Members            \$195.00  
Non-Members      \$ 295.00

### Meeting Registration Fee includes:

Program materials;  
Buffet Lunch;  
Coffee Break.

### Not included in Registration Fee:

Hotel accommodations, personal transportation to/from seminar

### NYS CLE Credit:

4 Continuing Legal Education Credits are available to those who attend this seminar which breaks down as follows:  
2 CLE credits - Ethics  
2 CLE credits - General (General credit includes categories in the area of skills, practice management and professional practice). This program is structured for both newly admitted attorney's and experienced attorney's.

# PAYMENT & REGISTRATION INFORMATION:

Mail registration information and fee (ARIAS•U.S. Fed. I.D. number 13-3804860), payable to ARIAS•U.S. to: ARIAS•U.S., 25-35 Beechwood Avenue, Mt. Vernon, NY 10553.

**CANCELLATION POLICY:** The cutoff date for refunds is 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. seminar/conference within a 12 month period. All credit requests must be submitted in writing.



## REGISTRATION INFORMATION

### 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 attendance 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.

## REGISTRATION FORM

Registration Fees (Registration Deadline March 6, 2000)

ARIAS•U.S. Member (please check appropriate category)

ARIAS•U.S. Member:      \$195  
☐ Corporate  
☐ Individual

Non-Member:              \$295  
☐ Non-member may apply for membership and receive member rate by checking this box. A membership application will be sent to you.

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CITY/STATE/ZIP: \_\_\_\_\_

PHONE: \_\_\_\_\_

### DIRECT INQUIRIES TO:

Stephen H. Acunto, Vice President, Managing Director

Maria Sclafani, Corporate Secretary

Phone: 914-699-2020 Fax: 914-699-2025

## GUIDELINES & BEST PRACTICES

By setting forth ethical and procedural guidelines and best practices for arbitration, ARIAS•U.S. aims to help reduce costs, streamline processes, curtail unnecessary discovery proceedings and realize the fair resolution of disputes.



*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 192 individual members and 29 corporate members of which 76 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 forums for insurance and reinsurance arbitrations professionals.

Sincerely,

A handwritten signature in black ink, reading "Mark S. Gurevitz".

Mark S. Gurevitz  
Chairman

A handwritten signature in black ink, reading "Daniel E. Schmidt, IV".

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  
FAX: 914.699.2025

**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

Benefits of membership include the newsletters, discounts to seminars/workshops, membership directory, access to certified arbitrator training, model arbitration classes and practical guidance with respect to procedure.

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E-MAIL ADDRESS: \_\_\_\_\_

### Fees and Annual Dues:

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE:	\$500	\$1,500
ANNUAL DUES:	\$250	\$750
TOTAL	\$750 △	\$2,250 △

AMOUNT ENCLOSED: \$ \_\_\_\_\_

*Return this application with check for Initial Fee and Annual Dues to:*

**ARIAS·U.S. Membership Committee**

Stephen H. Acunto

CINN Worldwide, Inc.

P.O. Box 9001

25-35 Beechwood Avenue

Mount Vernon, NY 10553

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# 2000 Calendar of Events

## SAVE THE DATE:

MARCH 10, 2000

ARIAS•U.S.  
One Day Seminar  
Chicago, IL

MAY 18-20, 2000

ARIAS•U.S.  
Spring Conference  
Ritz Carlton  
Palm Beach, Florida

CO-SPONSORED BY: ESLR

NOVEMBER, 2000

ARIAS•U.S.  
Annual Membership Meeting & Conference  
New York, NY

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

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