VOLUME 12 NUMBER 4

ARIAS QUARTERLY U.S.

FOURTH QUARTER 2005

Recent Developments under the Federal Arbitration Act

Some Ideas about How Arbitrators Can Improve the Process of Reinsurance Arbitrations

Report: Fall Conference Drills Down

Report: ARIAS•U.S. Election Results

Recently Certified Arbitrators

editor's comments

T. Richard Kennedy

Congratulations to Mary Lopatto, Tom Forsyth and Susan Stone on their elections to Chairman of the Board of Directors, and President and Vice President of ARIAS•U.S., respectively. Mary, Tom and Susan are extremely capable individuals who have each contributed greatly to the success of the Society over the past several years. We are indeed fortunate to have each of them in their new leadership roles.

Congratulations also to Elaine Caprio Brady, George A. Cavell and Daniel L. FitzMaurice on their election by the membership to the Board of Directors. The Society will be well served by such talented persons, each of whom agreed without hesitation to undertake the substantial commitment required in the work of the Board.

Well-deserved tributes were paid at the Annual Meeting to Tom Orr, retiring as Chairman of the Board, and to Gene Wollan, who completed his final term as a Board member. Leaving the Board also is Chris Milton, who was unable to be at the meeting. We hope that each of them will continue to be active in the important work of the Society.

This issue includes an excellent review of the substantial body of recent case law relating to the procedural powers of arbitrators and the scope of those powers. *Recent Developments under the Federal Arbitration Act*, by Thomas Cunningham and Melanie Jo Triebel, formed the basis of Tom Cunningham's presentation at the Annual Meeting.

Those of you who missed the presentation, and even those of you who heard it, will find the article invaluable in keeping abreast of the requirements of the Federal Arbitration Act as interpreted by the courts.

Your Editors considered a paper presented at the Las Vegas Spring Meeting by four of our distinguished members, including two of our newly elected Board members, to be well worthy of publication in this issue. *Some Ideas About How Arbitrators Can Improve the Process of Reinsurance Arbitrations*, by Dan FitzMaurice, Robert Lewin, Susan Stone and Richard White, is required reading for anyone who serves or hopes to serve as an arbitrator in a reinsurance arbitration. It is also worthwhile reading for counsel and parties to such arbitrations to know what can be expected of a good arbitration panel.

Be sure to note Editor Jay Wilker's reminder in this issue about the availability of indexing of articles that have appeared in the Quarterly. As Jay points out, the index is easy to use and likely will produce a carefully prepared analysis of almost any procedural issue you are likely to encounter in an insurance or reinsurance arbitration.

As year end approaches, I want to take this opportunity on behalf of your Editors to express our deep appreciation to our Executive Director Bill Yankus, Creative Director Gina Marie Balog and the staff at CINN for the outstanding work they do to make our Quarterly a continuing success of benefit to all our members. We also want to wish each member of ARIAS•U.S. a most Happy Holiday Season and Good Health and Success in the New Year.

contents

VOLUME 12 NUMBER 4

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 trk@trichardkennedy.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.

Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

Copyright Notice

feature

Recent Developments under the Federal Arbitration Act

This paper was presented at the ARIAS•U.S. 2005 Fall Conference

Thomas D. Cunningham

Melanie Jo Triebel

A lynchpin of the FAA is the federal policy favoring enforcing private arbitration agreements.

Thomas D. Cunningham is a partner in the Chicago office of Sidley Austin LLP, where he arbitrates and litigates domestic and international reinsurance disputes on behalf of ceding companies, reinsurers and receivers. Melanie Jo Triebel is an associate, also in the Chicago office. Her practice focuses on reinsurance disputes and insurance class action defense litigation.

Thomas D. Cunningham
Melanie Jo Triebel

Arbitration may be a creature of contract, but if parties fail to specify the procedural powers of an arbitration panel, or fail to agree upon the scope of those powers, from what other source may a panel draw its authority? In most instances, the answer is the Federal Arbitration Act, 9 U.S.C. §1, *et. seq.* (the "FAA"), and/or analogous state arbitration statutes. A substantial body of case law interpreting and enforcing the FAA has developed over the years. Recent cases have shed additional light on the proper role of arbitration panels - and courts - with respect to issues of arbitration procedure and process. This article will discuss those cases, and consider what impact they may have on reinsurance arbitrations.

I. GETTING STARTED: ENFORCING AND DEFINING THE SCOPE OF THE ARBITRATION AGREEMENT

A. Staying an Arbitration Under State Law

The FAA was enacted in 1925 to counteract judicial hostility towards private arbitration. Since that time, the role of arbitration in resolving complex commercial disputes - and relieving overburdened court dockets - has expanded significantly. A lynchpin of the FAA is the federal policy favoring enforcing private arbitration agreements. *E.g., Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration....") One means of animating that policy is § 3 of the FAA, which permits a party to stay litigation pending the conclusion of related arbitration. However, that policy is to be enforced in light of all the other terms of the parties' contract, which sometimes can lead to surprising results.

For example, in one recent case interpreting section 3, the Second Circuit determined that a choice of law provision in a retrocessional contract permitted a party to apply California law in order to stay a reinsurance arbitration pending the outcome of related litigation. *Security Ins. Co. of Hartford v. TIG Ins. Co.,* 360 F.3d 322 (2d Cir. 2004). This decision highlights the importance of carefully reviewing a state's arbitration rules when considering whether to include a choice of law clause in a reinsurance contract.

In the case, Security Insurance Company of Hartford ("Security") agreed to reinsure a portion of TIG Insurance Company's ("TIG") workers' compensation business. Like many reinsurance agreements, this one contained a broad arbitration clause. Unlike most reinsurance agreements, however, this agreement also contained a choice-of-law provision specifying that California law would apply. Security fully reinsured its obligations through a 100% retrocession agreement with Trustmark Insurance Company ("Trustmark"). The retrocession agreement contained neither an arbitration clause nor a choice of law agreement. In the negotiations for each of these agreements, both Security and Trustmark were represented by intermediary WEB Management, LLC ("WEB")

Significant losses developed under the book of business, and Trustmark alleged that cedent TIG had defrauded WEB in procuring the agreements. Trustmark suggested that Security rescind its reinsurance agreement with TIG. Security asked Trustmark for proof of the fraud, at which point Trustmark notified Security that it was rescinding the retrocession agreement. Security filed suit against Trustmark in the U.S. District Court for the District of Connecticut, seeking a declaration that the retrocessional agreement was valid and enforceable. Trustmark, in turn, filed a third-party complaint against cedent TIG. Security then suspended payments to TIG under the reinsurance agreement, and TIG initiated

arbitration against Security.

Security moved the district court to stay the TIG arbitration pending resolution of the tripartite action in federal court. *Id*. Security based its motion upon California Code of Civil Procedure § 1281.2(c)(4), which allows a court to stay arbitration proceedings pending the resolution of a court action involving one of the parties to the arbitration, and arising from the same transaction, where there is a possibility of conflicting rulings in the two forums.

The district court granted the stay, and the Second Circuit affirmed. While the FAA requires that "questions of arbitrability ... be addressed with a healthy regard for the federal policy favoring arbitration," the court determined, that policy does not change the long-established principle that arbitration is a creature of contract, and such agreements must be enforced according to their terms. The terms of the TIG-Security reinsurance contract included a California choice-of-law provision that was enforceable and, the court declared, was intended to include California's procedural arbitration rules. Relying on *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), the Second Circuit stated that section 1281.2(c)(4) was just such a procedural rule. The court distinguished Second Circuit precedent, which holds that a choice-of-law provision may not impose a substantive restriction on the parties' rights under the FAA or limit the authority of the arbitrators. Unlike such provisions, the court concluded that section 1281.2(c)(4) was a procedural rule that simply determined the order in which the various proceedings should be conducted, and not a substantive restriction on the parties' authority.

The decision in *Security* has, at present, a relatively narrow scope. For the decision to apply, the parties to an agreement must have included in that agreement a choice-of-law provision designating California law, or the law of a state with a similar provision allowing for the stay of arbitration proceedings. More generally, however, the case illustrates the far-reaching consequences that may result from including a choice-of-law provision in a reinsurance agreement.

B. Enforcement of an Arbitration Agreement by Non-Signatories

Under § 3 of the FAA, a court may stay litigation that involves "any issue referable to arbitration under an agreement in writing for such arbitration," pending the outcome of an existing arbitration of the issue. It is uniformly accepted that this section applies to litigation *between* signatories to an arbitration agreement. Less clear, however, is whether a non-signatory to an arbitration agreement may invoke § 3 in order to stay related litigation to which it is a party. Where the litigation and arbitration issues are "inherently inseparable," and a ruling in the litigation may obviate the need for arbitration, courts are increasingly likely to permit non-signatories to invoke FAA § 3 stays.

For example, the Court of Appeals for the Fifth Circuit recently confirmed that non-signatories can utilize the stay provisions of Section 3 under certain circumstances. *Waste Management, Inc. v. Residuos Industriales Multiquim*, S.A., 372 F.3d 339 (5th Cir. 2004). Waste Management, Inc. ("WM") was the parent corporation of Residuos Industriales Multiquim, S.A. ("RIMSA"), when RIMSA entered into a equipment lease using WM's performance guaranty and letter of credit. WM subsequently sold its stock in RIMSA to CGEA Onyx, S.A. ("Onyx") via an agreement containing a broad arbitration clause. Onyx later initiated arbitration against WM on claims under this agreement.

During this same period, RIMSA defaulted on its lease agreement and the lessor collected on WM's letter of credit. WM, in turn, initiated litigation against RIMSA, and filed a counterclaim in the arbitration with Onyx. In each of these disputes, WM sought repayment of the monies it had paid out on its letter of credit. RIMSA then moved to stay the litigation against it under section 3 of the FAA. The district court denied RIMSA's motion, and RIMSA appealed.

The Fifth Circuit reversed, confirming that stays under § 3 are available to non-signatories. The court identified three factors to be weighed in determining whether to grant such a stay: "1) the arbitrated and litigated disputes must involve the same operative facts; 2) the claims asserted in the arbitration and litigation must be 'inherently inseparable'; and 3) the litigation must have a 'critical impact' on the arbitration." *Id*. at 343. However, the court was careful to note

Where the litigation and arbitration issues are "inherently inseparable," and a ruling in the litigation may obviate the need for arbitration, courts are increasingly likely to permit non-signatories to invoke FAA § 3 stays.

CONTINUED ON PAGE 4

As arbitration is designed to operate as a faster and more efficient alternative to litigation, a party with the same dispute against multiple parties, or with a dispute arising under multiple contracts, may wish to resolve that dispute in a single arbitration proceeding.

CONTINUED FROM PAGE 3

that these three factors were illustrative only, and were neither required nor exhaustive. At bottom, the central focus should be on "whether proceeding with litigation will destroy the signatories' right to a meaningful arbitration." *Id*.

Not every court has moved in this direction, however. In a recent opinion in the U.S. District Court for the Northern District of Ohio, the court denied a non-signatory's request for a stay under § 3 of the FAA, finding that the operative facts in the litigation were separable from those in the arbitration, that the majority of cases do not permit a non-signatory to invoke § 3, and that as a matter of equity, an entity that did not bargain for the arbitration agreement should not be able to reap its benefits. *Asahi Glass Co. v. Toledo Eng'g Co.*, 262 F. Supp. 2d 839 (N.D. Ohio 2003).

Although none of the above cases involved reinsurance, it is not difficult to imagine their application in the reinsurance context, where reinsurance and retrocessional placements frequently involve multiple parties and contracts, some of which may not contain arbitration clauses.

C. "Consolidating" Arbitration Proceedings: *Green Tree* and Beyond

When reinsurance disputes arise, they can involve multiple parties, multiple claims, and multiple contracts.[2] As arbitration is designed to operate as a faster and more efficient alternative to litigation, a party with the same dispute against multiple parties, or with a dispute arising under multiple contracts, may wish to resolve that dispute in a single arbitration proceeding. (Indeed, if a party had to arbitrate the same dispute in multiple arbitrations, it may take longer and be less economical than if that party were not bound by an arbitration clause and could simply file suit, joining all related parties or claims or contracts in a single court action.) Before 2002 and 2003, a party opposing a "consolidated" arbitration proceeding would have filed an action in state or federal court seeking a declaration that it was not obligated to participate in such a proceeding absent its agreement, and such actions generally found success. *See, e.g., Government of U.K. v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) (no consolidation for multiple parties arising under multiple contracts); *Clarendon Nat'l Ins. Co. v. John Hancock Life Ins. Co.*, No. 00-9222, 2001 WL 1033581 (S.D.N.Y. Sept. 6, 2001) (no consolidation under multiple contracts involving the same parties).

Things changed with two decisions by the United States Supreme Court. In 2002, the Supreme Court decided *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) ("*Howsam*"). In *Howsam*, the Supreme Court considered whether a court or an arbitrator should decide if a six-year time limitation contained in the NASD arbitration rules applied to a brokerage dispute. Emphasizing the liberal federal policy favoring arbitration, the Court ruled that "procedural questions" that grow out of an arbitrable dispute are "presumptively not for the judge, but for an arbitrator, to decide." *Id*. at 84 (emphasis in the original). Accordingly, the Court found that applicability of the time-bar was for the arbitrators to decide, noting that this result aligned the decision makers with their respective areas of expertise in order to secure a fair and expeditious resolution of the underlying dispute - a fundamental goal of arbitration. Thus, under *Howsam*, questions of arbitration procedure are for arbitrators to decide and only certain "gateway" arbitrability questions are reserved for a court, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. Id.

One year after *Howsam*, the Supreme Court decided *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) ("*Green Tree*"). In *Green Tree*, the Court ruled that whether an arbitration could be conducted as a class action likewise was a matter of arbitration procedure for the arbitrator to decide. Referring to its decision in *Howsam*, the Court stressed that only a narrow set of gateway arbitrability questions are reserved for a court, and the narrow set did not include the availability of class arbitration. "[W]hat *kind of arbitration proceeding* the parties agreed to," the Court stated, is a question that "concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question." 539 U.S. at 452-53 (emphasis in the original). The Court therefore sent the issue of class arbitration to the arbitrators to resolve.

Post-*Green Tree*, courts deciding questions regarding the number of arbitrations have

struggled with reconciling the Supreme Court's teaching that arbitration procedure questions are for arbitrators with the FAA's goals of enforcing the parties' agreements to arbitrate in accordance with their terms and fostering the liberal policy favoring arbitration as an swifter means of resolving disputes. Accordingly, post-*Green Tree* cases have not spoken with one voice on the issue.

For example, in *Pedcor Management Co. v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) ("*Pedcor*"), the U.S. Court of Appeals for the Fifth Circuit considered whether ERISA plan administrators under over 400 separate reinsurance contracts could maintain a class arbitration against the plans' reinsurer. Once it established that the parties had a binding agreement to arbitrate the issue, the Fifth Circuit, following *Green Tree*, held that the question was one of arbitration procedure for the arbitrators to decide. Similarly, in *Yuen v. Superior Court*, 121 Cal. App. 4th 1133, 1138, 18 Cal. Rptr. 3d 127, 130 (2004), the California Court of Appeals held that whether two employees who brought "substantially similar" arbitration demands against a common former employer could consolidate them into a single arbitration proceeding was a question for the arbitrators to decide. Furthermore, in *Blimpie Int'l, Inc. v. Blimpie of the Keys*, 371 F. Supp. 2d 469 (S.D.N.Y. 2005), the court, again following *Green Tree*, held that whether 45 separate franchisees with 45 separate franchise agreements with a common franchisor could bring a single, consolidated arbitration against that common franchisor was a question of arbitration procedure for the arbitrators, not the courts, to decide. Finally, in *Certain Underwriters at Lloyd's London v. Cravens Dargan & Co., Pacific Coast*, No. 05-4266 JSL (C.D. Cal. Aug. 12, 2005), *appeal docketed*, No. 05-56154 consol. with No. 05-56269 (9th Cir. Aug. 19, 2005), the court held that reinsurers on each layer and each rewriting of the same layer of a single reinsurance treaty program were not entitled to a "no consolidation" declaration and had to present their "multiple arbitrations" theory to the arbitrators in accordance with the reinsured's demand.

On the other hand, courts have held that the number of contracts issue must be decided first, before sending a dispute to arbitrators. In *Employers Ins. Co. v. Century Indem. Co.*, No. 05-C-263-S (W.D. Wis. July 19, 2005), *appeal docketed*, No. 05-3437 (7th Cir. Aug. 18, 2005) ("*Employers*"), the court determined that two reinsurers who subscribed to the same layer of the same reinsurance treaty had "separate agreements" with the same reinsured and were entitled to appoint their own arbitrator to form two separate panels to whom the reinsured could present its "consolidation" motion. However, the court in that case also ordered a single arbitration (and formation of one arbitration panel) for one of the reinsurers, even though that reinsurer participated on more than one layer of the same treaty program. Similarly, in *Certain Underwriters at Lloyd's v. Century Indem. Co.*, No. 05- 2809, 2005 U.S. Dist. LEXIS 16675 (E.D. Pa. Aug. 1, 2005), the court concluded that each layer and each rewriting of the same layer constituted a "separate agreement" for purposes of panel formation. The court in that case, however, like the court in *Employers*, noted that the reinsured could present its request for a "consolidated" arbitration to the arbitrators.

Finally, charting a middle ground between the two categories of post-*Green Tree* cases cited above is *ReliaStar Life Ins. Co. v. Canada Life Assurance Co.*, No. 04-74 (JNE/JGL), 2005 U.S. Dist. LEXIS 4045 (D. Minn. Mar. 14, 2005) ("*ReliaStar*"). In that case, as in *Employers*, the court declared that each reinsurer who subscribed to the same reinsurance treaty with the same reinsured had its own separate agreement with the reinsured, entitling each reinsurer to its own separate arbitration. Unlike the court in *Employers*, however, the *ReliaStar* court did not allow the reinsured to make its number-of-arbitrations argument to the arbitrators. Indeed, the court in *ReliaStar* did not cite, much less address or analyze, *Green Tree* or *Howsam*, and surprisingly none of the parties in *ReliaStar* argued that the number-of-arbitrations issue was a procedural question for the arbitrators.

These divergent results demonstrate but a few of the problems that can arise in practice. In a dispute involving multiple parties and/or contracts, which arbitrators decide the number-of-arbitrations issue? Is it the panel formed pursuant to the arbitration demanded by the party seeking one arbitration, or is it the panel formed pursuant to the suggestion by the party(ies) seeking multiple arbitrations? If it is the latter, must the parties ask each panel to consider the consolidation question? Once one panel issues a ruling on the issue, must the other

CONTINUED ON PAGE 6

These divergent results demonstrate but a few of the problems that can arise in practice. In a dispute involving multiple parties and/or contracts, which arbitrators decide the number-of-arbitrations issue?

CONTINUED FROM PAGE 5

panels give comity to that ruling or does it have res *judicata* or collateral estoppel effect? If not, and if multiple panels reach conflicting conclusions, then what happens? These and other consequences of *Green Tree* as applied to arbitrations in the party appointed, three-person system remain in a state of flux.[3]

II. GETTING READY: COMPELLING PRE-HEARING DISCOVERY FROM THIRD PARTIES

Once arbitration commences, the parties frequently seek documents and depositions from individuals with relevant information. These individuals, such as reinsurance intermediaries, consultants or former employees of the arbitrating parties, are not always parties to the agreement to arbitrate. Such persons may be reluctant to testify or provide documents in disputes to which they are not a party. Since arbitrators' authority over persons not party to the arbitration agreement generally derives from the FAA, the starting point for this analysis is the FAA.

Section 7 of the FAA provides that arbitrators may "summon . . . any person to attend before them . . . and . . . to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case." FAA § 7. This language typically is interpreted to permit arbitrators to require attendance at the hearing from any person - party or non-party. The FAA does not, however, expressly address the ability of arbitrators to compel a non-party to provide pre-hearing testimony or documents.

The differing views on this issue are outlined in three Circuit Court cases: *Security Life, Comsat* and *Hay Group*. The liberal view is represented by the Eighth Circuit's decision in *In the Matter of Arbitration Security Life Ins. Co. and Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2002) ("*Security Life*"). In *Security Life*, cedent Security Life demanded arbitration against its reinsurance pool manager. Thereafter, Security Life sought discovery from one of the reinsurers and the panel issued a subpoena requiring the reinsurer to produce documents and appear for deposition. The reinsurer refused to comply, arguing that it was a third party to the arbitration and therefore the panel lacked authority to compel it to provide pre-hearing discovery. Security Life petitioned the district court to compel compliance with the panel's subpoena. The district court ordered Security Life's counsel to issue a subpoena to the reinsurer pursuant to Rule 45 of the Federal Rules of Civil Procedure on behalf of the district court in which the deposition or document production was to occur. The reinsurer appealed.

The Eighth Circuit addressed solely the production of documents issue, as by the time of the appeal the reinsurer had produced a witness for deposition pursuant to a California state court order. Examining the language of FAA section 7 in light of the policy favoring efficient resolution of disputes through arbitration, the court adopted an expansive view of section 7, holding that a panel's authority to subpoena documents at a hearing includes the implicit power to order pre-hearing document productions. 228 F.3d 865. The reasoning of the *Security Life* court had previously been adopted by several earlier opinions. *E.g., American Fed'n of Television and Radio Artists, AFL-CIO v. WJBK-TV*, 164 F.3d 1004 (6th Cir. 1999)(permitting document discovery but expressly reserving question of depositions); *Integrity Ins. Co. v. American Centennial Ins. Co.,* 885 F.Supp. 69 (S.D.N.Y. 1995)(arbitrators may not compel depositions); *Stanton v. Paine Webber Jackson & Curtis*, 685 F.Supp. 1241 (S.D. Fla. 1988)(permitting deposition).

The Fourth Circuit reached a different conclusion on the issue of pre-hearing discovery from third parties in *Comsat Corp. v. National Science Foundation,* 190 F.3d 269 (4th Cir. 1999) ("*Comsat*"). In *Comsat*, the court found no implicit power in the FAA for an arbitrator to subpoena a non-party for pre-hearing discovery. The Fourth Circuit stated that restricting an arbitrator's subpoena power over non-parties is consistent with the efficient and cost-effective dispute method that parties seek when they elect to arbitrate their differences. However, the court noted, an exception may be made in cases involving a "special need or hardship." 190 F.3d 269. Other than stating that a party must, at a minimum, demonstrate that the information sought was otherwise unavailable, the court did not otherwise explain what may constitute "special need."

More recently, the Third Circuit rejected both the implicit power rationale of *Security Life* and the special need exception of *Comsat* in its ruling in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2003) ("*Hay Group*"). Adopting a textual interpretation of section 7, Judge Alito noted that an arbitrator's authority over non-parties to the arbitration agreement arises solely from Section 7 of the FAA. Section 7's authority to compel a non-party to appear at the arbitration proceeding and to bring items with him or her, the court found, was limited to "situations in which the non-party has been called to appear in the physical presence of the arbitrator." *Id*. at 407. A concurring opinion in the ruling noted that this holding did not leave arbitrators powerless to compel produce of documents in advance of the ultimate hearing on the merits. The concurrence noted that Section 7 permits arbitrators to compel a non-party to appear with documents before a single arbitrator, who can then adjourn the proceeding. In many instances, the third party may waive the personal appearance and simply produce the documents. *Id*. at 413-14 (Tchertoff, J. concurring). The FAA's physical appearance requirement, Judge Tchertoff noted, requires the arbitrators to suffer some inconvenience, which may encourage them to restrict blunderbuss discovery requests against third parties.

Recent district court opinions have underscored the developing conflicts in this area. For example, the U.S. District Court for the Northern District of Illinois recently held that arbitrators can order non-parties to appear for deposition, where the party seeking the deposition agreed not to call the witnesses again

for testimony at the hearing, thus relieving the witnesses from appearing twice. *Scandinavian Reinsurance Co. v. Continental Casualty Co.*, No. 04 C 7020, 15-18 Mealey's Litig. Rep. Reinsurance 3 (2005) (N.D. Ill Dec. 10, 2004). In contrast, an opinion from the Southern District of New York held that arbitrators cannot order pre-hearing depositions of third parties. *Atmel Corp. v. LM Ericsson Telefon*, AB, 371 F. Supp. 2d 402 (S.D.N.Y. 2005). This court, unlike the Northern District of Illinois, specifically rejected the argument that the party requesting the deposition would use the transcript instead of summoning the witness to testify at the later hearing, holding that such statements by a party do not give the arbitrators the authority to order depositions. *Id*.

As the above cases demonstrate, there is no uniform rule concerning arbitrators' power to order pre-hearing discovery from non-parties.[4] As a result, parties and their counsel should carefully consider the jurisdictional case law when deciding whether to invest resources in seeking discovery from third parties.

III. GETTING RELIEF: PETITIONING THE COURT TO VACATE AN ARBITRAL AWARD DUE TO "MANIFEST DISREGARD" OF THE LAW

Once an arbitration award has been entered, the grounds for vacating that award are extremely limited. Under section 10 of the FAA, an award may be vacated in only four circumstances: 1) the award was procured by fraud, corruption, or undue means; 2) there was evident partiality in an arbitrator or arbitrators; 3) the arbitrators committed misconduct by failing to postpone a hearing for good cause, by refusing to hear evidence, or by other means; and 4) the arbitrators exceeded their authority. FAA § 10. In certain jurisdictions, these grounds have been expanded to include a fifth, judicially-created ground: an arbitrator's "manifest disregard" of the law. *See, e.g.*, Binning, John H. and Nefsky, Robert L., *Manifest Disregard: Vacating Arbitration Awards*, ARIAS U.S. Quarterly, Second Quarter 2002. But even under the manifest disregard of the law standard, courts grant significant deference to arbitration awards.

A recent decision demonstrating this deference is *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, No. CV 05-678-GLT, 16-2 Mealey's Litig. Rep. Reinsurance 2 (2005) (C.D. May 26, 2005) ("U.S. Life"). In *U.S. Life,* the court considered an arbitration award arising from a claim for rescission of a reinsurance contract. United States Life Insurance Co. ("*U.S. Life*") had filed an arbitration in order to rescind its reinsurance agreement with Superior National Insurance Co. ("Superior"). U.S. Life sought rescission because Superior had allegedly withheld material information about its workers' compensation business during the negotiations of the contract. California law provides that a contract may be rescinded for a material misrepresentation. Cal. Ins. Code §§ 331, 359.

In ruling on U.S. Life's rescission claim, the arbitration panel did not expressly make a finding of fraud. *Id*. It did, however, note that the reinsured did not dispute that it had withheld information, and the panel concluded that cedent Superior National "should have acted in a more open and forthright manner." *Id*. However, the panel declined to order rescission. Instead, the panel ordered a 10 percent reduction of the reinsurer's existing obligations under the treaty.

The reinsurer moved to vacate the order, arguing that the award was in manifest disregard of the law. The court, however, affirmed this creative award, finding that the award was "rationally related to the panel's assignment of some degree of blame" to the reinsured. *Id*. The court's decision to affirm the reduction demonstrates the continuing high level of deference given to arbitral awards, even under the doctrine of manifest disregard.

IV. CONCLUSION

The FAA and the case law interpreting it can affect parties and non-parties to reinsurance arbitration disputes. FAA case law is continuing to develop, and interested persons are well-served by staying abreast of those developments and considering their import for reinsurance arbitrations and for future reinsurance contract wordings. ▼

2 Some argue that multiple contracts in the reinsurance context can include not only separate contracts between the same parties covering different books of business, but also (a) different layers of the same treaty program and (b) the same layer of the same treaty program where the treaty wording has changed over time. Moreover, litigants also have argued successfully that each reinsurer subscribing to the same layer of the same reinsurance treaty has its own separate agreement with the reinsured.

3 One issue which does appear resolved is the scope of an arbitrator or panel's ability to order consolidation once the dispute has been referred to arbitration. Courts that have addressed the question have uniformly found that an arbitral decision regarding consolidation will be reviewed under the same deferential standard as other arbitral rulings. *E.g., Lefkovitz v. Wagner*, 395 F.3d 773 (7th Cir. 2005) (refusing to vacate an arbitrator's decision to consolidate multiple parties under multiple contracts), *cert. denied sub nom. Jarnis United Properties Co. v. Lefkovitz*, ___ U.S. ___, 2005 WL 2413835 (Oct. 3, 2005).

4 At least one commentator has suggested that parties might avoid arbitrators' ambiguous and limited discovery authority under the FAA by utilizing the broader discovery provisions often contained in state law. See Doering, A. Lindsay, *Does the Federal Arbitration Act Apply To Discovery of Third Party Documentation Where Parties Have Agreed to State Governing Law*?, 16-5 Mealey's Litig. Rep. Reinsurance 13 (2005). Utilizing the ruling in *Security Life,* discussed *supra*, the author suggests that state discovery statutes could supply procedural rules not subject to preemption by the FAA. This could allow parties to utilize the more liberal discovery provisions of the Uniform Arbitration Act or the Revised Uniform Arbitration Act, the author concludes.

news and notices

Two New Umpires Listed

At its meeting on September 15, the ARIAS Board of Directors added **Andrew Walsh** to the ARIAS Umpire List. Then, at the November 10 meeting, the Board added **Debra A. Roberts**, bringing the total number of listed umpires to 70.

To be included on the ARIAS list, a certified arbitrator must submit evidence that he/she has completed (not settled) three insurance/reinsurance arbitrations as a panelist. The ARIAS Umpire Selection Procedure (explained on the website) makes random selections from this list.

Board Certifies Fourteen New Arbitrators

At its **meeting on September 15,** the ARIAS•U.S. Board of Directors approved certification of eight new arbitrators, bringing the total to 264. The following members were certified; their respective sponsors are indicated in parentheses:

- **Robert K. Burgess** (David Spiegler, Paul Hummer, Robert Mangino)
- **Richard C. Franklin** (Linda Martin Barber, Louis Iacovelli, Paul Koepff)
- **Susan E. Grondine** (Lawrence Greengrass, Dennis Gentry, Mark Gurevitz, Andrew Maneval)
- **John M. Kwaak** (Paul McGee, Frank Haftl, Jeremy Wallis)
- **William Murray** (John Cashin, Richard Smith, James Corcoran)
- **Andrew J. Pinkes** (John Nadas, Mark Wigmore, Robert Green)
- **Andrew Rothseid** (Charles Niles, Ronald Jacks, Clement Dwyer)
- **W. Rodney Windham** (Thomas Player, David Raim, Steven Schwartz)

Then, at its **meeting on November 10,** the Board approved certification of six arbitrators, bringing the total to 270. The following members were certified; their respective sponsors are indicated in parentheses:

- **David Axene** (Bruce Carlson, James Galasso, Paul Fleischacker)
- **Robert A. Bear** (Frank Haftl, Alfred Weller, Joseph Carney)
- **Wallace Lockwood Burt** (Peter Bickford, James Phair, Clement Dwyer)
- **Robert S. James** (Ronald Wobbeking, Bruce Carlson, Hugh Alexander)
- **Denis W. Loring** (Robert Mangino, Susan Mack, Eugene Wilkinson)
- **Frank E. Raab** (Paul Dassenko, Edmond Rondepierre, Caleb Fowler)

Biographies of all arbitrators who were certified in September are in this issue of the Quarterly. Some of the November class are in this issue, the others will appear in the next. Most of their profiles are already on the website.

March Workshop Set for Chicago

The next Intensive Arbitrator Training Workshop will be located at The Hyatt Regency O'Hare Hotel in the shadow of O'Hare International Airport in Chicago. The move to the Mid-West has been made to give those who are not on the East Coast a more convenient venue. The Hyatt O'Hare, while significantly larger than previous workshop locations, was chosen to test staging the event in a large hotel and to provide the additional convenience of easy air access.

The workshop will take place on Tuesday March 7, with the reception and dinner the evening before. Registration is set for January 18 at 10:00 a.m. on the ARIAS website. The event is for members only who have not previously attended one of these workshops. The website calendar will provide additional information as it develops.

Basking Ridge Workshop a Success

The Intensive Arbitrator Training Workshop on September 7 has received rave reviews from those who attended. The new location at North Maple Inn proved to be exceptional. From the outdoor reception, to the first-class food, to the general sessions in the superb amphitheater, every stage of the event was outstanding.

Experienced arbitrators Gene Wollan, Jeff Morris, and Peter Scarpato provided instruction during the general sessions before and after the four hours of mock arbitration hearings, held simultaneously in three rooms. Attorneys from Budd Larner, Edwards & Angell, and Milbank Tweed pro-

vided spirited arguments in each of the rooms.

Considering the quality of the North Maple Inn experience, a return may well be in order at some point in the future.

Guest Room Reservations Open for Spring Conference

The Breakers has opened its system to begin taking reservations on the telephone for the May 18-20, 2006 Spring Conference. The phone number is 888-273-2537. Preliminary conference information is located on the website calendar. Full registration information and conference details will be sent to members in February.

Save November 2-3, 2006 for Next Year's Fall Conference

For those who need to plan far in advance, the dates for the 2006 Fall Conference and Annual Meeting are November 2-3 at the Hilton New York Hotel. Details will be on the website calendar as they develop.

Courier Shipments to ARIAS Need New Address (repeat)

With the recent relocation of the ARIAS administrative office, the 35 Beechwood address is no longer valid. The postal address for ARIAS is PO Box 9001, Mt. Vernon, NY 10552. However, UPS, FedEx, DHL, and Airborne are not able to deliver to a post office box address. Therefore, any materials being sent by courier service should be addressed as follows:

ARIAS•U.S.
131 Alta Avenue
Yonkers, NY 10705-1414

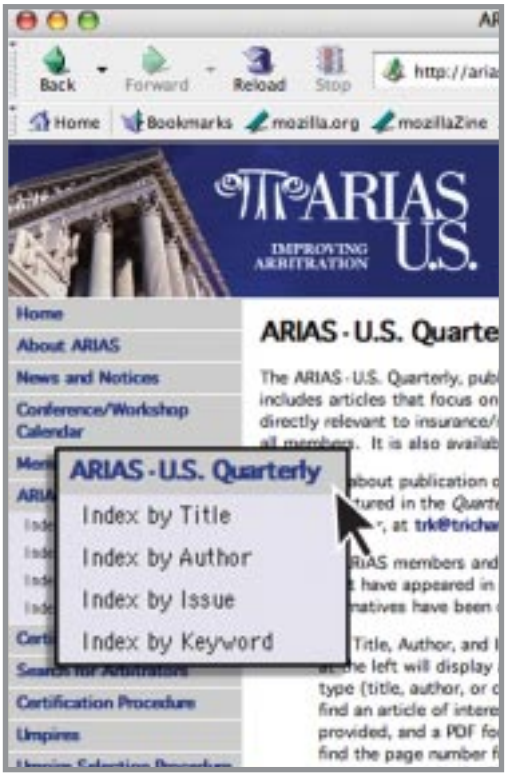
The phone number to show on the shipping label is 914-966-3180 x116.

Using the Quarterly for Research

By Jay Wilker

The periodical you are reading is more valuable than you might appreciate! The ARIAS•U.S. Quarterly has published numerous articles on issues that you are likely to confront as a party, arbitrator, umpire or counsel. All articles from the past eight years are available online and can be researched via keyword search. Here is how you do it. Go to www.arias-us.org, and select "*ARIAS•U.S. Quarterly*."
On the left-hand margin (see illustration below), a menu will come up. From that menu select the "Index by Keyword," which will pull up a list of the words at the right. Just click on a word to see a list of the articles relating to that subject. Then, click to open any PDF.

By selecting several keywords (two, three or four depending on the specificity of the search) from the index on the subject you wish to research, you will locate any article on that subject that has been published. You are likely to find very few procedural issues that have not been discussed in a previous *ARIAS•U.S. Quarterly* article. We hope you will find your use of the online word index to be valuable as a research tool.



AAA Code
Access to Records
Allocation
Arbitrability
Award
Arbitration
Arbitration Panel
Arbitrators Code of Conduct
ARIAS
Attorney's Fees
Attorney-Client Privilege
Bias
Choice of Law
Circuit Court
Collateral Estoppel
Common Law
Complete
Confidentiality
Consolidation
Convention
Court
Default
Depositions
Discovery
Disengagement
Disinterested
Disqualification
District Court
Evidence
Expenses
Expert
Federal Arbitration Act (FAA)
France
Functus Officio
Hearing
Integration Clause
Interest
Interim Award
Intermediary
Misconduct Neutral
Non-Party
Organizational Meeting
Partiality
Party-Appointed Arbitrator
Pre-hearing
Procedure
Process
Punitive Damages
Reasoned Award
Receiver
Relief
Res Judicata
Russia
Sanctions
Scope
Security
Survey
Subpoena
Summary Disposition
Third Party
Umpire
United Kingdom (UK)
Vacate
Witness
Work Product

feature

Some Ideas about How Arbitrators Can Improve the Process of Reinsurance Arbitrations

This paper was presented at the ARIAS•U.S. 2005 Spring Conference


Daniel L. FitzMaurice


Robert Lewin


Susan A. Stone


Richard L. White

Daniel L. FitzMaurice
Robert Lewin
Susan A. Stone
Richard L. White

Some reinsurance arbitrations run smoothly; others do not. When an arbitration bogs down, dates slip, disputes run amok, or the process simply falls off track, the usual suspects are the lawyers and one or both of the parties. In hindsight, however, all may share the blame for an unhappy arbitration experience, including the arbitrators. Indeed, former enemies may later find common ground in questioning why the arbitrators failed to prevent an arbitration from melting down. After all, the arbitrators are responsible for supervising the process. This paper will suggest some ideas for how arbitrators can improve the arbitration process from the selection phase through to rendering an award.[1]

The Selection Process for Party-Appointed Arbitrators

Arbitrators play a potentially helpful role from the first time they are contacted. In considering a possible assignment, the arbitrator must make several assessments, including a realistic view of his or her own availability and willingness to serve. To be sure, the notion of turning away work is an anathema to many who serve as arbitrators. Nevertheless, failing to assess accurately one's availability to serve may have undesirable long-term consequences, including frustration and annoyance from both sides when an arbitrator overbooks. Whether the contact takes the form of a discussion or questionnaire, the inquiry should cover the anticipated needs of the parties, and the arbitrator should respond candidly and completely on this and all topics. Arbitrators may avoid the temptation to overbook by using non-refundable retainers and cancellation fees so that they are not left with lost opportunity costs for the matters that they do undertake. In addition, potential arbitrators and umpires should ask whether parallel proceedings are likely and, if so, whether concurrent assignments can be expected. This information will help the arbitrator to make a more accurate assessment of the likely demands and potential conflicts. It will also enable the arbitrator to consider a self-imposed limitation on *ex parte* communications until the prospects for parallel arbitrations become clearer.

Umpire Selection

Various industry-sponsored umpire-selection methodologies, e.g., ARIAS•US Umpire Selection Procedure and/or Neutral Selection Procedures and RAA Manual For The Resolution of Reinsurance Disputes, employ questionnaires for umpire candidates (and for party appointed arbitrators). In initially nominating a slate of candidates, however, parties often do not utilize questionnaires. The questionnaires, if used at all, may come only after each party has nominated its respective slate. Questionnaires may provide considerable assistance to parties by promoting (1) the comprehensive listing of relevant arbitrations, e.g., those dealing with disputes comparable to the instant dispute; (2) relationships with the parties, their law firms and even individual counsel for the parties, as well as the party appointed arbitrators; and (3) the candidate's open mindedness on the issue(s) of the dispute. Additionally these questionnaires will solicit the candidate's billing arrangements, e.g., rate, retainer, refundability of retainer, and travel and expense provisions. Good questionnaires will also seek the candidate's availability for the organizational meeting, say, within the next two months as well as a

hearing, say, within the next year.

In requesting that candidates complete questionnaires, the parties should explain that the responses may not necessarily remain confidential. For example, the responses may become part of a court filing in connection with potential motion practice. Concern over such potential disclosure may prompt the candidates to communicate some sensitive information, like billing rates and procedures, in a different manner. The objective is to ensure that both the potential umpire and the parties consider, as comprehensively as possible, substantive and administrative matters before the selection process is finalized.

Umpire selection can also introduce difficult judgment calls for both the party and the candidate. For example, after reviewing the questionnaire does the candidate who is currently serving as a party appointed arbitrator against one of the parties, decline the invitation to be considered as the umpire for this dispute? Is that judgment different if the disputed issue is unrelated to this dispute? What effect is there if the law firms in both disputes are unrelated; are common? Should a selected umpire, who has no prior involvement with either party, decline a later request by one of the parties to serve as a party-appointed in a totally unrelated dispute? Does it affect the answer if the appointing party is unrelated to the first dispute but the law firm of the appointing party is not? Is there a normative, maximum number of appointments an arbitrator should accept from one party; from one law firm? If so, does the time interval among appointments affect this normative number? Candidates should be aware of these potential issues and think them out carefully before agreeing to proceed or choosing not to proceed.

Before the Organizational Meeting

There are many steps the arbitrators can take before the organizational meeting to assure that the arbitration will flow smoothly. Advance preparation before the organizational meeting will result in an organizational meeting which is more productive, and which creates clear guidelines for the arbitration process going forward. Arbitrators should consider requiring counsel to meet and confer prior to the organizational meeting, so to the extent possible an agreed schedule for discovery and other pre-hearing activity can be presented to the arbitration panel for approval at the organizational meeting. To the extent counsel cannot agree on certain aspects of the schedule, this can be debated and decided on at the organizational meeting, but counsel should be encouraged to resolve as much as possible amongst themselves prior to the meeting. Counsel should be told to create as detailed a schedule as possible, including dates for briefing of motions (including opposition and reply dates), and deadlines and cut-offs for document production, fact depositions, expert reports and depositions (if any), and the identification of witnesses and exhibits prior to hearing.

Arbitrators should also require the parties to present position statements at the organizational meeting which are as specific and detailed as possible. The parties should be told to address both the substantive issues in dispute and any anticipated procedural issues in dispute. Fulsome position statements help educate the panel on the true scope and nature of the case; they also provide the panel with context in which to consider discovery motions and other prehearing motions, such as motions relating to the use of expert witnesses. The parties should also be instructed to fully brief any matters which are expected to be in dispute at or soon after the organizational hearing, such a request for pre-hearing security.

The panel may also wish to consider meeting itself without counsel present before the initial organizational meeting, to determine the panel's own preference on such matters as dates for the final hearing and when *ex parte* communication should be cut off. Once again, the more preparation which the panel does prior to the organizational hearing, the smoother the hearing will go. In addition, pre-agreement among the panel helps the panel present a united front to the counsel at the first meeting, thereby helping to establish the panel's control over the proceedings from the start.

CONTINUED ON PAGE 12

Fulsome position statements help educate the panel on the true scope and nature of the case; they also provide the panel with context in which to consider discovery motions and other prehearing motions, such as motions relating to the use of expert witnesses.

The authors, who were panelists at the 2005 Spring Conference in Las Vegas are with the following firms: Daniel L. FitzMaurice, *Day, Berry & Howard LLP*; Robert Lewin, *Stroock & Stroock & Lavan LLP*; Susan A. Stone, *Sidley Austin LLP*; and Richard L. White, *Integrity Insurance Company*.

Indeed, throughout the proceeding, the panel should keep in mind that it has the ability, if need be, to enforce its authority by issuing sanctions and orders of interim relief against parties who refuse to comply.

CONTINUED FROM PAGE 11

At the Organizational Meeting

The arbitration panel should have two overall objectives in mind at the organizational meeting: (1) to resolve procedural issues and provide as much clarity as possible about the detailed workings of the arbitration process; and (2) to establish the panel's authority.

With respect to the first objective, the panel should make certain that everyone leaves the organizational meeting with a specific schedule. On occasion, some more laissez-faire umpires will simply tell the counsel at the organizational meeting to "work it out" on a going-forward basis. While it may be tempting to leave these matters in the hands of counsel, this merely invites disagreement and delay in the future.

The panel should actively work to identify and resolve areas of disagreement at the organizational meeting, rather than allowing uncertainty or, worse, delaying the inevitable. The end-product should be a realistic schedule, which has enough flexibility built-in to allow for some slippage without jeopardizing the hearing dates. Indeed, rather than trying to minimize the potential sources of conflict going forward, the panel should actively work to ferret out and address any areas of controversy which are likely to arise during the arbitration. Among other topics, the parties should be asked to address the contemplated need for third-party discovery and how that is expected to be obtained, the perceived need for the use of experts, the contemplated number of fact depositions, the perceived need to depose witnesses not resident in the US, etc.

Just as the panel should push counsel to identify procedural issues in dispute, the panel should also seek - through careful reading of the position statements and thoughtful questioning of the parties - to clarify the substantive issues in dispute. The panel should work in the organizational meeting to delineate the true contours of the dispute between the parties, by having counsel identify what is and what is not at issue.

As part of the objective of clarifying the arbitration process, careful consideration should be given to the possibility of rendering a reasoned award at the conclusion of the arbitration. To be sure, many arbitrators are not comfortable with reasoned awards, out of a perhaps justified fear that the non-prevailing party will try to make use of the reasoned award in its efforts to vacate or modify the panel's decision. Notwithstanding this initial reaction, panels should contemplate whether issuing a reasoned award is beneficial for the arbitration process as a whole, by de-mystifying the deliberation process and dispelling the misconception that arbitration is a matter of "jackpot justice."

The second major objective which the panel should keep in mind at the organizational meeting is establishing its authority and dominion over the proceedings. Indeed, throughout the proceeding, the panel should keep in mind that it has the ability, if need be, to enforce its authority by issuing sanctions and orders of interim relief against parties who refuse to comply. At the risk of engaging in an admission against self-interest, we have seen instances where more passive arbitration panels have allowed counsel and/or parties to run amok. While no one believes that arbitrators should act like despots or model their behavior on certain tyrannical judges, panels nevertheless should maintain control over the parties and their counsel. The arbitration process can perhaps best be compared to a three-legged stool, comprised of three distinct constituencies: (1) parties; (2) counsel; and (3) arbitrators. Often these various constituencies have different motivations and agendas. If the arbitrators cede too much control to the parties and/or counsel, the process becomes unbalanced, just as a three-legged stool becomes askew if one of its legs is too short.

As part of exercising their authority, arbitration panels may want to consider making some uncommon recommendations to the parties. For example, in the appropriate circumstance, an arbitration panel may want to suggest the parties engage in the sort of up-front disclosures called for by Rule 26(a)(1) of the Federal Rules of Civil Procedure. In other cases, the arbitration panel may want to recommend that the parties explore mediation before proceeding with the more costly and time-consuming arbitration proceeding. Mediation may make sense in situations where the dollars in dispute are relatively modest, or where the issues are clear-cut, or where the issues revolve around contractual interpretation rather than fact-intensive disputes.

During Discovery

Discovery is a vulnerable phase of the arbitration process. Many of the complaints about reinsurance arbitrations - excessive costs, delays, and controversies - originate in discovery. And while some parties and counsel can be left alone to complete discovery, one cannot always predict when and why the process will break down. Arbitrators may need occasionally to crack the whip. This includes holding the parties to schedules, absent good cause, and to build in deadlines for the parties to raise certain types of disputes. Although parties should be encouraged to attempt first to work out any disputes, they should proceed promptly to seek the panel's assistance when that step fails. Panels may also require interim status reports to ensure that the parties have not wandered astray. Passive arbitrators, including those who attempt to avoid ruling on an issue presented during discovery, may compound rather than cure the problem.

With regard to questions of privilege, the panel may request a more detailed and precise privilege log and for the preparer to group categories of documents that fit together. The arbitrators should also consider using a special master when *in camera* inspection might expose them to prejudicial material or when tricky questions arise in which a master's expertise may be useful. To avoid questions over the panel's authority to delegate this responsibility, the panel should seek the parties' consent. Alternatively, the panel may provide that the special master prepare a report and recommendation that will be subject to plenary review by the panel.

Pretrial Preparation

In the pretrial phase, the arbitration panel should once again exercise its authority to keep the process moving forward expeditiously. Panels should plan on scheduling at least two prehearing conference calls: one to discuss process and another to discuss substance, including any motions that need to be ruled on before the hearing. With regard to process, the panel should issue a pretrial scheduling order that clearly provides when the parties must submit prehearing briefs and response briefs, and when the parties must identify exhibits, witnesses and deposition designations. The panel should consider imposing page limitations, and should require the briefs to be submitted in sufficient time to allow the panel to fully absorb the contents. Parties should also be required to discuss the contemplated order in which witnesses will appear, any problems with witness scheduling, and estimated time of witnesses' direct and cross examinations. The panel should also think about imposing time limits on opening and closing statements. Agreements should also be reached on the use of technology during the hearing.

One method of dispute resolution which panels have been reluctant to employ in the past but which warrants further evaluation is the appropriate use of summary judgment to narrow issues, or in some case, dispense with the need for live testimony altogether. Although many arbitrators are not comfortable with the notion of depriving a party of its "day in court," after the parties have engaged in extensive discovery and briefing there may be little if anything new left to emerge at a live hearing. Panel members should consider whether summary judgment is an appropriate method of narrowing or resolving the dispute efficaciously.

During the Hearing

While arbitration hearings are designed so as not to require the formalities of judicial proceedings, there are several rules that arbitrators would be well advised to adopt to create order and promote efficiency. From the outset, it is critical that the arbitrators take control of all aspects of the proceedings. The arbitrators should make it clear that only they - and not the lawyers or the parties - are in charge. They also should be clear as to the rules that they wish the parties to abide by during the hearing - including the manner in which counsel and the arbitrators comport themselves and the manner in which evidence is introduced and received.

Turning to particular issues, arbitrators frequently are confronted with a party that wishes to introduce cumulative evidence - or stated in lay terms, evidence that proves what already has been established. While there is a tendency for arbitrators to allow the parties to decide how to present their case, it certainly is appropriate for arbitrators to limit repetitive testimony or curtail certain testimony where the point is considered to have been sufficiently established. Other tools exist to truncate the actual hearing time. For example, arbitrators could take an active role in demanding that the parties stipulate to all facts that are not in dispute. While this would have to occur in advance of the hearing, it can bean extremely important step to narrowing the matters that require live testimony. In addition, while there is no substitute for live testimony in evaluating demeanor and credibility, the testimony of many witnesses is more than adequately presented through videotape or deposition transcript. If parties are expected to rely on these methods to introduce evidence, however, the arbitrators must listen to and read these materials. In some instances, it may be appropriate to use a written statement in lieu of direct testimony with only cross-examination and examination by the panel taking place at the hearing. This latter technique works especially well with expert witnesses whose expert report may serve as the substitute for direct examination. Arbitrators also should consider limiting expert testimony where the testimony is not perceived as assisting the panel in reaching its decision. As stated previously, it would be most helpful if this subject were evaluated prior to the hearing so that the parties did not have to incur the expense of engaging an expert only to find that he or she is not called to testify. With respect to the estimated hearing schedule that was set at the beginning of the arbitration, it is important for the arbitrators to keep track of these estimates throughout the

CONTINUED ON PAGE 14

CONTINUED FROM PAGE 13

hearing and where necessary and appropriate ask counsel to speed-up their examinations. While arbitrators must be able to question witnesses and counsel as any area that they believe is relevant to the dispute, they should avoid any appearance of partisanship in connection with such questioning. And, with respect to disclosures of potential conflicts that arise for the first time during the hearing, the parties should be encouraged and not discouraged to inquire fully into the subject matter of the disclosure. With respect to the opening and closing statements, it is advisable to set time limits. And, in certain circumstances, asking counsel in advance of the closing to address particular questions can be extremely effective. The panel should also think twice before assuming that post-arbitral briefs will be necessary in light of the additional costs and delays that they impose. Finally, prior to the conclusion of the Hearing each party should submit a form of the Award that they seek the Panel to enter.

During Deliberations

When, where and how should arbitrators undertake the deliberation process? As with the hearing, many of these items need to be considered before the deliberation process begins. Aside from logistics, the location of the deliberations presumably has no impact on the outcome. For that reason, it is unlikely that one's adversary obtains any advantage in the arbitration if deliberations are conducted at the adversary's offices, provided that there is full disclosure to all parties. What is critical, however, is that the arbitrators in all cases provide for an adequate amount of time to evaluate the evidence that was actually received during the hearing. The various items that need to be considered, include (i) should the arbitrators be allowed to deliberate during the course of the hearings or must they wait until all evidence has been received and the hearings are concluded? (ii) should the arbitrators identify the issues that need to be decided and the evidence that must be reviewed if deliberations do not occur immediately after the close of the hearings? (iii) should the umpire set the initial agenda for the issues to be discussed and the order in which they should be discussed? (iv) should the arbitrators tailor the deliberations to the needs of the particular proceeding, i.e. the hearing has extended over several months or the resolution of certain issues will foreclose certain other issues? (v) depending on the language in the operative arbitration clause, should the umpire instruct the arbitrators that they are only to consider evidence adduced at the hearing in the context of industry custom in deciding the outcome of the arbitration? (vi) if the two party arbitrators agree on the outcome, should the deliberative process continue? (vii) should arbitrators be willing to compromise in order to obtain a unanimous award? and (viii) should arbitrators decide what the arbitrators may or may not discuss with the parties after the issuance of the award?

The Award and Post-hearing

The award should be rendered as expeditiously as possible. The schedule adopted at the organizational meeting should have provided for at least a half day for panel deliberations immediately following the hearing. Ideally, the award can be finalized during this period or at least the contours of the award resolved. Should that not be possible, the panel must establish a hard schedule of tasks, the completion of which will result in an award. Anything less is a disservice to the parties.

If a reasoned award will be issued, that should have been agreed at the organizational meeting. Often panels find it helpful to have counsel provide a draft award on the final day of the hearing. In this way the likely format of the award can be considered while the panel, counsel, and the parties are still together.

Once the award is finalized, the panel should collectively concur on the informal feedback that the party appointed arbitrators may provide respective counsel and parties. This should consist of the salient facts, market practice and possibly law included in the evidence presented that caused the panel to reach this particular award. Facts and market practice evidence obviously excludes confidential panel deliberations. Once the final award is transmitted to the parties, the party-appointed arbitrators may provide the agreed informal feedback. Some in the arbitration community believe that no further ex parte communication is appropriate until either the award is satisfied or vacated. This practice, however, may be too restrictive to serve as an absolute rule. ▼

1 The purpose of the paper is to be provocative. Accordingly, the authors have advanced these ideas solely for the purpose of discussion: none of the items included in this piece should be attributed to any one or more of the authors or to those they represent.

members on the move

In each issue of the Quarterly, we list member announcements, 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.

Do not forget to notify us when your address changes. **If we missed your change here, please let us know at** info@arias-us.org, so it will be included in the next issue.

Recent Moves and Announcements

On January 1, 2006, **Sidley Austin Brown & Wood LLP** will change its name to Sidley Austin LLP. Its Chicago address is now One South Dearborn. Everything else is the same.

One of our esteemed ARIAS founders, **Bob Mangino**, has moved. His new home and office information is Robert M. Mangino, 7 Beechwood Drive, Convent Station, NJ 07060-6121, phone 973-889-0381, fax 973-889-0382, cell 201-602-7285, email rob.mangino@verizon.net .

On October 17, 2005, **Rhonda L. Rittenberg** went from being a partner at Prince, Lobel, Glovsky & Tye to her new role as Vice-President and Associate General Counsel at Lexington Insurance. Her new contact information is Lexington Insurance Company, 100 Summer Street, Boston, MA 02110, phone 617-330-8436, fax 617-772-4588, email rhonda.rittenberg@aig.com .

John Weddle can now be found at 11348 Clarion Way, Minnetonka, MN 55343, phone 952-929-6652, email john.weddle@earthlink.net .

David Cargile has a whole new set of contact data. He is now settled in at 10 Settler's Cove, Beaufort, S.C. 29907, home phone 843-379-0381, office phone 843-379-0492, fax 843-379-0493, email dcargile@hargray.com .

Charlie Niles is now located at 720 Westhill Way, Worcester, PA 19446, where his numbers are phone 484-991-1142, fax 484-991-1143...email unchanged.

Beverly Grant's new address is 1228 Park Row, La Jolla, CA 92037, phone 858-459-2052 fax (858) 459-2053. Email is unchanged.

Cecelia (Sue) Kempler is currently established at Kempler Consulting Corp., 3140 S. Ocean Blvd., Palm Beach, Fl. 33480, phone 410-310-5363, email ckempler@bellsouth.net . She'll be able to walk to the ARIAS Spring Conference

Susan Claflin's new address and numbers are 70 Pine Brook Court, Cheshire, CT 06410, phone 203-699-1711, email susanclaflin@cox.net .

Also, **Linda Lasley** has now joined Lewis Brisbois Bisgaard & Smith, LLP, located at 221 N. Figueroa St., Suite 1200, Los Angeles, CA 90012, phone 213-680-5114, fax 213-250-7900, email Lasley@lbbslaw.com .

David Axene has moved. He can be found at Axene Health Partners, LLC, 27165 Tree Rose Avenue, Murrieta, CA 92562, phone 951-294-0841, fax 619-839-3980, email david.axene@axenehp.com . His website is at www.axenehp.com .

Daryn Rush, who had been a partner at White and Williams, has now joined the Philadelphia office of Funk & Bolton, where he chairs the firm's Reinsurance Practice Group. His new contact information is as follows: Daryn Rush, Funk & Bolton, P.A., One South Broad Street, Suite 1830, Philadelphia, PA 19107, phone 215-568-4104, email drush@fblaw.com .

Jack Cuff has opened his new Arbitration/Mediation Consulting practice, located at 7 Sheldrake Rd., Greenwich, CT 06830, cell 917-359-1514, home 203-829-0849, email jcuff@optonline.net .

In mid-December, **Barbara Murray** moved from Director, Insurance Services, PricewaterhouseCoopers to VP of Reinsurance at Kemper Insurance. Contact information will be in the next ARIAS Directory.

Jordan Named Arbitrator of the Year for New York County

Attorney **Leo J. Jordan**, an ARIAS•U.S. Certified Arbitrator, was named Arbitrator of the Year by the New York City Small Claims Court Arbitrators Association. Jordan, a retired vice president and counsel for State Farm Insurance Companies, was recognized for his services as a volunteer arbitrator for the New York City Civil Courts on October 20, 2005, at a dinner at the New York Arts Club. Jordan serves as an arbitrator several times each week at courts located in various section of the city, including Lower Manhattan, as well as the Mid-Town and Harlem Community Courts.

New Email Addresses

Robert Baer
rabsolutions@gmail.com

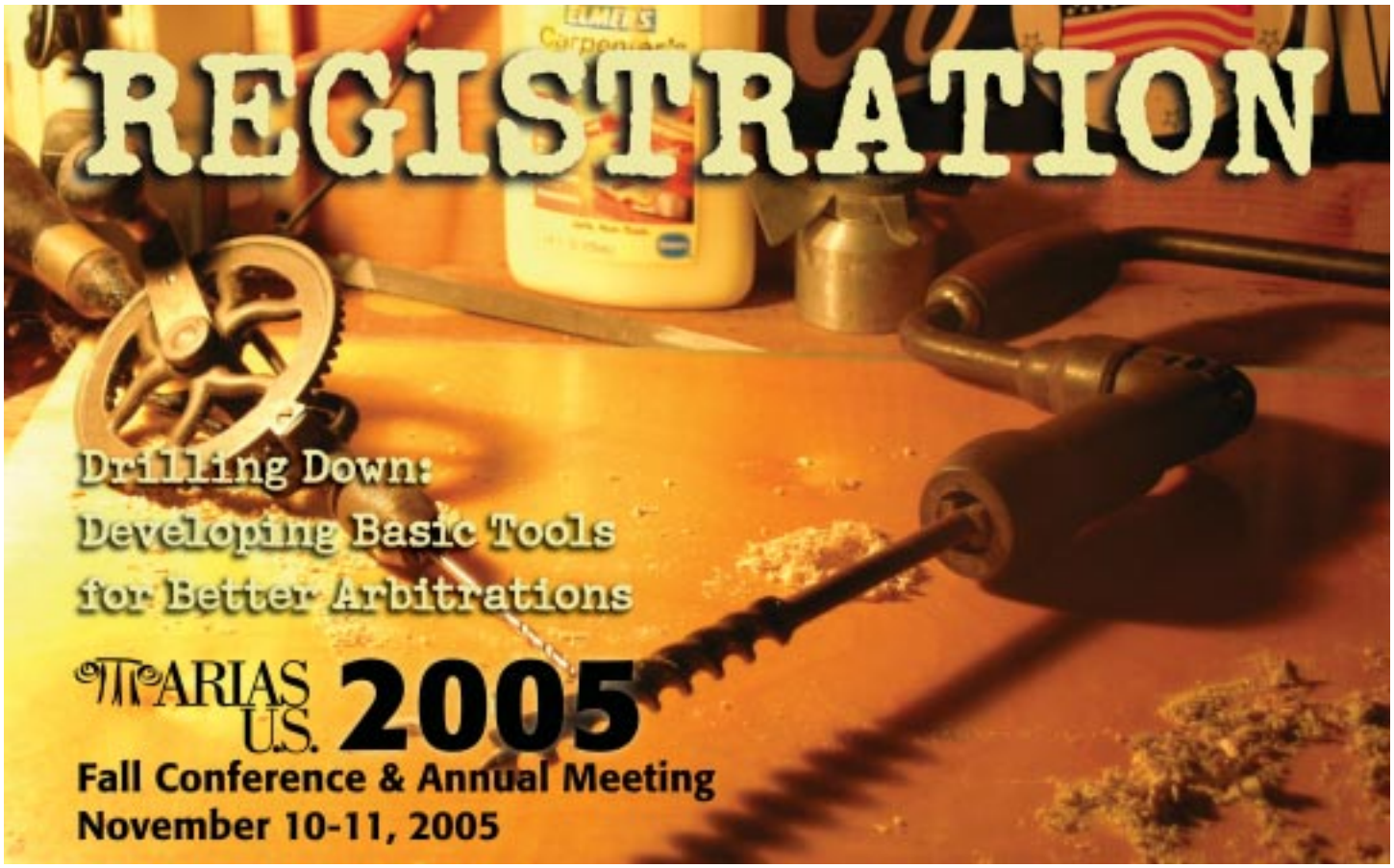
Christine Bancheri
cebancheri@comcast.net

Jens Juul
jensjuul@logic.bm

George Grode
georgegrode@comcast.net

Lost Member

If anyone knows the whereabouts of **Andrew Magwood**, please send an email to info@arias-us.org with an email address or other contact information.



Fall Conference Drills Down into the Details

Increasingly in recent years, it has been recognized by the Board that ARIAS has evolved into a multi-level, multi-segment organization whose training sessions needed to be reconfigured, accordingly. Members were at difference stages of their involvement with arbitration. Those who were learning about the process needed more basic subjects. Those who had been participating as arbitrators for several years were not spending their time well in sessions that covered fundamentals.

Also, since a large segment of the membership consists of people with legal experience and another large segment came through insurance disciplines, members were not necessarily bringing the same degree of understanding to the arbitration process and had different training needs to become better in their roles.

This year's Fall Conference took a major step forward in addressing these diverse needs within the ranks. Six simultaneous workshops drilled down into the details of topics that were of interest to discrete groups. The topics were:

- **Workshop A** - Legal Terms and Procedures for Non-Lawyers
- **Workshop B** - How to Write Reasoned Awards
- **Workshop C** - Reinsurance Underwriting and Accounting for Lawyers
- **Workshop D** - View from the Panel: The Top Ten Things Lawyers Can Do To Win - and Lose - Their Cases
- **Workshop E** - Positive Strategies Companies Can Adopt to Work Effectively with Outside Counsel to Achieve Efficient Arbitrations
- **Workshop F** - Making the Transition to the Center Chair: Moving From Arbitrator to Umpire

The sessions were presented twice, allowing everyone to attend two workshops. Conveniently, the selections coincided reasonably well with the varying room sizes available, so that everyone was assigned to his/her top two choices.

Responses to the new format were

broadly positive. Evaluation sheets indicate that the great majority of attendees were very pleased with the new approach.

Beyond the workshops, the conference opened with an outside point of view and addressed several other major areas.

Above: Thomas D. Cunningham provided an FAA update.

Left: Judge Harold Baer opened the conference.

Interactive Workshop A asked attendees for their opinions.

Workshop F

U.S. Circuit Court Judge Harold Baer, Jr. provided an overview of recent cases involving challenges to arbitration awards in the 2d Circuit, concluding that courts seem to be more willing these days to disturb arbitration awards than they were in years past. Not being afraid of controversy, Judge Baer then stated his preference for mediation which he believes is more efficient and achieves more acceptable results than arbitration.

Thomas D. Cunningham of Sidley Austin provided an update on the Federal Arbitration Act, highlighting recent

CONTINUED ON PAGE 18

developments, even to the point that the materials sent two weeks in advance required updating. His revised paper is featured in this issue of the Quarterly.

Mediation was another point of focus as Linda Lasley moderated a panel discussion on mediation experiences and how the resolution of certain disputes can benefit from this approach. Then, Charles Ehrlich outlined a draft proposal for ARIAS to create and maintain a list of qualified mediators

Five hundred for lunch.

What about mediation?

Newly elected Chairman, Mary A. Lopato presented Meritorious Service Awards to retiring Board members Thomas S. Orr and Eugene Wollan.

who could be available to the industry. Training would be the responsibility of the individual through established training programs. ARIAS certified arbitrators who fulfill the requirements would be considered qualified and listed in ARIAS communications. The proposal will be further discussed by the Mediation Committee for possible recommendation to the Board.

After early morning committee meetings, Friday morning of the conference was all about ethics. The Ethics subcommittee chairs reported on initiatives they were pursuing to examine a number of issue areas. Then, Susan Grondine moderated a

Founder T. Richard Kennedy awards gold lapel pins to retiring Board Members.

panel discussion that outlined and discussed the elements of three significant hypothetical ethics situations. The conference broke into smaller groups for an exchange of views on these issues. After lively exchanges of opinions, the group leaders reported the results to the full session.

There were successes and failures in handling the ever-expanding conference. For the first time in several years, the general session attendees were not squeezed in shoulder to shoulder. The Grand Ballroom allowed having tables for all and enough elbow room for the 535 attendees to write comfortably. The reception, on the other hand, became a little too intimate at its peak. Other options are being explored for 2006.

The enthusiastic responses of attendees confirmed the effectiveness of the program segments. The early organizational work by Tom Orr and Susan Stone paid off in the quality of the speakers, panelists, and workshop presenters. The format of simultaneous sessions is likely to be an important part of most, if not all, conferences in the future.

Chairman Mary A. Lopato (far left) and co-chairs Susan A. Stone and Thomas S. Orr, close the conference.

Mary A. Lopatto and Thomas L. Forsyth Elected Chairman and President

Susan A. Stone Named Vice President

Three New Board Members Elected

Mary A. Lopatto

At the Board of Directors meeting, held during the 2005 Fall Conference on November 10, Mary A. Lopatto, Managing Partner of the Washington, D.C. office of LeBoeuf, Lamb, Greene & MacRae LLP, was elected Chairman of ARIAS•U.S. and Thomas L. Forsyth, General Counsel of Swiss Reinsurance America Corporation, was elected President, succeeding Ms. Lopatto.

Also at that meeting, Susan A. Stone, a litigation partner at Sidley Austin LLP's Chicago office, was elected Vice President, joining Frank A. Lattal of ACE.

In the annual membership meeting, just before the Board meeting, Elaine Caprio Brady, Counsel to Liberty Mutual Insurance Company; George A. Cavell, Vice President & Manager, American Re-Insurance Company; and Daniel L. FitzMaurice, a partner in Day, Berry & Howard LLP, were elected as new members of the Board. They replaced departing Board members Thomas S. Orr, Eugene Wollan, and Christian M. Milton. Also, David R. Robb, of The Hartford, was re-elected to the Board.

Thomas L. Forsyth

> The Board consists of nine members, three representing insurance companies, three representing reinsurance companies, and three representing law firms.

An ARIAS Board member is elected for a three-year term and may be re-elected for one additional three-year term. The Board consists of nine members, three representing insurance companies, three representing reinsurance companies, and three representing law firms.

Susan A. Stone

Chairman Mary Lopatto has been with LeBoeuf, Lamb, Greene & MacRae LLP for almost 20 years, she has extensive experience in insurance and reinsurance litigation and specializes in the area of reinsurance arbitration, particularly international reinsurance disputes, subject to the Bermuda UNCITRAL Model Law on International Commercial Arbitration.

President Forsyth has been with Swiss Re since 1994. In addition to his General Counsel role, he is Head of Claims & Liability Management - Armonk. He is currently responsible for legal issues arising from Swiss Re's property & casualty reinsurance business in North & South America as well as certain claims and compliance matters.

Letter to the Editor

To the Editor:

The Annual Meeting in November was my first attendance at a meeting of ARIAS•US. I was absolutely astounded by the quality of the program and the quality and experience of the persons registered. My impression is that this organization is way ahead of the others in the industry in improving the arbitration process for insurance-related disputes.

I am particularly interested in the field of life, accident, health and annuity insurance, and was pleased to see the large number of attendees with similar interests who attended the breakfast meeting organized by Hugh Alexander. My own personal experience in representing clients in reinsurance arbitrations has shown that there is a growing need for arbitrators with experience in this field.

Let me know how I can help you in your efforts.

David D. Knoll
Winstead Sechrest & Minick P.C.
910 Travis, Suite 2400
Houston, Texas 77002-5895
(713) 650-2732
dknoll@winstead.com

in focus

Recently Certified Arbitrators

David V. Axene

Robert A. Bear

David V. Axene

David Axene began his insurance career in 1971 at the Travelers Insurance Company in its Group Department in Hartford. While there, he specialized in both Group Pensions and Group Health Insurance. He joined American Republic Insurance Company in 1973 as its Group Actuary specializing in small group health insurance products and negotiating reinsurance arrangements for those products. In 1974 he moved to American Mutual Life Insurance Company as Group Actuary and was responsible for its group insurance operations including negotiating reinsurance arrangements.

Mr. Axene joined SAFECO Life Insurance Company in 1975 as Group Actuary. While at SAFECO, he helped develop and launch its Stop Loss product, which became an industry leading product. In 1978, he transitioned to consulting, joining Milliman & Robertson, Inc. (now Milliman USA). He became a partner with that firm in 1984, leading one of the firm's largest health care consulting practices. Mr. Axene became an internationally known health care consultant and consulted widely with health plans, health insurance companies, Blue Cross Blue Shield plans, reinsurance companies, large employers, pharmaceutical companies, medical device companies, governments, etc. While at Milliman, he developed and founded the firm's healthcare management consulting practice including developing its Care Guidelines business, which continues today.

Mr. Axene joined Ernst & Young, LLP in 2001 as a direct-admit partner for its national Health Actuarial Services practice. In this role he led a consulting practice targeting the same types of clients served at Milliman.

He founded founded Axene Health Partners, LLC in 2003 with a physician business partner. The firm has grown significantly with multiple locations in California, Washington and Kansas.

Mr. Axene holds a Bachelor of Science degree in Mathematics, Physics, and Engineering from Seattle Pacific University and a Master of Science degree in Applied Mathematics from the University of Washington. ▼

Robert A. Bear

Robert Bear is a Fellow of the Casualty Actuarial Society, a Chartered Property Casualty Underwriter, a member of the American Academy of Actuaries, and a Fellow in the Conference of Consulting Actuaries. He has over 30 years of insurance industry experience, including 20 years managing reinsurance actuarial functions.

Mr. Bear is currently a Consulting Actuary in the firm he has established, RAB Actuarial Solutions, LLC. This independent consulting practice offers services in the following areas: (1) Property and Casualty insurance ratemaking and reinsurance pricing, including commutations and risk transfer analyses (2) loss reserving (3) enterprise risk management, and (4) mediation, arbitration and expert testimony. He recently served on an arbitration panel that provided a reasoned award.

Mr. Bear previously served as Senior Vice President and Chief Actuary of PXRE Group, where he managed the Actuarial Department and served as the Appointed Actuary for the companies within the group. He was responsible for loss reserving functions and pricing model development, along with related corporate modeling. He began his career at Insurance Services Office and subsequently served as an actuarial manager at Prudential Reinsurance, Signet Star Reinsurance and SCOR Reinsurance Company.

Mr. Bear recently moderated a panel on "Risk Load, Profitability Measures, and Enterprise Risk Management" at the 2005 CAS Seminar on Reinsurance. He has also authored a discussion of Rodney Kreps' paper on "Riskiness Leverage Models" (to be published in the 2005 CAS Proceedings and presented at the CAS Spring 2006 meeting).

Mr. Bear's service to the actuarial profession has included terms as Chairperson of the RAA Actuarial Committee and as President of Casualty Actuaries in Reinsurance. He has earned MS degrees in both theoretical and applied mathematics, as well as in economic systems. Additional information may be found on his website, www.rabsolutions.net. ▼

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

Robert K. Burgess

Robert Burgess is an attorney with over 30 years' experience in a wide range of legal and business matters, including insurance and reinsurance.

Mr. Burgess began his legal career with the law firm of Latham & Watkins, following graduation from Northwestern University School of Law in 1973. As an associate, he gained extensive experience in corporate, securities, tax, government contracts, litigation and general business law issues. As the firm expanded, he moved to Washington, D.C., where he became a partner in 1981, and later Chicago, and began to focus his practice on general corporate counseling and in the areas of securities, financings and mergers and acquisitions for a number of corporate and investment banking clients.

At various times, Mr. Burgess served as principal outside corporate counsel to several large clients, including Sears, Roebuck and Co., Midway Airlines, Inc., Playboy Enterprises, Inc., Owens-Illinois, Inc., Libbey, Inc., Health Care and Retirement Corporation, Idex Corporation and American Re Corporation. In addition to his transactional work, Mr. Burgess served as an adviser concerning a wide range of business and litigation matters, including insurance coverage and policy interpretation issues.

Mr. Burgess also represented Kohlberg Kravis Roberts & Co. in connection with a large number of leveraged buy-out transactions and related financings. In 1992, he advised KKR with respect to its acquisition of American Re-Insurance Company from Aetna Life & Casualty. He subsequently represented AmRe in connection with the initial public offering of its common stock in 1993.

In 1995, Mr. Burgess joined American Re, where he served as Executive Vice President, General Counsel and Secretary and as a member of its executive management group. He held the same positions in, and was a member of the Boards of Directors of, AmRe's insurance and reinsurance subsidiaries, including American Re-Insurance Company and American Alternative Insurance Company. As the chief legal officer of these companies, Mr. Burgess was extensively involved in many of their litigation and arbitration matters. He also had executive management oversight responsibility for AmRe's Claims, Internal Audit, Strategic Investments, Property and Facilities, Corporate Communications and Investor Relations, and Human Resources Divisions.

In addition to his law degree, Mr. Burgess has an undergraduate degree in business and accounting and is a Certified Public Accountant.

Robert K. Burgess

W. Lockwood Burt

Since 1980, Lockwood (Locke) Burt has been President of Ormond Re Group, Inc. and its subsidiaries Burt and Scheld Facultative Corporation, Ormond Insurance and Reinsurance Management Services, and W.J. Burt and Associates. Burt and Scheld Facultative Corporation underwrites property facultative reinsurance on behalf of Liberty Mutual Insurance Company and Employers Mutual Casualty Insurance Company. Ormond Insurance and Reinsurance Management Services performs runoff services, collection services, underwriting reviews, and claims and accounting work for insurance and reinsurance companies as well as state insurance departments. W.J. Burt and Associates acts as a reinsurance intermediary.

W. Lockwood Burt

Mr. Burt also owns BKS General Agency which operates as a wholesaler of primary insurance products in Florida and is President of Security First Insurance Company. Security First was formed in April 2005 to write homeowners insurance in Florida.

He has had extensive experience with commutations, having successfully completed the voluntary liquidation of the Northeastern Insurance Company of Hartford and several syndicates on the New York Insurance Exchange. In addition, Mr. Burt had extensive experience in crop hail insurance and reinsurance prior to selling Ormond Re's crop hail operation to The Hartford in 1993.

One unique aspect of Mr. Burt's career is his service as a member of the Florida Senate for 11 years, 1991 to 2002. His service included terms as Republican Majority Leader and Chairman of the Appropriations Committee. This experience gave him an intimate knowledge of Florida's regulatory and political environment.

Mr. Burt has a Bachelor of Science Degree with a major in Business Administration and a Masters Degree in Business Administration from Northwestern University in Chicago. He also has a Juris Doctor degree from Loyola University in Chicago. He is a member of the Florida and Illinois bar, a licensed insurance agent and reinsurance broker in New York, and former President of the Intermediaries and Reinsurance Underwriters Association.

CONTINUED ON PAGE 24

Richard C. Franklin

Susan E. Grondine

John M. Kwaak

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

CONTINUED FROM PAGE 23

Richard C. Franklin

Richard Franklin is a property and casualty insurance and reinsurance professional with experience developing and managing U.S. personal and commercial lines business for major insurers. His primary strengths include business analysis, underwriting, marketing, producer management, regulatory services and operations management. His experience includes both admitted and non-admitted markets.

Mr. Franklin was Chief Underwriting Officer for 10 years with a property and casualty insurer having $2+ billion of commercial lines insurance. Major lines include property, liability, automobile, workers compensation, D&O, and E&O. His expertise includes primary and excess, self-insured retentions, large deductibles, captives, managing general agencies and program business. In addition to underwriting, his experience includes business development responsibilities of research, and new product development.

His regulatory experience spans 25 years and includes producer and company licensing, filing, compliance, market conduct and underwriting audits. He was involved for 15 years with developing and negotiating company and industry positions in response to changes in legislation and regulation at the Federal and state levels.

Mr. Franklin's business management experience includes casualty manager of the New York City branch, Regional Manager for Southeast region personal and commercial lines, Chief Operating Officer of the farm insurance operations, Worker's Compensation product line officer, general manager of professional risk insurance, and Senior Vice President commercial insurance services.

He served as President of the CIGNA's property and casualty insurance companies from 1992 to 1999 and of ACE INA Excess & Surplus Lines Brokers from 1992 to 2004. He was a member of the Board of Directors of CIGNA and subsequently ACE Insurance Companies from 1992 to 2004. He also served on the Board of Directors of ACE Tempest Re USA from 2000 to 2004.

Mr. Franklin received a Bachelor of Science degree in business from the University of Delaware in 1970 and currently resides in the suburbs of Philadelphia, Pennsylvania. ▼

Susan E. Grondine

Susan Grondine is Senior Vice President and Counsel with Horizon Management Group, LLC, a subsidiary of The Hartford Financial Services Group, responsible for managing the discontinued operations of The Hartford. She provides legal counsel to this run-off group, which include excess and surplus lines insurance company, First State Insurance Company, and two reinsurance companies, New England Reinsurance Corporation and HartRe Company.

Ms. Grondine has been involved in over 100 arbitrations and concentrates on a variety of insurance and reinsurance issues impacting ceded/assumed claims, commutations, statutory regulation, liquidation and insolvency disputes pool/MGA/TPA managed business and alternative risk/finite products.

Prior to joining The Hartford in 1995, Ms. Grondine was counsel to Liberty Mutual Insurance Company where she worked with clients through the Home Office Legal Department and later the Environmental Department regarding workers' compensation programs, property and casualty claims and underwriting issues, first and third party liability claims, and environmental claims coverage issues.

Ms. Grondine is a graduate of Boston College and Boston University School of Law. She has been a member of the ABA's Corporate In-House Counsel Committee for the Young Lawyers Division and served as co-chair and chair of that group. She is a past member of the board of directors of the Boston Bar Association and Volunteer Lawyers Project, is currently serving on the Ethics Committee of ARIAS•U.S., and is a member of ARIAS (UK). She is a Board Member of The Esplanade Association of Boston and serves as its Treasurer. ▼

John M. Kwaak

John Kwaak has been involved in the insurance and reinsurance industry for over 40 years, starting as an underwriter with the Travelers Insurance Company and moving to primary broking with Marsh & McLennan for eleven years, before transferring to Guy Carpenter & Company for five years. At Guy Carpenter, he was involved with both treaty and facultative business, as well as facultative automatics.

With respect to the primary side, he placed the working covers for Fortune 500 companies on a worldwide basis, including

their international operations and offshore facilities. Those were all casualty coverages; he also handled marine and aviation, fidelity and surety, professional liability, and the first $100 Million Dollar umbrella placement. During this placement, he entered the facultative reinsurance arena.

In 1977, he joined O'Connor & Associates as Executive Vice President and Chief Operating Officer and expanded it to 175 people with four broking offices and one in-house underwriting facility. This facility was capable of writing both facultative and treaty business. As president of the organization, he placed the retrocessional programs behind both covers.

Since the late 1970's, Mr. Kwaak has been involved with the captive reinsurance marketplace in both helping to establish captives and placing reinsurance for them. In addition, he has been involved with MGA's since the early 1980"s and continues to be heavily involved. This includes finding the policy issuing company, placing the reinsurance, and helping to choose TPA's for the business.

In 1986, Mr. Kwaak joined Cole Booth Potter Seal and was involved in the run-off of the Booth Potter Seal in-house underwriting facility. He also supervised the facultative operation, in addition to his other duties.

From 1989 until 1997, when he joined Median Re as President, he was involved with other intermediaries in senior positions, placing admitted and non-admitted program business. He also concentrated heavily in the excess and surplus lines arena. Median Re is a fully licensed operating intermediary.

Denis W. Loring

Denis Loring has more than 35 years of experience in the insurance and reinsurance industries. He is currently a Senior Vice President with RGA Reinsurance Company, the second-largest life reinsurer in the United States. His specialties include financial reinsurance, asset-intensive reinsurance, and London market accident and health business.

Mr. Loring received his bachelor's degree from Harvard College and his master's from MIT, both in mathematics. He joined the John Hancock actuarial student program in 1971, attaining his Fellowship in the Society of Actuaries in five years. In 1981 he moved to the Equitable Life Assurance Society, where he founded and led the Reinsurance Department. His responsibilities included all of Equitable's ceded reinsurance, the reinsurance assumed line of business, and building the largest financial reinsurance program in the history of life insurance.

Mr. Loring left the Equitable in 1998 to join RGA/Swiss Financial Group, a reinsurance intermediary. Two years later, RGA bought out the Swiss and the group was merged into RGA as the Financial Markets Division. The intermediary firm RGA Financial Group exists as well, with Mr. Loring as Executive Vice President.

At RGA, Mr. Loring is active in a number of reinsurance industry organizations. He has twice served on the governing council of the Reinsurance Section of the Society of Actuaries, including as its Chair. He is on the Life Reinsurance Committee of the RAA, also having served as its Chair, and the Reinsurance Committee of the ACLI. For several years, he has taught the life reinsurance component of the RAA "Re Basics" course. He has taught "Life Reinsurance 101" to a number of audiences, including state regulators, in-house and outside reinsurance counsel, and, pre-TRIA, officials of the Department of the Treasury. His experience as cedent, reinsurer and retrocessionnaire gives him a broad perspective on the issues confronting the reinsurance industry.

William J. Murray

William Murray began his insurance career in 1969 as a trainee in Chubb's Surety Department. After spending seven years as a surety underwriter and attending law school, he joined Chubb's General Counsel Department where he spent the remainder of his 35-year career, retiring in 2004 as Senior Vice President, Deputy General Counsel and Chief Compliance Officer.

While at Chubb, Mr. Murray represented or supervised other lawyers representing virtually all of Chubb's line departments, including all underwriting areas, claims, litigation, reinsurance, and compliance. His expertise spans all lines of business written by primary property/casualty insurance companies as well as insurance regulation, legislation, and compliance. During his career, he drafted numerous policy forms and other types of insurance documents, including reinsurance agreements for his underwriting clients and has assisted Chubb's claims departments in interpreting insurance contract language in individual claims

CONTINUED ON PAGE 26

Denis W. Loring

William J. Murray

Andrew J. Pinkes

Frank E. Raab

CONTINUED FROM PAGE 25

situations. He dealt with insurance regulators and public policymakers on a wide variety of insurance issues, from Claims-made insurance contracts to insurance marketing/antitrust issues.

Mr. Murray served for many years as Chubb's representative on the Government Affairs Committee of the American Insurance Association, and also served as chairman of that committee and various regional subcommittees. He served on the National Association of Insurance Commissioners Advisory Committee on Financial Guaranty Insurance and was chairman of the NAIC technical advisory group responsible for drafting the Property/Casualty Risk Based Capital Model Act. In addition, he served on the technical advisory group on Catastrophe Reserves. During his tenure at Chubb, Mr. Murray also had responsibility for legal matters involving the Company's extensive international operations, with particular emphasis on the E.U. and Australia.

Beyond his expertise in underwriting/legal issues, Mr. Murray also provided legal guidance to many Chubb departments on reinsurance contract and collection issues and either directly participated in, or supervised other lawyers handling a number of reinsurance arbitrations and collection disputes on behalf of Chubb companies. He has also testified as an expert witness in a wide variety of settings, including U.S. legislative bodies and courts and the High Court of Ireland in Dublin.

Mr. Murray holds a Juris Doctor degree from St. John's University Law School and is admitted to practice before the New York and Federal courts. ▼

Andrew J. Pinkes

Andrew Pinkes is an attorney; he began his insurance career with The Travelers Property Casualty Company over 14 years ago. Mr. Pinkes' insurance experience includes managing direct and assumed claims, legal, actuarial, and finance issues arising from asbestos, environmental, and other complex tort claims, including, but not limited to, construction defect, molestation, legal malpractice, lead paint, pharmaceutical products, medical devices, silica, and mold.

Mr. Pinkes' career at The Travelers included serving as General Counsel of the Company's Special Liability Group (SLG) where he supervised 35 lawyers who provided legal support to the group's claim organization, including related coverage litigation. SLG is responsible for managing the coverage and liability issues presented by asbestos, environmental, and other complex tort claims. During his tenure at The Travelers, Mr. Pinkes also led SLG as its Senior Vice President.

In 2003, Mr. Pinkes joined The Hartford Financial Services Group as Senior Vice President of the Complex Claim Group (CCG), which is responsible for over 200 claim, legal, and actuarial professionals who handle the Company's direct exposures arising out of asbestos, silica, environmental, and other complex tort claims. Currently, Mr. Pinkes is Senior Vice President and Chief Operating Officer of Heritage Holdings, which manages the Company's P&C run-off operations, including direct and assumed claim handling and reinsurance collections. ▼

Frank E. Raab

Frank Raab joined the Insurance Co, of North America after being discharged from the Navy in l946. He was in the first class of INA's training school in Philadelphia. He served in many underwriting and marketing assignments including San Francisco, Portland, Spokane and Seattle. He then served as Branch Manager in Seattle and Dallas, before becoming an Assistant Vice President in the Policyholders Division in the Home Office.

When INA purchased Pacific Employers Insurance Company in Los Angeles, Mr. Raab was appointed President and CEO of PEIC. He soon was moved to Philadelphia and became Senior Vice President in charge of underwriting worldwide; he later became President and CEO of INA.

After retiring from INA, Mr. Raab started Allianz Insurance Company in the U.S. and was Chairman, President and CEO. He purchased an all-state shell from Greyhound and started from scratch.

After retiring from Allianz, Mr. Raab has served as a consultant. He also has been involved in starting new insurance companies and risk retention groups, and serving on the boards of small insurance companies and non-insurance companies. These include: Chairman, Royal State National Insurance Company; Vice Chairman, DTRIC Insurance Company; Director, Transmarine Insurance Company (Belgium-ocean marine); Chairman, C:ALTAG Laboratories; and member of three

insurance agency advisory boards. He teaches continuing education to agents and brokers. He has served as an expert witness approximately sixty times, as an arbitrator six times and an umpire once.

Mr. Raab received his CPCU degree in 1950. He has served the CPCU Society in many regional and national offices, including being National President. He received his BS degree from the University of California and is a Rear Admiral, USNR, retired.

Former positions include Chairman, Norton Life Insurance Company; Chairman, California Union Insurance Company; Chairman, Montgomery Collins; Vice Chairman, American Nuclear Insurers. ▼

Andrew Rothseid

Andrew Rothseid is a partner in a member firm on secondment to Pricewaterhouse-Coopers LLP and based in the firm's Philadelphia office. Mr. Rothseid leads the PricewaterhouseCoopers insurance restructuring practice in the United States.

PricewaterhouseCoopers provides a broad range of services to a global insurance clientele. Drawing on it's global resources, PwC provides clients with a spectrum of offerings aimed at achieving finality and extracting value from distressed and discontinued lines of insurance and reinsurance business.

Mr. Rothseid is a graduate of the University of Pennsylvania and the Tulane University School of Law and a lawyer admitted to practice in Pennsylvania (1983) and New York (1995). After ten years as a commercial trial lawyer in Philadelphia, he held various positions at American Centennial Insurance Company, and related run off entities, from 1993 through 1998, including General Counsel and Director.

From mid-1999 through May 2002, Mr. Rothseid served as a consultant to La Fondiara SpA, charged with progressing the run off and the development of an exit strategy of La Fondiara's London market subsidiaries Dominion Insurance Company Limited and B.D.Cooke & Partners Limited. He served as Managing Director of Dominion and B.D.Cooke from January 2001 through La Fondiara's successful sale of the business in February 2002.

Mr. Rothseid speaks at various conferences on the development and implementation of exit strategies for discontinued insurance portfolio, run off management and reinsurance arbitration. He also serves as an independent arbitrator in insurance and reinsurance disputes. ▼

William Rodney Windham

W. Rodney Windham is an actuary with 36 years of reinsurance experience working for both insurance and reinsurance companies, gaining a broad background in all areas of the life reinsurance industry.

Mr. Windham graduated from the University of Alabama with B.A., M.A., and Ph.D. degrees, majoring in mathematics. He is an Associate of the Society of Actuaries and a Member of the American Academy of Actuaries. He is a member of the Reinsurance Committee of the A.C.L.I.

Mr. Windham began his insurance career with Liberty National Life Insurance Company in 1970. He managed the company's ceded life reinsurance programs, both automatic and facultative, including special catastrophe covers. He also had special responsibilities with respect to planning for and calculating the company's federal income tax liability.

In 1981, Mr. Windham was directly involved in the formation of Alabama Reassurance company, and has been Vice President and Actuary ever since. The company offers life reinsurance on various bases, including coinsurance and modified coinsurance. He has direct responsibility for all aspects of numerous indemnity reinsurance agreements. Business is obtained directly from ceding companies, through brokers or intermediaries, or as retrocessions from other reinsurance companies. Profit analysis, contract wording, and contract administration are areas under Mr. Windham's supervision. He is also directly involved in regulatory matters, working with state insurance departments on such matters as contract approvals and credits for reinsurance. He is responsible for the company's Annual Statement.

Mr. Windham has served as an arbitrator, an expert witness, and has been directly involved as a major participant in arbitrations. ▼

in focus

Andrew Rothseid

William Rodney Windhan

Companies Have Access to Experienced Professionals

The membership of ARIAS•U.S. represents a wealth of highly talented insurance professionals, with a vast range of skills, who are in varying stages of employment, self-employment, or retirement. Many have time available for full or part-time assignments.

Prospective employers who require such talent for positions or projects have a pathway to connect with available members through the ARIAS•U.S. website Employment Opportunities section. Information about how to submit a job opening is located there.

We encourage companies looking for experienced insurance help to utilize this facility. Whenever a new posting is added, a mention will be included in the website's Current News section, accessed from the home page.

ARIAS•U.S. Certified Arbitrators

as of year-end 2005

George F. Adams
Therese A. Adams
Hugh Alexander
John P. Allare
David Appel
David V. Axene
Richard S. Bakka
Nasri H. Barakat
Linda Martin Barber
Frank J. Barrett
Robert A. Bear
Clive A. R. Becker-Jones
Bernard R. Beckerlegge
David L. Beebe
Paul A. Bellone
Dennis A. Bentley
Peter H. Bickford
Katherine Lee Billingham
John W. Bing
John H. Binning
Edgar Ward Blanch Jr.
Christian H. Bouckaert
Paul D. Brink
Robert C. Bruno
George A. Budd
Janet J. Burak
Robert K. Burgess
Mary Ellen Burns
W. Lockwood (Locke) Burt
Malcolm B. Burton
James I. Cameron
David L. Cargile
Bruce A. Carlson
Joseph E. Carney
Charles W. Carrigan
John R. Cashin
Marvin J. Cashion
Robert Michael Cass
John F. Chaplin
Susan S. Claflin
Dewey P. Clark
Peter C. Clemente
Martin B. Cohen
John D. Cole
Richard E. Cole
Robert L. Comeau
William P. Condon
James P. Corcoran
Carol K. Correia
John W. Cowley
Peter L. Craft
Dale C. Crawford
John J. Cuff
Patrick B. Cummings
Cathryn A. Curia
Bina T. Dagar
Thomas M. Daly
Paul Edward Dassenko
Michael S. Davis
Donald T. DeCarlo
John B. Deiner
Howard D. Denbin
Joseph J. DeVito
John S. Diaconis
Theodor Dielmann
A.L. (Tony) DiPardo
Brian J. Donnelly
John A. Dore
Andrew Ian Douglass
James F. Dowd
John H. Drew
Clement S. Dwyer Jr.
Charles G. Ehrlich
Michael W. Elgee
Charles S. Ernst
Robert J. Federman
Paul Feldsher
Paul R. Fleischacker
Charles M. Foss
Caleb L. Fowler
William W. Fox Jr.
James (Jay) H. Frank
Richard C. Franklin
Gregg C. Frederick
Kenneth H. French
Peter Frey
Steven A. Gaines
James P. Galasso
Ronald S. Gass
Peter A. Gentile
Dennis C. Gentry
Ernest G. Georgi
William J. Gilmartin
George M. Gottheimer
Colin L. Gray
Robert B. Green
Thomas A. Greene
Susan E. Grondine
Mark S. Gurevitz
Martin D. Haber
Franklin D. Haftl
William D. Hager
Robert M. Hall
Robert F. Hall
Lawrence F. Harr
Stanley Hassan
Charles W. Havens III
Paul D. Hawksworth
Alan R. Hayes
James S. Hazard
John Robert Heath
Robert D. Holland
John H. Howard
William H. Huff III
Robert M. Huggins
Ian A. Hunter
Fritz K. Huszagh
Louis F. Iacovelli
Wendell Oliver Ingraham
Ronald A. Jacks
Robert S. James
Bonnie B. Jones
Leo J. Jordan
Jens Juul
Lydia B. Kam Lyew
Sylvia Kaminsky
Keith E. Kaplan
Jerome Karter
James Ignatius Keenan Jr.
Cecelia (Sue) Kempler
T. Richard Kennedy
Bernard A. Kesselman
James K. Killelea
William M. Kinney
Patricia M. Kirschling
Floyd H. Knowlton
Eric S. Kobrick
Klaus H. Kunze
John M. Kwaak
Anthony M. Lanzone II
Mitchell L. Lathrop
Soren N. S. Laursen
Jim Leatzow
Y. John Lee
Thomas B. Leonardi
Raymond J. Lester
Denis W. Loring
Douglas R. Maag
W. James MacGinnitie
Susan E. Mack
Peter F. Malloy
Andrew Maneval
Robert M. Mangino
Jennifer Mangino
Richard S. March
Merton E. Marks

Richard E. Marrs
Fred G. Marziano
Roderick (Rod) B. Mathews
Paul J. McGee
Thomas J. McGeough
Walter R. Milbourne
Robert B. Miller
Edwin M. Millette
Christian M. Milton
Roger M. Moak
Lawrence O. Monin
Francis A. (Frank) Montemarano
Rodney D. Moore
Claudia Backlund Morehead
Jeffrey L. Morris
Gerald F. Murray
William J. Murray
Diane M. Nergaard
Thomas R. man
David J. Nichols
Barbara Niehus
Charles L. Niles Jr.
Patrick J. O'Brien
Robert J. O'Hare Jr.
Reinhard W. Obermueller
Elliot S. Orol
James M. Oskandy
Michael W. Pado
Herbert Palmberger
Glenn R. Partridge
James J. Phair
Joseph J. Pingatore
Andrew J. Pinkes
Michael R. Pinter
Thomas A. Player
James J. Powers
George C. Pratt
Raymond L. Prosser
Robert C. Quigley
Frank E. Raab
Peter F. Reid
George M. Reider Jr.
John H. Reimer
Robert C. Reinarz
Kevin T. Riley
Timothy C. Rivers
Eileen T. Robb
David R. Robb
Debra J. Roberts
Robert Leonard Robinson
Edmond F. Rondepierre
Jonathan Rosen
Angus H. Ross
Andrew N. Rothseid
Don A. Salyer
Peter A. Scarpato
Daniel E. Schmidt IV
Jack R. Scott
Savannah Sellman
James A. Shanman
Richard M. Shaw
Radley D. Sheldrick
Richard M. Shusterman
Frederick M. Simon
Paul M. Skrtich
David W. Smith
Richard E. Smith
Richard D. Smith
David Spiegler
Walter C. Squire
Timothy W. Stalker
J. Gilbert Stallings
Paul N. Steinlage
Richard E. Stewart
Michael H. Studley
John D. Sullivan
C. David Sullivan
David A. Thirkill
Elizabeth M. Thompson
N. David Thompson
Paul C. Thomson III
John J. Tickner
Kevin J. Tierney
Harry Tipper III
Thomas M. Tobin
Michael J. Toman
David W. Tritton
William J. Trutt
Jacobus J. Van de Graaf
James D. Veach
Theodore A. Verspyck
William J. Wall
Jeremy R. Wallis
Andrew S. Walsh
Michael T. Walsh
Paul Walther
Richard G. Waterman
Barry Leigh Weissman
Alfred O. Weller
Emory L. White Jr.
Richard L. White
Charles J. Widder
William Wigmanich
W. Mark Wigmore
Michael S. Wilder
P. Jay Wilker
Eugene T. Wilkinson
William A. Wilson
W. Rodney Windham
Ronald L. Wobbeking
Eugene Wollan
James D. Yulga
Michael C. Zeller
George G. Zimmerman

ARIAS·U.S. Umpire List

The ARIAS·U.S. Umpire List is comprised of ARIAS·U.S. Certified Arbitrators who have provided the Board of Directors with satisfactory evidence of having served on at least three completed (i.e., a final award was issued) insurance or reinsurance arbitrations. The ARIAS Umpire Selection Procedure selects at random from this list. Complete information about that procedure is available on the website at www.arias-us.org.

David Appel
Richard S. Bakka
Nasri H. Barakat
Frank J. Barrett
Paul A. Bellone
Peter H. Bickford
John W. Bing
John H. Binning
Janet J. Burak
Mary Ellen Burns
Bruce A. Carlson
Robert Michael Cass
Peter C. Clemente
Dale C. Crawford
Paul Edward Dassenko
Donald T. DeCarlo
John B. Deiner
A.L. (Tony) DiPardo
John A. Dore
Robert J. Federman
Charles M. Foss
Caleb L. Fowler
James (Jay) H. Frank
Peter Frey
Ronald S. Gass
Dennis C. Gentry
William J. Gilmartin
George M. Gottheimer
Robert B. Green
Thomas A. Greene
Martin D. Haber
Franklin D. Haftl
Robert M. Hall
Robert F. Hall
Charles W. Havens III
Paul D. Hawksworth
Robert M. Huggins
Wendell Oliver Ingraham
Ronald A. Jacks
Sylvia Kaminsky
T. Richard Kennedy
Floyd H. Knowlton
Peter F. Malloy
Andrew Maneval
Robert M. Mangino
Diane M. Nergaard
Charles L. Niles Jr.
Herbert Palmberger
James J. Phair
James J. Powers
George C. Pratt
Robert C. Reinarz
Debra J. Roberts
Edmond F. Rondepierre
Daniel E. Schmidt IV
Richard D. Smith
David A. Thirkill
Elizabeth M. Thompson
N. David Thompson
Paul C. Thomson III
Thomas M. Tobin
Jeremy R. Wallis
Andrew S. Walsh
Paul Walther
Richard G. Waterman
Richard L. White
W. Mark Wigmore
Eugene T. Wilkinson
Ronald L. Wobbeking
Eugene Wollan

case notes corner

When Declaratory "Final Awards" Clash with the *Funtus Officio* Doctrine

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

Ronald S. Gass*

Ronald S. Gass

...some panels will bifurcate the arbitration so that the merits of the dispute are decided first, and depending on the ruling, a separate hearing will be held later...

It is not unusual for an arbitration award to declare the respective rights and duties of the parties without providing for a specific monetary award, essentially leaving it up to the parties to apply the panel's rulings and to determine for themselves exactly what amounts are ultimately due. In a rescission action, for example, neither party at the time of the hearing may have calculated the exact amount of premium, claims payments, and other amounts that must be reversed if such relief were granted, particularly when the accounting is complex and spans several underwriting years. To address this quantification problem, some panels will bifurcate the arbitration so that the merits of the dispute are decided first, and depending on the ruling, a separate hearing will be held later to determine the specific monetary award flowing from the panel's declaratory rulings. But declaratory awards in non-bifurcated proceedings can raise special concerns about the *functus officio* doctrine (i.e., the legal principle that arbitrators are prohibited from reconsidering or amending an award once a final decision is rendered)

A recent Illinois federal district court action involving a non-bifurcated arbitration considers some of the pitfalls of issuing a declaratory award without including a specific monetary amount and highlights the tension between the *functus officio* doctrine and the panel's ability to "clarify" or otherwise transform its declaratory award into a specific amount to be paid to the prevailing party. In this case, a reinsurer initiated an arbitration on the ground that its cedent had breached the terms of certain aggregate stop loss reinsurance contracts issued in 2000 and 2001. Following a hearing, the arbitration panel issued an award declaring that the 2000 and 2001 excess of loss treaties inured to the benefit of the aggregate stop loss treaties and defining how subject premium and subject loss should be calculated under the contracts. The panel also required the cedent to restate its past reinsurance reports consistent with the declaratory award and retained jurisdiction for 30 days "in order to clarify any issues that may arise from the wording of the Award."

In the wake of this initial "Final Award," the cedent requested that the panel issue a "clarification" confirming the cedent's understanding of the subject premium and subject loss definitions as well as its application of that interpretation to the its damages calculation, which showed that the reinsurer immediately owed it nearly $28 million. The panel declined to adopt the cedent's proposed "Amended Final Award" but issued a second "Final Award," in which it confirmed that the cedent's methodology for calculating the subject premium and subject loss was "conceptually consistent with the [first] Final Award issued by the Panel" and refused, again, to include a specific monetary amount because it expected that "the parti[e]s can determine the appropriate financial result flowing from the Award once the methodology used by [the cedent] to recast amounts due from [the reinsurer] is considered."

The cedent then petitioned the federal district court to confirm both of the panel's declaratory "Final Awards" as well as its claim, based on its interpretation of those awards, that the reinsurer owed it nearly $28 million. The reinsurer also sought confirmation but only of the first award, arguing that that one had resolved all the disputed issues between the parties, that the *functus officio* doctrine therefore applied, that the panel no longer had jurisdiction to "reconsider" its initial award, and that the second award was not part of the panel's "final judgment" and had simply "affirmed" the first one.

The court observed that the *functus officio* doctrine was jurisdictional and acknowledged that the arbitrators' authority is entirely terminated by the completion and delivery

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

of an award. It also acknowledged one "well-established" exception - that arbitrators have the authority to issue a supplemental award clarifying or explaining the original award. In this case, the court found that the second "Final Award" did clarify the first within this allowable exception and ruled that it was properly part of the panel's final decision.

Focusing next on the parties' cross-petitions to confirm the panel's Final Awards, the court addressed the cedent's contention that confirmation meant that the court could direct the reinsurer to pay the nearly $28 million calculated as being due pursuant to the panel's declaratory awards. The reinsurer objected to any such order because it claimed that the cedent had neither rendered the required restated past reports nor submitted subsequent reports consistent with the panel's initial award. Also, the cedent had failed to demonstrate that certain reinsurance funds withheld accounts had been exhausted such that the reinsurer's payment obligation was triggered under the contracts.

Observing that its function in confirming arbitration awards was "severely limited," and that it "must not review the merits of the arbitration panel's decision," the court found both awards to be "unambiguous" when they twice directed the parties to determine any amounts due in accordance with its declaratory rulings. Therefore, the order for specific monetary relief sought by the cedent would constitute a modification, not confirmation, of the awards because such relief was never expressly ordered by the panel. In short, any amounts due would have to be calculated by the parties as the panel intended.

This case raises interesting questions about how a panel ought to approach disputes when the specific economic implications of its rulings are unknown at the time the declaratory award is issued. If, as in the foregoing district court case, a declaratory "final award" is issued and the parties are ordered to sort out its financial repercussions on their own, arbitrators should be mindful that the *functus officio* doctrine could preclude further panel intervention if any subsequent awards aimed at quantifying the exact amounts due are deemed to be "modifications" of the initial award rather than strictly "clarifications." One way to avoid this quandary is to bifurcate the arbitration and ensure that the parties understand at the outset that any interim declaratory award is just the first step in the dispute resolution process and that the panel retains jurisdiction for the purpose of adjudicating the financial implications of its rulings in subsequent proceedings.

In non-bifurcated arbitrations, the choreography can be trickier, and careful case management and award drafting are critical. For example, the panel might want to have an on-the-record dialogue with the parties in advance of any award to sort out exactly what role they want the panel to play in translating declaratory rulings into a specific monetary amount. Also, the panel may need to craft provisions in its initial declaratory award to make it clear that it is not relinquishing jurisdiction over the arbitration until such time as all the economic ramifications have been definitively quantified. Such measures ought to reduce, but may not completely eliminate, the risk that subsequent panel awards intended to convert declaratory rulings into exact amounts to be paid will be challenged as modifications of a prior "final award" violating the *functus officio* doctrine.

Continental Casualty Co. v. Scandinavian Reinsurance Co., Ltd., No. 05 C 2349, 2005 U.S. Dist. LEXIS 18995 (N.D. Ill. Aug. 30, 2005).

This case raises interesting questions about how a panel ought to approach disputes when the specific economic implications of its rulings are unknown at the time the declaratory award is issued.

ARIAS U.S.

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

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

An Invitation...

The rapid growth of ARIAS·U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS·U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of December 1, 2005, ARIAS·U.S. was comprised of 466 individual members and 88 corporate memberships, totaling 901 individual members and designated corporate representatives, of which 270 are 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 the list of 70 ARIAS arbitrators who have served on at least three completed arbitrations. The procedure is free to members and non-members. It is described in detail in the Umpire Selection Procedure section of the website at www.arias-us.org.

Similarly, a random, neutral selection of all three panel members from the list of ARIAS Certified Arbitrators is offered at no cost. Details of the procedure are also available through the website.

New in 2003 was the "Search for Arbitrators" feature on the website that searches the detailed background experience of our certified arbitrators. The search results list is linked to their biographical profiles, containing 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, Puerto Rico, Palm Beach, Las Vegas, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

In March of 2006, the Society will publish Volume VII of the ARIAS·U.S. Directory, with Profiles of Certified Arbitrators. The organization also publishes the Practical Guide to Reinsurance Arbitration Procedure (2004 Revised Edition) and Guidelines for Arbitrator Conduct. These publications, as well as the Quarterly review, special member rates for conferences, and access to intensive arbitrator training, are among the benefits of membership in ARIAS.

If you are not already a member, we invite you to enjoy all ARIAS·U.S. benefits by joining. Complete information is in the membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at info@arias-us.org or 914-966-3180, ext. 116.

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

Sincerely,

Mary A. Lopatto

Chairman

Thomas L. Forsyth

President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

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

914-966-3180, ext. 116

Fax: 914-966-3264

Email: info@arias-us.org

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ FAX _____

E-MAIL ADDRESS _____

Fees and Annual Dues: Effective 2/28/2003

	INDIVIDUAL	CORPORATION & LAW FIRM
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 representatives may be designated 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.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
PO Box 9001, Mt. Vernon, NY 10552

Payment by credit card (fax or mail): Please charge my credit card:
☐AmEx ☐Visa ☐MasterCard in the amount of $_____
Account no. _____Exp. ____/____/____
Cardholder's name (please print) _____
Cardholder's address _____
Signature _____

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

ARIAS U.S. Board of Directors

Chairman
Mary A. Lopatto
LeBoeuf, Lamb, Greene & MacRae
1875 Connecticut Ave. N.W., Ste. 1200
Washington, D.C. 20009-5728
202-986-8029
Mary.Lopatto@llgm.com

President
Thomas L. Forsyth
Swiss Reinsurance America Corporation
175 King Street
Armonk, NY 10504
914-828-8660
thomas_forsyth@swissre.com

Vice President
Frank A. Lattal
ACE Ltd.
17 Woodbourne Avenue
Hamilton, HM08 Bermuda
441-299-9202
acefal@ace.bm

Vice President
Susan A. Stone
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
312-853-2177
sstone@sidley.com

Elaine Caprio Brady
Liberty Mutual Insurance Company
175 Berkeley Street
Boston, MA 02116
617-574-5923
elaine.capriobrady@libertymutual.com

George A. Cavell
American Re-Insurance Company
555 College Road East
Princeton, NJ 08543-5241
609-243-4530
gcavell@amre.com

Daniel L. FitzMaurice
Day, Berry & Howard LLP
City Place
Hartford, CT 06103
860-275-0181
dlfitzmaurice@dbh.com

Steven J. Richardson
Equitas Limited
33 St. Mary Axe
London, EC3A 8LL England
44 20 7342 2370
steve.richardson@equitas.co.uk

David R. Robb
The Hartford Financial Services Group, Inc.
Hartford Plaza H.O.-1
Hartford, CT 06115
860-547-4828
drobb@thehartford.com

Chairman Emeritus
T. Richard Kennedy

Directors Emeritus
Charles M. Foss
Mark S. Gurevitz
Charles W. Havens, III
Ronald A. Jacks
Susan E. Mack
Robert M. Mangino
Edmond F. Rondepierre
Daniel E. Schmidt, IV

Administration

Treasurer
Richard L. White
Integrity Insurance Company
49 East Midland Avenue
Paramus, NJ 07652
201-261-8938
deputy@iicil.org

Executive Director
Corporate Secretary
William H. Yankus
Vice President
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180, ext. 116
wyankus@cinn.com

Carole Haarmann Acunto
Executive Vice President & CFO
CINN Worldwide, Inc.
P.O. Box 9001
Mt. Vernon, NY 10552
914-966-3180, ext. 120
cha@cinn.com

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552