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Building on the Beginnings: Re-Visiting the Formation of ARIAS•U.S.

INSIDE...

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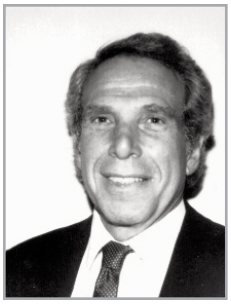

Eugene Wollan

editor's comments

We have a very special lead article in this issue. Susan Mack, one of the founding Directors of our organization, has given us the benefit of her ruminations on the origin and future of ARIAS • US. We are grateful for this unique perspective.

Many of us have been or will be involved in UK arbitrations. One consequence of these experiences, is, of course, to verify the accuracy of G. B. Shaw's observation that the US and Great Britain are two nations separated by a common language. Another consequence is exposure to the ways in which arbitrations in the Mother Country resemble, and differ from, arbitrations here in the Colonies. To cast additional light on this subject, Jonathan Sacher and David Parker have given us a very helpful discussion of the powers of arbitrators under UK law.

How many of you have given much thought to the situation in which an arbitration agreement is incorporated by reference into another document? Well, Tom Newman and Kimball Ann Lane have, and we now have the benefit of their study of this uncommon but important situation.

My contribution this time is a brief dissertation on hidden meanings. It should by now be no surprise that I am somewhat obsessed by language and semantics.

Handouts prepared for the ARIAS Conferences have proved to be an excellent source of material for publication to the wider audience that (we hope) will read this and other issues. This is, however, a limited source, and we urge all readers to consider the satisfaction and prestige that accompany publication in the ARIAS Quarterly, even if the origin of the article is not a meeting handout.

We wish all our readers a happy and healthy holiday season.

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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 ewollan@moundcotton.com .

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

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feature

Building on the Beginnings: Re-Visiting the Formation of ARIAS•U.S.


Susan E. Mack

Susan E. Mack

Court Reporter: Since this Organizational Meeting is taking place by teleconference, it's important that everyone identify themselves before speaking.

Arbitrator 1: This is John Doe, arbitrator appointed by the petitioner.

Arbitrator 2: This is Sam Smith, arbitrator appointed by the respondent.

Umpire: This is Susan Mack, the umpire. I'm the only friendly female voice on the phone, and I'm sure you'll be able to tell who I am.

Founding Board members (L-R), Front Row: Robert M. Mangino, Edmond F. Rondepierre, T. Richard Kennedy, Susan E. Mack.

Back Row: Charles M. Foss, Mark S. Gurevitz, Charles W. Havens III, Ronald A. Jacks, Daniel E. Schmidt, IV

Susan E. Mack was one of the founding directors of ARIAS•U.S. in 1994. She is an ARIAS•U.S. Certified Arbitrator and Qualified Mediator.)

As an umpire (and party-appointed arbitrator) involved in adjudicating reinsurance and insurance disputes, I've experienced this exchange several time over the years in telephonic hearings. I am often reminded of these exchanges when friends and acquaintances ask me what it was like to be the only female director among the original nine.

Certainly, 1994 was a different period in the history of ARIAS•U.S. from today, when both the Chairman and the President of the organization are women. As in the example of the teleconference, there was the feeling of being distinctive. And, in the context of the founding Board, being the only woman director mattered to me and to my few female industry colleagues. I was of the personal conviction that what I contributed, what I achieved, and what difference I made to the society would as identifiable as my voice on the teleconference. I viewed my contributions as important indicia of how other diverse directors would be welcomed and perceived in the future.

Until 1994, it was harder in corporate legal and reinsurance circles to be judged by the same criteria as my male counterparts. On the whole, I believed myself to be fairly treated at Aetna, where I was Head Reinsurance Counsel, However, I do have vivid memories of an early meeting in which, as a newly hired corporate lawyer, I was asked to list all my qualifications and credentials, while a male peer hired at the same time achieved credibility just by walking into the conference room. Certainly, in 1994, fewer women attained both prominence and parity in the reinsurance and insurance industries. But I am proud to say that, while there was a cognizable difference being a woman among the ARIAS•U.S. directors, there was absolutely no difference in the directors' collegiality or productivity in working together on the original Board.

Two years short of twenty since the formation of ARIAS•U.S., the seminal characteristics of the organization remain collaboration and dedication to continuous improvement. The focus of this article is to trace these principles back to the organization's beginnings. Additionally,

looking at ARIAS•U.S. today, certain hallmarks of the organization have developed that set us apart from other alternative dispute resolution groups. These are:

- A **high degree of penetration** into the reinsurance market, to the extent that both ceding insurers and reinsurers look to the society first for assistance in resolving their disputes;
- Recognition of **the value of certification as the "gold standard"** to be used when selecting arbitrators, umpires, and mediators;
- Realization of the **continued importance of growing gender diversity** among the certified arbitrators, umpires, and mediators;
- An **enhanced focus on ethical standards** for use in alternative dispute resolution; and
- A **willingness not only to embrace necessary change, but to re-visit the organization's offerings to meet the changing needs** of both the reinsurance/insurance industries and alternative dispute resolution practice.

I. The Beginnings: The Focus of the Founding Directors

As many of us will recall, 1994 followed a period marked by the development of asbestos, pollution, and toxic tort claims ceded to reinsurers. This burgeoning claim development was accompanied by the decision of many companies to cease active underwriting and run off their businesses. These factors led to an exponential increase in the number and complexity of disputes between cedents and their reinsurers. Since no existing U.S. arbitration society was dedicated to meeting the needs of both reinsurers and insurers on an objective basis, a working group was convened in 1992 and worked for two years to address the needs of the arbitral process in the reinsurance dispute resolution space.

By 1994, the original Board came together. The identities of the founding directors and their company/firm affiliations at that time were: (a) as cedents' representatives, Mark S. Gurevitz of the Hartford, Charles M. Foss of Travelers, and Susan E. Mack of Aetna; (b) as reinsurers' representatives Daniel E. Schmidt IV of Sorema NA Reinsurance Company, Edmond F. Rondepierre of General Re, and Robert M. Mangino of North American Reinsurance Corporation, and (c) as law firm representatives, T. Richard Kennedy of Werner and Kennedy, Ronald A. Jacks of Mayer, Brown and Platt, and Charles W. Havens III of LeBoeuf, Lamb, Green & MacRae.

The directors were unanimous in deciding two bedrock principles of ARIAS•U.S. First, as today, the aim was to remain an objective forum to which both parties to a reinsurance dispute (and their respective counsel) would have ready and equal access. Some of our number had noted that the only commonly used reinsurance arbitrator list was promulgated by the Reinsurance Association of America, a group whose membership was confined to reinsurers. Accordingly, the original article VI, section 1, which has remained constant over time, reads:

> The property, affairs, business and concerns of The Society shall be vested in a Board of Directors, consisting of nine directors. Three shall be current or former officers or employees of ceding insurers, three shall be current or former officers of professional reinsurers and three shall be current or former partners in private law practice.

Second, a common understanding among the founding directors was that we would veer away from discussion and intervention into the actual substance of reinsurance disputes in order to better develop premier process and procedures. Again, similar to the objectives within the current ARIAS•U.S. bylaws, prime among the goals of the original directors were:

(a) To promote the integrity of the arbitration process in insurance and reinsurance disputes;

(b) To promote just awards in accordance with industry practices and procedures; and

...

(f) To foster the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and just manner.

In the then highly charged atmosphere between ceding insurers and reinsurers which led to sharply divergent views about such issues as recoverability of expenses above limits in facultative certificates, the appropriate scope for aggregation and accumulation of latent injury/damage, and the recoverability of declaratory judgment expenses, this view helped the society to be viewed as even-handed in its treatment of both parties to a reinsurance contract. Even more importantly, by the end of the first decade of the existence of ARIAS•U.S., focus on procedural integrity, rather than substance, had led to these achievements:

- Development and distribution of important (and importantly non-partisan) procedural forms, such as umpire questionnaires, hold harmless agreements, and confidentiality agreements;
- Publication of the *ARIAS•U.S. Practical Guide to Arbitration Procedure*, providing general practice pointers for all stages of the arbitration proceeding;
- Development of reinsurance industry workshops and the *ARIAS•U.S. Quarterly*, both designed to enhance the knowledge base of members;
- Promulgation of an Umpire Selection Procedure, a software program acting as a viable alternative to the traditional "name three candidates, strike two from the other's list and draw lots to decide the chosen candidate" method; and perhaps most importantly,
- Drafting and distribution of the *ARIAS•U.S. Guidelines for Arbitrator Conduct*, to provide pragmatic guidance as to the application of ethical principles in the context of a proceeding.

By contrast with these two principles, substantial debate among the founding directors preceded the third area of agreement. During the first year that the founding Board was in operation, a

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lively discussion ensued as to whether the needs of reinsurance alternative dispute resolution would be better served by (a) simply educating and providing tools to support the existing small cadre of arbitrators or, alternatively, (b) expanding the current pool of arbitrators to meet the needs of the growing number of disputants. Proponents of the former approach, including myself, pointed to the specialized nature of our industry and the fact that the then- practicing arbitrators were a known quantity, conversant with industry custom and practice. Dick Kennedy was a vocal proponent of the latter approach.

As we all know, the Board ultimately decided to encourage new entrants as reinsurance arbitration panelists, while simultaneously assuring that pre-determined standards of integrity, experience and education were met or exceeded. Accordingly, rather than simply list arbitrators who forwarded their resumes to the society and held themselves out as qualified, the members of the Board established criteria that had to be demonstrated before an individual arbitrator could be held out to our membership and other interested parties as certified by the Society.

Interestingly, within the first two years, eighteen arbitrators were listed as ARIAS•U.S. Umpires and one was a woman – Therese Arana-Adams.[2] With the ready adoption of ARIAS•U.S. as important to the reinsurance dispute resolution process, ninety-nine arbitrators in total had been granted certification by ARIAS•U.S. by March 2001. Of that number, a total of five women made the list; namely, Therese Arana-Adams, Linda Martin Barber, Mary Ellen Burns, Bonnie B. Jones, and Debra J. Roberts. This representation paved the way for growing gender diversity in today's certified lists of certified arbitrators and certified umpires. Female representation on the certified arbitrator list has risen from 5% to more than 11%.

Of the current certified arbitrator list of 243, twenty-eight are women including Ms. Barber, Ms. Burns, and Ms. Roberts. Of the current certified umpire list of fifty-six, five are women, including, again, Ms. Burns and Ms. Roberts. We, as a society, have long embraced the contributions of talented women on the ARIAS•U.S. Board, as well as women arbitration lawyers. Presumably, in the near future the proportion of women - as well as other diverse arbitrators - will expand still further so that adjudication of disputes can benefit from the perspectives of arbitrators with different backgrounds, experiences, and predilections.

Certification of an expanded group of qualified arbitrators was clearly an aim that, once agreed, became a distinguishing characteristic of the society. But, as with all other crucibles of new ideas, there were some premises that were not adopted, either in part or in whole. Early on, there was a move to develop a grievance system, whereby ARIAS•U.S. Certified Arbitrators and Umpires who arguably violated ethical standards could be held accountable for their actions. This idea did not meet with uniform approval, as concerns were raised as to the individual liability of those who agreed to be on the committee of judges and as to the limited scope of authority in instances in which not every panel member was ARIAS•U.S. certified.

Among the other concepts that remain on the drawing board to this day was the premise of a three neutral panel in lieu of the predominant system of having two party-appointed (and, to a degree, partisan) arbitrators and one neutral umpire. Again, as had occurred with the debate about whether to expand the existing arbitrator pool, there was a substantive discussion about whether the parties to a reinsurance contract would readily discard the tried-and-true method of dispute resolution by a panel where only one member was demonstrably neutral. The idea of the three neutral panel was initially raised because of the apprehension that, with two potentially partisan arbitrators, the umpire would be the only real decision-maker (particularly dangerous in the foreseeable minority of cases in which an umpire was to be decided by lot between proposed, somewhat partisan umpire candidates) It is true that certain of the original Board held the conviction that a three-neutral panel observing early cut-offs on ex parte communications would limit the possibility of overly partisan behavior. But expansion on that idea and generating its acceptance among the parties to a dispute remain for the current or perhaps a future Board.

II. Building on the Beginnings: The Hallmarks of ARIAS•U.S. in 2012

Of course, other alternative dispute resolution organizations hold educational sessions and produce quality publications. ARIAS•U.S. has, however, realized the aspirations of the original Board in two significant and distinguishing respects; namely (1) the perception in the reinsurance marketplace as being the organization of first resort for reinsurance disputes and (2) ARIAS•U.S. arbitrator or umpire certification being the gold standard of the industry for selection of panelists.

Support for these statements is extensive. First, judging from my personal experience ranging from being an "active" arbitrator before my ARIAS•U.S. certification in 2004 to the present, the ARIAS•U.S. list now appears to be the predominant source for both reinsurers and insurers when selecting arbitrators. While I recall serving with arbitrators who were not credentialed by ARIAS•U.S. in the early 2000's, I have not had that experience within the past eight years. During the same eight years, I have managed several high value reinsurance disputes in my capacity as General Counsel to two reinsurance/insurance enterprises; never has a non-ARIAS•U.S. credentialed arbitrator name been put forward. Indeed, in many instances, arbitration demands contain an enclosure containing the ARIAS•U.S. profile of the appointed ARIAS arbitrator. Second, many other organizations still only list willing arbitrators without opining as to their credentials or experience in a given range of disputes. The International Association of Insurance Receivers, for example, actually lists a disclaimer that it has not verified the credentials of those on its arbitrator list and that there may exist other qualified arbitrators

whose names have not made it to the list (see www.IAIR.org). By contrast, the ARIAS•U.S. list has historically provided and continues to provide names of individuals who have been verified by the Board as having practical arbitration experience and/or having participated in intensive workshops as well as having completed the ethics module training. Third and last, the value of the ARIAS•U.S. arbitrator credential is recognized by other alternative dispute resolution organizations. For example, the Association of Insurance and Reinsurance Run-off Companies (AIRROC) requires that their own arbitrators, in lieu of having to demonstrate substantial employment in the industry, be certified as ARIAS•U.S. arbitrators.

With respect to an enhanced focus on ethics in the pursuit of alternative dispute resolution, more recent developments, simply put, do the original Board proud. Over time, the *ARIAS•U.S. Guidelines for Arbitrator Conduct* have morphed into a comprehensive Code of Conduct, specifying that arbitrators must uphold the integrity of the arbitration process (Canon I), conduct the dispute resolution process in a fair manner and render a just decision (Canon II) and make full disclosure of any conflicts of interest (Canon IV), among other standards. While the original Board's discussion about dispute-specific grievance adjudication has never come to fruition, developments since Fourth Quarter 2011 have brought the relevance of frequently recurring ethical issues of general concern into high definition. The Ethics Discussion Committee, chaired by Eric Kobrick of AIG, was formed last year to raise the level of awareness about ethical challenges. The Committee has been charged with preparing ethics hypotheticals for the *Quarterly* as well as for debate by attendees at the ARIAS Fall and Spring Conferences.

In my opinion, the most pronounced strength of ARIAS•U.S. is the society's willingness not only to embrace necessary change, but also to re-visit the organization's offerings to meet the changing needs of both the reinsurance/insurance industries and alternative dispute resolution practice. This laudable dedication to continuous self- improvement has manifested itself most recently in the formation and operation of the ARIAS•U.S. Arbitration Task Force. Chaired by Elaine Caprio Brady, Jeffrey M. Rubin, and Daniel L. Fitzmaurice, this Task Force is charged with making a formal recommendation to the present Board as to arbitration process improvement in March 2013.

Building on the conviction of the founding Board that the best work product emanates from an even-handed perspective, the Task Force has broad-based representation from the many professionals within the reinsurance/insurance industry. The Task Force is comprised of six voting company representatives; in addition, non-voting representatives include three attorneys, three certified arbitrators, one neutral arbitration advisor and one reinsurance broker representative. This group of individuals will put their varied viewpoints to good use in considering a variety of possible improvements, including possibly re-visiting the original directors' consideration of the implementation of all-neutral panels.[3] Other initiatives for exploration may well encompass coordination into international arenas by closer interaction with AIDA, among other groups, and enhancing penetration of ARIAS•U.S. process and leadership into the insurer vs. policyholder dispute resolution process.

It is too early to determine the exact substance of the Arbitration Task Force's ultimate recommendation to the Board, but no matter what the ultimate disposition of ARIAS•U.S. current initiatives to effect meaningful change, the legacy of the founding Board clearly continues. Striving to improve ARIAS•U.S. on the basis of continual reflection and adjustment has become not just an intermittent effort, but a constant. Given that and given the rate of change in the reinsurance/insurance industry, the ability of ARIAS•U.S. to thrive is assured as the society approaches its third decade.▼

1 The author would like to express her sincere gratitude to both T. Richard Kennedy, Chairman Emeritus of ARIAS•U.S., and Elaine Caprio Brady, current ARIAS•U.S. Chairman, for their generosity in sharing their perspective on ARIAS•U.S.'s formation and its current successes and aspirations. Additionally, acknowledgement is made to an article entitled "ARIAS•U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes." That article was co- authored by Mark S. Gurevitz and T. Richard Kennedy, and appeared in the Second Quarter 2002 edition of the ARIAS•U.S. Quarterly.

2 My thanks to Bill Yankus, the Executive Director of ARIAS•U.S., who kindly has provided the statistics on the number of certified arbitrators in total at various times in the Society's history, as well as the proportion of those certified arbitrators who were women.

3 See Mission of ARIAS•U.S. Arbitration Task Force: http://www.arias-us.org/index.cfm?a=413.

In my opinion, the most pronounced strength of ARIAS•U.S. is the society's willingness not only to embrace necessary change, but also to re-visit the organization's offerings to meet the changing needs of both the reinsurance/insurance industries and alternative dispute resolution practice. This laudable dedication to continuous self-improvement has manifested itself most recently in the formation and operation of the ARIAS•U.S. Arbitration Task Force.

news and notices

ARIAS•U.S. 2012 Fall Conference and Seminars Washed and Blown Out

As Hurricane Sandy approached on Monday October 29, it became clear that few, if any, of the registrants for the Wednesday through Friday events would be able to get to the Hilton. ARIAS•U.S. notified everyone by email that the events were canceled. Once power was restored, plans for follow up began. On November 15, ARIAS•U.S. announced that a modified conference would be held on December 17. Three of the general sessions were scheduled with the original faculties, along with the Annual Meeting, luncheon, and reception. Seminar credit toward certification will be provided for this event, rather than full conference credit, since the training content is significantly less than a full conference.

ARIAS•U.S. Certified Arbitrators whose certification expires on December 31, 2012 and who had registered for the November Conference will have their certifications extended until the November Conference, so that they can fulfill the renewal requirements at the May or November conferences.

Expiring Certified Arbitrators who had planned to attend one of the October 31 seminars for renewal will be extended until the March seminars, both of which will now be held in New York on March 14. They could also receive the needed seminar credit by attending the December 17 conference.▼

Conference and Seminar Refund Plan Announced

Full refunds are being paid for both canceled events. Seminar refund checks have all been issued. Conference refunds are being integrated with registrations for the December 17 Conference. The fee of $595 is subtracted from the amount paid by each Fall Conference registrant. A check for the difference is then sent. Those who do not register for the December Conference will automatically receive a check for the full amount after registrations are closed or upon request.▼

Mark Gurevitz Named Certified Umpire

At its meeting on September 14, the ARIAS Board of Directors named Mark S. Gurevitz an ARIAS•U.S. Certified Umpire, bringing the total number of Certified Umpires to 56.▼

Susan Mack Approved as Qualified Mediator

In a vote on September 23, the ARIAS Board of Directors approved Susan E. Mack as an ARIAS-U.S. Qualified Mediator, bringing the total number Qualified Mediators to 37. Information about the Qualified Mediator Program can be found on the ARIAS•U.S. website under Programs.▼

Intensive Workshop Trains 21

On September 19, DLA Piper's New York Office was host to the 2012 ARIAS Intensive Arbitrator Training Workshop, the only such event scheduled this year.

The day-long workshop featured experienced arbitrators Paul Dassenko, Roger Moak, and Elizabeth Thompson, who provided in-depth advice about many aspects of the arbitration profession.

During the course of a fast-paced day, the twenty-one arbitrators in separate mock panels each heard three rounds of proceedings in three separate arbitration hearing rooms. The arbitrators then sat to deliberate and decide the issues, followed by a critique.▼

Education Committee Chair and ARIAS•U.S. President Mary Kay Vyskocil of Simpson Thatcher & Bartlett LLP and Charles Fortune of Day Pitney LLP led the event. DLA Piper LLP (US) attorneys handling the hearings were Aidan McCormack, Ron Lepinskas, Mark Deckman, Sarah Kutner, David Ward, Brian Seibert, and Tom Thompson.

The photo below shows all of the participants at the end of lunch, before returning to the hearing rooms.▼

feature

Arbitrators' Powers: the English Law Perspective

Jonathan Sacher
David Parker

Introduction

The availability of arbitration as a dispute resolution mechanism is dependent solely upon an agreement between contracting parties to dispense with determination by courts of issues that arise between them, in favour of the arbitration process.

Major considerations behind organisations' decisions to include an arbitration agreement in commercial contracts include not only the traditional factors of time and cost (and expertise) but also the extent to which the process offers a final and binding resolution of disputes and the extent to which it offers procedural and other advantages. Chief among an analysis of the latter is understanding the powers that an arbitrator (or an arbitration tribunal) possesses. What exactly can an arbitrator do or not do? How does an arbitrator's position compare with that of a judge?

In English arbitrations, an arbitrator's powers (and duties and obligations) derive from two sources:

1. The arbitration agreement itself; and
2. The English Arbitration Act 1996 ("the Act").

The primary basis for, and scope of, an arbitrator's power arises from the agreement itself. Contracting parties are (subject to limited exceptions) free to agree as much or as little as they want concerning how an arbitration is to be managed. If they end up in an arbitration and they wish to change their original agreement, they are free to do that too (again subject to limited exceptions), provided both parties agree.

The Act, which is 76 pages long including its schedules, was drafted with this in mind. The intent was to lay down rules, procedures, and boundaries that are to apply to arbitrations in England. The Act is a framework or skeleton that underpins all arbitrations in England. It is also a fall back, so that if companies simply agree to arbitrate and nothing more, it is the provisions of the Act that govern that arbitration. Finally, it serves as a safeguard to ensure that arbitrations proceed in a way that is considered desirable and fair by society and lawmakers.

All this is embodied in the very first section of the Act, which sets out the general principles upon which the Act is founded:[1]

(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(c) The court should not intervene except as provided in the Act.

The Act itself is structured so that there are mandatory and non-mandatory sections, dealing with, among other things, arbitrators' powers. Schedule I to the Act lists the 25 provisions that are mandatory.[2] The non-mandatory sections outnumber those that are mandatory. Some of the mandatory sections affect the power of the arbitrators but others deal with the powers of the court etc. The parties are, of course, free to agree that any non-mandatory sections will not apply (in whole or in part).

Prior to the Act being finalised, at the consultation and discussion stage, a committee was commissioned to review the proposals that were to become the Act. The Departmental Advisory Committee on Arbitration Law ("DAC") in its Report on the draft Arbitration Act provides the background as to the intention underpinning

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Jonathan Sacher

David Parker

What exactly can an arbitrator do or not do? How does an arbitrator's position compare with that of a judge?

Jonathan Sacher is a Partner and Head of Dispute Resolution at Berwin Leighton Paisner LLP, London. David Parker is a Senior Associate at the firm.

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the general principle embodied in the Act:

> *"An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be ‚for the parties to decide how their arbitration should be conducted."*[3]

In this paper, we explore the principal source of arbitrators' authority; the source of their powers and their duties and responsibilities; and the ballpark within which they must remain. We do that by looking at a number of mandatory, non-mandatory, and indeed English law principles that are not encompassed by the Act itself.

Reference is made, where applicable, to relevant parts of the ARIAS UK Arbitration Rules ("the ARIAS Rules"), which parties sometimes elect to govern the arbitration clauses in reinsurance contracts in England. Of course, the ARIAS Rules cannot trump the mandatory provisions of the Act but are designed to offer a sensible, practical route through the non-mandatory ones. We discuss below some examples of the mandatory and non-mandatory provisions of the Act.

General duty of tribunals (Mandatory)

General duties, with which arbitrators must comply,[4] are imposed upon arbitrators and tribunals by the Act. Unsurprisingly, the section concerned is mandatory, the DAC suggesting that they *"failed to see how a proceeding which departed from the stipulated duties could properly be described as an arbitration..."*

The general duties are:

> (1) The tribunal shall -
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

The ARIAS Rules reinforce the Act, providing that the tribunal must act fairly and impartially as between parties, give parties reasonable opportunity to put forward their case, and ensure suitable procedures are in place to avoid unnecessary delay or expense.

There are various other mandatory provisions that are not discussed here.

Procedural and evidential matters (Non-mandatory)

We now turn to some of the non-mandatory provisions of the Act. The Act lists various procedural and evidential matters and gives the tribunal the widest possible discretion as to how these matters are to be managed.[5] The parties are free to agree otherwise, as this section is non-mandatory.

The list of matters is not exhaustive and is designed to *"help[.] the Tribunal (and indeed the parties) to choose how best to proceed, untrammelled by technical or formalistic rules..."*[6]

Procedural and substantive issues are covered, ranging from the language in which the arbitration is to be conducted to what form (if any) statements of case and/or disclosure is to take.

Perhaps one of the most striking examples of the wide discretion that English tribunals have concerns the issue of the substantive determination of the dispute.

Most would consider that holding an oral hearing would be fundamental and any failure to do so, absent express consent from the arbitration parties, would constitute an abuse of process, rendering an arbitrator's decision, effectively, ultra vires. The contrary, however, has been found to be the case in England.[7] Indeed, ARIAS Rule 11.3 provides that the parties may agree in writing for the tribunal to proceed to an award on the basis of documents alone.

ARIAS Rule 9 provides the tribunal with a wide discretion to make such orders and directions as it sees fit in light of its general duties. Rules 12 and 13 provide further detail as to specifics (such as use of witness evidence, form of pleadings, and disclosure) that mirror the powers afforded to the tribunal by the Act. Parties conducting an arbitration subject to the ARIAS Rules should therefore rely upon the procedural rules set out at Rules 12 and 13 that correspond to the matters detailed at section 34 of the Act.[8]

Confidentiality

The DAC took the decision not to include specific provisions to deal with confidentiality in the Acts. The decision caused a degree of controversy; it has been described as *"an extremely serious omission"*.[9]

Despite the absence of a mandatory provision in the Act, however, there is no doubt that English arbitrations are confidential unless the parties agree otherwise. The right to confidentiality stems from an implied term of contract between the parties, which the Courts are willing to enforce where necessary[10]. The English courts have been called on to consider the nature and scope of the duty of confidentiality and found:

> *"...there is... an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration..."*[11]

It is also clear that an English tribunal has no power to make directions that would breach the parties' rights to confidentiality:

> *"The formulation of the implied obligation is plainly influenced by the English rule in court proceedings... that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed... Breach of the rule of court is a contempt, but the court has a power to give permission for the document to be used, particularly when it is in the public interest."*[12]

The tribunal does, however, have the power to determine the scope of the obligation of confidentiality.

ARIAS Rule 13.1.4 expressly provides the tribunal with the power to require suitable undertakings from the parties that the proceedings will remain confidential, whilst Rule 11.5 provides that all meetings and hearings are private and confidential as between the parties.

Punitive Damages

Punitive damages are not available in English court actions. The Act makes no provision for an award for punitive damages and, absent agreement between the parties to the contrary[13], an arbitrator does not have the power to award punitive damages.

Parties engaged in arbitration subject to the ARIAS Rules should note that rule 14.2.2 specifically prohibits a tribunal from awarding punitive damages.

Costs

Subject to any contrary agreement between the parties, an English arbitral tribunal can make costs awards.[14]

"Costs" means:

> *"(a) the arbitrators' fees and expenses;*
>
> *(b) the fees and expenses of any arbitral institution concerned, and*
>
> *(c) the legal or other costs of the parties."*[15]

Generally, the winner will be awarded its costs (the loser typically having to pay approximately 75% of the winner's total costs bill[16]).

Again, subject to any agreement between the parties, a tribunal may direct that recoverable costs be limited to a specified sum[17].

The provisions as to costs are mirrored at Rule 18 of the ARIAS Rules, save that Rule 18.2 goes further by providing parties with the option to request the tribunal to assess and fix the amount of costs prior to the publication of its award.

Security for Costs

Similarly, provided the parties have not made agreement to the contrary, a tribunal may order that security for costs be provided by a claimant.[18]

The power to order security for costs was introduced for the first time by the Act. Previously, a respondent could only obtain security by making an application to the court. The English courts no longer have jurisdiction to make orders for security in respect of an arbitration.[19]

Security may not be sought solely because the claimant is ordinarily resident or incorporated outside of the United Kingdom (unless the parties reach agreement to the contrary). The rules of the English courts as regards security, whilst often familiar to many arbitrators, are of no effect. Nevertheless, the primary test ordinarily applied is whether there is reasonable evidence that the Claimant will be unable to meet the Respondent's costs if successful in the arbitration.

It is often remarked that security is harder to obtain in English arbitral proceedings than before the courts, because arbitrators are reluctant to be seen to pre-judge the matters before them.

The ARIAS Rules also provide a tribunal with the power to order security for costs at Rule 13.1.8. However, a note accompanies Rule 13.1.8 stating that the provision should only be used in "*exceptional circumstances*," confirming the difficulty that a defendant will face in seeking security from a claimant. The note also refers the reader to Rule 17: Rule 17.4 provides that the tribunal may require parties to deposit sums on account of the tribunal's own costs. It is noted that it is generally appropriate to order security for the tribunal's costs.

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Reference is made, where applicable, to relevant parts of the ARIAS UK Arbitration Rules ("the ARIAS Rules"), which parties sometimes elect to govern the arbitration clauses in reinsurance contracts in England. Of course, the ARIAS Rules cannot trump the mandatory provisions of the Act but are designed to offer a sensible, practical route through the non-mandatory ones.

Any party to an arbitration can challenge an award on the basis of a serious irregularity, by application to the English court pursuant to section 68 of the Act. This section is mandatory. To be successful, the challenger must convince the court that the irregularity alleged takes the form of one or more of nine prescribed examples.

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Security for the Award

Section 39 of the Act provides the parties with the option of agreeing that the tribunal should have the power to make an order on a provisional basis, including for the payment of money between the parties. The provisional order must be subject to the tribunal's final adjudication. The Act makes it clear that this section is not only non-mandatory, but requires an active decision on the part of the parties to extend the tribunal's powers accordingly. A suitable clause must therefore be included in the written arbitration agreement should the parties wish to extend such a power to the tribunal.

The ARIAS Rules, however, expressly exclude the power of a tribunal to require a party to post security at Rule 14.2.1, unless in the case of an award enforcing a contractual obligation.

Interest

Compensatory interest is in principle available under the Act as either simple or compound interest.[20]

Again, the provision is subject to contrary agreement of the parties. An arbitral tribunal did not have jurisdiction to award compound interest, absent agreement of the parties to the contrary, prior to the Act having come into force.[21]

The ARIAS Rules make specific provision for the tribunal to award interest at Rule 16.5, following the non-mandatory provision in the Act.

Provisional awards

If the parties consent, or have made provision in the arbitration agreement, section 39 of the Act allows the tribunal to make a provisional order. This allows the tribunal to order on a provisional basis any relief it could order in a final award. Unlike final awards, and as is indicated by their name, provisional orders are not final and binding, and a final award may take account of and/or reverse a provisional order.

However, there is no real equivalent to summary judgment in arbitrations; the arbitrators' powers to make provisional awards (or awards on different issues under section 47 of the Act) do not encompass summary judgment.

Rules 16.6 to 16.11.2 of the ARIAS Rules explicitly permit provisional orders, so there is no need to rely on the Act in this regard.

At this point, it is also worth mentioning that prior to the Act coming into force, it was the case that a party could obtain summary judgment in court on the basis that there was no genuine issue to refer to arbitration. This is no longer an option.[22]

Serious Irregularity

Any party to an arbitration can challenge an award on the basis of a serious irregularity, by application to the English court pursuant to section 68 of the Act. This section is mandatory. To be successful, the challenger must convince the court that the irregularity alleged takes the form of one or more of nine prescribed examples.[23]

All of the examples set out in the Act focus upon deviation from the procedure, rules, or form of proceeding the parties signed up for (taking into account the role the Act plays in 'filling out' the arbitration agreement where it is silent); for example, *"failure to comply with the requirements as to the form of the award."*

An applicant who alleges the award was reached following a serious irregularity is, in effect, seeking the court's assistance to remedy a breach of the method of dispute resolution he contracted for. The DAC provided a summary of its views on the matter:[24]

> *"An award of a tribunal purporting to decide the rights or obligations of a person who has not given that tribunal jurisdiction so to act simply cannot stand..."*

In any event, the courts have shown reluctance to intervene. The Commercial division of the High Court has recently reiterated its position[25]

> *"an applicant under s.68 has a high hurdle to overcome: there will only be a serious irregularity if what has occurred is far removed from what could reasonably be expected from the arbitral process..."*

At first blush, the availability of a challenge based on procedural irregularity might be seen as a fetter to arbitrators' powers; despite agreement or the wording of the Act, a party will always be able to construct a

case that an arbitrator's substantive or procedural handling of the case made it susceptible to challenge.

However, this is not, in fact, a fetter or erosion of arbitrators' power at all, but a means of providing checks and balances to ensure the proper exercise of the jurisdiction the parties have afforded to the arbitral tribunal by way of their agreement:

> *"... the Court should be able to correct serious failure [sic.] to comply with the 'due process' of arbitral proceedings."*[26]

Backing this up is the requirement that the court should, on finding a serious irregularity, remit the matter to the arbitral tribunal unless it would be inappropriate to do so.[27]

Appeal on a Point of Law

The ARIAS Rules are silent as to appeals to the High Court. It follows that section 69 of the Act, which permits appeals on points of law and is non-mandatory, would apply. The right of appeal as a point of law can therefore be excluded by agreement. Also, agreement between the parties to dispense with a reasoned award will effectively mean no right of appeal on a point of law.

ARIAS Rule 16.11 does, however, permit the tribunal, upon the application of either party within 28 days of the award, to correct any clerical mistakes, or accidental omissions, and remove any ambiguity. Further, and perhaps most helpfully, to:

> *"make an additional award in respect of any matter (including interest or costs) which was presented to the tribunal but omitted from the award"*

The Rules provide a large degree of opportunity for an award to be corrected or for an additional award to be made if the original award fails to deal with a point that had been argued before the tribunal. The provisions of the Act in respect of appeals are unaffected by the ARIAS Rules.

Conclusion

The Act contains a number of mandatory provisions that furnish a tribunal with various powers relevant to the exercise of their task. The remainder of the Act contains non-mandatory provisions. Many of the powers of an arbitral tribunal, both substantive and procedural, may be extended or limited by agreement between the parties, whether that involves a bespoke agreement, or adoption of arbitration rules, for example the ARIAS Rules. The basic premise of the Act is that non-mandatory sections will only apply if the parties make no agreement otherwise, leaving great scope for the parties to determine the nature of their dispute resolution process.

1 Practitioners familiar with the ARIAS UK Arbitration Rules will note that the same principles are restated on the covering page to the Rules.
2 The mandatory sections are: ss. 9 to 11 (stay of proceedings), s.12 (power of court to extend time limits), s.13 (application of Limitation Acts), s.24 (power of court to remove arbitrator), s.26(1) (death of arbitrator), s.28 (liability of parties for fees and expenses), s.29 (immunity of arbitrator), s.31 (objection to substantive jurisdiction), s.32 (determination of preliminary point of jurisdiction), s.33 (general duty of tribunal), s. 37(2) (expenses of arbitrator), s.40 (duty of parties), s.43 (securing attendance of witnesses), s.56 (without award in case of non-payment), s.60 (agreements to pay costs in any event), s.66 (enforcement of award), s.67, 68, 70 and 71 (challenging the award), s.72 (rights of persons not taking part), s.73 (loss of right to object), 5.74 (immunity of arbitral institutions) and 5.75 (charge to secure payment of solicitors' costs).
3 Report on the Arbitration Bill, February 1996 at para 19.
4 Section 33 of the Act.
5 Section 34(1) of the Act.
6 DAC report para 166.
7 O'Donoghue v Enterprise Inns Plc [2008] EWHC 2273 (Ch).
8 Ibid., para 17.
9 M. Rutherford and J. Sims, *Arbitration Act 1996: A Practical Guide* (1996) at page 22.
10 For example, *see Dolling-Baker v Merrett and Others* [1990] 1 WLR 1205.
11 *Emmett v Michael Wilson & Partners* [2008] EWCA Civ 184, paragraph 81, recently followed in Milsom and others v Ablyazov [2011] EWHC 955 (Ch).
12 *Emmett v Michael Wilson & Partners at* para [83].
13 The DAC considered that the parties could agree upon remedies that are not necessarily limited to those available at Court: thus, punitive damages are theoretically available should the parties wish to include them in their agreement; *Report on the Arbitration Bill*, February 1996 at para 234.
14 Section 61 of the Act.
15 Ibid., s. 59(1).
16 Ibid., s.61(2).
17 Ibid., s.65.
18 Ibid., s.38(3).
19 Although security may still be ordered in relation to an application put before the court in respect of an arbitration.
20 The Act, s.49.
21 *Report on the Arbitration Bill*, February 1996 at para 235.
22 *Halki v Sopex Oils Ltd* [1997] 1 WLR 1268.
23 Section 68(2) of the Act.
24 *Report on the Arbitration Bill*, February 1996 at para 279.
25 *Latvian Shipping Company v The Russian People's Insurance Company (Rosno) Open Ended Joint Stock Company[2012]* EWHC 1412 (Comm), at para 30.
26 Ibid., at 282.
27 The Act, s.68 (3).

The ARIAS Rules are silent as to appeals to the High Court. It follows that section 69 of the Act, which permits appeals on points of law and is non-mandatory, would apply. The right of appeal as a point of law can therefore be excluded by agreement. Also, agreement between the parties to dispense with a reasoned award will effectively mean no right of appeal on a point of law.

members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email that have come in during the last quarter, so that members can adjust their address directories.

Although we will continue to highlight changes and moves, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us at director@arias-us.org.

Do not forget to notify us when your address changes. Also, **if we missed your change below, please let us know**, so that it can be included in the next Quarterly. ▼

Recent Moves and Announcements

Christine G. Russell has moved to Brandywine Group of Insurance and Reinsurance Companies, where she is SVP Reinsurance. Her contact information is as follows: 30 S. 17th St., Suite 700, Philadelphia, PA 19103, phone 215-854-8193, cell 267-386-6971, email christine.russell@brandywineholdings.com .

Kieran Pillion is now "Of Counsel" at Smith, Stratton, Wise, Heher and Brennan LLP, 2 Research Way, Princeton, N.J. 08540, phone 609-987-6679, email kpillion@smithstratton.com .

David L. Pitchford's address has changed to Pitchford Law Group LLC, 1700 Broadway, 41st Floor, New York, NY 10019. There has been no change to his email, website, or telephone.

Merton E. Marks can now be found at Hymson, Goldstein & Pantilliat, PLLC, 12467 North Scottsdale Road, Suite 300, Scottsdale, Arizona 85254, phone 480-991-9077, fax 480-443-8854, email MMarks@legalcounselors.com .

G. Kathleen Karnell is now located at Silvermine Resolutions, LLC, 304 Main Street, #396, Norwalk, CT 06851, phone 203-945-7070, email kkarnell.smr@ gmail.com .

Norwalk is becoming the go-to city. **William Bonnell** and **Bruce C. Shulan** have a new address there, specifically, The Princeton Partnership, LLC, 40 Richards Avenue, Third Floor, Norwalk, CT 06854. Phone, fax, and email are unchanged.

Charles F. Barr's new address is 14 Hudson Street, #32, Bethel, CT 06801, phone 203-733-8221, email cbarr8528@aol.com .

Robert Nason can be contacted now at Nason Audit and Client Evaluation (NACE LLC), 114 Calle Norte, St. Augustine, FL 32095, phone 904-826-1513, cell 203-305-2515.

Gregg Frederick is now at Legion Insurance Company (In Liquidation), Three Parkway, 1601 Cherry Street, Suite 400, Philadelphia, PA 19102. All other business information remains the same.

Former ARIAS•U.S. Chairman **Mary A. Lopatto** has moved to Cozen O'Connor to be part of the Global Insurance Group in the firm's Washington office. Her new contact information is Cozen O'Connor, 1627 Eye Street NW, Suite 1100, Washington, DC 20006, phone 202-463-2502, email MLopatto@Cozen.com.▼

Email Address Changes

Susan Claflin's personal email address has changed to claflin.arbs@gmail.com. Her work email is unchanged at susan.claflin@aleagroup.com. She continues with arbitration work through Claflin Consulting Services LLC, in addition to her role as Senior Vice President, General Counsel and Corporate Secretary at Alea Group.▼

DID YOU KNOW...?

THAT THE MEMBERSHIP DIRECTORY ON THE ARIAS•U.S. WEBSITE CONTAINS COMPLETE CONTACT INFORMATION FOR ALL MEMBERS. ACCESS IS THROUGH THE "DIRECTORY" BUTTON IN THE MEMBERSHIP MENU. JUST USE YOUR EMAIL ADDRESS TO REQUEST A PASSWORD THAT WILL BE SENT TO YOUR INBOX, THEN LOG IN. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

feature

Incorporating Arbitration Agreements by Reference

Thomas R. Newman

While the enforceability of arbitration clauses in reinsurance agreements involving interstate or international commerce is governed by the Federal Arbitration Act ("FAA"),[1] state law governs the interpretation and formation of such agreements.[2] Section 2 of the FAA "preserves general principles of state contract law as rules of decision on whether the parties have entered into an agreement to arbitrate."[3]

The reinsurance contract does not have to contain an explicit arbitration clause. It may incorporate by reference an arbitration clause in another document.[4] It may even incorporate a clause from a document not yet in existence when the reinsurance contract is executed, so long as the parties' mutual intent to incorporate such a subsequently prepared document is clearly stated. Thus, "a written agreement to observe and be bound by the Charter, Rules and Regulations of the Association, and all amendments subsequently made thereto," was held to constitute a consent to be bound by arbitration procedures later adopted by the Association.[5]

Where the reinsurance agreement does not contain an arbitration clause, but refers in some manner to an arbitration clause in another document, it will be necessary to look to state law to determine the validity, meaning and effect of the incorporation language. This is one instance where the Federal Arbitration Act does not preempt state law, as it usually does;[6] rather, state law "governs whether an enforceable contract or agreement to arbitrate exists."[7]

Courts are to apply ordinary state-law principles governing the formation of contracts when deciding whether the parties agreed to arbitrate the matter in dispute.[8] "No particular 'magic' words are required to achieve incorporation."[9] It has been held that no specific word or phrase is required. It has even been held that the incorporating language does not have to mention arbitration, so long as the parties' agreement to resort to arbitration is otherwise clear.[10] A general incorporation provision will do. However, other courts disagree and follow the well-settled rule that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified."[11] Thus, at a minimum, the word "arbitration" must appear.

"As a matter of contract law, incorporation by reference is generally effective to accomplish its intended purpose where . . . the provision to which reference is made has a reasonably clear and ascertainable meaning."[12] Thus, where a construction subcontract incorporated by reference the "General Conditions" of the prime contract between the owner and the general contractor, it was held that the subcontractor could be bound to arbitrate a dispute under the arbitration clause contained in the General Conditions, even though the incorporation provision in the subcontract did not specifically mention that arbitration clause.[13]

When determining whether the parties have agreed to arbitrate, a court "cannot subject a purported arbitration agreement otherwise within the scope of the FAA and satisfying its requirements to a standard more demanding than that which [it] would apply to other agreements under the applicable state law."[14] By enacting § 2 of the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts."[15] Thus, it was held that the FAA preempts a state law requiring that there be an "express, unequivocal agreement" to arbitrate before parties would be compelled

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Thomas R. Newman

Where the reinsurance agreement does not contain an arbitration clause, but refers in some manner to an arbitration clause in another document, it will be necessary to look to state law to determine the validity, meaning and effect of the incorporation language.

Thomas R. Newman is counsel to Duane Morris LLP in its New York office and co-author of Ostrager & Newman, Handbook on Insurance Coverage Disputes (15th ed. 2011). He specializes in insurance and reinsurance coverage, arbitration, and litigation, as counsel, expert witness, and arbitrator. He is a member of the Chartered Institute of Arbitrators and LCIA.

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to arbitrate a dispute--a higher standard than that which applied to contracts generally.[16]

The naked two word phrase "Arbitration Clause" in a reinsurance slip or cover note, which has a distinct meaning within the industry and is commonly used to describe one of the provisions to be included in the final wordings (i.e., the complete agreement containing all of the terms of the reinsurance contract), has been held a sufficient written agreement to arbitrate.[17] This is so even where the "final slip included the words 'Arbitration Clause' in a laundry list of 14 'General Conditions" . . . [and] the parties agree[d] that there was no negotiation, nor for that matter the barest mention, of the arbitration provision in the parties' communications."[18]

Courts have been persuaded by expert evidence of reinsurance industry custom and practice indicating that the slip is an abbreviated reinsurance agreement that sets out in full only the most essential terms of the agreement, e.g., the parties, premiums, term, subject of the reinsurance, etc. Other general terms and conditions are merely described by their heading, e.g., "Insolvency Clause," "Arbitration Clause," "Intermediary Clause," without any text.

In Sumitomo Marine & Fire Insurance Co., Ltd. -- U.S. Branch v. Cologne Reinsurance Co. of America,[19] the New York Court of Appeals described the "swift, seemingly almost casual process of contract formation," as follows: "Typically, the details of the risk proposed to be ceded by the reinsured are circulated to possible reinsurers, who in turn indicate their willingness to accept some portion of the risk, and to be bound by their agreement to do so. In the London market -- the Mecca of the reinsurance world -- this was traditionally accomplished by the ceding company or its broker preparing a slip with brief details of the risk to be placed; the slip was then taken to prospective reinsurers who, if prepared to accept, initialed it, indicating the proportion of the risk they wanted. Under normal circumstances, the initialing of the slip constituted a binding agreement. With electronic advances, the slip has been replaced by an exchange of telephone calls or telexes, as in this case. Delivery of the original insurance policy to the reinsurer and issuance by the latter of a formal certificate of reinsurance may not occur until much later, and indeed are technically unnecessary for a binding agreement."

While the slip contemplates that it will be followed by a fully-worded reinsurance contract in which all the agreed terms are completely set out, as noted, this is not needed for a binding contract. Often, fully worded contracts or treaties take years to prepare or are not prepared at all. In the meantime, claims may be presented and disputes arise that require a dispute resolution mechanism. The slip acts in the nature of an insurance binder and when it contains the phrase "Arbitration Clause," arbitration, rather than resort to litigation, is what the parties have elected and what the courts will enforce.

When a contract contains an arbitration clause, there is a presumption of arbitrability that should not be disregarded "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[20] The presumption in favor of arbitration is so strong that we have not found a single case in which an arbitration clause, even one consisting of only a two word heading, was found too vague to be enforced.

Where the parties' agreement provided that "All disputes under this transaction shall be arbitrated in the usual manner," the court held that the clause was not too vague to be enforced. It was clear that the parties had agreed on a dispute resolution mechanism: arbitration and not litigation. The court held that this was all that was required to compel arbitration. "What the clause requires the parties in the present case to do is clear: arbitrate all disputes. They did not provide such implementing details as who the arbitrators would be, where arbitration would take place, and what procedures would govern. But the district court was able to supply those details."[21]

Under the FAA, the fact that a person or organization named in the arbitration agreement is unable to act as an arbitrator over the parties' controversy does not necessarily void the arbitration agreement.[22] Section 5 of the FAA expressly requires the court, at the request of either party, to name an arbitrator when the parties' agreement has not named one.[23] The arbitrator so named will then act with the same authority as if he had been designated by the parties' contract. Unless otherwise provided for in the agreement to arbitrate, the arbitration will then be before a sole arbitrator.[24]

It is only when the court finds that the choice of forum is "an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern" that the failure of the chosen forum (e.g., a designated organization or association has dissolved) will preclude arbitration.[25] Where the chosen forum is unavailable, or has failed for some reason, § 5 applies and a substitute arbitrator may be named.

Despite the importance of the "seat" of the arbitration in international arbitrations as the juridical rather than geographical location of the proceedings, i.e., it is the jurisdiction in which the arbitration has its legal grounding,[26] for arbitrations governed by the FAA failure to specify the location of the arbitration in the agreement to arbitrate is not fatal. If the location of the arbitration is not specified, under FAA § 4 the "hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."

ENDNOTES

1 9 U.S.C. 1, *et seq*.

2 *Employers Ins. of Wausau v. Bright Metal Specialties, Inc*., 251 F.3d 1316, 1322 (11th Cir. 2001); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993) ("*Progressive*").

3 *Progressive, supra*, 991 F.2d at 46. The FAA provides that agreements "to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

4 *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995)

5 *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 318 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988).

6 *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)("The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause").

7 *World Rentals & Sales, LLC v. Volvo Construction Equipment Rents, Inc.*, 517 F.3d 1240, 1245 n.4 (11th Cir. 2008), quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005).

8 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

9 *Homestead Ins. Co. v. Wachovia Bank*, N.A., 2008 US Dist Lexis 122267 at *10 (ND Ga. 2008).

10 *Weatherguard Roofing Co. v. D. R. Ward Constr. Co.*, 214 Ariz. 344, 348, 152 P.3d 12.27, 1231 (CA Div. 1 2007).

11 *Guerini Stone Co. v P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916); *Hooper Assoc. v AGS Computers*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365 (1989).

12 *Century Indem. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 534 (3d Cir. 2009)("Century").

13 *S. & H. Construction Co. v. Richmond County Hospital Auth.*, 473 F.2d 212, 215 (5th Cir. 1973).

14 *Century, supra*, 584 F.3d at 532; *Progressive, supra*, 991 F.2d at 46 ("A court may not, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law").

15 *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974)(" The United States Arbitration Act, now 9 U. S. C. § 1 et seq., reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements `upon the same footing as other contracts ... .'").

16 *Century, supra*, 584 F.3d at 532, n.16. ("It is not too much to state that enforcement of a substantive requirement that an agreement to provide for arbitration must be 'express' and `unequivocal' would be a partial reincarnation of the courts' pre-FAA hostility to arbitration.").

17 *CNA Reinsurance Co. v. Trustmark Ins. Co.*, 2001 U.S. Dist. LEXIS 7523 (ND Ill. 2001); *Allianz Life Ins. Co. v. American Phoenix Life & Reassurance Co.*, 2000 U.S. Dist. LEXIS 7216 (D. Minn. 2000); North Carolina League of Municipalities v. Clarendon National Ins. Co., 733 F. Supp. 1009, 1011 (E.D.N.C. 1990); Czarina, L.L.C. v. W.F. Poe Syndicate, 254 F.Supp.2d 1229, 1237 n.17 (MD Fla. 2002); Guar. Trust Life Ins. Co. v. Am. United Life Ins. Co., 2003 U.S. Dist. LEXIS 22777 *3 (ND Ill. 2003).

18 *CNA Reinsurance Co. v. Trustmark Ins. Co.*, 2001 U.S. Dist. LEXIS 7523 at *6 (ND Ill. 2001).

19 75 N.Y.2d 295, 301-302, 552 N.Y.S.2d 891, 894 (1990).

20 *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

21 *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987).

22 *Stinson v. America's Home Place, Inc.*, 108 F. Supp. 2d 1278 (MD Ala. 2000); *Warren v. American Home Place*, 718 So. 2d 45 (Ala. 1998).

23 § 5 of the FAA provides:
"If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C.A. § 5,

24 *Ibid*

25 *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

26 In an international arbitration, the key implication stemming from the parties' selection of the seat of arbitration is that the international arbitration statute in force in the chosen jurisdiction will govern the procedural framework and overall conduct of that arbitration, including the extent of any right of a party to challenge the arbitral award in a court of law. See, e.g., English Arbitration Act of 1996, § 1(2)(1) which provides, "The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland."

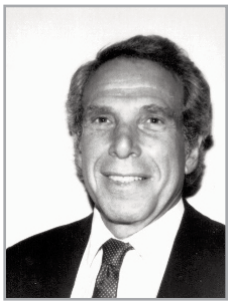
Courts have been persuaded by expert evidence of reinsurance industry custom and practice indicating that the slip is an abbreviated reinsurance agreement that sets out in full only the most essential terms of the agreement, e.g., the parties, premiums, term, subject of the reinsurance, etc. Other general terms and conditions are merely described by their heading, e.g., "Insolvency Clause," "Arbitration Clause," "Intermediary Clause," without any text.

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the unconventional side of the business.

Hidden Meanings

Eugene Wollan



The primary purpose of language is to convey something to the listener or reader – a fact, an event, an idea, a theory, whatever. Good writers do this with particular grace and felicity, whether they are essayists (E. B. White comes to mind), or poets (Robert Frost), or novelists (Ernest Hemingway), or lyricists (Stephen Sondheim). There is a another kind of writing, though, that either deliberately or inadvertently obscures the point or skirts the issue, and is notable more for what it doesn't say than what it says. Anyone encountering this kind of writing is well advised to read between the lines. Much of this kind of linguistic obfuscation originates (surprise!) in the world of advertising, but it can also be found in plenty of other contexts as well. Consider these examples:

WHAT THEY SAY	WHAT THEY DON'T TELL YOU
No other pain reliever works faster.	All pain relievers work at exactly the same speed.
Pay no interest until 2015.	On January 2, 2015 we'll bill you for two years of accumulated interest.
Pre-Owned.	Used.
You won't find this feature on an e-class Mercedes.	You will find it on other Mercedes models.
This policy covers all risks of physical loss or damage.	There are two pages of exclusions and sub-limits.
88% lean	12% fat
Reservation of all rights, whether or not here specified.	We hope we can think of something more later.

The primary purpose of language is to convey something to the listener or reader – a fact, an event, an idea, a theory, whatever.

Eugene Wollan, Editor of the Quarterly, is a former senior partner, now Senior Counsel to Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

Your deductible will vanish.	The absence of a deductible will be built into the premium.
- - -	- - -
Ask your doctor if it's right for you.	We don't want to be responsible if it makes you sicker.
- - -	- - -
Occurrence.	"When I use a word, it means Just what I choose it to mean" -- Humpty Dumpty in Through the Looking Glass.
- - -	- - -
"Available" 4-wheel drive.	You pay more for it.
- - -	- - -
"Available" trip cancellation coverage.	You pay more for it.
- - -	- - -
Our claim service is guaranteed.	But the results are not.
- - -	- - -
It is hereby understood and agreed.	This phrase is completely superfluous but we put it in because it sounds official.
- - -	- - -
Inquire within.	Ask inside.
- - -	- - -
Expert witness.	Hired gun.
- - -	- - -
All we want is a level playing field.	We want every advantage we can get.
- - -	- - -

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There is a another kind of writing, though, that either deliberately or inadvertently obscures the point or skirts the issue, and is notable more for what it doesn't say than what it says

But I draw the line at the scrivener of a contract, especially an insurance contract, where precision of language is an absolute prerequisite for clarity of thought and agreement. There simply cannot be a meeting of the minds unless those minds are tuned to exactly the same wavelength.

CONTINUED FROM PAGE 19

We'll double your order and
send you a second one free.

- - -

The first one is priced to give
us a profit on both.

- - -

Absolutely no fat.

- - -

The sugar content is
out of sight.

- - -

No artificial preservatives.

- - -

Loaded with sodium, the
original natural preservative.

- - -

Follow the fortunes.

- - -

Most of the time.

- - -

Your premium will never go up.

- - -

But your benefits will go down.

- - -

You can always speak to a live person.

- - -

There's this guy in Mumbai.

- - -

Your call will be answered in the
order in which it was received.

- - -

There's this guy in Mumbai.

- - -

We can get you the compensation
you deserve.

- - -

What we deserve is
40% of the recovery
plus liberal expenses.

- - -

It is hereby stipulated and agreed
by and between the respective
parties hereto.

- - -

The parties stipulate.

- - -

I would be willing to grant a certain degree of linguistic latitude to an advertising copywriter, whose livelihood after all depends on the persuasive quality of the writing rather than on its literal accuracy. But I draw the line at the scrivener of a contract, especially an insurance contract, where precision of language is an absolute prerequisite for clarity of thought and agreement. There simply cannot be a meeting of the minds unless those minds are tuned to exactly the same wavelength.

Law Committee Case Summaries

Since March of 2006, in a section of the ARIAS•U.S. website entitled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration and reinsurance-related issues. Individual members are also invited to submit summaries of cases, legislation, statutes or regulations for potential publication by the committee.

As of the end of 2012, there were 83 published case summaries and five regulation summaries and 40 links to state statutes on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions.

Provided below are three case summaries taken from the Law Committee Reports.

Munich Reinsurance Am., Inc. v. Tower Ins. Co., No. 09-CV-2598-FLW, 2012 U.S. Dist. LEXIS 99034 (D. N.J. July 17, 2012)

Court: United States District Court for the District of New Jersey

Dates Decided: July 17, 2012

Issues Decided: Whether language in a reinsurance contract is exclusionary in nature and which party bears the burden of proof when that language is not contained in the exclusion section of the contract.

Submitted by Daniel J. Neppl and Christopher M. Assise*

Summary

Whether language in a reinsurance contract is exclusionary in nature depends on the "effect or character of [the] phrase" at issue, and if that language has an "exclusionary effect," the reinsurer bears the burden of proving that the loss cession is excluded. Background Munich Reinsurance America, Inc. reinsured Legion Insurance Company for exposures arising out of property/casualty policies Legion had issued to policyholders. Munich Re, in turn, purchased retrocessional protection from Tower Insurance Company of New York. After Munich Re made payments pursuant to its reinsurance relationship with Legion, it sought indemnification from Tower for Tower's share of those payments.

The reinsuring clause in the retrocessional agreement between Munich Re and Tower provided, among other things, that Tower would indemnify Munich Re for 100% of the loss cession "unless" the underlying claims arose in one of two defined situations (in which case Tower had to indemnify Munich Re for less than 100%). Munich Re contended that these two defined situations were exclusionary in nature, and thus Tower had the burden of demonstrating that either criterion applied. Tower took the opposite position, contending, among other things, that Munich Re had the burden of proving the propriety of the reinsurance presentation because the definitional language at issue was part of the coverage grant.

Analysis

In evaluating the respective positions advanced by the parties, the court rejected the suggestion that the placement of the definitional criterion at issue in either the coverage grant or list of exclusions is dispositive. "Exclusions do not shed their essential character when they are moved from one section of a policy and are crafted as part of that policy's grant of coverage." Munich Re, 2012 U.S. Dist. LEXIS at *11-12 (quoting *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 332 (1998)). When trying to determine the nature of the definitional criterion at issue, the court stated that the "focus [is] on 'the effect or character of [a] phrase,' and where the language behaves like 'an exclusion of the coverage grant by the very operation of its terms,' the insurer should bear the burden of proving that phrase's application." Id. at *12 (quoting Carter-Wallace, 154 N.J. at 331). According to the court, allowing an insurer (or, in this case, a retrocessionaire) "to distribute provisions limiting liability throughout a policy, with the expectation that its shouldering of the burden of proof would be limited to the single section entitled 'Exclusions' ... would create considerable incentive to obfuscation and subterfuge." Id. (quoting *Andover Newton Theological Sch., Inc. v. Continental Cas. Co.*, 964 F.2d 1237 (1st Cir. 1992)).

The court concluded that the definitional criteria at issue were clear and unambiguous and that they had "an exclusionary effect." Accordingly, the court held that Tower, as the retrocessionaire, had the burden of proving that either criterion applied to the reinsurance presentation made by Munich Re.

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* *Daniel J. Neppl is a partner and Christopher M. Assise is an associate in the Insurance/Reinsurance Disputes Practice Area of Sidley Austin LLP. They each represent insurance companies in insurance and reinsurance disputes involving a broad spectrum of issues.*

In *Granite State Insurance Company v. Clearwater Insurance*

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Law Committee Case Summaries

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Granite State Ins. Co. v. Clearwater Ins. Co., No. 09 Civ. 10607 (RKE), 2012 U.S. Dist. LEXIS 61150 (S.D.N.Y. April 30, 2012)

Court: United States District Court for the Southern District of New York

Dates Decided: April 30, 2012

Issues Decided: Affirmation of a magistrate's order compelling cedent to produce to reinsurer documents concerning reasonableness of cedent's reserving practices

Submitted by Daniel M. Perry and Aluyah I. Imoisili*

Company, the court denied the cedent's motion to set aside a magistrate's order compelling the cedent to produce documents concerning its reserving practices. The court agreed with the reinsurer that the documents were relevant to its affirmative defense that the cedent acted in bad faith by failing to employ adequate procedures to give the reinsurer timely notice of losses.

Background

Plaintiff-cedent Granite State Insurance Company sued Defendant-reinsurer Clearwater Insurance Company for amounts outstanding under reinsurance certificates between the parties. In discovery, Clearwater sought "[a]ny and all documents concerning any reviews, analyses, or studies by any consultant or other third party concerning AIG's [(Granite's parent company)] reserves relating to asbestos exposures, claims, and/or losses." According to Clearwater, this request related to one of its affirmative defense that "[p]laintiff failed to implement reasonable and adequate practices and procedures to ensure the proper reporting to Clearwater of notice and related claim information..." In October 2010, Clearwater filed a motion to compel Granite State to produce documents responsive to this request. On June 27, 2011, the magistrate judge issued an order compelling Granite State to produce the requested documents. Granite State then filed a motion, seeking that the district court set aside the magistrate's order.

Granite State objected to the magistrate's order on two grounds. First, Granite State argued that the order was contrary to law because it was based on a misinterpretation of *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 4 F.3d 1049 (2d Cir. 1993). Granite State contended that under Unigard, the relevant issue for determining bad faith is whether the ceding insurer has any formal practices in place and not whether these practices were adequate or reasonable. According to Granite State, because it had already established that it had notification procedures in place, it should not have had to produce the documents that Clearwater requested, since the documents only relate to the adequacy or reasonableness of the notification practices. Second, Granite State argued that the order was "clearly erroneous" because it was beyond dispute that Clearwater received timely manual notice in the 1980s consistent with the terms of the reinsurance certificates. Therefore, Clearwater was not entitled to discovery related to the adequacy of Granite State's alternative method of providing automated notice.

The court denied Granite State's motion to set aside and upheld that the magistrate's order. The court held that the information was discoverable. The court reasoned that Granite State's interpretation of the bad faith defense under Unigard was too narrow because even if a party had procedures in place it would be relevant to the action whether those procedures ensured that the reinsurer actually received notice of losses. Irrespective of the interpretation of bad faith, the court explained, the documents were discoverable in light of the broad scope of Federal Rule of Civil Procedure 26(b)(1) since "a discovery motion is not the proper forum for deciding the merits of [a defense]." Similarly, the court held that Granite State's claim that it provided timely manual notice speaks to the merits of Clearwater's defense, but not to the permissibility of Clearwater's discovery request. The court also noted that, contrary to Granite State's contentions, the timeliness of the notice was in dispute. The court concluded that the magistrate's order was not "contrary to law" or "clearly erroneous." Nonetheless, the court appreciated Granite State's concerns that the documents contained sensitive and proprietary information, and ordered that the parties stipulate to a mutually agreeable protection order.

* *Daniel M. Perry is a partner and Aluyah I. Imoisili is an associate in the law firm of Milbank, Tweed, Hadley & McCloy LLP.*

Northwestern Nat. Ins. Co. v. Insco, Ltd., No. 11 Civ. 1124 (SAS) (S.D.N.Y. 2011) 2011 WL 1833303

Court: United States District Court, Southern District of New York

Dates Decided: May 12, 2011

Issues Decided: Whether the Federal Arbitration Act requires a court to appoint a replacement arbitrator after a party's initial arbitrator resigns, instead of allowing the party to appoint its own replacement, where the contract is silent on the method for replacement.

Submitted by Jennifer R. Devery and Stephanie V. Corrao*

In *Northwestern Nat. Ins. Co. v. Insco, Ltd*., the United States District Court for the Southern District of New York denied Northwestern National Insurance Company's petition to appoint a replacement arbitrator for respondent Insco, Ltd. pursuant to section 5 of the Federal Arbitration Act. The Court held that allowing Insco to appoint a replacement arbitrator was consistent with the terms of the parties' Reinsurance Agreement and the underlying goals of arbitration to amicably determine disputes by having an arbitration panel that is as mutually acceptable as possible. In so holding, the Court was not persuaded by NNIC's arguments that allowing a party to replace its own arbitrator on a sitting panel would create an incentive to manipulate the arbitration process. More specifically, in 2009, a dispute arose under a 1978 Reinsurance Agreement between NNIC and Insco and, as a result, NNIC demanded arbitration. Pursuant to the Agreement's arbitration clause, NNIC and Insco each appointed an arbitrator, after which an umpire was selected by lot. At the organizational meeting in February 2010, the arbitrators disclosed their possible conflicts of interest and the parties accepted the panel as constituted. However, by late 2010, a dispute arose concerning possible conflicts of interests that occurred subsequent to the organizational meeting regarding each of the party-appointed arbitrators. On February 15, 2011, three days before oral argument on NNIC's summary judgment motion in the arbitration proceedings, Insco requested that all three arbitrators resign on the basis of apparent partiality. Although the Insco-appointed arbitrator resigned that same day, neither the umpire nor the NNIC arbitrator resigned. The following day, Insco again requested a new panel and stated that it would name a new party-appointed arbitrator. On February 18, 2011, NNIC filed the petition at issue seeking court appointment of an ARIAS-certified arbitrator to replace Insco's arbitrator. Insco informed NNIC's counsel on March 4, 2011 that it had appointed a replacement arbitrator, and NNIC objected on the ground that Insco did not have authority under the Reinsurance Agreement to appoint a replacement arbitrator.

The FAA states that the parties' agreement regarding appointment of arbitrators and umpires must be followed. 9 U.S.C. § 5. However, the FAA further provides that if the parties do not provide a method for appointment, or if an arbitrator or umpire is not appointed for various other reasons, "the court shall designate and appoint" one. The Court cited numerous cases supporting the court's authority to appoint a replacement arbitrator, but emphasized that where the replacement was for a party-appointed arbitrator, courts defer to the party's selection. The Court found significant that neither party could point to a case in which a court imposed a replacement arbitrator on a party that had already selected someone else. The Court explained that it was appropriate to defer to the party's selection, if possible, because the underlying goal of arbitration agreements is "aimed at amicable determination of disputes with results which both parties will be willing to accept."

NNIC argued that the Court should reject Insco's attempt to replace its arbitrator because the Reinsurance Agreement did not expressly provide for a method of replacement and Insco allegedly had acted in bad faith to delay the arbitration. Unpersuaded by NNIC's arguments, the Court found significant that Insco was not requesting an entirely new panel and that it chose its replacement from the same ARIAS-certified pool from which NNIC requested that the Court make its selection. The Court distinguished *Ins. Co. of N. Am. v. Public Service Mut. Ins. Co*., 609 F.3d 122, 132 (2d Cir. 2010), where the Second Circuit raised concerns that a party might seek to manipulate the arbitration proceedings by forcing the resignation of its appointed arbitrator following an adverse ruling in order to get a second bite at the apple before a new panel. The Court explained that such concerns were not present here, where Insco only sought to replace its own arbitrator and not the entire panel. (In so holding, the Court did not discuss the fact that prior to the court litigation, Insco had initially requested that the entire panel resign.)

Finally, the Court held that allowing Insco to replace its arbitrator was consistent with the parties' intent that each be permitted to choose a party-appointed arbitrator, notwithstanding the lack of a specific provision in the Reinsurance Agreement addressing the selection of a replacement arbitrator.

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* *Jennifer R. Devery and Stephanie V. Corrao are partner and associate in the Insurance/Reinsurance Group of Crowell & Moring LLP. They each represent insurance companies in insurance and reinsurance disputes involving a broad spectrum of issues.*

in focus

Recently Certified Arbitrators

Barry W. Stinson

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

Barry W. Stinson

Barry Stinson has spent more than 24 years in the insurance industry. He currently is the President and CEO of Red Sky International Claims Consulting in the Orlando area. He was the senior executive responsible for all claims operations of Clarendon Insurance Group, one of the largest program writers in the country, writing $2.5 billion a year in multi-line premiums. He oversaw its successful run off, one of the largest, if not the largest, solvent run off in history. He was the President and CEO of North American Risk Services, a third party claims administrator with approximately $13 million in annual revenues and managed it through a sale to independent investors. He also worked in differing levels of claims operations at Progressive, AIG, Omni, and The Hartford.

Mr. Stinson has given testimony in over 200 litigated matters, primarily related to coverage and "bad faith" issues in Property and Casualty, Excess and Surplus, and Allied Health Lines, including their related Reinsurance. He has managed litigation and given testimony on behalf of his insureds and in direct corporate actions as the plaintiff and defendant in all states as well as internationally.

Mr. Stinson received his Bachelor's degree in Economics from Tulane University in 1987.

DID YOU KNOW...?

THAT ARIAS•U.S. HAS A PROCEDURE THAT ALLOWS PARTIES OR THEIR COUNSEL TO REQUEST A RANDOM SELECTION FROM A SUBSET OF ARIAS•U.S. CERTIFIED ARBITRATORS OR UMPIRES WITH SPECIFIC EXPERIENCE OR AREAS OF SPECIALIZATION. IT IS CALLED THE ENHANCED UMPIRE SELECTION PROGRAM. DETAILS CAN BE FOUND ON THE WEBSITE UNDER "SELECTING AN UMPIRE" IN THE ARBITRATORS/UMPIRES MENU. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

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 2012, ARIAS•U.S. was comprised of 338 individual members and 118 corporate memberships, totaling 970 individual members and designated corporate representatives, of which 240 are certified as arbitrators and 56 are certified as umpires.

The Society offers its *Umpire Appointment Procedure,* based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. Certified Umpires. The procedure is free to members and non-members. It is described in detail in the *Selecting an Umpire* section of the website.

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

The website offers the "Arbitrator, Umpire, and Mediator Search" feature that searches the extensive background data of our Certified Arbitrators who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

Over the 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, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the *ARIAS•U.S. Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, 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 director@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,

Elaine Caprio Brady
Chairman

Mary Kay Vyskocil
President

ARIAS U.S. Membership Application

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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, online membership application, and online registration for meetings.

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FIRST-YEAR DUES AS OF APRIL 1	$277	$800 (JOINING APRIL 1 - JUNE 30)
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NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $415 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, cell, fax and e-mail.

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By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

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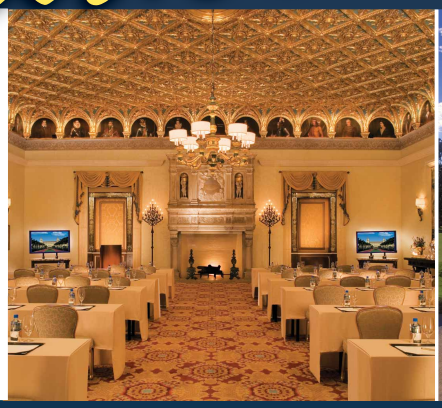


Two Years in a Row!

In the past, ARIAS•U.S. has interspersed visits to other venues. We have never before returned for a second consecutive year. However, the record of good experiences there is reason enough to stay settled for a second year. Block out the dates May 8-10, 2013 to avoid planning anything else. Many members have said we should always have ARIAS•U.S. Spring Conferences at The Breakers. Let's see how we like it two years in a row.

Save *the* Date...

May 8-10, 2013

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