ARIAS U.S. QUARTERLY
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New ARIAS Website Searches for Arbitrator Experience

editor's comments

T. Richard Kennedy

As you may have noted, the Quarterly is now being published according to a regular schedule. This meets our goal of being in the mail by the end of each calendar quarter. Our members have a right to expect nothing less. Thanks for this achievement go largely to Bill Yankus and the CINN staff.

Included in this issue are two excellent articles dealing with legal issues that arise in arbitration proceedings. The article by John Nonna, Larry Schiffer, and Lisa Joedecke, *Res Judicata and Collateral Estoppel*, describes the nature of the two doctrines as developed by the courts, and how res judicata and collateral estoppel may apply in arbitrations. *Available Relief in Arbitration*, by Mary Kay Vyskocil and Patricia Taylor Fox, discusses the authority of a panel to provide relief oftentimes requested by parties.

Our cover story, *New ARIAS Website Searches for Arbitrator Experience*, features the significant change that has recently been implemented in the ARIAS•U.S. website. A completely new search mechanism has been put in place that makes it possible now to bring up profiles of certified arbitrators who have specific insurance or reinsurance experience. It gives parties in a dispute an important new way to locate a pool of prospective arbitrators who have worked in the field involved in the dispute. After reading the article, I recommend that you take a test drive of the new system.

Let us hear from you also about what you are doing – relocating, change of address, setting up a new shop, or whatever. We will be happy to publish your information in *Members on the Move*.

T. Richard Kennedy,
Editor

Editorial Policy

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

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

Manuscripts should be submitted as email attachments to byankus@cinn.com.

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

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feature story

Res Judicata and Collateral Estoppel

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I. Introduction

The doctrines of res judicata and collateral estoppel preclude parties from relitigating claims and issues in subsequent proceedings already adjudicated in prior actions.[1] Res judicata, or claim preclusion, prevents a party from bringing a subsequent proceeding based on the same cause of action that was subject to a final judgment in a prior proceeding.[2] By contrast, collateral estoppel, or issue preclusion, prevents a party from relitigating in a subsequent action issues that were necessarily and previously decided in a prior action.[3] These doctrines serve to promote judicial economy, prevent unnecessary litigation, and preserve reliance on the finality of adjudicative decisions and awards.[4]

Both res judicata and collateral estoppel have been applied to arbitration.[5] Circumstances exist, however, where shortcomings in the arbitration process undermine the principles upon which preclusion is founded, often rendering the application of the doctrines inappropriate.

II. Res Judicata

Res judicata bars the relitigation of the same cause of action by the same parties in a subsequent adjudication.[6] For res judicata to apply, there must have been a final determination of the claim in the prior action, and the prior action must have involved the same parties.[7] "[A]n award of arbitrators itself may constitute the basis for a plea of res judicata."[8]

In order for res judicata to apply, the decision in the prior adjudication must amount to a final determination on the merits of the cause of action.[9] As one court explained, for an arbitration award to be final it need only "resolve the dispute submitted in a manner that does not remit the parties to a new controversy or future litigation, and . . . unequivocally indicate their respective rights and obligations . . . ."[10] This is true whether the arbitration award has been confirmed by a court, and regardless of grounds upon which the arbitration award was based.[11]

In contrast to collateral estoppel, res judicata applies to the adjudication of all issues based upon a single transaction or event, and bars the relitigation of those issues if they could have been determined in the prior proceeding, whether or not they were actually determined in the prior proceeding.[12] As the Seventh Circuit explained in Rudell v. Comprehensive Accounting Corp., "'[t]he prior judgment is conclusive not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented.'"[13] In determining whether a subsequent proceeding involves the same cause of action, courts consider several factors, including whether the same transaction, evidence, and facts are needed to support both claims.[14]

Res judicata also requires that the parties involved in the subsequent proceeding be identical to, or in privity with, the parties involved in the prior proceeding.[15] Whether the parties are in privity with one another is determined by examining whether they have common interests, either concurrent or successive, in the same legal rights.[16] Barring only those parties who were present in the prior action helps guarantee that the party being precluded from asserting the cause of action had a full and fair opportunity to litigate the issues arising from that claim.[17]

Consider a situation where a cedent has two separate reinsurers, both of whom refuse to indemnify the ceding company

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for its loss payment on the original policy. The ceding company demands arbitration seeking reimbursement from one reinsurer, but is unsuccessful. The ceding company then demands arbitration against the other reinsurer who asserts res judicata as a defense. The defense of res judicata should fail because the reinsurer in the second arbitration is not identical to, or in privity with, the reinsurer in the first arbitration. Although the determination in the second arbitration concerns the same loss payment and may require the presentation of similar evidence and facts, the second arbitration concerns a separate reinsurance agreement between different parties with interests distinct from those in the first arbitration.

Consider also a situation where the arbitration proceeding employed streamlined procedures, was governed by a confidentiality agreement, and the arbitration award had not been confirmed by a court. The arbitrator in the second arbitration must decide whether the determination in the first arbitration was final and whether that determination was based on the merits of the cause of action. Although the simplified procedures and confidentiality agreement may not affect the finality of the award, they may prevent the arbitrator in the second proceeding from learning facts that indicate whether the determination in the first arbitration was on the merits of the parties' claims.

III. Collateral Estoppel

Collateral estoppel bars the relitigation of issues previously and necessarily determined in a prior action, even if the prior action was based on a different cause of action.[18] Certain prerequisites must be met for collateral estoppel to apply: (i) the issue in the prior and subsequent adjudications must be identical; (ii) the issue must have been necessarily and actually decided in the prior proceeding; (iii) the issue must have been necessary to support a valid and final judgment on the merits; and (iv) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.[19]

Where these prerequisites are fulfilled, collateral estoppel may be applied to arbitration.[20] Characteristics common to many, if not all, arbitrations, however, may hinder the arbitrator's ability to undertake a meaningful collateral estoppel analysis. As a result, the application of collateral estoppel in the arbitral context could serve to transform the arbitration process into a forum inconsistent with the intent of the parties.

A. Simplified procedures may prevent a meaningful collateral estoppel analysis.

The characteristics that make arbitration an attractive alternative to conventional litigation also create obstacles to meaningful collateral estoppel analysis. Arbitration is a favored alternative method for dispute resolution because it is expedient and less expensive than litigation.[21] These benefits are achieved by consensus among the parties to the arbitration agreement, who maintain control over process while simultaneously simplifying the procedural requirements.[22] These simplified procedures may include restricted discovery, limited evidentiary submissions, and the lack of a reasoned opinion accompanying any potential award. Although beneficial to an expedient and inexpensive resolution of a current dispute, these simplifications often make it difficult, if not impossible, for an arbitration panel in a subsequent proceeding to determine whether an issue was necessarily and actually decided, and whether the party against whom preclusion is asserted had a full and fair opportunity to argue the issue.

In determining whether an issue in a prior proceeding is identical to an issue in a subsequent proceeding, and whether a party had a full and fair opportunity to litigate an issue, courts analyze several factors. These factors include whether the claims are closely related, whether the arguments in both proceedings overlap or deal with the same evidence and legal principles, and whether discovery in the prior proceeding can be expected to have encompassed material sought in the subsequent proceeding.

The doctrines of res judicata and collateral estoppel preclude parties from relitigating claims and issues in subsequent proceedings already adjudicated in prior actions.[1]

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The difficulty in undertaking a collateral estoppel analysis is compounded where there is no record of the prior proceeding, or where a confidentiality agreement governs the prior proceeding.

The lack of a reasoned opinion accompanying an arbitration award makes a collateral estoppel analysis challenging. Whether an arbitration award is accompanied by a reasoned opinion depends upon the rules agreed upon by the parties to the arbitration and the law in the jurisdiction to which the agreement is subject. For example, under New York law arbitrators are not required to issue reasoned opinions.[24] The Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes require only that the award "consist of a written statement . . . setting forth the disposition of the claims and relief, if any, awarded."[25] In practice, most reinsurance arbitrators do not write reasoned awards unless required to do so by the arbitration agreement.

Where an award is devoid of explanation, courts often find themselves forced to determine by implication whether an issue is precluded by a prior proceeding.[26] Implicitly determining whether an issue is identical to, or has been actually or necessarily decided, places a significant burden on the arbitration panel, which must glean from what little information is available whether the party against whom collateral estoppel is asserted in fact had a full and fair opportunity to argue the issue. Implicitly determining whether an issue is precluded also creates a seemingly insurmountable burden for the party asserting collateral estoppel, who carries the weight of affirmatively proving collateral estoppel.

Although ultimately resting its holding on a lack of privity between the parties against whom preclusion was asserted, a Connecticut federal court in Hartford Accident & Indemnity Co. v. Columbia Casualty Co., noted that "the pithy arbitration award makes it virtually impossible [to] ascertain that all identical issues were addressed and ruled on by the arbitration panel . . . ."[27] The Second Circuit has also commented on the issue, recognizing as much in BBS Norwalk v. Raccolta, Inc.[28] There, the court reversed summary judgment, holding that the party asserting collateral estoppel had not met its burden of establishing that the issue in the prior proceeding was identical to the issue in the subsequent proceeding.[29] One of the factors weighed in the court's decision was that, although not required, the arbitrator had given no reasons for the decision.[30]

The difficulty in undertaking a collateral estoppel analysis is compounded where there is no record of the prior proceeding, or where a confidentiality agreement governs the prior proceeding. In these circumstances, the interests of the parties to the prior proceeding in maintaining the confidentiality conflicts with the interests of the arbitrator or party asserting collateral estoppel in the subsequent proceeding in determining whether the issue in the prior proceeding was fully and fairly argued. These difficulties make a meaningful collateral estoppel analysis nearly impossible unless confidentiality is waived and relevant documents and transcripts from the prior proceeding are made available to the second arbitration panel.

Discovery limitations also make collateral estoppel analysis difficult. Discovery limitations cast additional doubt about whether the discovery in the prior proceeding encompassed the matters sought in the subsequent proceeding. An issue in a prior proceeding that required little or no discovery might not be as clear in a subsequent proceeding. Applying collateral estoppel prevents the parties from clarifying the issue in the subsequent proceeding, and thereby prevents them from fully and fairly developing the issue for argument.

Consider again the example of the ceding company illustrated above. Assume there was no discovery in the first arbitration, as was agreed by the parties in their arbitration agreement. Precluding an issue in the second arbitration that was on the periphery of the ceding company's dispute with the first reinsurer may prevent the ceding company from discovering facts that, although unnecessary for a determination in the first arbitration, are important to the determination in the second arbitration. This could

happen even if the ceding company and the second reinsurer did not limit discovery in the second arbitration agreement.

IV. The Arbitrability of the Preclusion Issue

Whether the application of the preclusion doctrines are themselves subject to arbitration depends on the arbitration agreement. Arbitration is rooted in a contractual agreement between consenting parties to submit their disputes to resolution in an alternative forum. Because the FAA guarantees the enforceability of these contracts, parties may make anything they choose subject to their arbitration agreement, other than that which is prohibited by law.[31] As a result of the strong presumption in favor of arbitrability established by the FAA, it is the arbitration agreement that serves as the measure of arbitrability. Armed with this liberal presumption, courts have held that the application of collateral estoppel in an arbitration is itself an arbitrable issue, particularly where the parties have failed to specifically exempt the issue from the arbitration agreement.[32]

In United States Fire Insurance Co. v. National Gypsum Co., the arbitration clause directed the parties to submit any disputed issues within the scope of the agreement to arbitration.33 The Second Circuit held that the issue of whether collateral estoppel could be asserted in the arbitration was itself arbitrable.[34] There, the court noted the presumption of arbitrability established with the passage of the FAA, and reasoned that where there is ambiguity the arbitration clause should be construed liberally. As such, the dispute over collateral estoppel was held to be within the scope of the arbitration agreement.[35]

IV. Conclusion

The application of res judicata and collateral estoppel to arbitration proceedings aims to avoid unnecessary and duplicative determinations of issues already decided. In theory, this aim is consistent with the intentions of the FAA and most participants who enter consensual arbitration agreements. In practice, however, the application of these doctrines may prove to prolong proceedings, and particularly where the record lacks information and determinations are made by implication, may hinder a meaningful preclusion analysis.

1 *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 327 (1979).

2 *Id.*

3 *Id.*

4 *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 467 (1982); *Commonwealth Ins. Co. v. Thomas A. Greene & Co., Inc.,* 709 F. Supp. 86, 88 (S.D.N.Y. 1989).

5 See e.g., *Rudell v. Comprehensive Accounting Corp.,* 802 F.2d 926 (7th Cir. 1986); *Behrens v. Skelly,* 173 F.2d 715 (3d Cir. 1949); *Usina Costa Pinto S.A. v. Louis Dreyfus Sugar Co., Inc.,* 933 F. Supp. 1170, 1176 (S.D.N.Y. 1996).

6 *Parklane Hosiery Co.,* 439 U.S. at 327.

7 *Associated Construction Co. v. Camp, Dresser & McKee, Inc.,* 646 F. Supp. 1574, 1578 (D.Ct. 1986).

8 *Behrens,* 173 F.2d at 720.

9 *Id.*

10 *In the Matter of the Arbitration between Albert H. Guetta and Raxon Fabrics Corp.*, 510 N.Y.S. 2d 576, 578 (App. Div. 1st Dep't 1987).

11 *Associated Construction Co.,* 646 F. Supp. at 1578.

12 See *Kremer*, 456 U.S. at 467 (1982).

13 *Rudell,* 802 F.2d at 929; *see also Associated Construction Co.,* 646 F. Supp. at 1578.

14 *Usina Costa Pinto S.A.*, 933 F. Supp. at 1177.

15 *Rudell,* 802 F.2d at 933; *Hartford Accident & Indemnity Co. v. Columbia Casualty Co.*, 97 CV 1413 (JBA) (D.Ct. Mar. 31, 2000).

16 *Behrens,* 173 F.2d at 717.

17 *Rudell,* 802 F.2d at 932.

18 *Parklane Hosiery Co.,* 439 U.S. at 327.

19 *Boguslavsky v. Kaplan,* 159 F.3d 715, 720 (2d Cir. 1998); Usina Costa Pinto S.A., 933 F.2d at 1178.

20 *Boguslavsky,* 159 F.3d at 720; *Commonwealth Ins. Co.,* 709 F. Supp. at 88.

21 *See National Union Fire Ins. Co. v. Belco Petroleum Corp.,* 88 F.3d 129, 133 (2d Cir. 1996).

22 *See id.*

23 RESTATEMENT (SECOND) OF JUDGMENTS § 7.

24 *Raxon Fabrics Corp.,* 510 N.Y.S. 2d at 578.

25 Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, Rule 15.4 (Sept. 1999).

26 *See Norris v. Grosvenor Marketing Ltd.,* 803 F.2d 1281 (2d Cir. 1986).

27 *Hartford Accident & Indemnity Co.,* 97 CV 1413 (JBA) (D.Ct. Mar. 31, 2000).

28 *BBS Norwalk*, 117 F.3d 674, 677 (2d Cir. 1997).

29 *Id.* at 677-78.

30 *Id.* at 678.

31 See FEDERAL ARBITRATION ACT, 9 U.S.C. § 2 ("[a] written provision in any...contract...to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation for any contract.").

32 *See e.g., Belco Petroleum Corp.,* 88 F.3d at 135.

33 *U.S. Fire Ins. Co. v. National Gypsum Co.,* No. 1761, (Winter, J.) (2d Cir. Nov. 4, 1996); see also Belco Petroleum Corp., 88 F.3d at 133.

34 *U.S. Fire Ins. Co.,* No. 1761 (Winter, J.); *see also Belco Petroleum Corp.,* 88 F.3d at 133.

35 *U.S. Fire Ins. Co.,* No. 1761 (Winter, J.); *see also Belco Petroleum Corp.,* 88 F.3d at 133. ▼

news and notices

Workshop Registration Scramble

Many members, who had hoped to attend the September Workshop, were disappointed to receive an email notice on Tuesday August 5 announcing that all 27 spots were filled. Some members had not even received or opened their letters containing the registration form. Executive Director Bill Yankus said that a flurry of faxes on Monday afternoon and Tuesday morning had quickly taken all positions.

This rapid response, two working days after the mailing, is an indication of how the growth of ARIAS•U.S. is putting new demands on the training program. Just nine months earlier, the January workshop had taken nine working days to fill up. Oversubscription to the Bermuda Conference was a precursor to this latest result.

Just as the main conferences now are being scheduled in much larger facilities, the workshops will need modification, as well. The solution is not as simple because the faculty of these sessions, which are primarily mock arbitrations, is nearly as large as the student body.

Directory Mailing

The 2003 Directory is planned for shipping to all members in October. The content of the certified arbitrator profiles will be drawn from the online versions of the directory sometime in September. Since the directory is only distributed once each year, members should keep in mind that the online profiles are updated continuously during the year. Whenever you are using specific information about an arbitrator, it may be worthwhile to check the latest profile at www.arias-us.org.

Fall Conference and Annual Meeting Announced

Hilton New York will again be the venue for the annual Fall Conference. Program details were announced in early September in the mail and on the website; online registration is available on the website. Hotel reservations may be made now by calling 1-800-445-8667. Rooms have been set aside, so please use the Group Code ARI.

Use of Electronic Communication with Members

One of the reasons that the workshops have previously been announced by mailed letters is that members have not all been fully connected through electronic means. While nearly all members have email addresses, facility with the process has not been universal. The ARIAS•U.S. administrative team would like to urge members to improve their operating efficiency with electronic media, if you are not currently comfortable with it. To function effectively in today's business world and to be an active, useful participant in arbitrations, it is more important than ever to have Internet access and good email capability, preferably through a broadband connection, using a cable modem or DSL line, if you are not on a corporate network.

The new website will increasingly be a place where information will be made available. A members-only area is being considered for privileged content. Also, signing up for events which have limited capacity may be better handled by announcing a time when registrations will be accepted. Such an approach prevents geographic and random postal effects from disadvantaging members.

Reminder: Spring Will Be a Little Late Next Year . . . and at The Breakers!

As reported in the last issue, a series of significant scheduling conflicts pushed the 2004 Spring Conference to June 9-11. That shift also affected the location, since some that were being considered are just too hot by June. However, Palm Beach, Florida is along the Atlantic coast and in June the average high temperature is in the mid-80s. It should be warm, but not unpleasant.

Best of all, the conference will be at The Breakers, the classic, elegant resort. With two golf courses and a beautifully renovat-

ed interior and spa, there could not be a more perfect location. By taking advantage of the early off-season, we get good weather, reasonable rates, and a location that is easy to get to. Plan to be there from Wednesday noon until Friday noon, if not through the weekend.

Reminder: Certification Expiration

Certified Arbitrators should keep in mind that maintenance of certification requires attending at least one seminar within the two-year certification period. Expiration dates are indicated on your certificate. If you have any question about the date or the rule, contact bparadis@cinn.com.

The purpose of this rule is to ensure that arbitrators maintain their knowledge and involvement in the process of improving arbitration.

Anyone who does not maintain certification will be withdrawn from the website and directory, until he or she attends another conference.

Online Calendar of Events

Many of the questions that come in to the ARIAS office relate to the timing, location, and content of conferences and workshops. While phone calls and emails are always welcome, members may find it faster and easier to refer to the calendar that is listed near the top of the navigation buttons at www.arias-us.org. The information there is kept current at all times. Any announcements relating to events are posted there first.

Board Decisions

Changes to By-Laws

At its June 27th meeting in Hartford, the Board approved a change to the ARIAS•U.S. By-Laws. Article III now reads as follows:

> The fiscal year of The Society shall begin on the first day of July of each year and end on the 30th of June of the following year.

All By-Laws text has been updated to reflect this change.

Confirmation of Requirement

The Board re-confirmed that arbitration experience cited in support of a certification application must have been completed within the past two years.

New Certifications/Umpires

At the June 27 Board meeting, the following 16 members were certified as ARIAS•U.S. Arbitrators. Biographies of recently certified arbitrators begin on page 20.

- Robert L. Comeau
- Andrew Ian Douglass
- Gregg C. Frederick
- Robert D. Holland
- Jerome Karter
- Patricia M. Kirschling
- W. James MacGinnitie
- Paul J. McGee
- Roderick B. Mathews
- Robert C. Quigley
- Richard M. Shaw
- Radley D. Sheldrick
- David C. Thirkill
- David W. Tritton
- Jacobus J. Van de Graaf
- Charles J. Widder

In addition, six members were added to the Umpire list:

- Ronald Gass
- Robert B. Green
- Wendell Oliver Ingraham
- T. Richard Kennedy
- James J. Phair
- Paul Walther ▼

...it is more important than ever to have Internet access and good email capability, preferably through a broadband connection, ...

feature

Available Relief in Arbitration


Mary Kay Vyskocil

MARY KAY VYSKOCIL
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I. The Arbitration Clause is the Starting Point for Determining the Scope of the Panel's Authority to Afford Relief

In considering the scope of an arbitration panel's authority to afford relief, the starting point is the arbitration agreement. Thus, where an arbitration clause did not limit the remedies that could be imposed, and specifically provided that the panel could render its decision based on "custom and usage in the insurance and reinsurance business" the court in *Unigard Security Insurance Co. v. Cigna Reinsurance Co.,* 82 F.3d 423, 1996 WL 162435 (9th Cir. 1996), held that because the evidence supported a finding that the panel could afford equitable relief, the arbitrators did not exceed their powers when they took equitable considerations into account in interpreting the contract. *See also Advest, Inc. v. McCarthy*, 914 F.2d 6, 10-11 (1st Cir. 1990) ("[A]rbitrators' remedial choices are not restricted to the array of anodynes proposed during the hearing. In actuality, the opposite is true: subject to the terms of the empowering clause, arbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases.")

In addition to looking to the arbitration agreement, courts will look to the submissions by the parties in determining the scope of the arbitrators' authority to grant relief. *E.g., Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989); *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.,* 931 F.2d 191, 195 (2d Cir. 1991). Further, "courts have, consistent with the federal policy favoring arbitration, been hesitant to find that the arbitrator exceeded his authority where the arbitration agreement fails to affirmatively or otherwise clearly limit the arbitrator's authority." *Rhone-Poulenc, Inc. v. Gould Electronics, Inc.*, 1998 WL 704420, *3 (N.D. Cal. 1998); *Michigan Mutual Insurance Co. v. Unigard Security Insurance Co.*, 44 F.3d 826, 831 (9th Cir. 1995) (where reinsurance agreement provided for arbitration of "any" dispute and did not place limits on the types of relief the panel could grant, "the panel had the authority to settle and determine the dispute appropriately").

II. Equitable Relief

"It is beyond question that the arbitrator may have broad equity powers if the rules under which he is operating provide for equitable relief." *Brown v. Coleman Co.*, 220 F.3d 1180, 1183 (10th Cir. 2000). Thus, where an arbitration was conducted under an AAA rule that gave the arbitrators the power to "grant any remedy or relief that the [panel] deems just and equitable," the panel's power to grant such relief was not limited by the scope of the parties' agreement. *See id.*

In *Executive Life Insurance Co. of New York v. Alexander Insurance Ltd.*, 999 F.2d 318 (8th Cir. 1993), Alexander reinsured Executive under three contracts for which Executive paid a one-time premium of $4.6 million. After the contracts were prematurely terminated, Executive sought a refund of unearned premium. Alexander refused to refund the premium and the dispute was submitted to arbitration. The arbitration clause provided that:

> A dispute or difference between the parties with respect to the operation or interpretation of this Agreement on which an amicable understanding cannot be reached shall be decided by arbitration. The arbitrators are empowered to decide all questions or issues and shall be free to reach their decision from the standpoint of equity and customary practices of the insurance and reinsurance industry rather than from that strict law.

Id. at 319. Following the hearing, the panel

...arbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases.")

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issued a written decision noting that the reinsurance agreements did not contain provisions for refund of premiums, and "the 'customary practices of the insurance and reinsurance industry' that do exist are not sufficiently specific to the issue here presented to dictate a result." Accordingly, the Panel stated that they sought "an equitable disposition [that] serious and determined negotiating efforts of the parties might have produced" and in order to "give recognition to the equities in favor of each party," the panel awarded Executive a refund of $333,000. *Id.* at 319-20.

The district court vacated the award, holding that the panel had exceeded its authority because neither the reinsurance agreements nor industry custom and practice provided for refunds. On appeal, however, the court noted that in determining whether the arbitrators exceeded their authority, the contract would be broadly construed and all doubts would be resolved in favor of the award. The court further noted that the arbitration agreements allowed the panel to use equity as well as industry custom and practice to resolve the dispute, and it was clear that the panel had considered custom and practice even though the industry customs and practices were not decisive. Accordingly, the appellate court held that it was error to vacate the award.

A. Reformation and Rescission

Under a broadly worded arbitration clause, arbitrators have the power to reform a contract. *Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989) (panel did not exceed authority in reforming contract); see also *Michigan Mutual Insurance Co. v. Unigard Security Insurance Co.*, 44 F.3d 826, 832-33 (9th Cir. 1995) (confirming award that excused reinsurers from future performance, although award put reinsurers in better position than if contract had been rescinded).

Likewise, arbitrators have the power to grant rescission of a contract. *E.g., ACE Capital Re Overseas Ltd. v. Central United Life Insurance Co.,* 307 F.3d 24, 33 (2d Cir. 2002) (holding that broad arbitration clause "must be held to encompass a claim of fraudulent inducement of the contract in general").

B. Temporary Equitable Relief

Arbitrators can generally afford temporary equitable relief in order to make the arbitration meaningful. Thus, in *Pacific Reinsurance Management v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), the court upheld a lower court decision confirming as final an interim award that required the members of a reinsurance pool to place in escrow sums that might be due to pool manager after a decision on the merits. In confirming the award, the court noted that "[t]emporary equitable orders calculated to preserve assets or performance needed to make a potential final award meaningful . . . are final orders that can be reviewed for confirmation and enforcement."

Likewise, in B*ritish Insurance Co. of Cayman v. Water Street Insurance Co.*, 93 F. Supp.2d 506, 516 (S.D.N.Y. 2000), the court noted that "courts in [the Second] Circuit have firmly established the principle that arbitrators operating pursuant to [provisions relieving the panel of judicial formalities and permitting them to abstain from following strict rules of law] have the authority to order interim relief in order to prevent their final award from becoming meaningless." Accordingly, the *British Insurance* court confirmed a prehearing security award in the amount of $1.7 million, while expressing some concern with panel's issuance of the award before it heard any evidence on the merits. *See id.* at 518.

While courts generally uphold awards of prehearing security designed to protect a future award on the merits, courts may not confirm awards requiring payment of out-

In considering the scope of an arbitration panel's authority to afford relief, the starting point is the arbitration agreement.

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Available Relief in Arbitration

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standing claims or balances pending a hearing and decision on the merits. Thus, in a recent decision, the court in *TIG Insurance Co. v. Security Insurance Co. of Hartford,* No. 3:02cv2206 (D. Conn. decided Jan. 21, 2003), refused to confirm, and vacated, an interim award requiring the reinsurer to pay outstanding balances pending a hearing on the merits. In reaching its decision, the court rejected the cedent's argument that the award merely resolved the question of whether the reinsurer was obligated to continue to perform under the contract during the arbitration, noting that the issue of the reinsurer's defenses (rescission) and its obligation to pay could not be independently resolved. The court also noted that the panel's award did not merely maintain the status quo during the arbitration; it altered the status quo. *But see Island Creek Coal Sales Co. v. City of Gainsville, Florida,* 729 F.2d 1046 (6th Cir. 1984) (confirming interim final order issued after the hearing on the merits, which directed city to continue accepting coal shipments under contract pending further order of the panel), abrogated on other grounds by *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000).

III. Partial Final Awards

If the parties agree that the arbitrators can render a final decision as to only part of a dispute, the panel has the authority to do so. *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.,* 931 F.2d 191, 195 (2d Cir. 1991). Once that issue has been resolved, however, the panel becomes *"'functus officio'* meaning that their authority over [that issue] is ended." *Id.*

IV. Prejudgment Interest

As a general matter, courts hold that arbitrators have the authority to award pre-judgment interest as part of their award. *E.g., Rhone-Poulenc, Inc. v. Gould Electronics, Inc.,* 1998 WL 704420 (N.D. Cal. 1998) (rejecting argument that panel exceeded its authority in awarding prejudgment interest); *see also J.A. Jones Construction Co. v. Flakt, Inc.*, 731 F. Supp. 1061, 1064 (N.D. Ga. 1990) (denying motion to vacate arbitrators' award of pre-judgment interest).

V. Advisory Opinions/Declaratory Relief

In general, courts hold that arbitrators may not render advisory opinions. *See Alpha Beta Co. v. Retail Store Employees Union, Local 428 AFL-CIO,* 671 F.2d 1247 (9th Cir. 1982) (denying motion to compel arbitration of the meaning of contractual provision). However, where there is a ripe dispute between the parties with respect to the construction of a treaty as applied to a specific claim, at least one court has recently ruled that arbitrators have the power to render declaratory relief. Thus, in *Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp.*, 246 F.3d 219 (2d Cir. 2001), the court permitted arbitration of the question of:

> [W]hether an Environmental Claim that is allocated by Hartford to two or more underlying Hartford policy periods must be allocated and billed to the [treaties] on the basis of one limit and retention per occurrence for each such underlying policy period, one limit and retention per occurrence for all such underlying policy periods, or on some other basis.

See id. at 222, 224. In so ruling, the court rejected the argument that Hartford was seeking an advisory opinion in arbitration, noting that "a difference or dispute exists over the construction of the [treaties] and their application to billed and unbilled pollution claims." *Id.* at 225. ▼

If the parties agree that the arbitrators can render a final decision as to only part of a dispute, the panel has the authority to do so.

ARIAS•U.S. 2003
Annual Meeting and Conference
"Bringing Reinsurance Arbitration to the Next Level:
THE VOICES OF EXPERIENCE"

November 6-7
Hilton New York
1335 Avenue of the Americas
(53rd to 54th Streets)
New York City

The Mercury Ballroom will be the location for all sessions of the Fall Conference. A series of panels, composed of experienced arbitrators, will examine some of the more complicated practical and procedural issues in arbitrations. Don't miss this valuable training experience!

This conference applies toward certification requirements.

Conference details are available at www.arias-us.org, where you can also register online using a credit card. Reserve your hotel room at 1800-445-8667

Two Great ARIAS•U.S. Conferences Coming Up!!!

ARIAS•U.S. 2004
Spring Conference

June 9-11

The Breakers

One South County Road

Palm Beach, Florida

This elegant, classic hotel, recently renovated throughout, will provide the dramatic setting for the ARIAS•U.S. Spring Conference. With spectacular sports and spa facilities, attendees may wish to stay for the weekend after the conference ends on Friday noon.

This conference applies toward certification requirements.

Conference details will be distributed and available on the website in March.

THE BREAKERS
PALM BEACH

members on the move

In each issue, we'll list employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can adjust their address books and Palm Pilots.

Don't forget to notify us when your address changes. If we missed your change here, please fill out and fax the form below so we'll be sure to catch you next time. Or email us at byankus@cinn.com with the subject "Member on the Move."

Recent Moves

John Cowley has relocated from Pennsylvania. His new address is Cowley & Associates, Insurance & Reinsurance Consulting, 25 Fairway Oaks Drive, New Orleans, LA 70131. His new contact numbers are: phone 504-391-9930, fax 504-391-9940.

J. Michael Gottschalk is no longer in Iowa. His new address is Vice President – Claims, National Indemnity, 4016 Farnam Street, Omaha, NE 68131, phone 402-536-3145, fax 402 536 3031, jmgottschalk@nationalindemnity.com

Debra Roberts has relocated from Carlsbad, California. Her new address is Debra J. Roberts, 3535 Lebon Drive, #5311, San Diego, CA 92122, phone 858-552-8630, fax 858-552-8692.

Mark S. Gurevitz has just moved up to Senior Vice President at The Hartford Financial Services Group. He is now Director of Property & Casualty Law.

New Addresses

Jay Frank has a new residence, closer to the office: James H. Frank, South Bay Harbor, Number 508, Osprey, Florida 34229. His office has the same phone and same fax, but his new home phone is 818-248-9534.

Jim Hazard's new phone number is 917-359-4465.

Send in your news...

Type of change (please indicate with a check):

☐ News ☐ Address ☐ Phone ☐ Fax ☐ E-mail

NAME:

If you mail it in, send to ARIAS•U.S., 35 Beechwood Ave., Mount Vernon, NY 10553

If you fax it, send to 914-699-2025.

ARIAS U.S.

Do you know someone who is interested in learning more about ARIAS•U.S.?

If so, pass on this letter of invitation and membership application.

An Invitation...

The rapid growth of ARIAS·U.S. (AIDA Reinsurance & Insurance Arbitration Society) gives testimony to the acceptance of the Society since its incorporation. Through numerous conferences, seminars, and literature, and through the establishment of an ambitious certification process, ARIAS·U.S. is realizing its goals. As of August, 2003, ARIAS·U.S. is comprised of 301 individual members and 52 corporate memberships totaling 530 members, of which 154 have been certified as arbitrators.

In recent years, ARIAS·U.S. has added to its list of accomplishments the launching of the ARIAS·U.S. Umpire Appointment Procedure and the approval of CLE "Accredited Provider Status" by the New York State Continuing Legal Education Board.

The Umpire Appointment Procedure includes a unique software program, created specifically for ARIAS·U.S., that randomly generates the names of umpire candidates from a list of ARIAS·U.S. 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 CLE Accredited Provider Status allows those who attend ARIAS·U.S. conferences to earn CLE credits in the areas of professional practice, practice management, skills and ethics. ARIAS·U.S. is proud to be on the list among other prestigious Accredited Provider organizations.

ARIAS·U.S. also publishes a Member Directory with Certified Arbitrator and Umpire Listings, the Practical Guide to Reinsurance Arbitration Procedure, and Guidelines for Arbitrator Conduct. These publications, as well as the Quarterly review, special member rates for conferences, and access to certified arbitrator training are among the benefits of membership in ARIAS·U.S.

In recent years, ARIAS·U.S. has held seminars across the county, including Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Boston, Miami, New York City, Puerto Rico, 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 Society.

If you are interested in learning more about the organization or membership, examine the many information areas of the web site, www.arias-us.org, then use the form on page 30 or apply online. If you have questions, contact Bill Yankus, Executive Director, at byankus@cinn.com or 914-699-2020, ext. 116.

Join us, and become active in ARIAS·U.S., the industry's best forum for insurance and reinsurance arbitration professionals.

Sincerely,

Daniel E. Schmidt, IV

Chairman

Charles M. Foss

President

cover story

New ARIAS Website Searches for Arbitrator Experience

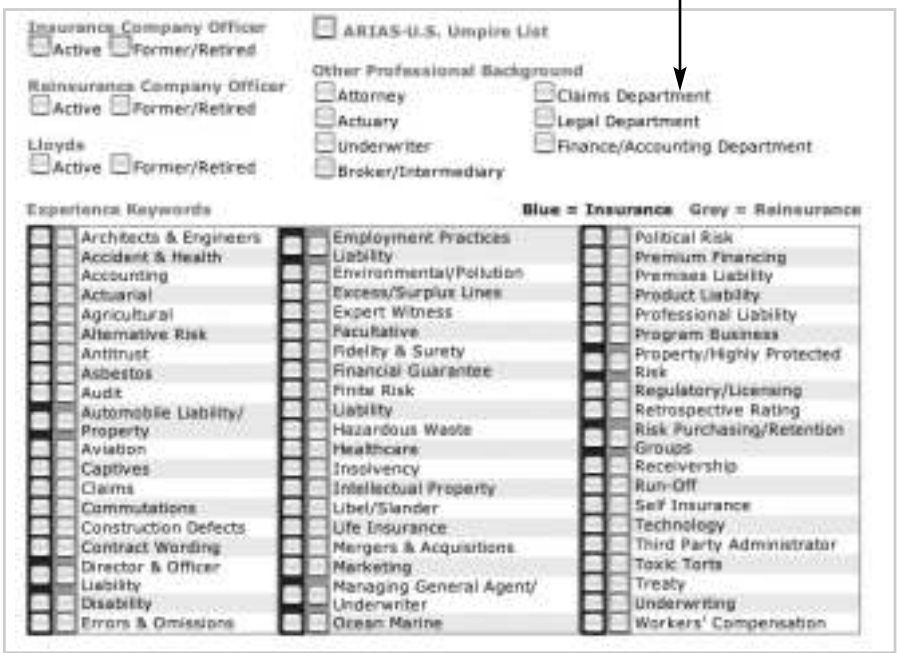
This may seem like déjà vu all over again, but the ARIAS•U.S. website (www.arias-us.org) has just been re-constructed. Yes, it was only in January that the new site went up, but that was just Phase I. The Phase II project was much more extensive, though less visible on the surface.

At first glance, it may look the same as it has since January. However, there is a lot going on underneath. The entire site has been converted over to a new platform, called ColdFusion, that allows everything to work faster and better. Also, the site now is being controlled by a software system, called Mountain Publisher, that makes it possible for ARIAS administrators to change information on any page in a matter of seconds.

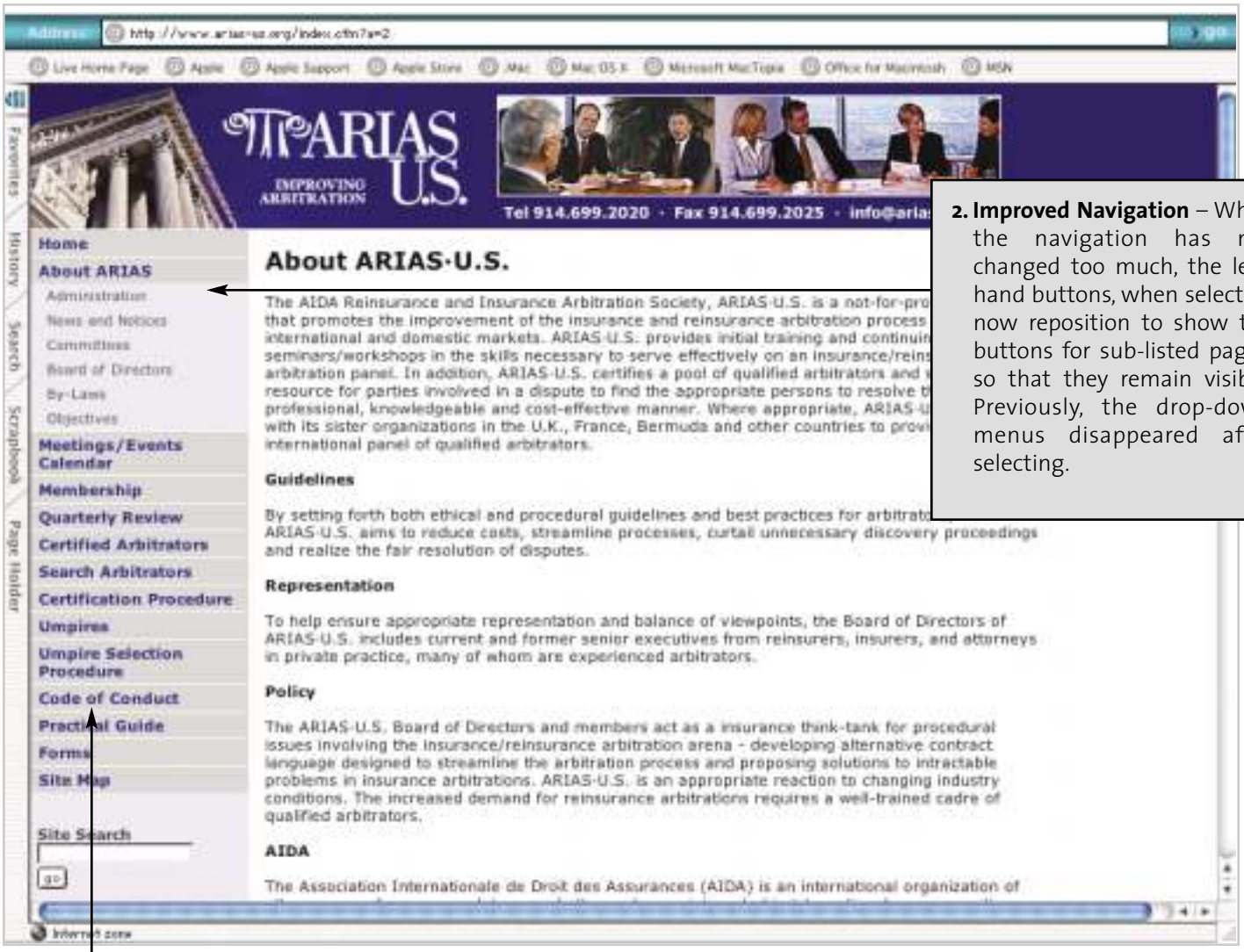
However, most importantly, the new site has a whole new search system sorting through the certified arbitrator profiles. Now, parties involved in an arbitration are able to fine-tune the selection of an arbitrator by specifying in detail the experience that they require and whether they want that experience to be on the reinsurance or insurance side. Now, finding a pool of arbitrators with exactly the right insurance or reinsurance background is easy.

Here are some of the key features that the site now offers:

1. Check-Box Search – The search page now contains 129 check boxes that allow the user to indicate the general professional background being sought (attorney, former reinsurance company officer) and specific functional experience preferred (asbestos, toxic tort, surety), each of the latter with a choice of insurance or reinsurance background. These experience details have been provided by each of the arbitrators. The results page lists the names (linked to profiles) of all who meet all of the requirements. These specifications can also be combined with location and company criteria.



"Now, finding a pool of arbitrators with exactly the right insurance or reinsurance background is easy."



2. Improved Navigation – While the navigation has not changed too much, the left-hand buttons, when selected, now reposition to show the buttons for sub-listed pages, so that they remain visible. Previously, the drop-down menus disappeared after selecting.

3. Code of Conduct and Practical Guide to Reinsurance Arbitration Procedure – These two publications are the primary sources of guidance for ARIAS•U.S. members in the process of arbitration. They are provided on the website in their entirety. Links throughout the text take the user directly to forms as they are mentioned in the text.

4. Up-to-Date Content – The entire ARIAS•U.S. site is now under the direct control of ARIAS•U.S. Administration. Therefore, new information about any arbitrator or any aspect of the organization is immediately updated. The calendar page always shows the latest information about conferences.

CONTINUED ON PAGE 18

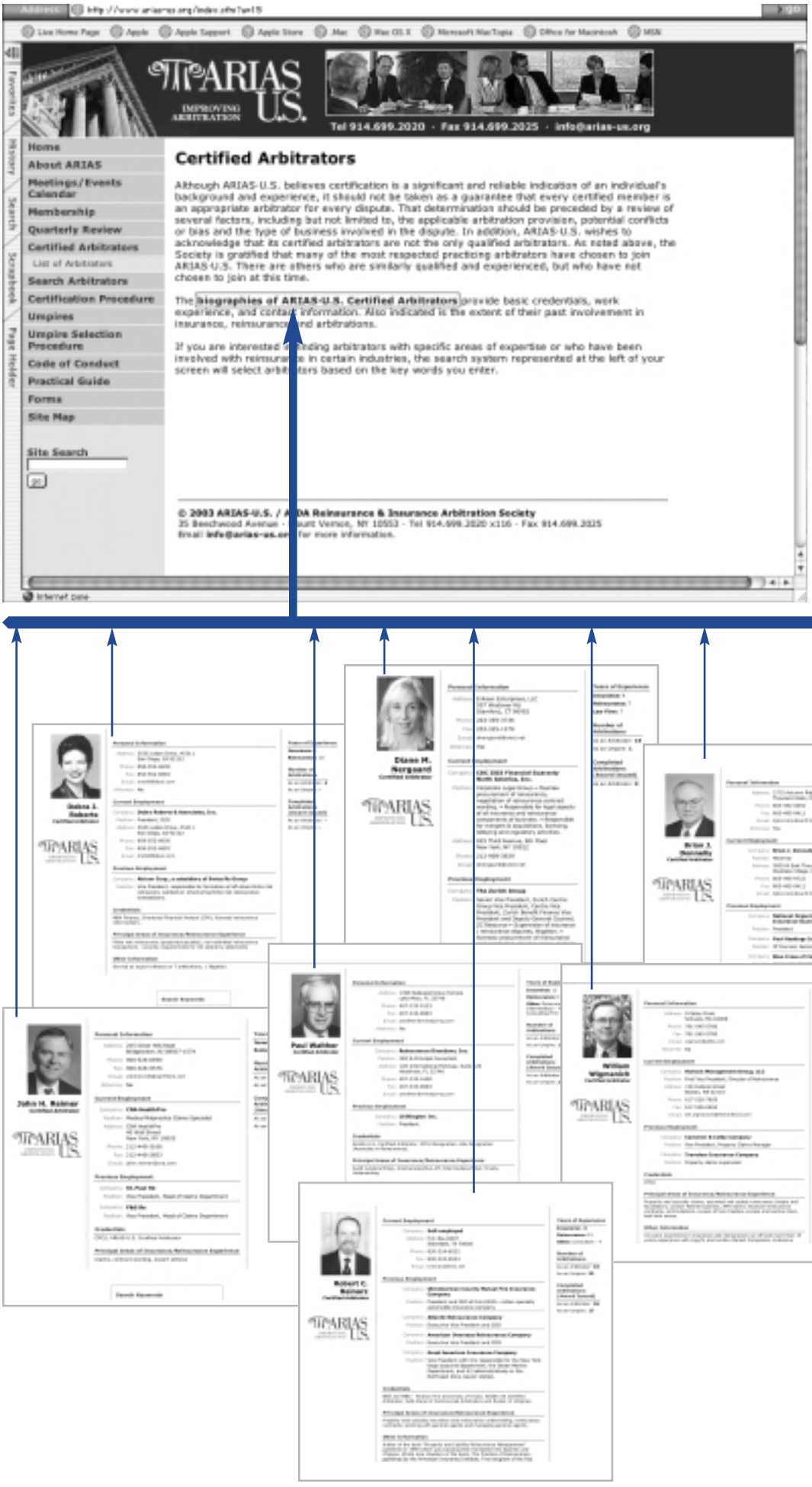
New ARIAS Website …

5. Online Registration for Conferences – All large conferences are now featured on the home page, and a secure registration system enables immediate registration, using a credit card. Workshops have not been included, but that may change soon.

November Conference Announcement
View PDF
Register Online

The ARIAS•U.S. administrative team worked closely with the Technology Committee, chaired by Larry Schiffer, in developing and implementing these latest changes.

Mountain Media of Saratoga Springs, New York (www.mountainmedia.com) provided design, programming, software, and support services to ARIAS for the project. ▼



6. New Arbitrator and Umpire Biographies – Profiles of all certified arbitrators have been reformatted and expanded for easier comprehension. Those who qualify as umpires are separately listed and linked to their profiles. All of the information about applying and qualifying for these listings is available within the site for easy reference.

in focus

Recently Certified Arbitrators

Robert L. Comeau

Andrew Ian Douglass

Robert L. Comeau

Robert Comeau is an actuary with over 30 years of comprehensive insurance operational experience, including individual and group life and health insurance, reinsurance, annuities and pensions.

His background encompasses a broad range of management and technical functions such as: pricing, underwriting, product development, marketing, administration, regulatory compliance, financial reporting, reinsurance, and litigation support and management, strategic planning, and mergers and acquisitions.

He has extensive experience negotiating and drafting reinsurance treaties, working with MGUs, TPAs and participating in reinsurance pools and is familiar with most lines of life and health insurance / reinsurance.

He has actual hands-on experience with a wide range of insurance products including: individual life, individual medical, long term care, individual disability, group life, group disability, stop loss, traditional group medical, managed care, small group, dental, specialty health, accident, workers comp carve-out, annuities and voluntary employee benefits.

He has served as a senior executive, including President and CEO, of several life and health insurance companies where he directed successful turnarounds.

Robert has served as a Board Member of American Council of Life Insurers, ACLI Forum 500, Blue Cross and Blue Shield of Nebraska (Finance and Personnel Committees), American Disability Reinsurance Underwriting Syndicate, Anchor Pacific Underwriters (M & A Committee) and Innovus, L.L.C.

Robert is a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries.

Andrew Ian Douglass

Andrew Douglass is a partner in the law firm of Morrison, Mahoney & Miller, LLP, a 160-lawyer firm which is one of the largest firms in the United States specializing in insurance and reinsurance matters. He is a co-chair of the Firm's complex insurance and reinsurance practice. The firm has offices in New York, London, Boston, and throughout New England. He is admitted to practice in New York, Illinois, Massachusetts and Rhode Island and has been a member of the bar of the U.S. Supreme Court for over 20 years.

Born in New York in 1943, Mr. Douglass graduated With Distinction (highest order) from the U.S. Naval Academy in 1964. He has an MBA and a law degree from Stanford, where he was a Note Editor on the Law Review. He is an ARIAS•U.S. Certified Arbitrator and is listed in The Arbitrators Directory published by The Reinsurance Association of America.

Prior to joining Morrison, Mahoney & Miller, LLP, Mr. Douglass was Senior Vice President and General Counsel for The St. Paul Companies, Inc. and St. Paul Fire & Marine Insurance Company, which through its St. Paul Re operations in New York and London was the sixth largest American reinsurer. While at The St. Paul, he worked on AFIA and Weavers-related disputes, plus numerous insurance acquisitions and the sale of a major insurance brokerage firm. He organized a St. Paul subsidiary as the first American corporate investor in Lloyd's of London. He represented St. Paul Re in the industry's first securitization of property risks. He was also a director of John Nuveen Company, Inc. NYSE-listed company.

Andrew Douglass has served on the Council of Chief Legal Officers and on the Lawyers' Committee of both the American Insurance Association and the Association of Bank Holding Companies. He also served as a member of the AIA's Financial Modernization Task Force and was an alternate to its Board of Directors. He has spoken at numerous reinsurance and insurance industry seminars on such topics as securitization of risks and mergers and acquisitions problems.

Mr. Douglass has handled a significant number of complex insurance and reinsurance disputes in the following areas: policy/coverage interpretation, reinsurance agreement interpretation (treaty and facultative), misrepresentation of the nature of the insured's (or cedent's) interests and activities, actual, apparent and implied authority of underwriters and brokers, broker moral hazard misrepresentation allegations and disputes, corporate divisions, ring-fencing (such as Lloyds, CIGNA, and Home), and London runoff pools, adverse selection and misrepresentations of books of business ceded, issues relating to Lloyd's underwriting syndicates and the LMX Spirals.

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in focus

Gregg C. Frederick

Gregg Frederick has been in the insurance business over 30 years, with experience in the life and health industry, as well as the property casualty industry. He is broadly experienced in dispute resolutions, accounting, business systems, and numerous product lines and reinsurance structures.

After graduating from Lehigh University in 1973, Mr. Frederick began his career with Penn Mutual Life Insurance Company, as an accounting trainee. In his thirteen years with Penn Mutual, he assumed various managerial positions, as well as the integration of acquired companies into the Company's existing operations and infrastructures. He also was responsible for systems development, including corporate reporting and product accounting. Lines of business in this process included annuities, life and health. Mr. Frederick also served on the Life\Health Statutory blanks committee of the A.C.L.I., which provided recommendations to the N.A.I.C. blanks committee. He also served on the boards of directors of several subsidiaries of Penn Mutual.

In 1986, Mr. Frederick moved to the Property Casualty industry when he joined Colonial Penn Group, Inc. to direct the preparation of their statutory and GAAP reporting for both their property\casualty companies and their life\health companies. During that time, he was also involved in evaluating and monitoring the run off of "fronted programs" and related Managing General Agent (MGA) business.

In 1988, Mr. Frederick joined Legion Insurance Company, a newly acquired company, as an officer and director, specializing in alternative risk insurance programs. The alternative risk programs involved captives, large deductible policies, and facultative and excess treaties that supported the various alternative risk program objectives. He established the initial Home Office operational structure supporting most aspects of these programs. He has been responsible for varied aspects of the company's business, including premium collections, claims funding and monitoring, systems development, reinsurance accounting, billing, collection, and arbitration and litigation support. Mr. Frederick also formed the company's field auditing department, which focused predominantly on MGA operations. He was also involved in managing significant investigative work and forensic accounting operations, including financial reviews of third party administrators.

Mr. Frederick has held the officer titles of Controller, Treasurer and Contract Compliance during his tenure with the company. He is presently employed by Legion Insurance Company (In Liquidation) as Senior Vice President – Reinsurance. In that role he is responsible for all aspects of reinsurance and works closely with members of the Pennsylvania Bureau of Liquidation Administration.

Robert D. Holland

Robert Holland, a CPCU, began his career in the Seattle home office of Unigard Insurance Group and, after intensive training, was dispatched to the field as a territorial underwriter, Underwriting Manager and Branch Manager with Unigard and Allstate Insurance Companies in Denver, St. Louis, and Houston.

From Texas he joined Yosemite - Great Falls Insurance Companies, two Surplus Lines companies headquartered in San Francisco, as Vice President of Property and Marine. He went on to became Vice President of Anderson and Murison, a highly respected Managing General Agency located in Southern California, to manage operating contracts granted by a wide variety of domestic and foreign companies and syndicates.

Orion Capital Companies recruited Mr. Holland as Vice President of a newly acquired Managing General Agency to oversee organizational changes and strategic growth. With the subsequent Orion reorganization, he moved to Orion's Connecticut Home Office where he became Vice President, Underwriting, managing independent agency produced retail-specialty programs. Shortly thereafter, he became Senior Vice President of Orion's Connecticut Specialty Insurance Group, to implement aggressive strategic growth in the wholesale specialty/surplus lines markets. Responsibilities included the analysis of business proposals, due diligence of potential business partnerships and corporate acquisitions, reinsurance, MGA contract design, implementation and control. New products included policy construction, regulatory, AIA Surplus Lines Committee and product management.

In 1994, Mr. Holland became President of John Deere Specialty Managers, a new operating unit of John Deere Insurance Group, to plan, implement and manage the group's strategic entry into the specialty/surplus lines markets. He successfully established this completely independent operating unit. Deere's insurance business was sold to Sentry Insurance in 1999.

In 2000, Mr. Holland elected to form his own consulting firm, R. Holland & Associates, LLC, to take full advantage of his rich and unusual professional background spanning over three

CONTINUED ON PAGE 22

Gregg C. Frederick

Robert D. Holland

Jerome Karter

W. James MacGinnitie

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decades. He has completed or is in process of both consulting and expert witness assignments and looks forward to arbitrating matters that can benefit from his experience.

Jerome Karter

Jerome (Jerry) Karter's 41 years in the insurance/reinsurance industry included positions in London, Paris and Brussels at a functional and senior management level in underwriting, claims and administrative operations of the property/casualty insurance, reinsurance and brokerage industries in the US and abroad.
Following 1961 graduation from Oberlin College (BA Economics), he joined the Insurance Company of North America (INA . . . later CIGNA) as a casualty underwriter. He subsequently joined the Factory Mutual System's Firemen's Mutual (FM Global) in the International Department, underwriting non-US property, casualty, D.I.C. and assumed facultative reinsurance.
In 1969, Mr. Karter moved to Factory Mutual International in London as an Account Executive, then Assistant to the Managing Director and member of its Management Committee with responsibility for Corporate Development, which included obtaining licenses, or operating/management agreements with indigenous companies, in 28 countries throughout the world. In 1975, he headed FM Global's new start-up subsidiary, Affiliated FM, in Paris as President and CEO, underwriting property (non-HPR) and casualty throughout Europe. He rejoined INA in Brussels in 1978 as Vice President and General Manager Europe for direct property/casualty operations in the Continental European region (12 countries), and Vice President and General Manager INA Re, a worldwide direct and broker Treaty and Facultative Reinsurer.
Mr. Karter returned to New York in 1984, joining Johnson & Higgins in the International Department where he was appointed Senior Vice President and Manager in 1985 and a member of the J&H International Practice Committee.
In 1989, he moved to SCOR Reinsurance, a full Treaty and Facultative reinsurance company in the US, Mexico and Central American broker market, and its several General Security reinsurance and primary insurance companies, as President, CEO and Director. He was appointed a member of the SCOR Group Executive Committee in Paris in 1996, and Vice Chairman of SCOR US in 2000. He retired from SCOR in June of 2002.
Mr. Karter was: Chairman of the Reinsurance Association of America (RAA) from 1997 to 1998, a past member of the Board of Directors and Executive Committee of the RAA, a past member of the Brokers Reinsurance Markets Association (BRMA) and the National Association of Casualty and Surety Executives, past Chairman of the Committee of American Insurers in Europe. He is currently a member of the Board of Overseers of St. John's University School of Risk Management, Insurance and Actuarial Science. He is a former Business Insurance columnist on international subjects, has spoken at numerous conferences on insurance and reinsurance. Mr. Karter was born in the Hague, the Netherlands and is fluent in Dutch, and strong in French and German.

W. James MacGinnitie

James MacGinnitie is an actuary with over 40 years of experience in the insurance and reinsurance business. Since his retirement as CFO of CNA Financial in 1999, he has worked as an independent consultant and as a director of three insurers: Renaissance Re, NORCAL Mutual, and Trustmark Insurance.
Prior to returning to CNA, where he had begun his career as an actuarial trainee, he managed two major actuarial consultancies: Ernst & Young, where he was the managing partner of the insurance actuarial practice and vice chair of the firm's international insurance committee; and Tillinghast/Towers Perrin, where he initiated and managed the casualty actuarial practice, and became president of Tillinghast prior to its merger with Towers Perrin. He has also been a professor of actuarial science at the University of Michigan.
As CFO of CNA Financial and its insurance subsidiaries, he was responsible for all accounting, internal audit, management information, ceded reinsurance, actuarial reserving, and facilities management.
He has extensive experience as an expert witness, in court, regulatory and arbitration proceedings. His consulting experience includes both ceding and assuming companies, self insureds and captives, in lines such as workers comp, professional liability (particularly medical malpractice), asbestos and environmental liability, and excess & surplus. A significant part of his experience is international, particularly in Bermuda and the UK, and he lived and worked for two years in Bogotá, Colombia.
Active in professional actuarial affairs, he has served as president of the Casualty Actuarial Society, the American Academy of Actuaries, the Society of Actuaries, and currently is president of the International Actuarial Association. He is also a director of ASTIN and the Actuarial Foundation. He is one of approximately 25

active US actuaries who are fellows of both the CAS and the SOA.

Paul J. Mcgee

Paul McGee, CPCU, Are, is a veteran of 37 years in the reinsurance profession, a career that began in the Professional Reinsurance Department of the Employers Group of Boston in 1966. Mr. McGee moved on in 1975 to become a senior vice president of Boston Reinsurance Corp and in 1982, President of Paul J. McGee Associates Inc. In these capacities, he was responsible for the production and underwriting of assumed reinsurance and the negotiation and placement of ceded reinsurance.

Currently a vice president of Horizon Management Group, a subsidiary of The Hartford, he is engaged in various capacities associated with the management of companies in runoff, including auditing and commutation of assumed and ceded reinsurance, assisting counsel in dispute resolutions, advising claims management on claims related underwriting issues and conducting reinsurance educational programs for employees in Hartford and Boston.

A graduate of Boston College with an A.B. degree in Economics, he has received both the CPCU and Are designations and has served the CPCU Society as President of the Boston Chapter, a National Director and Chairman of the Reinsurance Section. A past president of the Insurance Institute at Northeastern University in Boston, Mr. McGee has been a lecturer and course leader on reinsurance for many years at the Insurance Library Association of Boston.

Roderick B. Mathews

Rod Mathews is a partner in the Alternative Dispute Resolution, Healthcare, and Government Relations and Administrative Law practice groups in the Richmond, Virginia office of the multi-office law firm Troutman Sanders LLP. Prior to his current private law practice, Mr. Mathews served for seven years as Senior Vice President, Law and Government Relations Officer for Trigon Blue Cross Blue Shield of Virginia (now Anthem Corporation).

He practiced law previously as a partner in the Richmond office of Christian & Barton LLP. He managed that firm's litigation practice and represented life, health, disability, property and casualty, and professional liability insurers in state and federal courts, administrative law and regulatory procedures, and the political process. In addition to service as an ARIAS certified arbitrator, Mr. Mathews is an arbitrator on the commercial panel of the American Arbitration Association; for the American Health Lawyers Association; and for the National Association of Securities Dealers Dispute Resolution. He is an experienced mediator and has served as a mediator certified by the Supreme Court of Virginia. Mr. Mathews has spoken extensively on the use of alternative dispute resolution for healthcare insurance and managed healthcare disputes, including at meetings of the Federation of Defense and Corporate Counsel and the National Association of Medical Society Executives. He is a contributing editor of Aspen Publishers "Healthcare Dispute Resolution Manual." His articles about ADR for healthcare insurance and managed care disputes have been published in Corporate Counsel, the AAA's Dispute Resolution journal and in various other journals and bar publications. He was an organizing member of the Joint National Commission on Alternative Dispute Resolution for Healthcare sponsored by the American Medical Association, the American Bar Association and the American Arbitration Association. He has served as outside counsel to The Medical Society of Virginia, the principal association of physicians in Virginia. He was a member of the American Bar Association's Task Force on ADR for E-Commerce.

Mr. Mathews is a past president of the Virginia State Bar. He is active in the American Bar Association where he has served on the Board of Governors (and its Executive Committee) and serves in the House of Delegates as Virginia's state delegate and member of the ABA nominating committee. He is a past-chair of the Health Law Committee of the ABA Dispute Resolution Section and a former council member and officer of the Litigation Section.

His bachelor's degree is in economics from Hampden-Sydney College, Virginia, and his LL.B. degree is from the University of Richmond, Virginia. He is a graduate of the Executive Program, the Business School, the University of Michigan.

Diane Nergaard

Diane Nergaard has 18 years of experience in the insurance/reinsurance industry and has extensive experience acting as both counsel and client in reinsurance arbitration disputes. She transitioned from private practice to in-house counsel at Crum and Foster in 1992 where she was involved with running off a $1-billion portfolio of reinsurance recoverables.

Ms. Nergaard subsequently worked for Zurich Reinsurance and Centre Insurance Company where she held various positions, including deputy general counsel. During this period, she was involved with coverage issues, contract wording and acquiring impaired books of busi-

in focus

Paul J. Mcgee

Roderick B. Mathews

Diane Nergaard

in focus

Robert C. Quigley

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ness many of which involved asbestos and other environmental issues. She also created a virtual insurance company, a broker/dealer and helped develop Zurich's company owned life insurance product as a joint venture between Centre, Kemper Life (a Zurich subsidiary) and Kemper Asset Management, which combined life insurance with tax-advantaged corporate benefits funding and off-shore reinsurance.
Ms. Nergaard was also involved with Centre Re's core products including finite risk structures and transactions on the forefront of the conversion of insurance and capital markets, such as CAT bonds.
Presently, Ms. Nergaard is with CDC IXIS Financial Guaranty where she acquired a P&C company and converted it to a shell company by assumptively reinsuring all prior business. She is also responsible all of the licensing and regulatory issues associated with converting the P&C shell to a financial guaranty company licensed in 42 states. In addition, Ms. Nergaard is involved with all aspects of reinsurance and contract wording.

Robert C. Quigley

Robert Quigley is a certified public accountant practicing in the insurance industry for the past thirty years as an auditor, financial reporter, controller, treasurer, and consultant. For the past sixteen years, through his firm, Quigley & Associates, he has specialized in insurance company insolvencies, reinsurance matters and litigation support relating to insurance industry audit failures and contract disputes. For the past eleven years, on behalf of the NAIC, he has served as a team leader on financial standards accreditations, working with regulators across the country. He has also contributed to the body of insurance industry literature, authoring a chapter for an insurance textbook as well as trade publication articles on accounting and actuarial topics.
He started his insurance career at INA in 1972; moved to Reliance as an assistant treasurer in 1981, and joined The Mutual Fire, Marine and Inland Insurance Company, as its Vice President and Treasurer, in 1985. His initial efforts to rebuild the treasury function there were overshadowed by a financial guaranty program experiencing massive defaults in both the oil and gas and real estate sectors. He assumed control of The Mutual Fire's accounting function in early 1986, published its 1985 Annual Statement with discounted loss reserves and extensive footnote disclosures, declared a payment moratorium to financial guaranty bondholders, commuted reinsurance relationships, and fashioned a rescue plan with the support of the Pennsylvania Insurance Department. Confident that the state regulators, creditors, and judiciary were in the best positions to affirm and implement the plan, he left to establish his insurance industry practice.
His experiences at INA, Reliance and The Mutual Fire exposed him to every nook and cranny of insurance company operations. Since 1987, that background has allowed him to take a multi-faceted approach to expert witness, forensic accounting, reinsurance inspection, and other industry assignments.
In addition to ARIAS•U.S., Bob is a member of the American Institute of CPAs, the Society of Insurance Financial Management, and is active in Penn State alumni affairs, serving as a mentor to accounting and actuarial science students at its business school, Smeal College, and president-elect of the alumni society at Abington College, where he recently endowed a scholarship. After raising four sons, he and his wife, Barbara, are now enjoying their four granddaughters. A grandson is due in September.

Richard M. Shaw

Mr. Shaw left Overseas Partners US Reinsurance Company in August 2003 after serving as General Counsel since October 2000, where his responsibilities included holding company, licensing, and corporate secretarial matters, as well as directing the claims operations and acting as legal counsel to all units of that company.
Prior to joining Overseas Partners US Reinsurance Company, Mr. Shaw was principal counsel to the assumed reinsurance, special program and large account divisions, corporate information services, and ceded reinsurance departments of Reliance Insurance. In those roles, he was responsible for resolution of issues including: development and negotiation of traditional, assumption and financial reinsurance contracts; advice on surplus lines issues, resolution of reinsurance claims disputes; development of various property and casualty policy forms, preparation of collateral agreements for large account transactions, and agency, MGA and program manager agreements; negotiation of various corporate transactions including sale of insurance company and data processing center, real estate and equipment leasing agreements, and software licensing agreements; advice on various bankruptcy, corporate secretarial and holding company issues; and supervision of litigation.
Mr. Shaw's prior employment included: Beneficial Insurance Group, Counsel/Vice President; Insurance Company of North America, Assistant Vice President and Regional Counsel; U.S. Marine Corps, Captain-Judge Advocate

Corps. Mr. Shaw received his J.D. from Boston College Law School and his B.A. from Colgate University. He is admitted to practice in Pennsylvania.

Mr. Shaw's publications include "Casualty Excess of Loss Treaty Reinsurance" - Chapter in Reinsurance, 2nd Edition, edited by Robert Strain, 1997 and "Casualty Excess of Loss" – Chapter in Reinsurance Contract Wording, edited by Robert Strain, 1992; "New ISO CGL 'Claims Made' Policy and Its Implications For The Reinsurance Intermediary" - Presented Spring 1987 Meeting of The Tort and Insurance Practice Section of American Bar Association; "Not That Simple," Best's Review, June 1988 (Originally entitled: "Capital Raising Concerns in Forming a Risk Retention Group"). Mr. Shaw's presentations include "Quota Share Contract," "Reserves, Insolvency, and Unauthorized Reinsurance," "Casualty Reinsurance," and "Reinsurance Fraud," Strain Seminars, 1987-2003: "Special Clauses in the Reinsurance Contract," "Adjustable Premium Clauses in the Reinsurance Contract," "Commutations and the Reinsurance Contract," Executive Enterprises, Inc., 1989-90: "Reinsurance Dispute Resolution" - Philadelphia CPCU Seminar, 1989; "The Reinsurance Contract," Prentice-Hall Seminars, 1991; Mealeys Reinsurance Seminar – January 2003.

Radley D. Sheldrick

Radley (Lee) Sheldrick retired from Factory Mutual Insurance Company (FM Global) as AVP, Manager Runoff Operations at the end of 2002 and is now, as President of Reinsurance Diversified Services, Inc., offering arbitration and consulting services to the property and casualty industry. During his 12 _ year tenure with FM Global and its predecessor, Arkwright Mutual, he was responsible for and involved in the resolution of numerous issues involving reinsurance and excess/surplus lines coverages in the US, London and European Markets.

After graduation from Brown University as an Economics major in 1958, Mr. Sheldrick served as Director Technical Services (Claims) for John Hancock Property and Casualty Insurance Company during the formation of the company (formerly Hanseco) and transfer of its business from Sentry Insurance, a Mutual Company. During that time, he also rendered services to John Hancock Reinsurance Company. Previously, Lee was Secretary and Casualty Claim Manager for Cameron & Colby (New England Reinsurance Co. and First State Insurance Co.) and prior to that a Casualty Claim Consultant at Commercial Union Insurance Company and Casualty Claim Manager for Middlesex Insurance Company and Sentry Insurance that acquired Middlesex. During this period, he acquired the CPCU Designation in 1971. His career began, as like many others at the time, with Liberty Mutual as a claim adjuster.

Mr. Sheldrick's experience over the years, although primarily involving claims, has encompassed the spectrum of issues usually resulting in disputes and arbitration and litigation. These include not only aggregation and allocation issues common to many disputes today but also coverage interpretation and placing problems dogging intermediaries (brokers) as well as reinsurers and cedents, all of which too frequently arise in a discontinued book of business.

Although other exposures, including marine, aviation and professional liability, have been a concern, the ones occupying most of his attention recently have been asbestos and environmental, usually designated APH in the London Market. As measured by A.M. Best Special Reports, FM Global has been an industry leader in recognizing and disposing of these. As principal of his own consulting company, Lee continues to be very much involved in these matters.

Radley D. Sheldrick

Kevin Tierney

Kevin Tierney

Kevin Tierney is a lawyer and business executive whose career has been focused on insurance and reinsurance matters. For 23 years, he served as a lawyer with UNUM Corp. and its subsidiaries, including 8 years as Senior Vice President, General Counsel and Secretary from 1991 to 1999. In this role, he was responsible for all legal matters related to the company's worldwide life, health and disability insurance and reinsurance operations. In addition to his role as General Counsel, Mr. Tierney served as a member of this S&P 500 company's senior management group and was a director of its major insurance subsidiaries.

Mr. Tierney has extensive experience in the merger and acquisition of insurance companies, and from 1984 through 1986 he was one of the principal participants in the demutualization of Union Mutual Life. His early work experience with Union Mutual involved providing legal services in virtually all areas of the company's operations including responsibility for management of all direct and reinsured claims litigation matters. Currently, Mr. Tierney focuses on service as an arbitrator, mediator and expert witness, in addition to providing legal representation in matters related to the insurance and reinsurance industries. Mr. Tierney also serves as an independent trustee of a mutual fund for the Merrill Lynch Insurance Group. Throughout his career, Mr. Tierney has been active in a wide variety of community affairs ranging from President of the

in focus

David C.Thirkill

David W. Tritton

Jacobus J. Van De Graaf

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Board of Directors of an alcoholism treatment facility for women to Vice President of Development for Maine's major symphony orchestra.

David C. Thirkill

David Thirkill is a reinsurance underwriter by training and is now a reinsurance workout specialist with RiverStone Reinsurance Services LLC, part of the international Fairfax Group. Since joining RiverStone, he has managed numerous and significant arbitrations involving Fairfax subsidiaries in both the U.S. and the U.K. His duties include leading and participating in commutations and acquisition teams. His background includes finite and traditional reinsurance underwriting in London and Bermuda. He has in-depth experience of domestic U.S. insurance in both property and casualty areas. He has helped form insurance and reinsurance companies. He has much knowledge of the captive insurance and reinsurance markets as an underwriter, broker and manager.
Mr.Thirkill's 30-year career in both active and run-off environments coupled with an in-depth understanding of complex reinsurance issues and active participation as a manager in multiple arbitration settings, provide a unique combination of a thorough understanding of the arbitration process and its dynamics and an exhaustive knowledge of the international insurance and reinsurance markets and their practices.
He has been appointed both as an arbitrator and umpire in arbitration proceedings.
Mr. Thirkill has served on numerous professional organizations and has presented many speeches and articles on industry related topics. While not a lawyer, his active participation as a manager/client has led him to believe strongly in ADR and a belief that a seasoned professional with senior level experience in both the reinsurance business and hands on experience of the arbitration process can bring special value to that process.

David W. Tritton

David Tritton has over 30 years in the insurance and reinsurance industry. He is currently a Senior Vice President at Benfield Group, the third largest reinsurance intermediary in the world. He graduated from the University of Pennsylvania's Wharton School with a Bachelor of Science degree in Economics.
Prior to Benfield, Mr. Tritton was with American Re Insurance Company for 18 year and held many positions of increasing responsibility, including facultative, treaty and a two year stint heading up American Re's claim division, including asbestos and environmental. He was a member of American Re's Executive Management Group in the Office of the President when he retired from American Re in 2002.
Previous to American Re, Mr. Tritton worked at Allstate, INA Re and Reliance Insurance Company. During those years, he was involved with primary casualty underwriting, captives, MGA's, and was a reinsurance buyer of both treaty and facultative reinsurance.
He has served on several boards, including NOVA American Insurance Group, the insurance Education Foundation and the College of Insurance Hammond Fund. He and his wife, Tina, reside in Yardley, Pennsylvania.

Jacobus J. Van De Graaf

Coby Van de Graaf spent almost forty years in the reinsurance business and retired as Managing Director and CEO of Towers Perrin Re in 1999. After his retirement, he spent an additional three years consulting to Towers Perrin Re.
Mr. Van de Graaf's insurance career began with Marsh and McLennan in 1958. In 1962, he joined Towers Perrin Re and spent seven years there as a reinsurance broker. In 1970, he went with General Reinsurance Corporation in the Treaty Marketing Department, holding a variety of positions including Senior Vice President in charge of Treaty Marketing and President of Herbert Clough. He rejoined Towers Perrin in 1985, establishing a new office in Stamford, Connecticut. In 1993, he became Chief Operating Officer and in 1994, CEO and Managing Director. While at Towers Perrin, he was also a member of the Board of Directors and on the Management firm with approximately 9,000 employees. He also served as a Member of the Board and member of the Executive Committee of BRMA. Specializing in the handling and placement of many reinsurance programs, both as direct writer and broker, over the years, Mr. Van de Graaf's background provides a unique level of experience.
In addition to his ARIAS•U.S. Certification, Mr. Van de Graaf is currently participating in several cases as an expert witness.
Mr. Van de Graaf is a graduate of Syracuse University and the Tuck Executive Program at Dartmouth College. He is married and has three grown sons and seven grandchildren. He splits his time between New Canaan, CT and Seabrook Island, SC.

in focus

Charles J. Widder

Charles J. Widder

Chuck Widder has over 32 years of experience in the insurance/reinsurance industries, starting with the Swiss Re America group of companies in 1971 through 1986, serving as Senior Vice President and Controller. In that capacity, Mr. Widder was responsible for all Statutory and U.S. GAAP accounting and financial reporting, taxes and reserving functions. While at Swiss Re America, Mr. Widder worked closely with Atrium Corp. to structure and model various finite risk reinsurance transactions and many innovative and cutting edge reinsurance risk transfer products.

Prior to joining Swiss Re America, Mr. Widder worked on the audit and management consulting staffs of KPMG, an international firm of Certified Public Accountants, where he engaged in audits of Fortune 500 companies in the manufacturing, commercial and investment banking industries. As a consultant, he engaged in merger and acquisition due diligence reviews for investment banking clients, operational reviews and systems development and implementation.

Mr. Widder joined US International Reinsurance Company from 1986 through 1990 as Executive Vice President and Chief Financial Officer. In that capacity, He was responsible for all accounting, treasury, tax and financial reporting functions (Statutory, U.S. GAAP and SEC) for the U.S. and international group of companies. Additional responsibilities included Claims and Information Technology Departments. His experience also included corporate acquisitions in Asia, Europe and Canada, structuring and accounting for financial reinsurance, commutations of reinsurance treaties in run-off and development of corporate budgets and systems development.

In 1991, Mr. Widder joined American Re-Insurance Company as Vice President of Product Analysis and Regulatory Relations. His responsibilities included the structuring, financial modeling, risk transfer evaluation of finite risk reinsurance transactions, development of integrated risk financial products, including derivatives, establishment of off-shore special purpose entities for securitization transactions, commutation arrangements for cancelled reinsurance, assumption and novation reinsurance transactions, and interface with clients, outside CPA firms and Insurance Department Regulators. Mr. Widder also participated in the consulting practice of Am-Re Consultants, performing financial due diligence on merger and acquisition engagements. Other functions included the review and preparation of accounting opinion letters for FASB, SEC and Statutory exposure drafts, opinions and pronouncements impacting the insurance and reinsurance industries. He was an active participant on NAIC working groups, committees and sub-committees, assisting in the formulation of accounting, financial reporting and regulation of U.S. domiciled insurance and reinsurance companies.

Mr. Widder has a BBA in Accounting from Iona College, MBA from Pace College Graduate School of Business Administration and completed the Executive Management Program at the J.L. Kellogg Graduate School of Management, Northwestern University. Chuck also served as Chair of the Reinsurance Association of America Accounting Committee and is the past president of the Society of Insurance Financial Management.

Mr. Widder is currently the principal and founder of CJW Reinsurance Consulting and Arbitrations Services, Inc., performing operational reviews, merger and acquisition due diligence reviews of insurance and reinsurance entities, consulting support for start-up insurance companies and expert witness testimony.

case notes corner

Case Notes Corner is a regular feature in which Ron Gass reports on a significant court decision related to arbitration.

Panel Exceeded Powers by Imposing $10,000/Day Sanction for Party's Noncompliance with Interim Security Order

by RONALD S. GASS*
The Gass Company, Inc.

In reinsurance disputes, arbitration panels are frequently requested to issue prehearing security and other interim relief orders, but are there any limits on their enforcement powers if a party refuses to post the required collateral or letter of credit ("LOC")? In a dispute raising this question, one panel sought to enforce timely compliance with its security orders by imposing a $10,000/day fine on the offending party, and it was this unusual sanction that was challenged in May 2003 before a California federal district court.

This dispute arose when certain reinsurers declined to indemnify approximately $2.5 million in legal expenses incurred by the cedent in underlying insurance coverage litigation. These expenses were ceded under a reinsurance treaty that specifically authorized interim payments. Because the cedent alleged that it would take a Schedule F Annual Statement penalty for this uncollected reinsurance, the panel issued an oral interim order at its organizational meeting on November 25, 2002 requiring the reinsurers to establish an escrow account for the entire disputed cession prior to year-end in a form to be mutually agreed by the parties. To understand how such a prosaic order escalated into a $10,000/day sanction requires a more elaborate than usual recitation of the facts.

...one panel sought to enforce timely compliance with its security orders by imposing a $10,000/day fine on the offending party,...

On December 18, 2002, the reinsurers posted a $2.5 million bond; however, on December 24th, the cedent objected alleging that it was inadequate for California statutory reporting purposes. Responding to the cedent's complaint and pressing need to resolve this issue prior to year-end, the panel issued a second interim order on December 26th requiring the reinsurers to post either cash collateral or an clean, irrevocable and unconditional LOC drawn on a bank acceptable to the state regulators. On December 27th, the reinsurers objected to the second interim order on the ground that they were not given an opportunity to respond to the cedent's bond objections due to the intervening holiday and prior to the panel ruling.

When the panel declined to revise its second order, the reinsurers argued, inter alia, that the two interim orders were irreconcilable and effectively constituted a decision on the merits in favor of the cedent without benefit of a hearing and before the necessary claims files could be produced by the cedent and audited. In response, the panel modified its second interim order on January 2, 2003 to provide that (1) if the cedent drew down on the LOC, it must establish an escrow in an equivalent amount to be held by counsel for the reinsurers but under the panel's control, and (2) the reinsurers must comply with the amended interim order within 10 days.

The parties briefed the escrow dispute, and on January 14, 2003, the panel directed the reinsurers to comply with the modified second interim order without delay. On January 22nd, with the reinsurers still out of compliance, the cedent moved for the panel to impose a $10,000/day sanction. The reinsurers responded with a motion to remove the umpire alleging lack of impartiality and opposed the fines because they did "not draw their essence from the Treaty." The cedent countered that the panel must be granted broad latitude in interpreting the contract and that such sanctions were permissible because the parties had not agreed to limit the remedies available to the panel.

On January 31, 2003, the panel proposed staying the cedent's pending sanctions motion if the parties would agree to submit the statutory penalty issue to examination by an "independent consultant" it had selected. The reinsurers opposed the consultant appointed by the panel because he was a party arbitrator for the cedent in other pending arbitrations against the reinsurers. However, because the consultant had previ-

ously been an arbitrator appointed by a party adverse to the cedent, had ruled against it, and had served as a party arbitrator for the reinsurers in two other matters, it overruled the reinsurers' objection and denied their petition to remove the umpire.

On February 7, 2003, the panel issued a third interim order imposing a $10,000/day sanction on the reinsurers, retroactive to January 17th, for each day the reinsurers refused to post the required collateral, noting that it would "revisit" the sanctions if there was timely compliance with the interim order. Having reached an impasse, the reinsurers filed a state court petition to vacate the panel's second and third interim orders and to disqualify the umpire. The cedent subsequently removed the matter to federal court.

Regarding the reinsurers' motions to vacate the panel's interim security orders, which were deemed sufficiently "final" to permit judicial review, the district court concluded that there was "no question" that the panel had the authority to require interim security in the form of an escrow. Such a broad remedy drew its essence from the contract, which "implicitly empowered" the panel to "formulate appropriate relief for any dispute submitted to it" and explicitly authorized interim payments for compensable losses. Hence, the panel had not "exceeded its powers" in issuing the modified second interim order.

Nevertheless, the district court found the panel's $10,000/day sanction for noncompliance to be "arbitrary," and therefore, it vacated the third interim order on the basis that the panel had exceeded its powers under the Federal Arbitration Act ("FAA"), citing the familiar maxim: "Arbitrators have no power to enforce their decisions. Only courts have that power." Noting that there is "no categorical ban" on a panel imposing sanctions for noncompliance with its orders, it chose to focus on the narrower question of whether such substantial daily sanctions exceeded the panel's authority. Examining the two possible sources of such power - the FAA and the arbitration contract construed in light of FAA policy - the court held that the statute did not explicitly grant panels inherent authority akin to a court's civil contempt power. From an FAA policy standpoint, such a penalty unduly burdens parties' right to pursue judicial review of final interim orders by forcing them to risk substantial fines in the event that the order is not ultimately vacated by the court. It also found nothing in the contract wording to justify such a substantial penalty.

The reinsurers' motion to disqualify the umpire in this case was quickly dispensed with by the court. It noted that federal courts have "consistently" held that they do not have the power under the FAA to disqualify an arbitrator while proceedings are pending because such actions can be "highly disruptive to the expeditious arbitration process fostered by the FAA." The district court also rejected the reinsurers' novel contention that the interim orders in this case were "final" for the purposes of judicial review and that disqualification of an arbitrator for bias after the issuance of such a "final" award was appropriate. Judicial review and enforcement of an interim order, according to the court, are not an "undue intrusion upon the arbitral process," but judicial disqualification of an arbitrator during the pendency of the arbitration is.

The reinsurers also argued that the umpire's conduct in issuing the interim orders violated the FAA's "evident partiality" and "misconduct" standards. "Evident partiality" in this context, according to the court, required a showing of actual bias that must be both "direct and definite." In the absence of any specific factual allegations in this case, the court held that there was no evidence that the umpire was predisposed to favor either party or that he acted with improper motives. Given the impending year-end deadline, it detected no misconduct or fundamental unfairness in the "compressed" timing of the panel's expedited consideration of the cedent's interim security request because the reinsurers were well aware of the issue's urgency.**

The limits of panels' authority to fashion appropriate sanctions to enforce their interim prehearing security orders were certainly challenged in this case; however, the facts, as is so often the case, obviously played a critical role in persuading the district court to find the panel's $10,000/day sanction to be "arbitrary" and in excess of its powers under the FAA. While the district court acknowledged that there was "no categorical ban" on panels imposing sanctions for noncompliance with their orders, it was obviously troubled by both magnitude and timing of substantial fine imposed here when analyzed against the backdrop of due process and what constitutes a fundamentally fair hearing.

Certain Underwriters at Lloyd's, London v. Argonaut Insurance Co., No C-03-1100 EMC, 2003 U.S. Dist. LEXIS 8796 (N.D. Cal. May 13, 2003).

** In an interesting footnote (Note 5), the district court cited federal case law to justify its refusal to delve into the reinsurers' allegation that the second interim order was issued before its party arbitrator ever learned of it. The court implied that such an unwarranted examination of the panel's internal deliberations, which should remain "confidential and inviolate," could lead to the disfavored practice of calling arbitrators as witnesses regarding matters heard or considered by the panel in reaching its decisions. ▼

Mr. Gass is an ARIAS•U.S. Certified Arbitrator. He may be reached via E-mail at rgass@gassco.com or through his website at www.gassco.com.

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