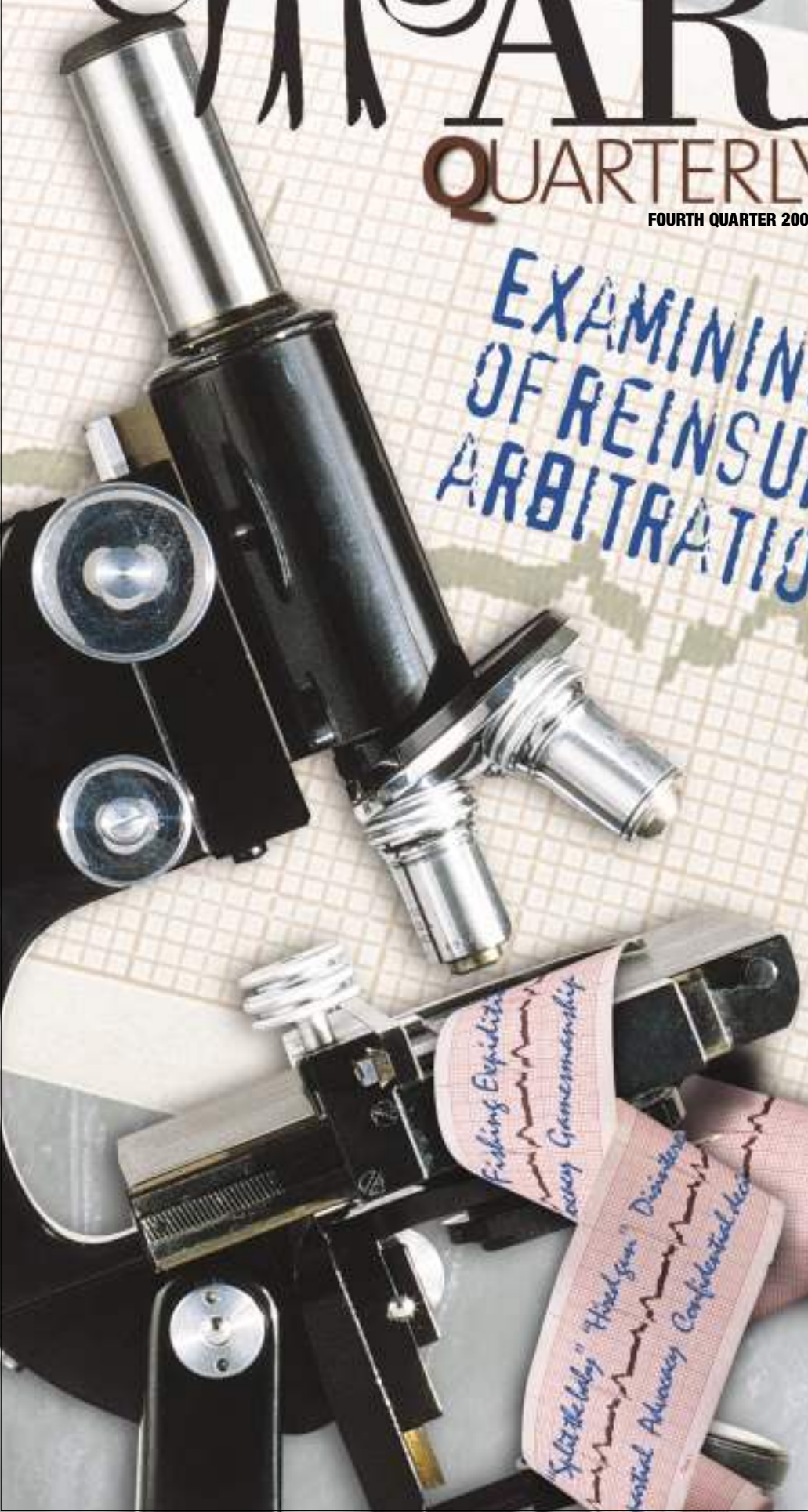
ARIAS QUARTERLY U.S.

FOURTH QUARTER 2003

EXAMINING THE STATE OF REINSURANCE ARBITRATION



editor's comments

T. Richard Kennedy

The Editors wish to congratulate the newly elected directors and officers of ARIAS•U.S., each of whom is listed in the report in this issue. At the same time, we want to note with deep appreciation the tremendous contributions of the two outgoing officers and directors, Mark Gurevitz and Dan Schmidt. In addition to Mark and Dan's long-standing efforts on behalf of the entire organization, each deserves special credit for the growing success of our Quarterly. Happily, each has agreed to remain actively involved in the activities of ARIAS•U.S.

As suggested by our cover, the articles in this issue assess the current state of reinsurance arbitrations. Jack Whittle and Anne Quinn, in *The Current State of Reinsurance Arbitration: Addressing the Common Areas of Complaint*, suggest that the industry is largely responsible for a perceived rising level of dissatisfaction with the arbitration process. The authors thoughtfully recommend several steps that could be taken to address the complaints, involving principally revision of the arbitration clauses to require changes in the process. Similarly, Earl Davis, in *Reinsurance Arbitration: Some Thoughts for Improvement*, expresses concern that "customers" of the reinsurance arbitration process are losing confidence in it as a dispute resolution means. Rather than relying on changes to the arbitration clauses, Mr. Davis would look primarily to arbitrators sitting on current panels to address the concerns. James Shanman likewise seems to favor more effective *Hearing Management* by arbitration panels, while, at the same time, offering helpful guidelines regarding what the permissible limits of that management may be.

It is important to note that many of the process improvements recommended by the authors have been a primary focus of ARIAS•U.S., and indeed were the reason for founding of the organization. For example, ARIAS has served to greatly expand the pool of qualified arbitrators. Ongoing ARIAS•U.S. training programs help arbitrators deal with issues arising from such things as discovery and privilege disputes, ex parte communications, and conduct of the hearing. ARIAS•U.S. arbitrators also are encouraged to offer parties the option of a reasoned award, or alternative methods of dealing with ex parte communications or confidentiality, according to the circumstances of the dispute and wishes of the parties. I encourage you to review the papers and forms of documents presented at the November 2003 Annual Meeting as ample evidence of the foregoing.

It is noteworthy that both the articles by Whittle and Quinn and by Earl Davis recommend that the industry get away from party-appointed arbitrators in favor of all neutral panels. Whittle and Quinn go so far as to suggest that ARIAS•U.S. might be the "neutral body to maintain a full and qualified roster of reinsurance arbitrators from which to generate arbitrator and umpire lists, process any conflicts and tally the voting." The possibility of providing a process for neutral panels recently has been taken up by the ARIAS•U.S. Board of Directors, which has directed a study of the question. The study committee, chaired by Mark Gurevitz and Gene Wollan, presented an interim report at the Annual Meeting, and likely will make its final recommendations in the near future.

The same two articles call not only for an arbitrator Code of Conduct, which ARIAS•U.S. has, but also for enforcement of such a Code, which ARIAS•U.S. has eschewed to date for various and practical reasons. However, I expect that the Board might be willing to reconsider possible enforcement measures if enough members feel it has become necessary.

A very encouraging development in the service available to ARIAS•U.S. members is reported in the article by Michael Davis and Mary McCarthy, *New York Court Appoints Umpire from ARIAS•U.S. List*. This issue also includes another excellent recent case report by Ron Gass in *Case Notes Corner*. Finally, be sure to read Bill Yankus' interesting report on the Annual Meeting, especially if you were one of our few unfortunate members unable to be present. ▼

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.

contents

feature story

The Current State of Reinsurance Arbitration: Addressing the Common Areas of Complaint

ANNE QUINN
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The arbitrators themselves, while not without fault, have simply fallen into roles largely created by the reinsurers.

Anne Quinn and Jack Whittle are both members of Gen Re's legal department in Stamford, Connecticut. They work on a wide variety of non-claims disputes in and outside of the United States, as well as provide regulatory guidance and contract support to Gen Re's business units.

Those of us involved in the world of reinsurance disputes have seen a rising level of dissatisfaction with the arbitration process among the very same group that, in fact, ultimately controls this process – the reinsurance community itself. "We" wrote the arbitration clauses embedded in our certificates and treaties that guide these very same arbitrations that are now leaving a decidedly bad taste in our collective mouths. While the initial reason to use arbitration was to resolve these commercial disputes quickly, reasonably and without too much added expense; quite the opposite has happened. The arbitrators themselves, while not without fault, have simply fallen into roles largely created by the reinsurers. The arbitration lawyers have, in large part, now grown comfortable with the process (and the enhanced need for their time and attention) and they have no motivation to advocate change. It is therefore up to reinsurers to assume a leadership role and re-establish a more satisfactory process with a more dependable outcome. The most effective way to accomplish this is to re-think and re-draft the arbitration clauses that direct and guide the arbitration process.

The corrective analysis can begin by reviewing some of the common areas of complaint, which leads to proposed solutions that are achievable with basic revisions to the arbitration clause. It is also quite true that some of these drafting solutions require additional support from an external organization for the new processes being created.

These proposals can be organized around these familiar "common areas of complaint" that are being voiced with increasing frequency:

Common Area of Complaint Number One: the selected arbitrator/umpire cannot participate in my arbitration for two years; there are too few "good" arbitrators available in the current pool of qualified candidates; arbitrators could misbehave without consequence

Perhaps the core problem here is the depth of the pool of qualified arbitrators. The sheer number of reinsurance arbitrations has exploded beyond the bounds of what anyone expected when the arbitration clauses (and the supporting processes) were originally drafted and conceived. Unfortunately, many insurance and reinsurance companies have long-standing prohibitions in place that do not permit their active employees to participate as panelists in arbitrations, so the pool of arbitrators is largely comprised of those who have retired from the insurance business (after long and fruitful careers or otherwise). While valid reasons exist for these companies to restrict their employees from taking on possibly time consuming work outside of their employment, the need for more "active in the business community" arbitrators is so great that these companies must re-think their positions, if only to ultimately serve their own best interests. The current pool of qualified arbitrators is simply too small to serve the current demands of the reinsurance community, and we all suffer for it.

Some arbitration clauses in treaties and certificates issued by U.S. reinsurers call for retired members of the insurance or reinsurance community, while others are largely silent on the issue without affirmatively permitting actively employed arbitrators to serve on the panel. Such arbitration clauses should be expanded to affirmatively include "active" members of the reinsurance community as permissible arbitrators.

It is also the case that many reinsurance arbitrations get bogged down in time-consuming legal arguments involving **discovery** and

privilege issues. Perhaps the time has come for the arbitration associations to train and encourage the use of "special masters" on these issues, which would free the arbitrators from this chore and ensure that these (often highly-sensitive and legally complex) issues get qualified attention with a consistent approach. If such Special Masters were created, arbitration clauses could be amended to direct that all disputed matters of discovery and privilege be referred to a Special Master as certified by, for example, ARIAS.

Finally, many of us have heard rumors of a few instances of "arbitrator misbehavior" that would clearly be at odds with the rules of the various arbitration organizations. If such rumors are true, what is lacking is effective enforcement by these organizations, which should be made a priority item.

Common Area of Complaint Number Two: the decisions from arbitration panels often "split the baby"; the decisions (more in the nature of pronouncements) from the panels are short and do not appear to be well-reasoned; short and confidential decisions have no precedential value to inform future adversaries or future panels

The feeling is all too familiar: after a long, hard fought and expensive arbitration, the panel issues a short decision that is lacking in reasoning or support, or perhaps the award looks like nothing more than a even split, a "something for everyone" pronouncement that does not seem to allow for the possibility that one side was, in fact, right. Perhaps if arbitration panels detailed their consideration of the evidence and the reasoning behind their decisions, such "baby-splitting" awards would be better understood and justified, or perhaps having to detail their reasoning and the basis of their conclusions might result in fewer of these types of decisions and improve the quality of their reasoning and awards in all matters. In any event, the parties are entitled to know the reasoned basis of the panel's decision. While some arbitrators have retorted that a longer, well-reasoned opinion might lead to judicial reversal, the positive impact of accountability should not be feared.

Once again, the reinsurers have the power in their own hands to quiet many of their own complaints. The arbitration clause should be revised to require the panel to issue a written decision detailing the reasoning supporting the decision, and the evidence and facts relied upon in reaching that decision.

It is also time to reconsider the confidentiality automatically imposed by some arbitration clauses, arbitration panels or agreed to by the parties. Once implemented, the (hopefully well-reasoned) decisions of the arbitration panels would have much value that should be leveraged by "publishing" them in a common database available to the reinsurance community. It is also becoming quite clear that some arbitrations might be not be brought if other attempts to invoke arbitration over the same issue were shown to be unsuccessful, or at the very least, published arbitral opinions can help guide future business conduct of more than just the losing party. The arbitration associations themselves (such as ARIAS) might be willing to "publish" and maintain a database of the decisions, which would aid in resolving similar disputes in the future without resort to arbitration. If the resistance to such "publication" of arbitral awards is high, perhaps the publication of these decisions with the party names redacted could be considered as a compromise.

Common Area of Complaint Number Three: the three-member arbitration panel has devolved into one judge and two opposing advocates; "hired gun" arbitrators; the advocacy services provided by my lawyer (at great cost) are now largely duplicated by the advocacy services provided by my party-appointed arbitrator (at great cost); certain arbitrators appear to have relationships with certain law firms or clients

Easily the most "broken" area of reinsurance arbitrations relates to the structure and formation of the three-member arbitration panel itself and how it functions once constituted. It is now a far cry from a disinterested and impartial panel of three wise men (or women). We are compelled to pick a party-appointed arbitrator who best shares our view of the case, not necessarily because we want to game the arbitration system by "getting to" one of the panelists but because we know the other side is trying to do the same thing and we need, at best, an offsetting

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advocate. The selection of a party-appointed arbitrator now hinges on the prospective appointee's alignment with the appointing party's position and the appointee's track record of advocacy in carrying that view to a successful result. Is this what we had in mind when we went to the three-member arbitration panel system?

Most reinsurers will privately confide that all they really want is their case to be heard by an arbitration panel comprised of three experienced, ethical and fair-minded people with no predisposition towards either of the parties (including hoping for future arbitral appointments by a party), any individuals associated with or employed by the parties or either of the parties' lawyers.

The state of affairs in this area also gives rise to another common complaint that the arbitration process was designed to fix in the first place: lengthy proceedings and the attendant runaway legal expenses (now resulting from counsel and arbitrator billings.) We pay our outside counsel to prepare our cases and advocate our positions, and we [essentially] are now paying again for this same service by our party-appointed arbitrator. In addition, we have devolved to a system where, once a panel is finally in place, there is first a trial put on in front of the panel by the lawyers, and a second, private "trial" where the merits of the parties' cases are presented with varying degrees of advocacy by the party-appointed arbitrators to the umpire in a private setting. Reinsurers never meant to have "redundant advocates" and private justice when they drafted the original arbitration clauses and agreed to include them in their reinsurance contracts; the three-member panel was a construct that ensured (we had surely hoped) an even-handed decisional process that did not rely on the wisdom and judgment of one person alone.

If there is blame to be laid, it is not the fault of those who have chosen or made themselves available to serve as an arbitrator; any system where your business success (more cases equals more fee income) is driven by your advocacy success on behalf of those who openly interview and appoint you will *always* bring us to this place.

The arbitration clause drafting solutions in this area are obvious. First, and easiest to accomplish, the arbitration clause should be redrafted to require all three panelists to be both disinterested *and impartial*. While some might suggest that requiring impartiality of the panelists alone would solve many of the current problem, we all know in our hearts that, where human nature is concerned, you cannot have each litigant openly hand-picking one of their judges (and paying their hand-picked judges' salaries) and expect complete, impartial participation in a panel by these same hand-picked "judges". Therefore, it is now time to seriously consider a more drastic revision to the arbitration clause: *eliminate the current party-appointment process altogether* – build in a process where the three panelists are voted upon and selected from short lists of qualified arbitrators produced by a neutral body from an agreed roster, and keep the parties' votes forever secret from the arbitrators so the non-umpires never know who they are "working for". While this is a proposal that can be initiated within the wording of the arbitration clause, it also requires reference to and reliance upon a neutral body to maintain a full and qualified roster of reinsurance arbitrators from which to generate arbitrator and umpire lists, process any conflicts and tally the voting.

Perhaps ARIAS could consider its role in such a procedure.

Implementing these proposed revisions and revised processes would result in a return to what was originally envisioned by the reinsurance community: an efficient, unbiased and truly impartial panel arbitrating disputes with their collective business judgment and wisdom, unclouded by alliances or allegiance to any party. ▼

news and notices

Intensive Training Workshop Redesigned

As you all know so well, the growth of ARIAS•U.S. has put increasing demands on the training program. The over-subscription to the Bermuda Conference, the rapid close-out of the September workshop, and the "full house" in New York in November are clear evidence of the need for ongoing expansion.

Just as the main conferences now are being scheduled in increasingly larger facilities, the workshops have been modified, as well. The solution was not so straightforward because the faculty for these seminars, which feature mock arbitrations, had to be significantly increased. Also, the larger groups no longer fit in the largest conference rooms previously provided by participating law firms.

The first test of the new workshop format will take place on February 23-24 at the Hastings Hotel in Hartford. The Hastings was formerly the Aetna Training Center; it has been refurbished into an attractive facility that suits perfectly the needs of our workshop.

The seminar capacity has been doubled to 54 and the fee now is all-inclusive. Previously, an attendee paid $150 and had also to pay for a hotel room and dinner. Now, for a payment of $340 (including all hotel-related taxes), all workshop, lodging and food expenses are covered. Only transportation costs (air, car, and/or taxi) need to be handled separately.

The program will begin on Monday evening, February 23, with a reception and dinner. The workshop, itself, will begin at 8:30 am on Tuesday and continue until 4:30. The fee covers workshop costs, the reception and dinner, breakfast and lunch on Tuesday, coffee breaks during the day, and a single overnight room.

Six law firms have accepted the invitation to join the program. They are:

- Bingham McCutchen
- Chadbourne & Park
- Choate Hall & Stewart
- Day Berry & Howard
- LeBoeuf, Lamb, Greene & MacRae
- Simpson Thacher & Bartlett

Registration has also been redesigned. Previously, announcements were sent in the mail, with response on a first-come/first-served basis, through faxes and mail. However, distant members complained that they had not even received their mail before registration was closed. Now, registration will begin on Wednesday, January 7 at 10:00 am on the website, www.arias-us.org. The site will open for registrations at that time and accept them until all 54 positions have been filled. We sincerely hope that this will be seen as a fairer method and that all who wish to attend can be accommodated. As usual, the workshop is open only to members who have not previously attended one. In the future, when everyone in that category has been accommodated, members will be able to register for a repeat session.

Directory Completed

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

Spring Conference Details in March

As everyone knows by now, the 2004 Spring Conference is set for June 9-11, 2004 at The Breakers. Palm Beach, Florida is along the Atlantic coast and in early June the average high temperature is in the mid-80s. It should be warm, but not unpleasant.

The Breakers is a classic, elegant resort. With two golf courses and a beautifully renovated 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 (West Palm Beach International Airport). Plan to be there from Wednesday noon until Friday noon, if not through the weekend.

All the details about the program will be

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news and notices

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sent to members in early March and posted on the website, giving you plenty of time to make arrangements. Of course, ARIAS members are compulsive about advance planning, so to help you get started, The Breakers has opened its reservation system. You can sign up for your room now. The phone number is 1-888-BREAKERS (1-888-273-2537). Be sure to say that you are coming for the ARIAS Conference to get a room from our block at the special rates of $185 Superior, $220 Deluxe, and $320 Oceanfront. You will want, at least, to stay overnight on June 9 and 10.

Recertification

Certified Arbitrators whose certification expired at the end of December will receive recertification notices in January. Maintenance of certification requires attending at least one seminar within the two-year certification period. Expiration dates are indicated on all certificates.

Anyone who did not attend a conference or workshop during the past two years will be considered lapsed and will be withdrawn from the website and directory, until he or she attends another conference.

The purpose of this rule is to ensure that arbitrators maintain their knowledge and involvement in the process of improving arbitration. If you have any question about the date or the rule, contact mmassucci@cinn.com.

Save the Dates for the 2004 Annual Meeting

Hilton New York will once again be the venue for the annual Fall Conference. A much larger space, the Trianon Ballroom, will be the location of the general sessions. Details of the program will be announced in September, 2004.

Annual Dues

Invoices were going out in late December for your 2004 dues. Individual dues of $250 and corporate dues of $750 should be paid by the end of January. Corporate dues notices are sent to the key contact at each firm. If you think you should have received an invoice, but did not, please contact Mara Massucci at mmassucci@cinn.com or extension 112 at 914-699-2020. An address correction may be needed.

New Certifications

At the November 6 Board meeting, the following seven members were certified as ARIAS•U.S. Arbitrators. Biographies of recently certified arbitrators begin on page 22.

- Dennis A. Bentley
- John D. Cole
- Richard E. Cole
- Michael S. Davis
- Robert J. Federman
- William D. Hager
- James K. Killelea

John W. Thornton

We note with sorrow the passing of Sparky Thornton on November 21, 2003, in Miami, Florida.

Hearing Management

feature story

The following article is based on a paper presented by James A. Shanman at the ARIAS•U.S. Fall Conference, November 6-7, 2003

JAMES A. SHANMAN
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The strong preference for arbitration as a procedure for resolution of reinsurance disputes goes back at least many decades, certainly beyond the recollection of the authors. However, until relatively recently, perhaps the last twenty years or less, reinsurance arbitrations were rare. Indeed, since the reinsurance world was traditionally a small, closed community -- often aptly described as a "gentlemen's club" -- there were very few actual disputes. Those disputes that occurred seldom reached the point where actual proceedings were commenced. Most were resolved by informal negotiation in the belief that it was extremely important to maintain long-term relationships between cedents and reinsurers and that to do so required substantial give and take.

The arbitrations arising from the relatively few unsettled disputes generally bore little resemblance to the arbitrations of the last ten to twenty years. They tended to be much more informal and non-adversarial (it was not unusual for no counsel to be involved). There was little or no discovery and, most relevant for present purposes, actual evidentiary hearings were uncommon.

Times have changed, as everyone involved with reinsurance knows. Disputes are frequent, often very contentious and, as many have observed, arbitration today looks more like litigation. With respect to hearings in particular, this has created a number of consequences. First, although no statistics are available, the percentage of arbitrations that extend through hearing has greatly increased. Second, while hearings are still relatively informal compared to civil trials, they have become more structured as well as more adversarial. For example, not long ago, evidentiary objections during hearings were exceedingly rare. While not exactly the norm now, evidentiary objections are not unusual. Third, hearings have become considerably longer, often lasting weeks, or even months.

These circumstances have given rise to growing concerns regarding hearing management. The most important issues in such management are budgeting of hearing time, the ability and willingness of panels to cut off witnesses or even to exclude altogether testimony of a witness, the handling of evidentiary objections, and miscellaneous procedural questions involving scheduling and briefs.

Unfortunately, little guidance exists as to how to handle these areas of hearing management. Since arbitration is a creature of contract, the parties have the right to specify the ground rules and even to waive procedural rules. Thus, the parties may have agreed on specific rules for the hearing. On the other hand, more commonly, the parties have passed on that opportunity (or perhaps been unable to agree), leaving responsibility for hearing management entirely in the hands of the panel. In such case, the parties ostensibly have consented to accept whatever rules the arbitrators formulate. Of course, there are constraints on what arbitrators can do, but when reviewing an arbitration panel's decision, a court has a very narrow scope of review.

The arbitrators' power to manage hearings arises from the effect given to arbitration agreements by the Federal Arbitration Act (the "FAA") and state arbitration acts. The FAA enunciates a few general circumstances in which a panel's

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James A. Shanman

David N. Stone

...until relatively recently, perhaps the last twenty years or less, reinsurance arbitrations were rare.

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decision may be vacated if the hearing process falls short of certain procedural standards. Thus, a party to an arbitration may seek an order from a court vacating an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced ... ."

New York's arbitration act similarly stresses the right of the parties to present evidence. "The parties are entitled to be heard, to present evidence and to cross-examine witnesses." The California Arbitration Act includes as a ground for vacating an award that "[t]he rights of the party ... were substantially prejudiced by the refusal of the arbitrators to hear evidence material to the controversy ... ." Similarly, the Illinois Uniform Arbitration Act states that "the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing," and it is grounds to vacate the award if the arbitrators "refused to hear evidence material to the controversy." The real challenge for the arbitrators, then, is to provide an effective and efficient timetable for resolving the parties' dispute while at the same time ensuring that the matter is heard fairly.

Arbitrators seeking to determine what constitutes proper conduct of a hearing will search the FAA in vain. In effect, the law states "thou shall not" in a general way without providing corresponding specific, positive guidance. The basic requisites of a valid hearing are that the arbitrators be present, that the parties whose rights are affected have been given notice of the proceedings, and that those parties have an opportunity to be heard and to present evidence before the panel.

The concern for arbitrators tasked with management of hearings is fundamental fairness. "A fundamentally unfair proceeding may result if the arbitrators fail to give each of the parties to the dispute an adequate opportunity to present evidence and argument." Canon VII ("Advancing the Arbitral Process") of The Guidelines for Arbitrator Conduct, promulgated by ARIAS•U.S. in 1998, offers this simple directive to arbitrators on the topic of hearing time management: "Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, internal rulings, and written awards." A comment to Canon VII advises that "[a]rbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings." Neither the ARIAS Guidelines nor the FAA and state acts have much to offer the concerned arbitrator beyond this entreaty to be impartial. Arbitrators should heed such basic advice as giving the parties reasonable notice of the time and place of the hearing and granting adjournments upon sufficient cause.

Unfortunately, these basic principles are insufficient in and of themselves to resolve most potential problems. Once the hearing begins, some lawyers may seek to formalize proceedings, and less experienced arbitrators may become bogged down with procedural issues not addressed in arbitration statutes or agreements, like issuing subpoenas, handling third party claims and the admission of evidence. Arbitrators who have not had the opportunity to familiarize themselves with the matter prior to the hearing may be reluctant to limit the evidence for fear of excluding something material.

Despite a panel's best wishes to move the proceedings along, delays can occur at the hearing as a result of the arbitrators' refusal to set or enforce schedules. If the arbitration continues past the original hearing dates, finding additional hearing dates when busy lawyers and multi-member panels are free for even a few days can be challenging. While many attorneys in theory may believe specific time schedules should be imposed by arbitrators during the hearing, or even the setting of arbitrary time limits on each party to complete a pro-

...there are constraints on what arbitrators can do, but when reviewing an arbitration panel's decision, a court has a very narrow scope of review.

ceeding within the available time, such beliefs may well be overwhelmed by circumstances during an actual hearing when a key witness' three hours are up and he or she still has substantial material evidence to offer.

In the area of managing the hearing itself, one of the arbitrators' chief concerns is arguably the hearing (or not hearing) of particular witnesses or testimony. In this context it should be kept in mind that even in courts limits are imposed on a party's ability to put on its case, and those limits are typically upheld on appeal. Further, arbitrators should take heart from the fact that errors of fact or law are almost never sufficient to vacate a panel's award.

With regard to evidentiary objections, many arbitrators are not familiar with or accustomed to legal technicalities (indeed, the absence of such technicalities is often cited as a major advantage of arbitration). The arbitrators should be prepared to rule on the admissibility of evidence and to weigh its relevance. On the other hand, arbitrators who determine to exclude evidence should be aware that the refusal to receive evidence is usually not a sufficient basis alone to vacate an award. Rather, the excluded evidence must be material and relevant to the issues in the arbitration. The conduct of arbitrators who forbid cross-examination of a witness, not altogether but on certain matters, is harmless as long as the exclusionary rulings do not prevent the other party from fairly presenting its case. The introduction of an improper exhibit is not misconduct if the party seeking to vacate an award was not prejudiced by the submission.

It should be noted that the term "misconduct" is used to describe any unfair act, whether or not it was intentional. Upon judicial review of a panel's refusal to hear evidence, it is not enough that the arbitrators concluded they had sufficient other evidence -- it is for the court to determine whether the arbitrators have exceeded their powers. Arbitrators have been excused for refusing to hear evidence of a party's good character and credibility if such evidence did not bear directly on a material issue. The arbitrators can always request an offer of proof when in doubt as to the relevance of a witness's testimony. The refusal of arbitrators to order production of original records upon a party's request would not be misconduct where the party had examined the original materials before the hearing, had copies in his possession and witnesses were subject to extensive cross-examination on the documents.

In terms of scheduling, arbitrators as a rule are much more flexible than judges, taking into consideration the number of parties involved, and the supreme importance of proceeding in the presence of all the parties. Upon due cause shown, a panel should grant an adjournment if it is reasonably called for. Misconduct has been found where arbitrators have refused to adjourn hearings to allow a party the opportunity to obtain relevant evidence. Conversely, a panel's refusal to reopen proceedings would probably not be considered prejudicial misconduct if the evidence was available at the time of initial hearings and the party declined to offer it. Similarly, refusing to open a case to take more testimony on an issue which had already been explored at length is extremely unlikely to constitute misconduct.

In conclusion, arbitrators should follow a rule of fundamental fairness in managing hearings. But what is fair -- a three-week hearing, or one that lasts a year? In order to achieve the efficiency which the parties sought in agreeing to arbitrate in the first place, a panel may be forced at times to cut off a witness, to limit testimony and to exclude evidence. The most satisfactory hearing management presumably arises from the agreement of the parties, but if the panel must proceed without such agreement, it should take solace in the fact that judicial review of its award is severely limited in scope, and state and federal arbitration acts are highly deferential to the arbitrators' judgment. ▼

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Fall Conference Takes ARIAS•U.S. to New Levels

Not only did the 2003 Annual Meeting & Conference set a new level of attendance, up 50% over last November, but also it took on a higher level and broader scope of issues being faced by reinsurance arbitrators today.

The program took on this agenda by covering the most difficult problems at all stages of the arbitration process, from initial organization, through conduct of hearings and panel deliberations, to the award and post-award issues. Entitled "Bringing Reinsurance Arbitration to the Next Level: The Voices of Experience," the day and a half of general sessions featured panel discussions among ARIAS certified arbitrators who have been involved in 50 or more arbitrations during their careers.

Real-world "sea stories' told of how these difficult problems were addressed and resolved in a variety of past disputes. Attendees were nearly unanimous in their praise of the extent of the knowledge that poured out in the course of the day and a half. Many also commented on the value of having the extensive series of related "Documents of Experience" that were sent out two weeks before the conference to all who had registered before the deadline (92%). Since these papers were cross-referenced to the program that was also sent early, attendees were able to prepare themselves for the veterans' discussions. (One of these documents is included in this issue on page 9.)

Top and Middle:
Few seats were free in the Mercury Ballroom.

Left:
Veteran arbitrators share their experiences.

However, they were also nearly unanimous in their distress at the discomfort of being shoulder to shoulder in the warm room for a day and a half. Moderate growth had been anticipated to raise attendance to the low 300's. However, the 50% increase to nearly 400 forced a theatre-style room arrange-

ment that went right up to the capacity of the Mercury Ballroom.

This year's conference was also highlighted by an address at the luncheon on Thursday by the Honorable George C. Pratt, a retired federal judge and new member of ARIAS, who spoke about his extensive history of involvement with disputes both in litigation and arbitration.

While there were question and answer periods over the two days, audience interaction during the conference was minimal, due to the large number in the room. The program, by definition, had to be more one-directional and conducted in a single group. Previous conferences have

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Above:
Chairman-elect Charlie Foss leads the Annual Meeting.

Left:
An "Under the Sea" welcome...

Top Left:
Conversations were difficult to end when the breaks were over.

Above Left:
Judge Pratt addresses the conference.

CONTINUED FROM PAGE 13

included breakout sessions that allowed much more involvement. Comments in the evaluations suggest that many members missed having the smaller groups as a part of the conference. The Spring Conference in Palm Beach will include significant interaction.

In spite of the concerns expressed, the overall assessment of the conference was "Outstanding." Everyone left with a much deeper understanding of the issues they could face and of ways to effectively deal with them to expedite future arbitrations.

Next year's Fall Conference will again be at the Hilton. The Trianon Ballroom, which is 50% larger, has been reserved. The room will be arranged classroom-style, to the extent possible. Five breakout rooms have also been set aside. The dates are November 11-12, 2004. Mark your calendar or let the website calendar remind you. It always contains the latest information about all ARIAS•U.S. events. ▼

Editor's Note: For information about elections conducted during the Fall Conference, *please see page 15.*

Above:
...with O'Doul's all around.

Dan Schmidt steps down as Chairman.

Above:
Dan Schmidt and Mark Gurevitz retire and light up the room.

Right:
Bill Yankus warns of the CLE implications of not signing out.

Charles M. Foss and Thomas S. Orr Elected Chairman and President

Lopatto is President Elect

Wollan a Vice President

Two New Board Members Elected

Charles M. Foss

Thomas S. Orr

At the Board meeting, held during the 2003 Fall Conference on November 6, Charles M. Foss, General Counsel, Reinsurance Litigation, for Travelers Property Casualty Corporation, was elected Chairman of ARIAS•U.S. and Thomas S. Orr, Senior Vice President for North American Claims at General Reinsurance Corporation, was elected President, succeeding Mr. Foss.

Also at that meeting, Mary A. Lopatto, Partner at LeBoeuf, Lamb, Greene & MacRae, L.L.P., was elected President Elect and Eugene Wollan, Partner at Mound Cotton Wollan & Greengrass, was elected Vice President.

At the annual membership meeting, just before the Board meeting, Frank A. Lattal, Executive Vice President and General Counsel of ACE Bermuda and Steven J. Richardson, head of Reinsurance (assumed) at Equitas Limited in London, were elected to the Board of Directors, replacing Daniel E. Schmidt, IV and Mark S. Gurevitz, who have retired from active Board service.

Charlie Foss has been a member of Travelers legal department for over twenty-five years, specializing in corporate, insurance, and reinsurance matters. His current responsibilities include the management of all reinsurance litigation and arbitration involving Travelers Indemnity Company and Travelers Casualty & Surety Company. Mr. Foss has been a member of the ARIAS•U.S. Board of Directors since its founding in 1994.

Tom Orr has been with Gen Re since 1981 and has eight years of previous experience in various claim positions with Aetna Life & Casualty and the Home Insurance Company. He is a member and past chair of the Claims Committee of the Reinsurance Association of America. ▼

Mary Lopatto

Eugene Wollan

feature

Reinsurance Arbitration: Some Thoughts for Improvement

Earl C. Davis

Earl C. Davis

The key question for those of us who are primarily customers of the reinsurance arbitration process is: Has the process become faster, less expensive and fairer in recent years? Few would argue that it is faster or less expensive. Attempts to shorten the process for smaller arbitrations (under $1 million) through the use of a single arbitrator, minimal discovery, and written submissions have met with little or no success. Even the smallest arbitration (up to $5 million) through hearing costs a minimum of $500,000 per party and takes up to two years. As to whether it is fairer, is open to debate. "Gamesmanship" in the attempt to insure victory or pursue hidden agendas is eroding trust.

Most of the U.S. reinsurance arbitration clauses are fairly standard with, at most, minor variations as to the qualifications of the arbitrators and selection of the third arbitrator (umpire). The unique nature of the relationship between ceding companies and their reinsurers has been recognized by the drafters of reinsurance agreements. The reinsurance arbitration clause is no exception, and rightly so.

If we, as an industry, wanted litigation, either real or quasi, we would opt to go to court or choose to follow the British lead which, for all practical purposes, requires a QC to serve as the third arbitrator to make legal rulings and write a legally sound and reasoned award. What makes the U.S. system different (to the consternation of many attorneys) is our reliance on business, rather than legal principles to resolve our disputes. Our arbitration clauses talk about treating the reinsurance relationship as an "Honorable Engagement" and ask the panel to look at "Custom and Practice of the Industry," rather than "legal obligations," and to be "relieved of all judicial formalities" and "rules of evidence." Most also require the panel to be made-up of "active or retired executives of insurance or reinsurance companies." Our arbitration clauses all impose strict timetables for selection of a panel and in most cases for the entire process. Except for the timetable for selection of the party appointeds, the rest of the timetable is almost always ignored. I submit that if you ask most business executives who pay the bills and are responsible for balance sheets, they still want, primarily, a business resolution based on most of, if not all, of the principles outlined above.

Throughout this discussion, there sits an 800-pound gorilla. Our industry has changed in the last ten years: runoffs, insolvencies, portfolio transfers and the lack of long-term business relationships, to name just a few, have changed our industry and have had a severe impact on the nature of the disputes and how we resolve them. As one long-time industry observer recently stated, "the art of negotiating" has been lost, and "the demand for arbitration" has taken its place. In 1992, a survey of RAA members, at a claims conference, found no reinsurance company present that was in an arbitration. If the survey were taken today, all would be in at least one and in most cases multiple arbitrations. The reasons we arbitrate have also changed. A number of today's arbitrations are used by reinsurers as fishing expeditions to seek evidence for rescission, delay payment, or force ceding companies into commutation discussions. Ceding companies, for their part, are using arbitration to buy time to get their act together and avoid statutory penalties for failing to collect reinsurance recoverables in a timely manner. These factors and others have led to the "gamesmanship" which has crept into the process driving all of us toward the lowest common denominator. We are

There must be a collective effort to get back to a process where we can all be on a level playing field. The "gamesmanship" to obtain an unfair advantage must end.

Earl C. Davis is President of San Francisco Reinsurance Company and a Senior Vice President of Fireman's Fund Insurance Company in Novato, California. He has been active in insurance and reinsurance arbitrations since about 1985.

losing confidence in our dispute resolution process.

Is party appointed just another way of saying advocate, a person who will advocate and vote the party line? JAMS recently changed its rules to allow its members to accept party- appointed assignments, and a respected JAMS arbitrator told me, that to him, that meant advocate. The AAA will not constitute a panel where one of its arbitrators is asked to be an advocate, unless both agree to be advocates. The AAA Code of Ethics leans heavily toward neutral panels. The Reinsurance Dispute Resolution Task Force, which was established in 1997, rejected a recommendation to include the option for selection of non-party-appointed, neutral panels, with most members wanting to retain the party-appointed process. In just six years, there has been a big change of view among a majority of members. There will be a non-party-appointed option in the 2003 revised procedures.

Is there any doubt we are on a slippery slope when arbitrators send advertisements that they are certified and open for business, actively lobby to be selected to panels, and are exclusively selected by the same party over and over? In one recent case, and I am sure it is not the only case, a party-appointed arbitrator excused himself from a panel because it was clear that the other party's appointed arbitrator was an advocate and was undermining the process. Parties who don't like what is happening are not going to unilaterally disarm; it would be foolhardy to do so. There must be a collective effort to get back to a process where we can all be on a level playing field. The "gamesmanship" to obtain an unfair advantage must end. Before we insert an organization into our arbitration clauses, we should insist they have a written code of conduct which they enforce. Ex parte communication, except on a very limited basis, for all panel members should end. Party-appointed arbitrators should select umpires in consultation with, not at the direction of, their respective parties or the parties' attorneys.

We need to expand our pool of arbitrators and umpire candidates. There are currently too few. ARIAS•U.S. has trained and certified many qualified candidates who are not currently being used. We go back to the same few because they are in our collective black books. As far as umpire candidates are concerned, as an industry, we go back to the same ten to fifteen individuals in whom we all have confidence. With the ever-growing number of arbitrations, these individuals are overburdened and many of the most respected will not take new assignments unless hearings are scheduled in 2005.

Panels must also accept their role to insure that the process is fair but timely, that discovery is limited by relevance. Attorneys will ask for everything, not even expecting to get everything requested. Let us not disappoint them, and just say "no". Hold them to the time frame they agreed to and the number of days that have been set aside for the hearing. And above all, panels should reject applications to postpone the hearing date. With the schedules of several involved individuals, a new hearing date likely will not be obtainable for at least another six to twelve months.

I have great respect and admiration for the leaders and members of ARIAS•U.S. and what they are seeking to accomplish. Recognizing that no one organization or individual -- certainly not me -- has all the answers, I hope that some of my thoughts here may provide some helpful grist for consideration. ▼

What makes the U.S. system different (to the consternation of many attorneys) is our reliance on business, rather than legal principles to resolve our disputes.

feature

New York Court Appoints Umpire from ARIAS•U.S. List

Michael S. Davis

Mary G. McCarthy

MICHAEL S. DAVIS
MARY G. MCCARTHY
ZEICHNER ELLMAN & KRAUSE LLP
NEW YORK, NEW YORK

The New York County Supreme Court recently appointed two ARIAS-certified arbitrators as an umpire and an alternate, respectively, in a contested application to appoint an umpire. This case is the most recent of seven cases where the authors have petitioned the courts seeking the appointment of arbitrators or umpires in arbitration proceedings arising from loss sensitive insurance programs. In each instance the court was urged to appoint ARIAS-certified arbitrators.

In the most recent of these cases, ARIAS•U.S. was itself put at issue. In that proceeding, we urged the court to consider ARIAS-certified arbitrators and the responding party urged the court not to appoint ARIAS arbitrators. We presented the court with a showing of the comprehensive quality of ARIAS certification requirements and the rigorous standards that ARIAS mandates. The court then "reviewed candidates" from the ARIAS•U.S. Directory and appointed the two individuals from that directory.

The court then "reviewed candidates" from the ARIAS•U.S. Directory and appointed the two individuals from that directory.

The Nature of the Disputes

In each of seven arbitration cases where we asked a court for an ARIAS-certified appointment, an insurer was seeking to enforce obligations arising from a loss-sensitive insurance program. The common element in these programs is that the economic cost of losses within a specified retention amount remains with the insured.

Although the forms of agreement varied (some involved loss indemnity agreements, deductibles or self-insured retention policies, while others involved retrospective rated premium), each agreement contained an arbitration clause that included an arbitrator selection clause similar to the following:

> The Arbitrators and Umpire shall be active or retired executive officials of Fire or Casualty Insurance or Reinsurance Companies, active or retired Risk Management Officials in the same or similar industries or active or retired executive officials of Insurance Brokers or Insurance Agents. If either of the parties fails to appoint an Arbitrator within one (1) month after being required by the other party in writing to do so, or if the Arbitrators fail to appoint an Umpire within one (1) month of a request in writing by either of them to do so, such Arbitrator or Umpire, as the case may be, shall at the request of either party be appointed by a Justice of the Supreme Court of the State of New York.

The disputes that arose under these programs had characteristics similar to disputes between a ceding company and a reinsurer in that the insurer sought recovery of losses paid and/or security for losses anticipated. However, unlike reinsurance disputes, these insureds had no significant experience with insurance arbitration, and thus had an apparent discomfort or distrust of the process.

Under these circumstances, the insureds hesitated to name party-appointed arbitrators and/or failed to select an umpire by agreement. While requests to the courts to appoint arbitrators or umpires may be unusual in a reinsurance context, as noted above, we found it necessary to file these seven proceedings against insureds within the last five years. In doing so, we asked the courts to appoint arbitrators or umpires from the ARIAS•U.S. Directory of Certified Arbitrators, and this effort has been successful in either obtaining such an appointment or, alternatively, settling the dispute on the merits.

Michael Davis is a partner and Mary McCarthy is an associate of the New York City office of Zeichner Ellman & Krause LLP. They practice in the areas of commercial insurance, banking litigation, bankruptcy and arbitration. Mr. Davis is an ARIAS•U.S. certified arbitrator.

ARIAS•U.S. Certification in the Courts

ARIAS•U.S. certification requirements have been acknowledged in at least one published judicial decision. *Sphere Drake Insurance Limited v. All American Life Insurance*, 2002 WL 1008464 (N.D.Ill. May 17, 2002), acknowledged ARIAS•U.S. to be "an organization formed to promote the improvement of the insurance/reinsurance process and to provide the training necessary to serve effectively on an insurance/reinsurance panel." (*Id*., fn 1.) *Sphere Drake*, however, did not involve a judicial request to appoint an arbitrator or umpire. Rather, the *Sphere Drake* court was called upon to confirm or set aside an award. While the trial court in *Sphere Drake* did set aside the award at issue, that decision was reversed by the United States Court of Appeals, which also acknowledged the arbitrator's ARIAS experience, and reinstated the award. *Sphere Drake Insurance Limited v. All American Life Insurance*, 307 F.3d 617, 619 (7th Cir. 2002).

Sphere Drake is the only published decision we are aware of that addresses -- and validates with approval -- ARIAS certification. While *Sphere Drake* involved the enforcement of an award, this article addresses cases brought specifically to request judicial appointment of arbitrators or umpires where the appointment process has failed.

The Most Recent Case

The most recent of the cases we have brought involved two separate applications to "a Justice of the New York Supreme Court" at different points in time. In the first instance, the insured had failed to respond to a Demand for Arbitration that included a demand that it name a party-appointed arbitrator. Our client then filed a petition to compel arbitration and to have the court appoint an arbitrator, asking the court to consider the ARIAS•U.S. Directory of Certified Arbitrators as a resource for the appointment. In that instance, before the court reached a decision, the insured agreed to participate in arbitration and it appointed a non-ARIAS member as its party-appointed arbitrator. The insurer appointed an ARIAS-certified arbitrator.

Subsequently, the parties and the party-appointed arbitrators were unable to agree upon an umpire. The insurer moved again for judicial assistance, seeking appointment of an umpire pursuant to the parties' agreement and pursuant to both Section 5 of the Federal Arbitration Act (9 U.S.C. §5) and Section 7504 of New York's Civil Practice Rules and Law (CPLR §7504). In this second motion, our client's petition again referenced ARIAS. That application described ARIAS' objectives, submitted excerpts from ARIAS certification requirements and attached the 2001 ARIAS•U.S. Directory of Certified Arbitrators as an exhibit.

Nonetheless, the insured objected to the court giving consideration to ARIAS. The insured suggested that ARIAS membership would imply a bias in favor of the insurance industry and thus characterized ARIAS as non-neutral. Our reply brief to the court responded:

> ARIAS exists to promote fair and efficient arbitrators. . . .. It has certified all of [Insurer's] candidates under the detailed and rigorous standards set forth in the ARIAS directory [which were submitted as an exhibit to the Court]. The directory states:
>
> > ARIAS•U.S. seeks to train and certify knowledgeable and reputable professionals for service as panel members in industry arbitrations. Certification is for a term of two years after December 31 of the year of certification or recertification and may be maintained as indicated below.
>
> . . . ARIAS certification is a particularly valid basis upon which to select an arbitrator or Umpire because it provides a source of individuals that have qualifications that go beyond the parties' agreement to select qualified individuals.

While our adversary was distrustful of persons connected to the insurance indus-

CONTINUED ON PAGE 20

The court said that its appointee "meets all the necessary qualifications and has substantial experience as an arbitrator and umpire."

ARIAS•U.S. Promoted In Court...

CONTINUED FROM PAGE 19

try, "the lady doth protest too much" (Hamlet, Act 3, 2, 230), and the court was plainly not persuaded. Rather, the court stated that it had "reviewed candidates from the list maintained by ARIAS•U.S." and ordered the appointment of an ARIAS-certified arbitrator as umpire. The court said that its appointee "meets all the necessary qualifications and has substantial experience as an arbitrator and umpire." The court also named another ARIAS-certified arbitrator as an alternate, in the event the first-named individual was unable or unwilling to serve.

Other Cases

In six other cases our clients have moved before courts in New York to appoint either arbitrators or umpires in similar circumstances. In support of these applications, we submitted the ARIAS Directory to assist the court in identifying and selecting qualified arbitrators. In one of these matters, after we had submitted the ARIAS Directory, the court required each side to submit five specific nominees for the court to consider. We then submitted five names from the ARIAS Directory, and the respondent submitted five names from other sources. The court selected one of the ARIAS individuals that we nominated.

In the other five matters, judicial appointment was ultimately not required, yet in each instance a positive result was achieved by submitting the ARIAS Directory to the court. In one case, the respondent selected an ARIAS-certified arbitrator after receiving the ARIAS list as part of our client's motion. In another, the parties agreed to an ARIAS-certified umpire after a motion was argued, but before it was decided. In a third case, the parties again agreed to select an ARIAS-certified umpire after a motion had been filed. A fourth case was settled on its merits before the motion to appoint was decided.

The remaining case, *National Union Fire Ins. Co. v. Younger Brothers*, 2001 WL 669042 (S.D.N.Y., June 13, 2001), resulted in a published decision. In *Younger*, we again sought to compel arbitration and to appoint an arbitrator. The *Younger* court ordered that arbitration to proceed. However, the United States District Court would not rule on the request to appoint an arbitrator. That court determined that the language in the agreement that "a Justice of the Supreme Court of the State of New York" shall appoint should be followed literally. Thus, the federal court deferred that issue to the New York state court. After this decision was issued, and before the New York state court needed to act, the parties resolved the dispute without further proceedings.

CONCLUSION

In each of seven cases filed in court, submission of the ARIAS-certified arbitrator directory assisted the court or the parties to reach a positive result. Twice the court selected ARIAS-certified individuals to serve as umpires and three times the parties selected ARIAS-certified individuals as arbitrators or umpires after the ARIAS directory was put before the court. In these cases, we made it clear that we would not consent to the mutual appointment of an umpire who was less qualified than an ARIAS-certified arbitrator. The remaining cases were resolved without the need to complete the arbitration process. Thus, it appears that the ARIAS•U.S. Directory of Certified Arbitrators has been a useful tool to assist our clients and the courts to advance arbitration and to advance the resolution of insurance disputes. ▼

In each of seven cases filed in court, submission of the ARIAS-certified arbitrator directory assisted the court or the parties to reach a positive result.

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 let us know, so we'll be sure to catch you next time. Email ARIAS at info@arias-us.org with the subject "Member on the Move."

Recent Moves and Announcements

Marc Bressman has informed us that Budd Larner's Cherry Hill office has moved to: Budd Larner Rosenbaum Greenberg & Sade, 1939 Route 70 East, Suite 100, Cherry Hill, New Jersey 08003, phone 856-874-9500, fax 856-874-9660, direct to Marc 856-874-2080, mbressman@budd-larner.com

Debra Roberts has relocated again, but is staying in San Diego. Her new address is Debra J. Roberts, Debra Roberts & Associates, Inc., 877 Island Avenue, #316, San Diego, CA 92101, phone 619-546-9770, fax 619-546-9781. Same email drob888@aol.com.

Steven G. Bazil has been admitted to membership in the International Association of Insurance Receivers (IAIR). His law firm, Bazil & Associates, specializes in representing insolvent reinsurers and companies in run off. The firm has extensive involvement in the London Market and Latin America. Email sbazil@bazillaw.com.

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in focus

Recently Certified Arbitrators

Dennis A. Bentley

John D. Cole

Dennis A. Bentley

Dennis Bentley has had a career in insurance and reinsurance which has spanned over 37 years and which has given him an in-depth technical knowledge of custom and practice in the reinsurance industry and an appreciation of the needs of both cedants and reinsurers. These years have been split almost equally between London and New York and have been augmented with extensive knowledge of the current standards of operation practiced by insurance managing general agents in the USA.

Mr. Bentley has benefited from the manner in which his career evolved following his introduction to the insurance and reinsurance industries as a trainee in the Risk Management Department of Esso Petroleum (UK) Ltd. Having committed his career to the profession, his technical knowledge developed during time spent in the Reinsurance Claims Department of the Northern Employers/British & European in London and a ten-year stay with C. T. Bowring & Co. Ltd. During that period, Mr. Bentley gained considerable experience with both inwards and outwards reinsurance claims handling, the drafting and production of Treaty Reinsurance Contract wordings (including being part of a two-man team charged with the task of attempting to standardize contract structure and the production of a Treaty Clause Book, with both the format and clauses receiving wide approval throughout the London Company and Lloyd's community), before transferring to become a Treaty Reinsurance Broker, ultimately achieving the position of Account Executive with C. T. Bowring.

In late 1977, Mr. Bentley joined Reinco Intermediaries, the reinsurance intermediary arm of Bayly Martin & Fay and established the reinsurance broking office in London. He was responsible for the design and implementation of administrative systems, the development of relationships with Lloyd's and Companies in London, Holland, Scandinavia and the Far East. At the end of 1979, Mr. Bentley transferred to New York and by the mid 1980s, was appointed President of the Reinco Group, which at that time comprised broker offices in New York, Los Angeles, London, Bermuda and Paris and a general agency in New York.

Since 1990, Mr. Bentley has provided reinsurance consulting services which have included, inspection of records to assist discovery for insurance and/or reinsurance disputes and performing as an arbitrator in various reinsurance disputes. Additionally, he has developed a practice that includes the conduct of coverholder reviews of managing general agents in the USA and Canada. Mr. Bentley is an associate of Insurance Solutions Ltd in the UK and a member of B.I.L.A.

John D. Cole

John Cole is an attorney whose 30 years of property-casualty insurance experience, the majority as a senior executive, has concentrated in management of complex claim, legal and reinsurance issues. Prior to entering private practice in 2002, Mr. Cole served as Executive Vice President and Chief Claims Officer for Zurich Group, responsible for all North American claim operations for the U.S.'s third largest commercial insurer. These responsibilities included management of the group's largest claim exposures for all lines of U.S. commercial and London specialty lines business. During this period, he created Zurich's first Reinsurance Claim Recovery department and jointly managed executive responsibility for Zurich's reinsurance arbitration and dispute resolution policy.

Previously, Mr. Cole served as Senior V.P. and General Counsel of Maryland Casualty Company, including the limited period Maryland was an active reinsurer. This position included contract, reinsurance counseling and regulatory duties. Subsequently, he was appointed Senior V.P. and Chief Claims Officer for Maryland Casualty, following its acquisition by Zurich.

Mr. Cole was among the industry's early managers of asbestos, pollution and toxic tort claims. In 1981 he was named a member of the newly created Asbestos Claim Managers Association's first governing committee. In 1986, he was elected by his peers as founding Chairman of the Insurance Environmental Litigation Association (now Complex Insurance Claims Litigation Association), which represents major commercial insurers' interests as amici in emerging coverage disputes and appeals. In 1992, he testified before Congress at the request of the American Insurance Association board, advocating industry views concerning Superfund re-authorization. He maintained executive responsibility for asbestos and environmental claim management and reinsurance issues for Maryland and Zurich for more than 20 years.

Mr. Cole's practice at Wiley Rein & Fielding LLP

Profiles of all certified arbitrators are on our web site at www.arias-us.org

emphasizes reinsurance arbitrator/umpire assignments, as well as selected expert witness, management consulting and complex litigation matters. He is a member of the International Association of Defense Counsel (V.P. 1994-96, Member – Reinsurance Committee), the Maryland and District of Columbia Bars.

Richard E. Cole

Richard Cole has over 40 years in the insurance/reinsurance business, having retired in late 1999. Since retirement he has been consulting with various insurance companies as well as being involved in expert witness work and arbitrations. His unique background as a reinsurance intermediary as well as being on the underwriting side of the reinsurance business has been especially helpful to expert witness and arbitration assignments.

Mr. Cole entered the insurance business in 1963, joining the Harleysville Insurance Company where he worked in the underwriting, claims and marketing departments. He then joined the Lititz Mutual Insurance Company as a state fieldsman for the state of Florida.

In 1971, Mr. Cole entered the reinsurance business as an account executive for the Mutual Reinsurance Bureau, responsible for the northeast and southeast areas of the country. In 1973 he joined Pritchard & Baird, a reinsurance Intermediary, as an Assistant V.P.

He moved to Wilcox in 1975 as VP in charge of all domestic treaty business. While there, he developed a large book of regional company treaty business as well as specialty, program business.

In 1979, Mr. Cole left to form his own intermediary, Sten-Re, Cole & Associates with the financial backing of Reed Stenhouse. The firm became profitable in four months and went on to become quite successful, eventually being bought by AON in 1985, which merged it with Booth Potter Seal, changing the name to Cole, Booth, Potter. In 1988, Mr. Cole retired for the first time spending time on various entrepreneurial activities.

In 1990, Mr. Cole was recruited to become CEO of Chartwell Reinsurance Company, a broker market reinsurer. During his tenure there, he led a management buyout of the firm, a reverse takeover of Reinsurance Corp Of New York, a bond offering, formation of one of the first corporate capital vehicles at Lloyd's and a stock offering for Chartwell. The company grew from under $100 million in revenues to just under $1 billion during this period.

In 1999 the company was merged into Trenwick America Re, where Mr. Cole remained on the board for a short period.

Currently, Mr. Cole is Vice Chairman and director of Indiana Lumbermens Mutual Insurance Company and resides in Southern California.

Michael S. Davis

Michael Davis is an attorney and a partner at the Manhattan firm of Zeichner Ellman & Krause LLP. He has 30 years' experience on a wide range of insurance, arbitration and commercial litigation matters, concentrating in arbitration, bankruptcy, insurance and insurance-related arbitration. His experience also includes antitrust, contracts, employment, maritime, real estate and securities matters. He has also been an adjunct assistant professor at C.W. Post College, Long Island University.

Mr. Davis began his legal career as an associate at Chadbourne & Parke and later served for six years as Senior Counsel in charge of Corporate Litigation for American International Group, Inc. At AIG, Mr. Davis's responsibilities included litigation relating to loss-sensitive and retrospective insurance programs, captive insurance programs, reinsurance disputes, bankruptcy, insolvency matters and commercial litigation. For the eleven years immediately prior to joining his present firm, he was a partner at Zalkin, Rodin & Goodman LLP.

At this time, Mr. Davis's practice focuses on the representation of insurance companies in commercial disputes and in bankruptcy matters, both as creditors and as insurers. He has filed numerous proceedings seeking to compel arbitration and to select arbitrators. An article by Mr. Davis concerning this aspect of his practice appears in this issue of the Quarterly on page XX. Mr. Davis litigated In re Transport Associates, Inc., 263 B.R. 501 (Bankr. W.D.Ky. 2001), which held that an insurance arbitration agreement must be enforced by a bankruptcy court despite a claim of bankruptcy court jurisdiction.

Mr. Davis has also represented financial institutions in prosecuting insurance and reinsurance claims. Published decisions include: Chemical Bank v. Affiliated FM Insurance Company, 970 F. Supp. 306 (S.D.N.Y. 1997); 815 F. Supp. 115 (S.D.N.Y. 1993); In re McLean Industries, Inc., 132 B.R. 271 (Bankr. S.D.N.Y. 1991); Insurance Co. of the State of Pa. v. J.L. Kelley, Inc., 612 F. Supp. 1196 (S.D.N.Y. 1985); Jasper Corp. v. National Union Fire Insurance Co., 1999 WL 781808 (M.D.Fla. 1999).

Mr. Davis has engaged in community service as

in focus

Richard E. Cole

Michael S. Davis

in focus

Robert J. Federman

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a trustee of The Harvey School, Katonah, NY (1993-1998), and representing clients on a pro bono basis through Volunteer Lawyers for the Arts, Citizens Committee for Children of New York, Inc. and Community Law Office of the Legal Aid Society.

Mr. Davis graduated from the University of Rochester (A.B., 1969) and Boston School of Law (J.D., 1972). He is admitted to practice in New York State and several federal courts including the United States Supreme Court, courts of appeals and district courts in several parts of the country. He is a member of ARIAS•U.S., the Association of the Bar of the City of New York; American Bar Association; and has been a member of the American Arbitration Association, Panel of Arbitrators.

Robert J Federman

Robert Federman has been an active arbitrator and mediator since the 1970's. He began his legal career in the 1950's in Cleveland, Ohio, following graduation from Case Western Reserve University. He earned his Juris Doctor degree in 1956 and was employed by Selective Insurance Company, initially as a claim adjuster. He re-entered private law practice in 1975 in Los Angeles, California. During his 18 years insurance employment, he served as in-house counsel, underwriting advisor, associate general counsel, reinsurance manager, corporate counsel, corporate secretary and ultimately, claims vice president.

From 1976 to 1998, he was the founding senior partner of his Century City law firm, responsible for defense of insurance related litigation. Mr. Federman has also managed claims audits, and has litigated contractual and bad faith issues. He has been directly involved, as counsel, in connection with construction defect claims, excess and surplus lines litigation, and interpretation of reinsurance treaties, including facultative placements throughout the United States and Europe.

Since the 1970's, he has been appointed arbitrator, umpire, expert witness, and mediator directly related to his areas of expertise. In 1998, he relocated to San Luis Obispo, California where he continues his law practice, of counsel to Ward and Federman. He also serves as a Court appointed Settlement Judge pro tem, and Court appointed Discovery Referee for the Superior Court.

Since the 1980's, Mr. Federman has both planned and presented national A.D.R. programs and seminars through the American Bar Association (TIPS), defense Research Institute (DRI), Federation of Defense and Corporate Counsel (FDCC), Lawyers for Civil Justice (LCJ), and the Association of Defense Trial Attorneys (ADTA). He has served as Director, Officer, President, and Chairman of the Board of the FICC (1992-1994). In 1993, he participated in the Harvard Law School Mediation Workshop. He is certified in their advanced training program. Mr. Federman is admitted to practice law in both Ohio and California, as well as various Federal Courts, including the Supreme Court of the United States.

Colin L. Gray

Colin Gray was born in Dublin, Ireland graduating from Trinity College, Dublin in 1978. He spent two years in public accounting in Dublin and Chicago passing the CPA exam in 1980. He spent four years in the commodities industry as a regulatory accountant before joining L.W. Biegler in 1984. He served as an Assistant Vice President at Biegler and International Surplus Lines Insurance Company and later as a Vice President of Crum and Forster Managers Corporation (Illinois) and International Insurance Company. In 1992 he became Vice President of Resolution Reinsurance Services Corporation, part of the Resolution Group – Crum & Forster's runoff division. In 1999 he founded Gray Wolf Group a consulting firm specializing in Insurance and Reinsurance recoveries.

During his insurance career, Mr. Gray started and built a comprehensive reinsurance recovery team at Crum & Forster, which handled all aspects of the recovery process from initial identification of claims with reinsurance to final collection. He has traveled internationally, negotiating settlements of complex claims and commutations of contracts. He has directed the prosecution of numerous arbitrations and litigations. Mr. Gray has been involved in systems development, reinsurance accounting matters, including Schedule F and the procurement and management of letters of credit. He has had extensive experience recovering from the London market, including from insolvent Schemes of Arrangement.

Mr. Gray was recognized as an Associate in Insurance Accounting and Finance (AIAF) in 1989, an Associate in Reinsurance (ARe) in 1992, and was designated a Chartered Property Casualty Underwriter in 1993.

William D. Hager

William Hager is a lawyer and former insurance executive with 29 years of intense experience in the insurance and reinsurance fields. A native

of Iowa, he holds a bachelor's degree in mathematics (secondary education), a master's degree (educational psychology) and a law degree from the University of Illinois. He is a member of the Iowa State Bar Association, the American Bar Association and is also admitted to practice in Illinois and before the U.S. Supreme Court.

He is currently president of Insurance Metrics Corporation (www.expertinsurancewitness.com), Boca Raton, Florida, an organization that provides expert witness services, arbitration services and non-litigation insurance consulting. He serves his community as an elected member of the Boca Raton City Council.

Mr. Hager has extensive experience as to most insurance issues and many reinsurance issues. As a regulator and NAIC member, he dealt with reinsurance relationships with primary insurers, including the extensive reinsurance reporting requirements on the NAIC Annual Blank; approval of certain reinsurance transactions; and the unwinding of reinsurance transactions relating to insolvent insurers. As CEO of NCCI, he had oversight responsibility for reinsurance products including Table M and Excess Loss Factors produced by NCCI. His experience as the lead hearing officer on scores of intense and complex insurance cases provides him with a valuable depth of understanding.

Following law school, Mr. Hager began his career drafting insurance (and occasionally reinsurance) legislation as Counsel to the Iowa House of Representatives. From that position, he was named Iowa Assistant Attorney General and assigned exclusively to the Department of Insurance, representing that Department in all legal (and numerous political) forums. From there, he was named First Deputy Insurance Commissioner and in this position had responsibility for overseeing all life, health, property casualty and the prosecution division as to agent and insurer violations.

Mr. Hager served in the U.S. Congress as an Administrative Assistant to an Iowa congressman, including drafting responsibilities relating to insurance (and occasionally reinsurance) legislation. He was then named General Counsel and Director of Government Relations for the American Academy of Actuaries in Washington, D.C., where he was an active participant in all facets of the actuarial profession, including organizational work leading up to the Actuarial Standards Board (ASB).

Following his tour in Washington, Mr. Hager was named Commissioner of Insurance for the State of Iowa and served a full term in that position, serving concurrently as a Member of the Executive Committee of the NAIC, where he chaired a number of its lead committees. In 1990, he was named President and Chief Executive Officer of the National Council on Compensation Insurance in New York, where he served that organization for eight years, restoring rate adequacy to a $15 billion base of underlying workers compensation premium.

James K. Killelea

James Killelea is an insurance attorney and claims professional with 34 years of experience in the insurance/reinsurance industry. His background includes a broad range of management and technical responsibilities. He was formerly Senior Vice President, General Counsel and Corporate Secretary of Crum and Forster Commercial Insurance Company. In that position, his duties included managing the law department, insurance regulatory matters and corporate secretarial duties. He was also involved in the corporate reorganization of Crum and Forster. As part of senior management, he coordinated the underwriting and claim operations of several of Crum and Forster's Regional Offices. Prior to becoming General Counsel, as Vice President and Associate General Counsel, he directly managed corporate claims-related coverage and extra-contractual litigation, including cumulative injury and toxic tort coverage lawsuits.

Prior to joining Crum and Forster, Mr. Killelea was Vice President and General Counsel of Home Insurance Company. He represented Home Insurance and its Canadian subsidiary, Commonwealth Insurance, in several reinsurance arbitrations, which included ceded as well as assumed business. He also represented Home in presentations before London-based reinsurers relating to failed savings banks. Before becoming its General Counsel, he was Home's Vice President of Claims and Chief Technical Officer. In that capacity, he managed the large loss claim department in New York City.

Mr. Killelea is a member of the Connecticut Bar and is admitted to practice before the U. S. District Court for Connecticut, the Court of Appeals for the Second Circuit, and the U. S. Court of Claims. He graduated from Yale University, received his law degree from New York University Law School and an MBA from the University of Connecticut. Mr. Killelea is a member of the Connection Bar Association and its Alternate Dispute Resolution Committee. He has spoken at numerous insurance seminars on insurance policy coverage issues including coverage of environmental and toxic tort claims.

in focus

James K. Killelea

William D. Hager

in focus

Paul J. McGee

Roderick B. Mathews

Profiles of all certified arbitrators are on our web site at www.arias-us.org

After graduation from law school, Mr. Killelea practiced law in Connecticut and then joined Travelers Insurance Company, where he worked from 1970 to 1986. As Counsel in Travelers Law Department, he worked on a variety of corporate and insurance law matters. He was instrumental in forming a unit in the Law Department dedicated to representing Travelers interests in environmental coverage disputes and directly negotiated the settlement of many serious coverage disputes with policyholders.

In 1995, after his tours at Crum & Forster and Home Insurance, he returned to Travelers as Associate General Counsel, participating in the review of Aetna's inventory of disputed reinsurance recoverables in connection with Travelers' acquisition of Aetna Casualty and Surety. Since his retirement from Travelers, Mr. Killelea has worked on consulting assignments for several insurers on professional E&O and specialty lines program business. In that capacity, he performed audits and also handled claims and coverage disputes on professional liability programs for several Third Party Claim Administrators. He has also been a panel arbitrator in a reinsurance dispute conducted in London under English law.

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.

Francis A. Montemarano

Frank Montemarano has over 35 years experience in the insurance and reinsurance industry. His insurance career began in 1968 with Aetna Life & Casualty in the Rochester, New York Claim Department as a Field Claim Representative handling all types of insurance claims. At that time, he served as an arbitrator for the American Arbitration Association handling inter-company claim disputes. He developed an extensive background in product liability, surety and fidelity bond claim management, loss analysis, planning, field audit, field management and environmental claim management. He held management positions in the field offices and Home Office of Aetna and was appointed an officer of that company in 1982 and served as the loss analysis and planning manager for the Commercial Insurance Division Claim Department.

In 1991, Mr. Montemarano was recruited and joined Transamerica Insurance Group as Vice President and Director of Environmental Claims. In that position, he was responsible for management of all environmental and latent health claims against the company. He also had oversight responsibility for reinsurance matters on those claims. He was involved in negotiations establishing reinsurance agreements at the time of Transamerica's divestiture of the Property and Casualty Companies through an IPO forming TIG Insurance Group. Mr. Montemarano assumed additional responsibilities at TIG, including the management of the Bond Claim Department, the Assumed Reinsurance Claim Department, Third Party Administrators and Staff Counsel. He retired as Senior Vice President, Insurance Services in 2000.

Mr. Montemarano received a BS from the University of Rochester, Rochester, New York in 1968. He is a Chartered Property and Casualty Underwriter (CPCU), has an Associate in Reinsurance (ARe) designation and has taken extensive management and insurance related courses throughout his career.

Currently, Mr. Montemarano is providing consulting services in the insurance and reinsurance area to several clients. He has been involved in reinsurance audits both here and in London.

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 business 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 for 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.

in focus

Francis A. Montemarano

Diane Nergaard

case notes corner

Case Notes Corner is a regular feature on significant court decisions related to arbitration.

Ronald S. Gass

Facultative Reinsurer Not Bound to Follow Cedent's $257 Million NonProducts Asbestos Single Occurrence Settlement Allocation

RONALD S. GASS*
THE GASS COMPANY, INC.

In a significant follow-the-settlements decision, a Connecticut federal district court held that a facultative reinsurer was not bound to follow its cedent's $257 million nonproducts asbestos claims allocation based on a single occurrence, as opposed to a multiple occurrence, theory.

This dispute arose from the cedent's 1995 $257 million settlement of certain Owens Corning Fiberglas ("OCF") asbestos nonproducts exposure claims arising under various excess policies that were allegedly reinsured and allocated to facultative reinsurance certificates issued between 1975 and 1977. Unlike the $25 million excess policies' asbestos products coverage, which included both occurrence and aggregate limits, the nonproducts coverage carried only occurrence limits (the Wellington Agreement's imputed nonproducts aggregate limit was inapplicable to these policies because they incepted after August 1975).

The reinsurer's fac certs provided that the liability of the reinsurer "shall follow that of [the cedent] and shall be subject in all respects to all the terms and conditions of [the cedent's] policy" and that "[a]ll loss settlements made by [the cedent], provided they are within the terms and conditions of the original polic(ies) and within the terms and conditions of this Certificate of Reinsurance, shall be binding on [the reinsurer]."

After commencing an arbitration with OCF over its nonproducts asbestos liabilities and following extensive settlement negotiations, the cedent agreed to settle its liability for roughly the net present value of one additional set of occurrence limits plus defense costs. The settlement agreement, however, was silent on the parties' allocation formula and explicitly disclaimed any particular coverage theory. The cedent ultimately allocated the "vast majority" of its cash payments to OCF as a single occurrence of nonproducts asbestos claims using each policy's occurrence limit as the applicable indemnity limit and further allocating some of the initial case payments as defense costs. It then spread the settlement payments evenly among the policy years on a single-occurrence basis, allegedly without regard for potential reinsurance recoveries.

The reinsurer objected to the cedent's single-occurrence allocation theory, primarily on the basis that the OCF nonproducts asbestos claims were attributable to OCF asbestos jobs spread over 700 job sites across the U.S. between 1953 and ending predominately in the 1970s. Moreover, each job entailed work by different sets of workers, job conditions, buildings, and possibly different products. Hence, the definition of "occurrence" in the excess policies, according to the reinsurer, dictated the conclusion that losses arising from each of these 700 sites must be treated as a separate and distinct occurrence, and when so allocated, the cedent's settlement payments never pierced OCF's excess policies reinsured under the certificates. The cedent countered that the follow-the-fortunes/follow-the-settlements doctrine required its reinsurers to follow its single occurrence settlement and subsequent allocation because they were reasonable under the circumstances and not executed in bad faith.

Granting the reinsurer's summary judg-

OCF consistently argued that there were multiple occurrences of nonproducts asbestos exposures, which would have resulted in virtually unlimited insurer liability.

*Mr. Gass is an ARIAS•U.S. Umpire and an ARIAS•U.S. Certified Arbitrator. He may be reached via email at rgass@gassco.com or through his Web site at www.gassco.com.

ment motion, the federal district court concluded that, under the facts of this case, the reinsurer was not bound by the cedent's single occurrence settlement allocation because it was founded on a position the cedent had abandoned earlier to achieve an expedient, bottom-line driven settlement with OCF. In the context of both the arbitration and the subsequent settlement negotiations with OCF, the cedent had contended that only a single set of occurrence limits was available under its primary and excess policies and that those limits were applicable to both OCF's asbestos products and nonproducts exposures. OCF consistently argued that there were multiple occurrences of nonproducts asbestos exposures, which would have resulted in virtually unlimited insurer liability.

The district court found it significant that the cedent's executives had testified that they were willing to compromise the OCF nonproducts asbestos claims on the basis of roughly one additional set of occurrence limits, meaning one set of occurrence limits for asbestos products exposure (which it had previously paid OCF) and another one for the nonproducts exposure. The court construed this "two occurrence" position as an abandonment of the cedent's original one-occurrence theory and movement toward OCF's (and now the reinsurer's) multiple-occurrence theory. Thus, the court saw none of the evils the follow-the-settlements doctrine was intended to avoid – deterring cedents from or otherwise punishing them for good faith settlements when the principal underlying the settlement, its single-occurrence theory, was ultimately abandoned to achieve what it perceived to be a cost-effective settlement regardless of the applicable theory.

Travelers Casualty & Surety Co. v. Gerling Global Reinsurance Corp. of America, No. 3:01cv872 (JBA), 2003 U.S. Dist. LEXIS 17407 (D. Conn. Sept. 30, 2003).

COURT APPOINTS UMPIRE WHEN PARTY-ARBITRATORS REACH IMPASSE

When the party-arbitrators in this reinsurance arbitration reached an impasse over umpire appointment, an Illinois federal district court stepped in to appoint one in response to an action brought by the cedent pursuant to Section 5 of the Federal Arbitration Act. Because the cedent was U.S.-based, the branch issuing the reinsurance agreement was in the U.K., and the reinsurer's parent company was in Australia, the reinsurer argued that the umpire must be from a neutral country based on international arbitration rules drawn from either the United Nations Committee on International Trade Law or the American Arbitration Association.

Rejecting the reinsurer's contention, the district court found no basis in the parties' reinsurance agreement to apply these international rules, which expressly provided that the arbitration panel was to consider Illinois law to the extent that it looked to any substantive law. Finding no "substantial proof" that an umpire from the U.S. would be biased against the reinsurer, it held that someone from the U.S. was "best qualified" to serve as the umpire in this dispute. The court then proceeded to review each umpire candidate's qualifications based on "questionnaires," and appointed the one candidate who had had no prior involvements with any of the parties, counsel, or party-arbitrators.

Continental Casualty Co. v. QBE Insurance, No. 03 C 2222, 2003 U.S. Dist. LEXIS 17826 (N.D. Ill. Oct. 6, 2003).

...its single-occurrence theory, was ultimately abandoned to achieve what it perceived to be a cost-effective settlement regardless of the applicable theory.

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 growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) gives testimony to the acceptance of the society since its incorporation. Through conferences, seminars and literature, and through its certification process, ARIAS•U.S. is realizing its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of the end of November, 2003, ARIAS•U.S. was comprised of 338 individual members and 56 corporate memberships, totaling 592 individual members and designated corporate representatives, of which 161 have been certified as arbitrators.

The society offers its *Umpire Appointment Procedure*, based on a unique software program created specifically for ARIAS•U.S., that randomly generates the names of umpire candidates from a list of 51 ARIAS•U.S. certified arbitrators who have served on at least three completed arbitrations. The procedure is free to members and available at a nominal cost to non-members.

New for 2003 is the "Search Arbitrator" feature on the ARIAS•U.S. website, www.arias-us.org, that searches the detailed experience data of our certified arbitrators. The resulting list is linked to arbitrator profiles, with specifics of experience and current contact information.

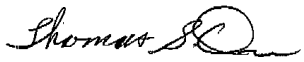
In recent years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York City, Puerto Rico, and Bermuda. The Society has brought together many of the leading professionals in the field to support the educational and training objectives of ARIAS•U.S.

ARIAS•U.S. is in the process of publishing Volume V of its *Directory and Certified Arbitrators Listing*. The society also publishes 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.

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the membership area of the website; an application form is at the end of this Directory and online. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at info@arias-us.org or 914-699-2020, ext. 116.

Join us, and become an active part of ARIAS•U.S., the industry's preeminent forum for the insurance and reinsurance arbitration process.

Sincerely,



Charles M. Foss
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ARIAS U.S. Membership Application

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

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

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

- MEMBERSHIP BENEFITS
  Benefits of membership include the newsletters, special rates for seminars/workshops, membership directory, access to certified arbitrator training, model arbitration classes and practical guidance with respect to procedure.

Complete information about ARIAS·U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a calendar of upcoming events, and online registration for meetings.

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Fees and Annual Dues: Effective 2/28/2003

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INITIATION FEE:	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*:	$250	$750
FIRST-YEAR DUES AS OF APRIL 1:	$167	$500 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1:	$83	$250 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

* Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.

NOTE: Corporate memberships include up to five designated representatives. Additional designated representatives are available for an additional $150 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, fax and e-mail.

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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 at noon on Friday. This conference applies toward certification requirements.

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