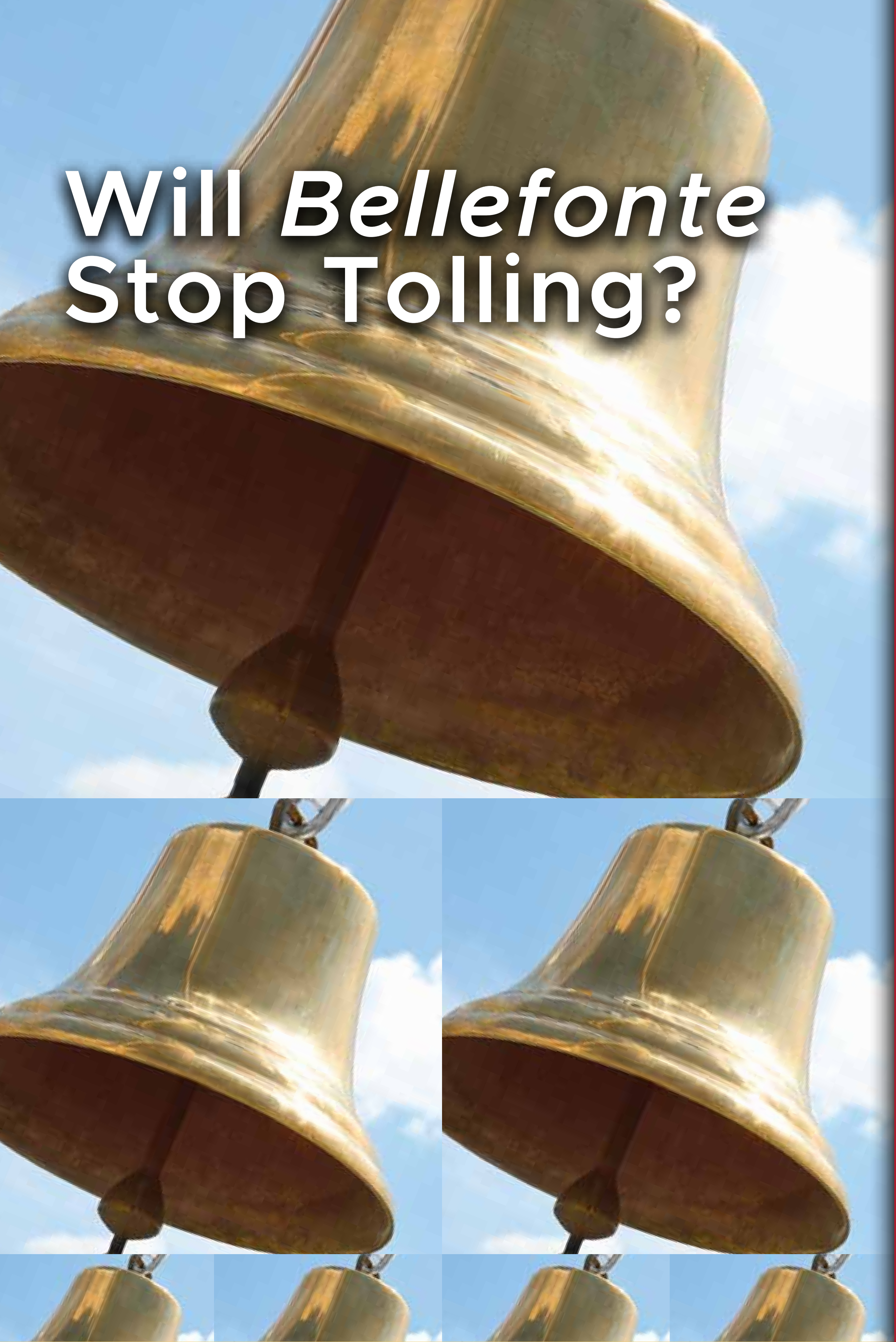
ARIAS US

QUARTERLY

Will *Bellefonte* Stop Tolling?



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- *2017 Fall Conference Highlights*

Q3/Q4 • 2017






FEATURES

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 a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

EDITOR'S LETTER

Every year, out comes at least one cringe-worthy decision in which judges display their lack of knowledge and understanding of the reinsurance industry by arriving at a result from far out of left field, through factual or legal assumptions at odds with how the business of insurance is actually conducted. It's enough to cause some to run from the courts at the first opportunity into the arms of people who understand them. Hey, that's us, ARIAS!

ARIAS offers a roster of experienced arbitrators knowledgeable about the business. But that's not the only inducement we offer. ARIAS also offers an even playing field, a fair shake. In terms of ascertaining the qualifications of our arbitrators, one only has to look at our credentials. But how can ARIAS demonstrate we're committed to fairness?

Enter the ARIAS Code of Conduct. A code, however, means little unless those subject to it walk the walk and talk the talk. To encourage arbitrators to keep its code of conduct at the forefront of their thoughts, ARIAS requires arbitrators to re-certify their commitment to the code every two years by passing a test. While many naysayers believe ethics codes have no effect on behavior, there have been some interesting experiments that show they do. Our lead article on ethics, by Mark Megaw, introduces us to these experiments and also explains what ARIAS has tried to accomplish by adopting its ethics testing methodology.

As would any editor of an insurance or reinsurance publication, I regularly give thanks to the *Bellefonte* decision, its progeny, and the many debates they've engendered. On the one hand, some have criticized the decision as an example of the cringe-worthy ones that demonstrate the inability of lay judges to deal with reinsurance questions; others, meanwhile, have lauded it as the best thing since sliced bread—and well-reasoned sliced bread at that.

Whatever their differences, all can agree that the decisions and discussions subsequent to the original *Bellefonte* opinion have filled many a page. Fortunately for me and other editors, *Bellefonte* is back in the courts again with the recent argument before the New York Court of Appeals, to which the Second Circuit turned in an attempt to figure it out—or, more precisely, to have the highest court of New York do the dirty work by figuring it out for them.

If you didn't have a ringside seat at the argument, Peter Chaffetz, Steven C. Schwartz, and Gretta L. Walters have written a concise summary. Also, it's not too late to snag a ringside seat in the courtroom for a recap—and it's free! Both sound and videos of the argument are available at https://www.nycourts.gov/ctapps/arguments/2017/Nov17/Video/124.html.

If betting were not illegal, ARIAS could well run a pool on the outcome of the New York case. As far as editors of insurance and reinsurance publications go, we're hoping that the opinion raises more questions than it answers and leads to additional controversies with which to fill our pages. For now, we're thankful to Sylvia Kaminsky and the ARIAS Law Committee for bringing us news of another case dealing with *Bellefonte*, *Century Indemnity Company v. OneBeacon Insurance Company*. This time, in a case of "first impression" for

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the Pennsylvania courts, the Superior Court notched another victory for cedents in ruling that the reinsurer had a duty to pay for defense expenses above a liability cap. Definitely worth a read.

In looking at another timely topic for ARIAS members, information security, Dan Cotter suggests that companies and law firms help arbitrators fulfill their responsibility to secure and protect confidential information by keeping it out of their hands. Early in the proceeding and before addressing the question of what measures arbitrators will take to ensure the security of information, parties and their counsel should be considering whether the information is necessary to arbitrate the matter at hand.

Ron Gass has been contributing his Case Notes Corner column to the *Quarterly* for many years. Ron has decided to take a well-earned break, so his column in this issue will be his last. I think you'll find the case he's chosen, *Johnson v. Dentsply Sirona Inc.*, interesting. It deals with whether an arbitration award ordering interim injunctive relief to prevent irreparable harm is a final award that can be confirmed. In the opinion of one district judge, there were no precedents to stop him, so he confirmed. Time will tell whether the ruling will survive on appeal.

Have you ever attended a conference one day and forgotten what was said at it the next day? Presentations at ARIAS conferences are so interesting that they are almost impossible to forget, but occasionally there is someone who falls asleep in the middle of a presentation after attending one of those wild ARIAS parties the night before. Not to worry—the *Quarterly* has your back. While we've occasionally published articles growing out of a conference presentation, we've never recapped all of the conference presentations—until now. In this issue, you can read what you forgot (or never had the opportunity to hear) at our fall conference.

In the United States, arbitration clauses often require arbitrators to have experience as officers and directors of insurance or reinsurance companies. In London, where the experience requirement often has been simply that arbitrators have experience in the industry, it was thought by some (including lawyers) that they could qualify by dint of having spent their careers representing clients in insurance and reinsurance disputes. In a blow to lawyers, the High Court in London, in *TonicStar Ltd v Allianz Insurance plc, Sirius International Corp.*, recently ruled to the contrary. As one of our English correspondents, Jonathan Sacher, reports, working as a lawyer simply doesn't meet the qualification requiring years of experience in insurance or reinsurance. The lesson for lawyers? If you want to be an arbitrator, get out of the cold and go in-house.

I conclude with my customary reminder that the *Quarterly* relies solely on material contributed by the members of ARIAS. The magazine is what you make it. Unless you step up and contribute, there'll be nothing to make.

It will be a relief to some, but no one more than me, that this is the last time I'll be nagging anyone with this reminder. Recently, I asked the ARIAS Board of Directors for help obtaining articles. Instead of sending articles, they offered up the welcome assistance of Larry Schiffer, a prolific writer and experienced editor who has been a mainstay of our association for many years.

The original plan was for Larry to join me as co-editor. In fact, he's had a hand, if not more, in this issue. However, I quickly came to think of Larry as my ticket out of the editorship. The truth is, I never sought the job. (Apparently, neither did anyone else.) Unfortunately, I was vulnerable to bribery, so all it took was a free lunch.

I've now served in this position for nearly four years, and I'm now ready to step aside and relinquish to someone else the pleasure of cajoling ARIAS members into contributing articles and assuming the other duties of the position. I'm pleased as punch that Larry has agreed to succeed me. I know you will be, too.

I'm pleased to have had the opportunity to work with our Editorial Board, representatives of various committees, and our authors to produce a magazine that continues to be interesting, relevant, and practical. I've enjoyed meeting many people I might not otherwise have met. I'm particularly proud that we've published more arbitrator-focused articles. We've also run more pieces from ARIAS committees.

Please join me in welcoming Larry as editor. If you care to send him a welcome gift, make it an article.

– Tom Stillman

EXTRA! EXTRA! THIS JUST IN! As we went to press, the New York Court of Appeals ruled in *Global v. Century*, a case involving the fallout from the *Bellefonte* decision. Peter Chaffetz, Steven Schwartz, and Gretta Walters responded quickly and updated their article on page 11 to reflect the court's ruling. You can count on the *Quarterly* to continue bringing you case analyses and commentaries as the courts attempt to construe the decision. Think of it as my own welcoming gift to Larry and all those who will be writing articles for the *Quarterly* in the future.

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1 Peter Chaffetz has first-chaired more than 40 arbitrations and trials, with a practice focus in reinsurance for 25 years. He regularly speaks and publishes on issues concerning the insurance industry as well as on general issues affecting U.S. and cross-border litigation and regulatory compliance.

Information Flow in the Arbitration Process — p. 15

2 Dan Cotter is a partner at Latimer LeVay Fyock LLC and has almost 30 years of direct and indirect experience in the insurance industry as a buyer, seller, and counsel and with Form A filings, general regulatory and government relationships, and market conduct. He is a sought-after speaker on topics ranging from insurance to cyber security law and data protection.

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3 Ronald S. Gass is an ARIAS•U.S. Certified Umpire and Arbitrator. He can be reached via e-mail at rgass@gassco.com or through his website at www.gassco.com.

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4 Sylvia Kaminsky is an ARIAS•U.S. Certified Arbitrator and Umpire and an independent insurance/reinsurance industry consultant. She has served in well over 175 arbitrations involving insurance, reinsurance and security matters. She is the co-chair of the ARIAS•U.S. Arbitrators Committee and a member of the Law Committee.

Designing the Ethics Exam for ARIAS•U.S. — p. 5

5 Mark T. Megaw is a former ARIAS•U.S. board member and a current member of the ARIAS Ethics Committee. He was previously the head of assumed and ceded reinsurance disputes for the ACE Group of Companies (now known as Chubb). Although retired from the practice of law, he serves in neutral roles in reinsurance arbitration disputes.

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6 Jonathan Sacher heads the multi-disciplinary insurance practice at Berwin Leighton Paisner. He specializes in reinsurance/insurance litigation, arbitration, and dispute resolution for a wide variety of U.K. and international insurers, reinsurers, and brokers. He is a former chairman of the British Insurance Law Association.

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7 Steve Schwartz, a partner at Chaffetz Lindsey LLP, has devoted most of his practice to reinsurance arbitration and litigation since the early 1990s. During that time, he has handled disputes relating to both property/casualty and life and health reinsurance, as well as finite risk reinsurance. He is the author of *Reinsurance Law: An Analytic Approach*.

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8 Gretta L. Walters, an attorney at Chaffetz Lindsey LLP, has experience representing individual and corporate clients in complex litigation matters and international and cross-border disputes in arbitration and state and federal court. She has represented several reinsurance brokers as amicus curiae in cases involving disputes over reinsurers' liability for expenses.

Designing the 2017 Ethics Exam for ARIAS•U.S.

By Mark T. Megaw

Five years ago, when ARIAS•U.S. was planning its annual spring conference, the co-chairs tried to get Dan Ariely[1] as the keynote speaker. Ariely is a behavioral economist, author, and regular contributor to the *Wall Street Journal*, and he has a sense of humor. His research was of particular interest to the conference planning committee because Ariely has studied the question of whether ethics education promotes ethical behavior. Unfortunately, he couldn't be enticed to join us.

As *Quarterly* readers know, ARIAS recently revised its own ethics exam. Mindful of the issues Ariely has been studying and believing that the exam will help its members in many ways, ARIAS updated its online ethics test.

The ARIAS ethics exam is, in all forms that have been used to date, an unusual test. Unlike the vast majority of tests, the ARIAS exam structure requires everyone who takes the exam to obtain a 100 percent score. Indeed, with the latest design, test takers are thrown into a circular pattern by which any incorrect response within a module of the test prompts the entire module to reappear, again and again, until every question has been correctly answered.

ARIAS is not seeking to use the test to identify arbitrators who need remedial training; it has neither the ability nor the desire to track the number of times an arbitrator takes the exam to earn a passing score. Similarly, ARIAS does not post the exam results so that companies hiring arbitrators can identify those who earned the highest scores or completed the exam in the fastest time. ARIAS, as expressed through its subcommittee of test designers,[2] had a different purpose in mind in amending its exam.

The most straightforward purpose was, of course, education. With a broad goal of ethics education, the exam drafters sought to (1) pose some questions that will prompt perceptive thoughts about challenging issues that arise in the practice of arbitration and (2) provide guidance to assist in the resolution of such issues.

The exam might also have addressed big-picture issues and asked whether, for example, jury service, which is a form of unpaid conscription, should be subject to market forces that allow busy people to get out of jury duty by paying for a substitute.[3] Indeed, a variation of this line of thought sometimes pervades debates that describe the party-appointed arbitral system as a mercenary one.

But the ARIAS Ethics Committee did not go that way. While such profound questions may lie beneath the surface of many arbitral dilemmas (as every ethical fork in the road in some way supports or denies fairness in the system), the ARIAS Ethics Committee saw a more focused remit. They knew that an ARIAS ethics exam, unlike a philosophy or law textbook, should have and promote "right" answers.

ARIAS serves a community of businesses that seek consistency in the basic ethos by which their disputes will be handled. Stated another way, the exam reflects the constituents that it serves today, all of whom seek a fair process in the midst of an adversarial system. This brings us back to the question of whether ARIAS can do anything to increase ethical behavior among its constituents. Dan Ariely's research suggests that it can.

An Honest Baseline

The study of ethical behavior is challenging because the topic is multifaceted and nuanced, making it difficult to obtain meaningful empirical data. Ariely's studies resolve this challenge by focusing on honesty as a proxy for ethics. From those results, he challenges us to examine whether behaviors that promote honesty (such as taking an oath) are also likely to promote ethical conduct.

Ironically, for Ariely to create his meaningful empirical data on honesty, he had to fool his subjects. Ariely's subjects (who were often students, though his results were confirmed across many demographics) were given a test that contained too many math questions for the time allowed to answer them. They were enticed to do well on the exam because they were to be paid based upon the number of "correct" answers submitted. They were allowed to self-score their results, and in some variants of the test they were allowed to shred their own answer sheets before collecting their payment for the number of correct answers they reported.

The study of ethical behavior is challenging because the topic is multifaceted and nuanced, making it difficult to obtain meaningful empirical data.

How would Ariely know whether his subjects had honestly reported their results? Simple: he had adjusted the shredding machine so that it looked and felt like it was shredding their answer sheets, but it was only shredding the margins of the papers. This caused the students to believe they would not be caught if they were dishonest, while simultaneously allowing Ariely to identify whether the students had honestly reported their scores.

In the base model of his experiment, Ariely found that his subjects often cheated, though by small amounts. Ariely believes that the modest level of cheating suggests that people begin with a baseline of honesty, applying a "can I live with myself" standard. Some subjects could self-justify some cheating, but none of them offered wholesale falsities. Critically, when Ariely altered the test so that students began[4] their exam by being reminded of an ethics code—such as by writing a pledge at the top of their answer sheet promising to comply with the MIT[5] Honor Code—they cheated less often.[6]

Drawing on Ariely's findings, ARIAS is likely to better serve its goal of promoting ethical conduct by reminding arbitrators—when applying for membership, making disclosures, and taking the ethics exam—that their behavior is expected to conform to the ARIAS•U.S. Code of Conduct. A similar impression is likely made on witnesses who take an oath prior to providing testimony. The reminder of a higher calling has a salutary impact on behavior.[7]

Combining a Useful Experience with a Useful Reminder

Of course, promoting "honest behavior"[8] is only one purpose of the ARIAS ethics exam; the ARIAS Ethics Committee also hoped to better prepare arbitrators for real-life questions that might come their way. The committee embraced that goal because statistics[9] reveal that a significant percentage of arbitrators have participated in only a few arbitration hearings. Taking the exam could help arbitrators practice spotting issues they might confront before they see them for the first time during or after an appointment.

Another goal of the exam is to remind arbitrators that the ARIAS•U.S. Code of Conduct is more than a proscriptive text—it is a useful, ever-available resource that is worth reading more than once. As they take the new exam, arbitrators will see pointers toward the code throughout. The correct responses point to particular canons in the Code of Conduct. The test, therefore, is more than just an exam—it actively encourages arbitrators to use the Code of Conduct as a resource.

For example, one answer highlights how Canon VIII, which requires arbitrators to decide cases based upon the evidence rather than upon their personal relationships, and Canon IV, Comment 5, which focuses on the consequences to the parties of withdrawal by an arbitrator, each provide guidance to panel members who find that they have personal relationships with witnesses who appear before them. ARIAS recognizes that it serves an industry where panel members might know witnesses, and its new exam tailors its questions to that audience.

On a bigger scale, the exam serves to remind arbitrators that there is a community of arbitrators who are embracing certain fundamental rules and standards. In this vein, the exam reflects strong community standards that should withstand, and stand apart from, the rare and sometimes headline-grabbing examples of bad behavior. The exam's designers did not create a test that focuses on the borders of appropriate behavior—they discussed and consciously decided to point toward foundational elements of the industry's shared ethos so as to reinforce those elements.

By one important measure, the exam design process has proved to be an honest one—ARIAS has been embraced by the industries it serves. That said, public examples of unethical behavior can take a toll. A variation on one of Ariely's studies provides a helpful lesson on the impact of public trust on group behavior.

In this variation, Ariely presented students at Carnegie Mellon University with the same dilemma as recounted previously: an exam with more questions than could be answered in the amount of time allotted, coupled with a cash payout based on the total number of self-reported correct answers. There was just one difference—he "planted" a student actor in the crowd. Approximately 30 seconds into the five-minute exam time, the actor stood up and loudly declared that s/he had completed the entire exam. The actor then promptly and publicly collected the maximum cash payment.

Given the number of questions involved and the short time frame in which they were to be answered, the students must have believed their fellow "student" was cheating. How did this knowledge influence them? It depended. If the actor wore a sweatshirt from the University of Pittsburgh (a Carnegie Mellon crosstown rival), the rate at which the Carnegie Mellon students cheated was unaffected; in contrast, if the actor prominently wore a Carnegie Mellon sweatshirt, the other students cheated at an alarming rate.

Ariely believes that because his Carnegie Mellon subjects did not feel an affinity with the cheater from Pitt, they did not join in. When the actor wore a Carnegie Melon sweatshirt, the belief that "cheating is rampant among my peers" took hold and fostered an environment of misbehavior.

The ARIAS ethics exam designers implicitly understood this empirical evidence. The test was designed to remind arbitrators of their common industry bond and that they collectively respond to a higher calling. With its simple exam, ARIAS•U.S. has reached for lofty goals. And as a community, we should be the better for it.

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1. Dan Ariely is the James B. Duke Professor of Psychology and Behavioral Economics at Duke University. His work is referenced throughout this article, including his *New York Times* best-selling book *Predictably Irrational* (revised and expanded version published by Harper in 2010), public interviews, and TED talks, including the 2009 talk, "Why We Think it's OK to Cheat and Steal (Sometimes)."
2. The subcommittee of the ARIAS•U.S. Ethics Committee that handled the laboring oar in the drafting of the revised ethics exam was composed of Patricia Fox, Susan Grondine, Stacey Schwartz, Mark Megaw, and Liz Thompson. That group reported its draft to the entire Ethics Committee, which included all members of the subcommittee as well as Deidre Derrig, Mark Gurevitz, Susan Mack, Jim Rubin, Larry Schiffer, and Brian Snover. Thereafter, the draft exam was approved by the ARIAS•U.S. Board of Directors.
3. In Michael J. Sandel's book, *Justice, What's The Right Thing To Do?*, he explains (at page 85) that "the reason we draft jurors rather than hire them is that we regard the activity of dispensing justice in the courts as a responsibility all citizens should share. Jurors don't simply vote; they deliberate with one another about the evidence and the law. And the deliberations draw on the disparate life experiences that jurors from various walks of life bring with them. Jury duty is not only a way of resolving cases. It is also a form of civic education and expression of democratic citizenship. Although jury duty is not always edifying, the idea that all citizens are obligated to perform it preserves a connection between the courts and the people."
4. Ariely and others conducted a study which demonstrated that signing an oath *before* being given the opportunity to cheat rather than afterward (e.g., at the bottom of a test/submission, such as is common on tax and insurance forms) increased honesty. See Shu, Lisa L., Nina Mazar, Francesca Gino, Dan Ariely, and Max H. Bazerman. 2012. Signing at the Beginning Makes Ethics Salient and Decreases Dishonest Self-Reports in Comparison to Signing at the End. *Proceedings of the National Academy of Sciences*, 109 (38):15197. This study included work in the insurance field; the authors concluded that "a simple change in signature location likely reduced the extent to which customers falsified [auto] mileage information in their own financial self-interest at cost to the insurance company…" Id. at 15198.
5. The results were repeated across thousands of test takers, although in his TED talks, Ariely seems to enjoy sharing the "MIT version" of this story because MIT has no honor code. Thus, the oath to uphold the MIT honor code had an impact even when the students had no specific text with which they were making a pledge.
6. The very existence of a perjury charge demonstrates that not every witness honors the oath. Undoubtedly, Ariely would recognize that his research is important because it identifies a trend toward honesty, not because it provides a guarantee.
7. Some of Ariely's other research demonstrates that there is a temporal impact to oath-taking (see note 5 supra); the impact of stating an oath is strong only when it immediately precedes the opportunity to cheat. With this in mind, it is best to see the ARIAS ethics exam as one link in the chain of educational reminders about the ARIAS Code of Conduct (which reminders include ARIAS ethics seminars, administering witness oaths, the words of panel members, by counsel, and the applicable questions within the ARIAS umpire questionnaire). No one should believe that the ethics exam is an annual, single-dose inoculation against unethical behavior.
8. Among the areas where "honesty" affects ARIAS•U.S arbitrators are the obligations for arbitrators to make honest disclosures against self-interest and to fairly evaluate evidence and issues that run contrary to a party appointment.
9. An ARIAS•U.S. arbitrator, David Thirkill, compiled unofficial statistics using information on the ARIAS website as of January 1, 2017, and circulated them on January 23, 2017. His compilation shows that 47 of 170 arbitrators (27 percent) have been selected for two or fewer arbitrations; many fewer arbitrators will have had actual hearing experience.

Can Lawyers be Arbitrators? A New English Decision

By Jonathan Sacher

In the latest London Market World Trade Center dispute, *TonicStar Ltd v Allianz Insurance plc, Sirius International Corp*,[1] the High Court in London has considered a standard London Market reinsurance arbitration clause, known as the Joint Excess of Loss Committee (JELC) arbitration clause, that has been widely adopted by the market in the U.K. for many years.

In *TonicStar*, the court confirmed that the position under English law is that lawyers specializing in insurance/reinsurance matters, as well as auditors or other advisers to the insurance and reinsurance industry, do not qualify under arbitration clauses requiring arbitrators to have a certain number of years of "experience of insurance or reinsurance." TonicStar sought an order that the reinsurer's nominated arbitrator, Alistair Schaff QC (a leading and renowned English insurance and reinsurance barrister), be removed as an arbitrator on the grounds that he did not qualify to act as an arbitrator under the 1997 JELC arbitration clause, which the parties had included in a reinsurance contract under which a dispute had arisen.

The JELC clause stated: "Unless the parties otherwise agree, the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

The reinsurer took the position that Mr. Schaff has considerably more than 10 years' experience of insurance or reinsurance, acquired from working with or on behalf of that industry. TonicStar's position was that, in order to satisfy the qualification that an arbitrator must have "ten years' experience of insurance or reinsurance" within the meaning of the JELC clause, the nominee must have 10 years' experience in the business of insurance or reinsurance itself, not in an advisory capacity. Acting as a legal advisor to the industry was not good enough and not what the parties had agreed to when they chose to use the JELC dispute resolution provisions in their contract.

In reaching its decision, the court relied on the unreported 2000 English decision of *X v Y*, where the same clause was considered and the same result was reached (i.e., legal experience did not qualify an individual to act as an arbitrator under a clause of this nature). In *X v Y*, on the facts, the court considered that "the parties intended a 'trade' arbitration," based on reasons that included the following:

- If the JELC had intended to include lawyers, the clause would have said so expressly.
- In default of appointment, an arbitrator was to be appointed by the chairman of the Lloyd's Underwriters' Association and/or the International Underwriting Association of London, both of whom would be well-acquainted with persons within the insurance and reinsurance industry, but who were less likely to be able to identify appropriate lawyers.

- The clause had been drafted by a trade body, namely the Joint Excess Loss Committee.

In *TonicStar*, the reinsurer advanced arguments—several of which the court did not dismiss without consideration—that the *X v Y* decision was obviously wrong. One of these arguments was based on the ARIAS (UK) clause that, the reinsurer argued, offered a full version of the phrase in question and one which the JELC clause should be read to so that it expressly included lawyers "with not less than ten years' experience of insurance or reinsurance as persons engaged in the industry itself or as lawyers or other professional advisers."

The reinsurer also argued that the ordinary and natural meaning of the phrase "experience of insurance or reinsurance" includes experience acquired through service of, and interaction with, the insurance/reinsurance industry. Notably, the reinsurer contended, the experience required is stated to be "of," not "in," the industry/market. A natural reading of the words themselves leads to an interpretation that the parties have flexibility in nominating an arbitrator whose particular experience makes him/her most suitable for the particular dispute provided he/she has experience of the industry (in any capacity).

Nonetheless, the court adopted the position previously taken in *X v Y*, for the following reasons:

- The reinsurance contract in question was dated only seven months after that decision, so if the JELC had wanted to include lawyers, it could have done so or the parties could have, at that stage, agreed to include lawyers.
- The JELC published a further draft of the Excess Loss clauses in 2003 (i.e., after the *X v Y* case) and used the same wording again in the arbitration clause as in the 1997 clause.

The *X v Y* decision is relatively well-known in the reinsurance market (on account of, for example, being cited in *Butler & Merkin's Reinsurance Law*) and has stood as applicable English law without challenge for 17 years.

However, and despite its findings, comments by the judge suggest that, had he not been constrained by the earlier court's decision, a different outcome might have been reached:

"[U]ninhibited by that decision [i.e., *X v Y*], I might well have decided that the ordinary and natural construction of the phrase in question did not limit the fields in which experience of insurance or reinsurance could be acquired."

If *TonicStar* is appealed, practitioners and market participants are likely to have a keen eye on the Court of Appeal, which is not bound by *X v Y*.

Amended JELC Clauses

Going forward, an amended JELC arbitration clause will come into force on January 1, 2018. The new version expressly includes lawyers as qualifying to be appointed as arbitrators.

This amendment puts the issue to bed as far as the JELC clauses go, but others that remain silent on the issue of whether lawyers are properly qualified to sit as arbitrators will still be bound by the court decisions summarized in this article. However, the new clauses are not retrospective, and disputes under the old clauses are likely to continue to arise in which lawyers cannot be appointed as arbitrators (perhaps to the surprise of the contracting parties).

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Comment

Disputes between insurers/reinsurers can take many forms, from technical disputes that turn on the meaning of a single word in a reinsurance contract to the application of market custom and practice to a particular set of circumstances.

At the time of agreeing to the terms of a reinsurance contract, neither party can anticipate the nature of a dispute that might arise and, consequently, who might be best suited to resolve it. Against this background, it might seem strange that either party would wish to roll the dice and limit the pool of potential arbitrators and exclude some potentially suitable (and desirable) options. Certainly, if the parties wish to do so, it might be expected that they would do so expressly.

However, the decisions summarized above demonstrate that that is not the case (at least in England). Most London Market reinsurance contracts require the arbitrators to apply English law. It is, therefore, regrettable that, by chance or naivety, many reinsureds/reinsurers who have opted for the JELC wording rather than the ARIAS (UK) wording are locked into contracts where disputes under English law cannot be dealt with by arbitrators who have many years' experience of precisely the issues on which a dispute is based.

Misapplication of the law can lead to increased cost and delay and undermine the parties' decision to choose arbitration in the first place to resolve their disputes.

For reinsurance contracts governed by English law, legally qualified arbitrators have a particular attraction in that, unless otherwise agreed, parties can, in limited circumstances, appeal an arbitration on a point of law (under 69(3) of the English Arbitration Act 1996). Misapplication of the law can lead to increased cost and delay and undermine the parties' decision to choose arbitration in the first place to resolve their disputes. No one would want arbitration to develop into, in practice, a pre-action step that parties take prior to court determination. However, parties can agree to exclude this right to appeal, and the English courts have been reluctant to re-open a reinsurance arbitral award on an appeal of a point of law historically.[2]

Perhaps with that in mind, under the current ARIAS (UK) clause, lawyers are expressly included within the definition of those who have at least 10 years' experience of insurance and reinsurance, although this has not always been the case. Contrast that with ARIAS•U.S. sample clauses, where only industry professionals may be appointed as arbitrators.

Of course, reinsurance arbitrations in the United States tend not to require the arbitrators to apply the law. This grants the arbitrators a much wider discretion, permitting those involved within that trade to reach a commercially sensible resolution to their dispute without being constrained by technical legal considerations. U.S. arbitral tribunals also tend not to provide written reasons in support of their awards, as is required (unless excluded) under English law. One of the perceived disadvantages of a reasoned award, according to the ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure, is that these "will ultimately favor appointing lawyers as arbitrators, whereas the essence of arbitration frequently is to obtain a business, rather than legalistic, resolution."[3]

ARIAS•U.S. makes clear that under traditional practice, arbitration is considered to be a "trade" matter—a dispute resolution option chosen by those who want their dispute considered by industry experts who, with their industry hats on, will work toward a practical business solution that will not be interfered with or later reviewed by legal practitioners. In this way, ARIAS•U.S. differs from its English industry counterparts, who have made a concerted move toward the lawyer-arbitrator in recent years. It may be that a couple of key underlying differences in arbitration practice in the two jurisdictions is responsible for the difference.

What is clear is that contracting parties need to take care when including arbitration provisions to ensure that their choice of arbitrators (should a dispute arise) is not constrained by the language they adopted at the outset, when the focus was not on disputes and how they would be resolved.

1. [2017] EWHC 2753 (Comm)
2. There has only been one successful appeal of an English Reinsurance Arbitration Award since the 1996 Arbitration Act.
3. ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure. 2004. Chapter 5.4, page 45. McLean, Va.: ARIAS•U.S.

Global v. Century: Bellefonte Stops Tolling

By Peter R. Chaffetz, Steven C. Schwartz, and Gretta L. Walters[1]

For nearly 30 years, the ruling of the Court of Appeals for the Second Circuit in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*[2] was a source of uncertainty in the interpretation of facultative certificates. That has now changed. Although the New York Court of Appeals' December 14, 2017, ruling in *Global Reinsurance Corp. of America v. Century Indemnity Co.* does not mention the *Bellefonte* case by name, it squarely addresses the debate that case has caused.

A brief review of the Second Circuit's 1991 ruling in *Bellefonte* and the case law that followed will provide context. In *Bellefonte*, the court held that the Reinsurance Accepted provision of a facultative certificate was an absolute cap on the reinsurer's liability, inclusive of losses and expenses.[3] For one of the certificates at issue, the Reinsurance Accepted was "$500,000 part of $5,000,000 excess of $10,000,000 excess of underlying limits."[4] Thus, the ruling meant that the limit of that certificate, for both losses and expenses, was $500,000.

The first major ruling to reaffirm *Bellefonte* came three years later, in *Unigard Security Insurance Co. v. North River Insurance Co.*[5] Concluding that "*Bellefonte's* gloss upon the written agreement is conclusive,"[6] the *Unigard* court refused to consider whether the following form clause or evidence of industry custom and practice, which the *Bellefonte* court had not considered, might change the analysis. Some have interpreted *Bellefonte* and *Unigard* to create a per se rule under which facultative reinsurers are not liable for defense costs in addition to limits, even where the underlying policy clearly covers such costs.

More than a decade later, the New York Court of Appeals weighed in. In *Excess Insurance Co. v. Factory Mutual Insurance Co.,*[7] the court was presented with a somewhat different form of facultative certificate—covering a property rather than a casualty policy—but still followed *Bellefonte*.[8] The court granted summary judgment to the reinsurer, holding that "[o]nce the reinsurers have paid the maximum amount stated in the policy, they have no further obligation to pay . . . any costs related to loss adjustment expenses" (id. At 583).

The *Bellefonte* line of cases has been controversial. As the late Eugene Wollan put it, *Bellefonte* and its progeny "shocked" many in the reinsurance community "because they ran in the face of long-standing industry practice."[9] Indeed, it has been reported that reinsurance arbitrators often rejected *Bellefonte*.[10] It has also been difficult to predict the results of litigation, as in recent years courts both inside and outside of New York have split. Some have continued to follow *Bellefonte's* rationale, while others have rejected or distinguished it.[11]

The *Global* Case

The facts in *Global* squarely raised the *Bellefonte* issue. Between 1971 and 1980, Global facultatively reinsured several general liability insurance policies that Century had issued to Caterpillar Tractor Company.[12] In the late 1980s, Caterpillar began to face massive liability

The Court of Appeals' concise decision, issued less than four weeks after argument, focused narrowly on the question that the Second Circuit had certified. And that, in turn, required the court to determine precisely what had actually been decided in Excess back in 2004.

for asbestos-related claims.[13] Century ultimately paid Caterpillar not only the full indemnity limits of the insurance policies, but also for defense costs in addition to those limits.[14] In fact, Century ultimately paid Caterpillar more than $90 million, of which 90 percent represented expenses.[15]

Century billed Global under the facultative certificates for both indemnity and defense costs. Global denied liability for defense costs, arguing that its liability was capped by the "Reinsurance Accepted" provisions of the facultative certificates. Century obviously disagreed.

Global commenced a declaratory judgment action against Century. The district court granted Global partial summary judgment,[16] concluding based on *Bellefonte* and *Unigard* that the certificates "unambiguously capped Global's liability for both losses and expenses."[17]

Appeal to the Second Circuit

Century appealed to the Second Circuit. Century was supported by four large reinsurance brokers, who filed an amicus curiae brief arguing that industry custom and practice require that, where the underlying policy covers defense costs in addition to limits, the corresponding facultative certificate does, too.[18]

Surprisingly, the Second Circuit expressed doubt about its own *Bellefonte* and *Unigard* decisions. Although it had held in those cases that Reinsurance Accepted provisions are an "explicit limitation on liability," the Second Circuit now observed that it had "never explained why this is so."[19] The court also acknowledged that the argument that *Bellefonte* and *Unigard* were wrongly decided is "not without force."[20] Indeed, the court admitted that its *Bellefonte* holding is "difficult to understand."[21]

Nonetheless, the Second Circuit still had to contend with *Excess*. Because *Excess* was decided by New York's highest court, it is authoritative as to New York law.[22] Recognizing that the interpretation of *Excess* is best left to New York's highest court, the Second Circuit certified to the Court of Appeals[23] the following question: Does the decision of the New York Court of Appeals in *Excess Insurance Co. v. Factory Mutual Insurance Co.*, 3 N.Y.3d 577 (2004) impose either a rule of construction or a strong presumption that a per-occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap, regardless of whether the underlying policy is understood to cover expenses such as, for instance, defense costs?[24]

The Ruling of the Court of Appeals

The Court of Appeals' concise decision, issued less than four weeks after argument, focused narrowly on the question that the Second Circuit had certified. And that, in turn, required the court to determine precisely what had actually been decided in *Excess* back in 2004. However, before examining the *Excess* decision itself, the court canvassed some of the subsequent decisions that had given *Excess* a broad interpretation. It observed: "Although *Excess* did not say that third-party defense costs under any facultative reinsurance contract are unambiguously or presumptively capped by the liability limits in the certificate, some courts have nonetheless read our decision that way . . ." [citations omitted].

The court disavowed those decisions,

emphasizing the critical difference between a case's dicta and holding: "[i]t is basic that principles of law 'are not established by what was said, but by what was decided . . .' [citations omitted]. Accordingly, the court's holding comprises only those 'statements of law which address issues which were presented to the [court] for determination'" (bracketed word in original).

The court then applied that principle to read *Excess* narrowly and to make clear that its ruling in *Excess* did no more than interpret the meaning of the phrase, "LIMIT: US$ 7,000,000" in light of the entirety of the agreement that was then before it. Thus, it observed, "[t]he *Excess* Court was simply not faced with the question presently before the Second Circuit: whether there is a blanket 'presumption' or 'rule of construction' that a limitation-on-liability clause applies to all payments by a reinsurer whatsoever."

Therefore, the court concluded: "[w]e hold definitively that *Excess* did not supersede the standard rules of contract interpretation otherwise applicable to facultative reinsurance contracts." It then proceeded to review the New York rules of contract interpretation that it considered relevant to the proper construction of a facultative certificate. One such principle, which it traced back to its 1902 ruling in *London Assurance Corp. v. Thompson*, was that the intention of the parties should be gathered from the words used, taking into account, when the meaning is doubtful, the surrounding circumstances. It further cautioned that the certificate, "while serving as written confirmation of a contract, might not in and of itself constitute the fully integrated agreement."

In that way, and without ever mentioning the Second Circuit's rulings in either *Bellefonte* or *Unigard*, the court squarely repudiated broad readings of those cases. Indeed, it removed any doubt as to that intention when it went on to say, variously, that, "a court is not free to alter the contract to reflect its own personal notions of fairness and equity" and that courts should not "adopt[] a blanket rule based on policy concerns." Rather, it summed up, "[t]he foregoing principles do not permit a court to disregard the precise terminology that the parties used and simply assume, based on its own familiar notions of economic efficiency, that any clause bearing the generic marker of a 'limitation on liability' or 'reinsurance accepted' clause was intended to be cost-inclusive. Therefore, New York law does not impose either a rule or a presumption, that a limitation on liability clause necessarily caps all obligations owed by a reinsurer, such as defense costs, without regard to the specific language employed therein."

The *Global* case now returns to the Second Circuit. Going forward, parties will need to interpret facultative certificates based on their language and context, without resort to purported *per se* rules.

1. The authors are attorneys with Chaffetz Lindsey LLP in New York, where Peter R. Chaffetz and Steven C. Schwartz are partners and Gretta L. Walters is an associate. The authors are counsel for Aon Benfield U.S.; Guy Carpenter & Company, LLC; JLT Re (North America) Inc.; and Willis Re Inc. (collectively, the "Reinsurance Broker Amici") and submitted amici curiae briefs to the U.S. Court of Appeals for the Second Circuit and the New York Court of Appeals on behalf of the Reinsurance Broker Amici in *Global Reinsurance Corp. of America v. Century Indemnity Co.*
2. 903 F.2d 910 (2d Cir. 1990).
3. Id. at 914.
4. Id. at 911.
5. 4 F.3d 1049 (2d Cir. 1993).
6. Id. at 1071.
7. 3 N.Y.3d 577 (2004).
8. Id. at 584-85.
9. Eugene Wollan, Sing a Song of Reinsurance, *ARIAS•U.S. Quarterly*, 1st Quarter 1999, at 5.
10. See Michael H. Goldstein, For Whom Does Bellefonte Toll? It Tolls for Thee, *Mealey's Litig. Rep. Reinsurance*, Aug. 13, 1998, at 13 ("[M]ost arbitrators likely will ignore *Bellefonte*, even where the same parties and the same certificate language are involved").
11. Compare *Century Indemnity Co. v. OneBeacon Insurance Co.*, 173 A.3d 784 (PA Super. 2017). (rejecting the reinsurer's reliance on *Bellefonte* and finding that a facultative reinsure was liable for defense costs in addition to the amount stated in the Reinsurance Accepted provision) to *Continental Casualty Co. v. Midstates Reinsurance Corp.*, 24 N.E.3d 122, 126-27 (Il. App. 2014) (adopting *Bellefonte* to cap a reinsurer's expense obligations despite the certificate's following form provision). Several recent rulings in the Second Circuit have questioned *Bellefonte's* holding by recognizing the importance of industry custom and practice in interpreting reinsurance contracts. See, *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.*, 594 F. App'x 700, 703 (2d Cir. 2014) (Summary Order) (finding the facultative certificates before it ambiguous and remanding to the district court to consider evidence of industry custom and practice); *TIG Premier Insurance Co. v. Hartford Accident & Indemnity Co.*, 35 F. Supp. 2d 348, 351 (S.D.N.Y. 1999) (noting expert opinion that "cost-supplement arrangements were 'the norm,' and that the dollar amount in the Reinsurance Accepted box of the [] certificate 'would not be understood as an absolute cap on the insurer's potential payments to or on behalf of the policyholder'").
12. See *Global*, 843 F.3d at 122 (2d Cir. 2016).
13. Id.
14. Id.
15. Id.
16. See *Global Reinsurance Corp. of America v. Century Indemnity Co.*, No. 13 Civ. 06577, 2014 WL 4054260, at *4–7 (S.D.N.Y. Aug. 15, 2014), reconsideration denied, 2015 WL 1782206 (S.D.N.Y. Apr. 15, 2015).
17. *Global*, 843 F.3d at 123.
18. See generally Brief for Amici Curiae Aon Benfield U.S.; Guy Carpenter & Co., LLC; JLT Re (N. Am.) Inc.; and Willis Re Inc. in Support of Defendant-Counter-Claimant-Appellant (Nov. 4, 2016).
19. *Global*, 843 F.3d at 124-25 & n.6.
20. Id. at 126.
21. Id.
22. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").
23. See *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 843 F.3d 120, 128 (2d Cir. 2016), certified question accepted, 28 N.Y.3d 1129, 68 N.E.3d 98 (2017) ("Because this is ultimately a determination to be made by New York, we certify the . . . question to the New York Court of Appeals."); see also N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) ("Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.").
24. *Global*, 843 F.3d at 128.

Information Flow in the Arbitration Process: An Evolving Situation

By Daniel A. Cotter

In the 1st Quarter 2017 issue of the *ARIAS Quarterly*, my colleague David Winters published an article, "The Five Stages of Grief, the ARIAS•U.S. Guide to Data Security in Arbitrations, and You," in which he introduced a draft of the guide. The draft has since been revised, and the final version was posted on the ARIAS website on June 7 as the ARIAS•U.S. Practical Guide for Information Security in Arbitrations.

The guide, like most privacy and security protocols and guidance, starts with the premise that confidential information will be shared among the parties and arbitrators. But an initial question that should be addressed before tackling what arbitrators should be doing to protect personally identifiable information and protected health information (collectively referred to as "confidential personal information") is whether such information should be given to arbitrators in the first place.

The Practical Guide

The introduction to the guide includes the following narrative:

This Practical Guide is drafted primarily to provide guidance to arbitrators and to outline how companies and law firms can help arbitrators comply with the responsibility to secure and protect confidential information in the arbitration process.

Arbitrations often involve the exchange of regulated forms of information, such as "personally identifiable information" and "protected health information," or other information that is sensitive from a business operations standpoint.

This language presupposes that the parties will exchange "personally identifiable information" and "protected health information" or other confidential business information.

The guide then provides approaches to data security in five discrete areas:

1. the organizational meeting;
2. confidential information "at rest";
3. confidential information "in motion";
4. disposing of confidential information; and
5. responding to incidents.

Each section of the guide discusses steps that arbitrators can take to help ensure the security of any confidential personal information they receive during the arbitration proceedings. The guide offers valuable insights and practical guidance. If there is confidential personal information to be exchanged, the guide is a must. However, parties and counsel should consider what exchanges are required *before* the organizational meeting takes place.

The organizational meeting section addresses the minimum necessary exchange of confidential and sensitive information that may be required for the successful conduct of the arbitration. It states as follows:

If the parties anticipate that these types of information or documents will be exchanged, they should ask whether that exchange is truly required and necessary. If there is no reason why this information must be exchanged, consider steps to avoid the exchange. For example, consider whether a column of a spreadsheet may easily be removed or documents be redacted.

This is an excellent starting point to raise the issue of which information, if any, of a confidential or sensitive nature needs to be exchanged and/or disclosed to the arbitrators. The language cited above also contemplates that each party will, in advance of the organizational meeting, have begun analyzing which confidential personal information must be exchanged.

New York Cybersecurity Regulations

On December 28, 2016, the New York Department of Financial Services (NYDFS) issued cybersecurity regulations that took effect on March 1, 2017. These regulations are the most extensive to be issued by any agency to date and will have a major impact on the cybersecurity practices of financial services companies and on those with whom they interact.

Included in the NYDFS cybersecurity regulations are requirements that regulated financial institutions, including insurers and reinsurers, have in place a third-party service provider management system to ensure the security of sensitive data, with "minimum preferred terms" for third-party service providers. Law firms that do business with New York-regulated financial institutions fall within the definition of third-party service providers, as do arbitrators who are appointed by New York-regulated insurers and reinsurers.

The regulations require that financial institutions provide minimum necessary access privileges to users and "periodically review such access privileges." While the regulations permit regulated entities two years from the March 1, 2017, effective date to comply with third-party vendor requirements, law firms and arbitrators should be taking steps to ensure they have adequate data security policies and procedures in place to satisfy third-party vendor requirements.

The Need for Confidential Personal Information

Parties to arbitration should start with the question of whether there is any obligation, given the nature of the dispute to be adjudicated, to disseminate confidential personal information. What confidential personal information is absolutely essential to be disclosed to the arbitrator to present an issue? How much of what is produced in discovery also needs to be used in briefs or in a hearing and, therefore, must be given to the arbitrators? Should parties or their counsel scrub confidential personal information from documents before producing the documents or before providing documents to the panel?

The organizational meeting section of the Practical Guide helps frame this discussion so that everyone involved in the arbitration considers the question of which confidential personal information is actually necessary to adjudicate the dispute between the parties. Each case will, of course, present different circumstances, but framing the initial question as "What exchange of confidential personal information is truly necessary?" rather than as "What methods will the arbitrator take to ensure security of exchanged information?" permits the parties and the arbitrators to think about the minimum necessary disclosure of confidential information. Even before arbitrators are selected, the parties should begin to consider which information is necessary to arbitrate the matter at hand.

Law firms that do business with New York-regulated financial institutions fall within the definition of third-party service providers, as do arbitrators who are appointed by New York-regulated insurers and reinsurers.

Access rights in the user access arena may be informative in this first step.

User access rights agreements often include a "principle of least privilege," which contemplates that the rights granted to a particular user are limited to the minimum access necessary for the user to adequately perform the user's required task. In the arbitration process, we might call this pre-organizational meeting analysis and consideration the "principle of least exchange," contemplating the least amount of confidential personal information necessary to effectuate a successful arbitration of the matters at issue.

In addition to this "principle of least exchange," the parties should consider taking other steps to minimize the confidential personal information that is exchanged. For each piece of data, the parties should consider whether the disclosure and exchange of individualized data are necessary to advance the arbitration. Instead of providing personally identifiable information or protected health information, can a summary document be prepared that de-identifies the individuals so that particular individuals cannot be identified should inadvertent disclosure occur?

Conclusion

Following these steps might minimize the amount of confidential personal information provided to arbitrators and minimize the burden on arbitrators to effectively safeguard information. Before simply exchanging confidential personal information and applying the steps outlined in the guide, the parties should first examine whether they can eliminate, or significantly reduce, the exchange of documentation containing confidential personal information.

However, even if the arbitration does not involve material that meets the definition of confidential personal information, arbitrators still must be vigilant regarding confidentiality. The ARIAS•U.S. Confidentiality Agreement calls for the protection of certain information that is part and parcel of the arbitration, including "all briefs, depositions and hearing transcripts generated in the course of [the] arbitration, documents created for the arbitration or produced in the proceedings by the opposing party or third-parties, [and] the result and all other terms of the final award." So even if confidential personal information is not exchanged, arbitrators must take steps to ensure the confidentiality of arbitration information.

Recapping the Fall 2017 Conference

The 2017 ARIAS•U.S. Fall Conference, held November 2-3 at the New York Marriott Marquis, offered eight general sessions and seven breakout sessions on topics ranging from resolving evidentiary disputes at hearing to addressing privilege issues in arbitrations to arbitrating small disputes cost-effectively. Following are summaries of some of the conference sessions.

Information Security for Arbitrators: File Encryption and Deletion

Randi Ellias, Butler Rubin Saltarelli & Boyd LLP
Ronald S. Gass, The Gass Company

Keeping information secure is vital in any confidential arbitration. On November 2, the ARIAS Technology Committee held the second in a series of workshops for arbitrators focused on information security. The Technology Committee is offering these workshops to assist arbitrators in preparing for potential new requirements relating to cybersecurity that may be imposed upon them by insurance and reinsurance companies seeking to comply with the New York Cybersecurity Regulations (23 N.Y.C.R.R. 500, et. seq.), which went into effect on March 1, 2017, and will be phased in over a two-year period.

As of March 1, 2019, companies regulated in New York will be required to establish procedures to ensure that their third-party service providers (including arbitrators) have their own policies and procedures in place to protect electronic non-public information, including personal identifying information. In addition, on August 7, 2017, the Cybersecurity Working Group of the NAIC passed its proposed Insurance Data Security Model Law (the "Model Law"), which echoes many of the requirements set forth in the New York Cybersecurity Regulations.

The information security workshop addressed file encryption and deletion of files at the conclusion of a matter. With respect to file encryption, the workshop focused on situations where an arbitrator might not need to encrypt an entire e-mail, but would need to protect the attachments to that e-mail. The presenters demonstrated simple techniques for encrypting a Word document and a PDF document, as well as how to use WinZip to compress and encrypt multiple documents of differing file types.

With respect to the deletion of files, arbitrators were reminded to check for relevant files in all formats (including Word, e-mail, Excel, and any other program used during the course of the matter) and to make sure to empty the "trash can" or "recycle bin" on their computer to ensure the file was actually deleted. Even at that point, a file is never truly gone, but retrieving files deleted in this manner would require forensic restoration, which is expensive and relatively rare. Arbitrators were also cautioned that if they routinely back up computer files to a cloud, they would also have to remove any relevant files from the cloud. Arbitrators who use firm or company computers for their arbitration work were encouraged to consult with the IT personnel for their firms or companies to determine what backup files might exist and the best solution for deleting those files.

The presenters plan to make the Powerpoint slides used during the presentation, which include instructions for the techniques demonstrated, available on the ARIAS website.

Captives in Reinsurance Disputes

Robert M. Horkovich, Anderson Kill
Sandra J. Sutton, MCIC Vermont LLC
Larry Zelle, L. Zelle LLC

Reinsurers and arbitrators should recognize that coverage conventions and arbitration rules may take on a unique cast in disputes between a captive and its reinsurers. This session was designed to provide tools to understand the application of "follow the fortunes" in disputes involving captives. It also focused on what captives look for in arbitrators and on ways that captives may seek to modify arbitration clauses.

The panel opened with the question of whether ARIAS•U.S. could become the forum of choice for the resolution of disputes involving captives. Sandra Sutton, a representative from a Vermont-domiciled reciprocal risk retention group, introduced the audience to her organization and explained how it handles the claims of its policyholders and what it seeks from the dispute resolution process with its reinsurers. Like other captives, it seeks a fair, efficient, and unbiased process, and it looks for arbitrators that can provide such a process.

Larry Zelle discussed his experience as counsel in matters involving captives and the notion that disputes involving captives may be perceived differently by reinsurers as well as by arbitrators because of the symbiotic relationship between the captive and the captive's policyholder. Bob Horkovich then provided the perspective of counsel for captives in terms of ARIAS•U.S. rules that may need to be changed to make ARIAS a more enticing forum for captives.

In particular, Bob discussed the notion that the pool of arbitrators should be expanded beyond the traditional requirement of someone with insurance or reinsurance experience as a director or officer. He also discussed Rule 14.3 of the ARIAS rules pertaining to relieving the panel from following strict rules of law or evidence and the concept of an "honorable engagement," as the result is that captives may not have certainty as to the rules of the game.

The audience asked a number of questions, with a focus on the notion of bias (real or perceived) when it comes to reinsurance disputes involving captives.

The ARIAS•U.S. Ethics Code in Practice

Mark Gurevitz, MG Re Arbitrator & Mediator Services
Peter Gentile, ARIAS•U.S. Certified Arbitrator
Jeanne Kohler, Carlton Fields
Mark Megaw, ARIAS•U.S. Certified Arbitrator
Steve Schwartz, Chaffetz Lindsey LLP

The practice at past ARIAS•U.S. conferences has been to confront contentious ethical issues and discuss areas for potential improvement to the ARIAS Code of Conduct. In light of the overall success of these efforts over the last several years and the adoption of positive changes by the ARIAS•U.S. Board, the Code of Conduct has become an effective and practical document that reflects the current thinking of the organization regarding applicable standards.

In a break with recent tradition, the goal of this year's ethics presentation was to highlight what are now standard ethical practices (and some best practices) in the areas of conflicts, disclosures, ex parte communications, and advocacy. The panelists at this session identified and discussed key Code of Conduct sections applicable to each situation, explained how arbitrators and counsel think about these obligations from a practical perspective, and provided pointers for both new and experienced practitioners.

In the area of conflicts, the panel highlighted some situations where an arbitrator's experience or relationships may limit the appointments an arbitrator may take and the discretionary factors to be considered that may affect an arbitrator's judgment. The panel also emphasized that it is an arbitrator's duty to carefully understand the facts of a prospective appointment in order to fully think through the factors outlined in the code.

The panel discussed the importance of timely and full disclosures that convey to the recipient the essence of the nature of key relationships and experience, the unique considerations related to "active" arbitrators currently working for companies and experts, and the parameters and limitations of disclosing past or present involvement "with the contracts or claims at issue." The panel also noted that while the discretionary areas of the code require the arbitrator to consider whether and how certain factors might affect his or her judgment, there is nothing in the code that requires the arbitrator to disclose the details of that self-analysis.

The panel reviewed the dos and don'ts of ex parte communications, the importance of clarity regarding the cut-off and resumption of ex parte communications, and the scope and limitations of permissible communication throughout the course of the proceeding.

Finally, the panel addressed the difficult and complex topic of permissible advocacy by party arbitrators. The panel focused on the need to strike the right balance between advocating for a party at each stage of the arbitration and the arbitrator's ultimate role as decision maker.

The panel concluded by emphasizing that while the code is comprehensive and adequate to address most situations that might arise, it can only be effective and address the concerns of counsel and the parties if arbitrators know it in detail and understand what is expected of them in all situations.

The Bermuda Form: Can ARIAS Disrupt the Traditional Model?

Jonathan Goodman, General Electric
Mike Merlo, Aon (Bermuda)
Len Romeo, Arch Insurance (Bermuda)
Robin Saul, XL Bermuda Ltd/Insurance

This conference panel discussed whether Bermuda Form arbitrations work well and whether ARIAS•U.S. has assistance to offer in terms of improving the model. Moderators Greg Hoffnagle (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo) and John Jacobus (Steptoe & Johnson LLP) provided a brief overview of these arbitrations, which are conducted under U.K. procedural rules but the substantive law of New York.

The panel first addressed arbitration panelist conflicts and disclosures. The conference panelists noted that strict confidentiality, along with structural issues such as the "repeat player" effect, have led to a perception that some parties are disadvantaged in understanding the suitability of potential arbitrators. Panelists discussed a potential disruption point—the use of ARIAS information-forcing rules, including the ARIAS•U.S. Umpire Questionnaire. It was agreed that the adoption of better disclosure rules would be helpful.

The conference panel also discussed the application of New York law in these proceedings and whether the decision-making process in Bermuda Form arbitrations would be enhanced by encouraging the use of ARIAS•U.S. arbitrators with knowledge of New York law to serve as umpires. It was suggested that ARIAS could establish a special, separate "Bermuda Form" pool of certified candidates to serve in this role.

Next, the panel discussed jurisdictional concerns the Bermuda carriers might have with using ARIAS•U.S. panels and procedures. This could create "additional contacts" to the United States, potentially subjecting them to U.S. courts as well as exposing them to U.S. regulatory and tax issues. Panelists stated that this is a real concern, particularly for the Bermuda carriers, but also believed that there may be ways to potentially address these concerns—for example, continue to conduct the arbitrations outside the United States and consider reaching an agreement between the parties that this cannot be used as a ground for attempting to establish jurisdiction in the United States.

The panel next discussed confidentiality and the lack of access to any precedent to guide companies, either in advance of arbitrations or during the proceedings themselves. The panel also addressed a commonly expressed concern that strict confidentiality may have given companies an incentive to use sequential arbitrations to try to achieve new or different results in sequential proceedings, unchecked by precedent. The panel discussed a potential disruption point—creating an archive of anonymized decisions, similar to the ARIAS•U.S. Law Committee Reports, wherein basic confidentiality for participants would be preserved, but helpful precedent made available on a going-forward basis.

Neal Katyal, former acting solicitor general of the United States, delivers the keynote address.

Brian Snover presents at “Through the Looking Glass: Insurance Company Perspectives on Policyholder Arbitration” as Glenn Frankel and Kim Hogrefe look on.

Erik Rasmussen engages with fellow attendees at the cocktail reception.

Ron Gass (left), Mitchell Cohen, and Michael Wilder enjoy the cocktail reception.

Steve Schwartz, Kyley Knoerzer, and Eileen Sorabella listen to a conference presentation.

John Chaplin speaks at “The Gatekeeper: A Practical Guide to Resolving Evidentiary Disputes at Hearing” as moderator Catherine Isely and panelist Nina Caroselli listen.

Attendees listen attentively to panelists at “Privilege and Its Perils: Insights and Strategies for Addressing Privilege Issues in Arbitration.”

Top: Don Frechette, Aimee Hoben, Jonathan Rosen, and Christopher Bello present “Discovery—A Matter of Balance: Keeping a Watchful Eye on the Objective.” Above: Mitch Harris, Bryce Friedman, Jodi Ebersole, and Kathleen Perlman deliver the panel presentation “Workers' Compensation Disputes in the Insurance and Reinsurance Sphere: A Practical Guide.”

A bird’s-eye view of the cocktail reception.

Discovery: A Matter of Balance

Christopher Bello, General Re Life Corporation
Don Frechette, Locke Lord LLP
Aimee Hoben, The Hartford
Jonathan Rosen, Arbitration, Mediation and Expert Witness Services

The complexity and amounts involved in modern-day reinsurance disputes often compel the conclusion that discovery of some type is a reality we all must simply come to accept. The real question, then, becomes one of determining the proper scope of that discovery. As panelist Jonathan Rosen made clear, "One size simply does not fit all."

While the federal rules are not binding in arbitration, they provide a framework for the analysis of discovery issues. Rule 26 makes clear that, in assessing the issue of "proportionality," at least six factors merit consideration:

- the importance of the issues at stake in the action;
- the amount in controversy;
- the parties' relative access to relevant information;
- the parties' resources;
- the importance of the discovery in resolving the issues: and
- whether the burden or expense of the proposed discovery outweighs its likely benefit.

One of the key points of inquiry for any arbitration panel should be whether the discovery at issue is targeted to obtain the most relevant information in the least intrusive way possible. In any discovery dispute, the arbitration panel will, and should, expect to hear from the proponent of discovery exactly what they are looking for, why they need it, and why the propounded discovery is the most effective and efficient means of obtaining it. In other words, "dragnet" discovery, designed to capture every potential bit of information with an eye toward "sorting it out later," is to be avoided.

The session panelists, together with the audience, considered several hypothetical discovery disputes.

In a life reinsurance dispute, the discovery requested—10 years of underwriting files across all business written—was generally viewed as overly broad. While there was general agreement that some discovery was necessary, the time frame was viewed as excessive. One member of the session panel suggested that a better method would be to allow sampling of the files and, if (and only if) further supportive information was discovered, to then potentially allow additional inquiry.

A second hypothetical concerned discovery regarding contemporaneous notes of a reinsured's draftspersons in connection with an admittedly ambiguous treaty provision. All of the draftspersons are available to testify, and the e-recovery cost of the documents will be about $100,000. Consequently, the questions posed were whether to allow the discovery and who should pay for it. The majority of the discussion panel, and about half of the audience, were in general agreement that discovery should be permitted because, as a general principle, contemporaneous notes will always be a better indicator of actual events than experientially informed recollections years after the fact.

The greater area of disagreement concerned the allocation of costs. Some members of the audience, as well as the session panelists, saw no reason to retreat from the American Rule absent bad faith (particularly since it was the reinsured's business decision to change document storage systems). Others were more willing to compel the reinsurer to be initially obligated to pay for the discovery. Panelist Rosen opined that, as with all matters relating to costs and attorneys' fees, the ultimate allocation should await the outcome of the arbitration.

A third hypothetical related to a reinsured's acceptance of claims, where the reinsured expressly stated that its decision was based on advice of counsel. The reinsurer sought the documents evidencing that advice, and the reinsured objected on the basis of privilege. This hypothetical dispute engendered considerable debate, with most of the discussion panel and a slight majority of the audience advancing the view that privilege cannot be used as both a sword and a shield. Once reliance upon the advice of counsel was placed at issue, the content of that advice became fair game for inquiry by the reinsurer.

Workers' Compensation Disputes in the Insurance and Reinsurance Sphere

Jodi Ebersole, Travelers
Bryce Friedman, Simpson Thacher & Bartlett LLP
Mitch Harris, Day Pitney LLP
Kathleen Perlman, BerkleyRe

Workers' compensation insurance spawns disputes between policyholders and insurers and between insurers and reinsurers. On the direct side, workers' compensation disputes may be an area into which arbitrators certified by ARIAS•U.S. may expand. On the reinsurance side, ARIAS arbitrators are well-equipped to handle disputes, but they should be aware of unique elements in such disputes.

This session addressed the key procedural and substantive issues presented in workers' compensation arbitrations, both in insurance and reinsurance settings. The panelists discussed the specialized structure of workers' compensation programs, with a particular focus on premium financing arrangements. They also addressed the following issues:

- common issues concerning the scope of the arbitration panel's authority and arbitrability in workers' compensation arbitrations;
- arbitrator selection, the current pool of frequently used arbitrators, and issues about which court intervention is often sought;
- the key insurance claim issues that arise in such arbitrations, including disputes over the calculation of retrospective premiums, claim payment, and audits;
- data security concerns;
- forced commutation provisions in workers' compensation reinsurance contracts; and
- other disputed issues in workers' compensation reinsurance arbitrations.

Key takeaways from this session were as follows:

Introduction. Most workers' compensation insurance policies are guaranteed cost policies (e.g., a policy where the insured's costs are guaranteed to remain at a stated manual rate). Larger, qualified employers may share risk through loss-sensitive policies via a large deductible, retrospective premium, self-insured retention, or other like loss-sharing policy.

Many insurers use a separate agreement, called a "program agreement," "deductible agreement," or "retrospective premium agreement" (collectively, a PA[1]) to document how the employer will pay its loss-sensitive obligations. PAs often contain arbitration clauses in their dispute resolution clauses. Workers' compensation insurance contracts and PAs operate together, but PAs often are not an endorsement or attachment to the workers' compensation policy.

Common features of PAs. PAs often are vehicles for financing premiums, usually through installment payments of basic premiums and/or loss-sensitive payments. Some PAs require that the policyholder post collateral to secure future premium payments. The insurer often exclusively determines the amount of collateral.

PAs generally provide for an initial premium and additional retrospective premiums to be paid based on a formula that focuses on incurred losses. Workers' compensation policies provide for audits of the policyholder's books and records to determine the actual exposure base. PAs may contain enhanced audit requirements.

A PA often outlines "development factors" and claim handling charges to be applied based on the losses incurred or paid for the policy term. Many PAs contain arbitration clauses.

Common disputes under PAs. Some policyholders claim PAs are unenforceable if they are not approved by the state's insurance regulator. Most courts have rejected this argument.

Where a PA contains an arbitration clause, a challenge to the PA's propriety as a matter of a particular state's in-

Workers' compensation policies provide for audits of the policyholder's books and records to determine the actual exposure base.

surance law must be arbitrated. A challenge to the existence of an agreement to arbitrate is for the court.

Most premium adjustments focus on employee classification and are a prime area of disputes. Claim payment often spawns disputes because claims drive retrospective premiums and the employer's experience modification factor. Policyholders often contend that the insurer is holding more collateral than is necessary to satisfy the policyholder's obligations.

Common workers' compensation reinsurance issues. Some workers' compensation reinsurance contracts contain mandatory commutation clauses that require the parties to commute existing claims or all claims (i.e., projected to ultimate). The clauses generally require that the reinsurer pay the present value of existing losses and, in cases of total commutations, IBNR. Some clauses contain dispute resolution provisions under which an actuary or panel of actuaries will determine the amount the reinsurer must pay.

Sunset clauses may bar claims that are not reported to the reinsurer by a specified date. Courts have distinguished between general loss reporting and providing loss information for sunset purposes. Courts also have found that reporting for sunset purposes must contain sufficient information to show whether that loss may reach the reinsurer's coverage.

1. Policyholders seeking to invalidate PAs call them "side agreements."

The Gatekeeper: A Practical Guide to Resolving Evidentiary Disputes at Hearing

Nina Caroselli, RiverStone Resources, LLC
John F. Chaplin, Compass Reinsurance Consulting LLC

Arbitrators must rule quickly on evidentiary disputes at hearing, often without the aid of briefing and while confronted by party predictions that vacatur will follow from adverse evidentiary rulings. At two breakout sessions, conference attendees grappled with realistic evidentiary disputes set in a farcical arbitration involving a bungling celebrity couple, a bitcoin cyber ransom, and an FBI-hunted hacker with a propensity to Twitter-taunt. The arbitration, *In the Matter of the Arbitration Between WidgetKicks and ACME Insurance Company*, arose from a hypothetical coverage dispute between an online retailer and its insurer over first-party network business interruption and cyber-extortion threat claims.

In advance of the session, participants were provided with program materials excerpting the ARIAS-U.S. Code of Conduct and Practical Guide to Reinsurance Arbitration Procedure, the ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, the AAA Commercial Arbitration Rules, and the Federal Rules of Evidence to prepare to rule as arbitrators confronted with evidentiary disputes at a hearing. At the session, panelists Nina Caroselli of RiverStone Resources, LLC and ARIAS-Certified Arbitrator John F. Chaplin presented eight scenarios, including party requests for extension of hearing schedules to permit rebuttal witnesses, challenges to documentary evidence, and objections to lines of witness testimony. Then, to simulate the speedy rulings arbitrators often must make at hearing, attendees voted immediately (by text messaging) to grant or deny motions to admit or exclude disputed evidence. The votes were tabulated, and the panelists then revealed how they voted and why.

Audience voting results on the evidentiary disputes varied by as much as 25 percentage points between the two sessions. For example, at the first session, the audience voted by a 3:1 ratio to grant policyholder WidgetKicks' motion for an extension of the arbitration hearing to permit rebuttal witnesses to testify. At the second session, the audience split evenly.

The panelists encouraged attendees ruling on evidentiary disputes in future arbitrations to (1) identify any contract language or rules that might govern evidence presented at hearing, (2) assess the relevance and reliability of the evidence offered, (3) seek fairness and efficiency at hearing, and (4) understand the impact of evidentiary rulings on any award issued. Moderator Catherine Isely (Butler Rubin Saltarelli & Boyd LLP) concluded the debate over the hypothetical evidentiary disputes by surveying court decisions in which the parties challenged arbitral awards based on evidentiary rulings in the arbitrations.

Preliminary Injunctions in Arbitration: Are They 'Final' Awards Ripe for Judicial Confirmation?

By Ronald S. Gass

Occasionally in insurance and reinsurance arbitrations, a party may request immediate equitable relief from the panel. This may take the form of a preliminary injunction motion seeking to bar conduct by the opposing party that is likely to cause irreparable harm during the pendency of the arbitration. The need for such a motion may arise, for example, when the parties' contract includes a non-compete clause or a confidentiality provision designed to protect proprietary business information or trade secrets, as may sometimes be found in managing general agent and insurance agency agreements.

While it is generally well settled that prehearing security awards are sufficiently "final" rulings to warrant immediate judicial review and confirmation, what about arbitral preliminary injunctions? Significantly, the U.S. Supreme Court has not yet ruled definitively on this question, and not every federal circuit court of appeal has addressed it, either. This uncertain legal posture is what makes a recent Oklahoma federal district court decision[1] outside of the insurance and reinsurance arbitration arena noteworthy, because it addresses head-on whether arbitral preliminary injunctions may be considered interlocutory "final" awards subject to immediate judicial review and confirmation under the Federal Arbitration Act (FAA).

In 2007, an endodontist, William Ben Johnson, and a manufacturer of endodontic products, Dentsply Sirona Inc., entered into an agreement under which the doctor agreed to perform consulting services for 10 years in exchange for receiving annual compensation plus royalties on the inventions he assigned to the manufacturer. Under their contract, Johnson agreed not to disclose any confidential information about Dentsply's business and not to compete with it for three years after the contract's December 31, 2017, termination date. The parties further agreed to arbitrate any disputes by engaging in binding arbitration before a single arbitrator appointed by the American Arbitration Association (AAA) and subject to the AAA Commercial Arbitration Rules.

Despite the agreement's arbitration clause, Johnson initially filed suit in Oklahoma federal district court in July 2016 seeking a declaration that the confidentiality and non-compete provisions were unenforceable. Ultimate-

As with pre-hearing security motions, there may be times when a party succeeds in persuading a panel to issue equitable relief in the form of a preliminary injunction early in an arbitration to avoid irreparable harm.

ly, that court action was stayed, and the matter was remanded for arbitration. Early in that arbitration, Dentsply filed a motion for a preliminary injunction to enjoin Johnson from competing with it, revealing any confidential information, and intentionally taking actions inconsistent with Dentsply's "best interests."

Following a June 2017 evidentiary hearing on Dentsply's motion, the arbitrator granted its request, finding that the agreement was valid and in effect. To prevent irreparable harm to Dentsply, the arbitrator ruled that Johnson be enjoined from breaching the contract's confidentiality and non-compete provisions. Based on the evidence presented, the arbitrator concluded that Johnson had already taken actions benefiting Dentsply's competitors and had engaged in other conduct "against defendant's best interests." The arbitrator also noted that during the motion hearing, Johnson stated that he had no intention of violating the parties' agreement, which in the arbitrator's view eliminated any hardship the injunction might impose on him because the final evidentiary hearing was scheduled prior to the December 2017 expiration of the parties' agreement.

Unlike prehearing security awards in insurance and reinsurance arbitrations, which are commonly denoted in some manner as "final" to facilitate immediate judicial appeal and enforcement, the arbitrator muddied the waters in this case by stating the following: "All rulings herein are tentative and based on the record presented thus far. Although some of these conclusions may be less likely to change than others, all of them are subject to revision after the final, evidentiary hearing."

In August 2017, Dentsply returned to the district court seeking confirmation of the arbitrator's preliminary injunction, which was vigorously opposed by Johnson, primarily on the ground that it was not a "final" award subject to confirmation under § 9 of the FAA. In granting Dentsply's motion to confirm the arbitrator's preliminary injunction award, the Oklahoma federal district court observed that since there were no U.S. Supreme Court or Tenth Circuit precedents, it looked to non-binding decisions in other circuits for guidance. It is well settled under the FAA that only "final" arbitration awards may be subject to judicial review, but there are recognized exceptions for certain types of interlocutory arbitral rulings if they "finally and definitively dispose[] of a separate and independent claim."

Dentsply argued that the arbitrator's ruling "finally and definitively" disposed of two independent claims: (1) that Johnson's attempted early termination of the agreement was improper, and (2) that he may not compete against it during the agreement's term. Without judicial confirmation, Dentsply contended, the arbitration would be rendered meaningless if Johnson disclosed confidential information to its competitors or the non-compete provision was breached—in other words, the injunction would "lack teeth" because only the court, not the arbitrator, has enforcement powers.

Johnson raised numerous counterarguments, which were mostly variations on the theme that the arbitrator's preliminary injunction award lacked sufficient finality to be judicially confirmed under the FAA. First, he seized on the arbitrator's injunction wording, which suggested that it was "tentative" and "subject to revision" and, therefore, could not properly be characterized as "final" for FAA confirmation purposes. Rejecting this position, the district court observed that in other federal circuits, the courts often looked beyond the letter of the arbitral ruling and focused on "the substance and impact of the interim arbitral award to determine whether it is final and thus subject to judicial review."

Second, Johnson argued that §§ 9-11 of the FAA, when read together, provide that only a "final," not interim, award may be confirmed and only on the limited bases set forth in § 10(a)(1)-(4). Again relying on non-binding case law from other circuits, the district court agreed with Dentsply that an interim award resolving an independent claim or a discrete and time-sensitive issue such as a preliminary injunction may be judicially confirmed.

Third, Johnson claimed that the parties' agreement did not contemplate judicial confirmation of interim awards like preliminary injunctions and that the arbitration clause required the arbitrator to enter a final, binding decision only after conducting an evidentiary hearing on the merits. Dentsply countered, and the district court readily concurred, that the AAA Rules incorporated by reference in the agreement plainly authorized arbitrators to issue interim, interlocutory, or partial rulings, orders, and awards (AAA Rule R-47(b)); that the arbitrator held an evidentiary hearing regarding Dentsply's injunction motion; and that other courts have clearly considered such interim awards to be "final" for judicial review and confirmation purposes.

The district court found that Johnson had presented no authority or "any good reason" for it not to confirm the arbitrator's preliminary injunction and acknowledged that the case law in other circuits demonstrated that interim awards could be judicially reviewed and that they were sufficiently "final" under the FAA to merit confirmation. It granted Dentsply's motion and confirmed the arbitrator's award of equitable relief, observing that such an award was not a "preliminary or procedural trifle" such that judicial review would "frustrate our arbitration system's goal of expediency." Here the injunction "finally and definitively" disposed of an independent issue, preserved Dentsply's valuable confidential information, and protected it from prohibited competition by Johnson during the pendency of the arbitration. Not to enjoin such conduct at an early stage in the arbitration—particularly when the injunction award was made after an evidentiary hearing, explicitly found irreparable harm, was of limited duration, and did not prejudice Johnson—could render meaningless any relief that may be subsequently awarded to Dentsply following the December 2017 evidentiary hearing on the merits.

As with pre-hearing security motions, there may be times when a party succeeds in persuading a panel to issue equitable relief in the form of a preliminary injunction early in an arbitration to avoid irreparable harm. Assuming no binding legal precedent in the relevant jurisdiction barring judicial confirmation of such interim awards, arbitration panels should carefully craft their grant of a preliminary injunction so as not to create inadvertent stumbling blocks for the prevailing party's subsequent judicial enforcement efforts. One way to clarify the finality of a preliminary injunction award and to enhance its judicial enforcement prospects would be to include a provision along the following lines:

IT IS ORDERED that this preliminary injunction award shall constitute an independent, severable, and discrete final arbitration ruling of the panel that conclusively disposes of [the moving party's] motion for a preliminary injunction; is necessary and proper to make the panel's ultimate final award in this arbitration following an evidentiary hearing on the merits meaningful; and is subject to confirmation, at the discretion of the moving party, in a court of competent jurisdiction prior to the panel's issuance of its final award on the merits of the parties' pending disputes in this arbitration.

While panels in insurance and reinsurance arbitrations may rarely be requested to issue a preliminary injunction, situations can and do arise that necessitate prompt equitable relief to protect a party's valuable business interests against irreparable harm, particularly when breaches of non-compete clauses, spoliation of evidence, or confidential information, trade secrets, or other forms of intellectual property are at stake.

1. *Johnson v. Dentsply Sirona Inc.*, Case No. 16 Civ. 0520-CVE-PJC, 2017 U.S. Dist. LEXIS 158285 (N.D. Okla. Sept. 27, 2017).

Law Committee Case Summaries

By Sylvia Kaminsky

Since March 2006, in a section of the ARIAS•U.S. website titled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration- and reinsurance-related issues. Individual ARIAS•U.S. members are also invited to submit summaries of cases. Legislation, statutes, or regulations for potential publication by the committee. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions.

Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America and Pacific Employers Insurance Company v. OneBeacon Insurance Company f/k/a CGU Insurance Company f/k/a General Accident Insurance Company of America, No. 1280 EDA 2016, Pa. Super., 2017 Pa. Super. LEXIS 806

Court: Superior Court of Pennsylvania

Date Decided: October 17, 2017

Issue Decided: Whether the language in a facultative certificate provided coverage for defense expenses in excess of the liability limit of the certificate

Submitted by: Sylvia Kaminsky, Esq.

In *Century Indemnity Company and Pacific Employers Insurance Company (PEIC) v. OneBeacon Insurance Company*, the Superior Court of Pennsylvania was asked to decide on an appeal by the reinsurer, OneBeacon, the following issues: (1) whether the Philadelphia County Court of Common Pleas, in a bench trial, properly ruled that the facultative certificates at issue provided for defense expenses in excess of the liability cap; (2) whether Century was estopped from raising its defenses based upon prior court decisions; and (3) whether the cedents were entitled to interest on certain proofs of loss. The court affirmed the trial court's decision in favor of the cedents.

The case involved two cedents that issued similar underlying excess blanket catastrophe liability policies. Both cedents' policies included a "second obligation to provide coverage for defense costs" to insureds that were involved with massive asbestos-related losses. The facultative certificates issued by OneBeacon's predecessor reinsured a certain layer of the underlying policies. They were renewed the following year by endorsement and a new certificate, respectively. The certificates were on a double-sided pre-printed form that listed the type of insurance, the underlying policy limits, and the ceding company's retention. They contained general provisions that provided, in relevant part:

"…the liability of the Reinsurer specified in Section IV shall follow that of the Company and except as otherwise specifically provided herein, shall be subject in all respects to all the terms and conditions of the Company's policy."

"All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, who shall be bound to pay its proportion of such settlements, and in addition thereto … its proportion of expenses …"

OneBeacon paid the "Reinsurance Accepted" limit amounts on the certificates, but refused to pay any defense costs above the stated limit. The trial court denied OneBeacon's motion for summary judgment, in which OneBeacon argued that (1) it paid the "Reinsurance Accepted" limit, which was its maximum liability; (2) the cedents were estopped from seeking defense costs in addition to that limit; and (3) it owed no interest because it had no duty to pay prior to the time that it issued payment.

In denying OneBeacon's motion, the trial court determined that the certificates were ambiguous and, consequently, that OneBeacon could present extrinsic evidence at trial. The trial court further ruled that the cedents were not collaterally estopped from asserting their claims based on prior decisions. The trial court granted partial summary judgment in favor of the cedents, concluding that OneBeacon had a duty to pay promptly following receipt of a proof of loss, and awarded the cedents pre-judgment interest. A three-day bench trial followed, in which the trial court found in favor of the cedents.

In affirming the trial court's decision and noting that "this is a case of first impression for Pennsylvania courts," the court provided a very detailed history and analysis of the *Bellefonte* case and its progeny. The court stated that in *Bellefonte*, the court concluded that the "in addition thereto" language merely outlined the different components of potential liability under the certificate and did not indicate that either component is not within the overall stated limitation. The court also noted that the *Bellefonte* court also emphasized the "subject to" clause in the certificates, which made all the provisions subject to the liability limits.

In comparing the language of the certificates at issue to that in *Bellefonte*, the trial court determined that while the language was similar, it contained slight variations and that *Bellefonte* did not establish a blanket rule that all limits of liability are presumptively expensive-inclusive, but that each certificate must be analyzed as a whole to discern its meaning. While the court stated that the general conditions of the certificates were almost identical to those in *Bellefonte*, it agreed with the trial court that the "subject to" language was materially different and did not expressly provide that all of the coverage was subject to the "Reinsurance Accepted" limit. In *Bellefonte*, the "subject to" clause stated that the reinsurance was subject to the conditions and amount of liability set forth in the certificate. In this case, the "subject to" clause stated that the reinsurance was subject to the general conditions set forth on the reverse side of the certificate. The court found that the certificates did not expressly provide that all of the coverage was subject to the "Reinsurance Accepted" limit: "Accordingly, absent language providing that the entire certificate is subject to the 'Reinsurance Accepted' amount, a reasonable interpretation of the language is that where the underlying policy covers expenses in addition to liability limits, the reinsurance certificate provides the same coverage."

The court specifically held that a reasonable interpretation of the certificates' reference to OneBeacon's liability refers only to liability for losses which is supported by the general conditions that require the reinsurer to pay its proportion of losses, "and in addition thereto" its proportion of expenses. The court concluded that because the certificates followed the underlying policy, it would cover expenses above the liability limit. The court rejected OneBeacon's arguments, which included its position that the wording does not distinguish between losses and expenses and therefore its limit is capped.

The court agreed that the certificate language was ambiguous as to whether defense costs are limited to the stated limit and that summary judgment was properly denied, allowing for extrinsic evidence at trial. It discussed at length OneBeacon's arguments regarding extrinsic evidence and expert testimony, in which OneBeacon claimed that such evidence was inadmissible and unpersuasive. The court rejected OneBeacon's arguments, finding that the testimony of the cedents' underwriters was proper as to their underwriting intention and as to their companies' requirement that the reinsurance provide concurrent coverage with the underlying policies. The court also found admissible the testimony of the cedents' expert on the industry's custom and usage regarding the language in facultative certificates issued during the early 1980s. The court noted that OneBeacon was able to present its own expert to refute the cedents' expert.

The court further held that the cedents were not collaterally estopped from raising their defenses. The court found that the language of the certificates in the cases of *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 2014 WL (S.D.N.Y. 2014) (on appeal as the Second Circuit certified the question to the New York Court of Appeals and "is therefore far from settled") and *Pacific Employers Ins. Co. v. Global Reinsurance Corp. of America*, No. 09-6055, 2010 WL 1659760 (E.D. Pa 2010), are different from the ones under review in this matter and that the rulings in those cases do not constitute a final judgment for purposes of collateral estoppel.

Finally, the court found that the cedents met their burden of proving damages. Having submitted their proofs of loss under the certificates that attached no other conditions for payment, the court found OneBeacon's failure to pay and its failure to actively seek information entitled cedents to an award of pre-judgment interest.

Newly Certified Arbitrators

Perry S. Granof is the managing director at Granof International Group LLC, where he provides insurance consulting and claims resolution services specializing in international and domestic professional liability exposures. He previously served as vice president and claims counsel with Chubb. He is the principal editor of, and contributor to, *The Global Directors and Officers Deskbook* (ABA 2014), authored the chapter on international alternative dispute resolution for the upcoming ABA publication *Resolving Insurance Claim Disputes Before Trial*, and has spoken on professional liability insurance issues throughout the world.

He is a member of the State Bar of Wisconsin, the Washington State Bar, and the American Bar Association and is a Fellow of the Chartered Institute of Arbitrators (FCIArb). He currently serves as chair of the ABA Torts Trial and Insurance (TIPS) Dispute Resolution Committee and the CIArb-North American Executive Board, having previously served as chair of both the ABA TIPS Professionals' Officers' and Directors' Liability and International Committees. He also sits on the American Arbitration Association's Commercial Panel and is a public arbitrator for the Financial Institution Regulatory Authority (FINRA).

Kim Hogrefe is a former senior officer at Chubb with 29 years of experience directing and handling claims under direct policies of insurance and both ceded and assumed reinsurance.

As a senior vice president, he had global responsibility at Chubb for direct claims of the highest complexity and financial exposure under cyber, directors and officers, errors and omissions, employment practices liabilty, fidelity and surety, fiduciary liability, general liability, and property insurance policies. He led the strategy and handling for recovery and arbitration of high value ceded and assumed reinsurance claims. Prior to joining Chubb, he was a Manhattan assistant district attorney, investigating and prosecuting criminal matters, including the murder of John Lennon.

He is the board chair of the National Judicial College, is certified as a mediator by Pepperdine University, and mediates for a New Jersey court program. He is active in the American Bar Association and serves on the Judicial Division Council and the Cybersecurity and Data Privacy Committee of TIPS. He is a frequent presenter on the topics of cyberliability risks, arbitration and mediation strategies, and claim management.

William (Bill) Sofsky, CPA, is a lecturer in the Department of Accounting at the University of North Carolina at Charlotte and an independent consultant. After starting his career in public accounting, he worked in accounting, finance, and treasury roles in the insurance industry for 26 years.

He began his teaching career at UNCC in 2015 after serving as senior vice president and chief accounting officer of SCOR Global Life Americas. Prior to that, he held the same position with the Transamerica Reinsurance division of Aegon. He spent the majority of his insurance industry career with the Aegon Group, including four years in The Netherlands.

He has experience and expertise in international financial reporting standards, U.S. generally accepted accounting principles, and U.S. statutory basis financial reporting for insurance entities and is a former member of the American Council of Life Insurers Reinsurance Accounting Committee. He has also served as an officer and board member of insurance and reinsurance subsidiaries of international insurance groups.

He is a certified public accountant and is currently licensed in North Carolina. He is a Fellow of the Life Management Institute and has also held the Chartered Life Underwriter and Chartered Financial Consultant designations during his career.

Newly Certified Mediator

Steve Gilford is an attorney who has focused on insurance and reinsurance for more than 30 years. He has extensive experience in mediations and has been involved in almost every area of insurance, including commercial general liability, property/business interruption, directors and officers, errors and omissions, cyber, recall, employment practices law, and life and health, as well as facultative and treaty reinsurance. He has represented policy holders, captives, insurers, and ceding and assuming companies in a wide range of litigation and in arbitrations in the United States, Bermuda, Canada, and England.

He co-chaired the insurance practice at Proskauer, where he opened its Chicago office in 2008 after 20 years as a partner at Mayer Brown. He is currently transitioning his practice to focus on mediations and arbitrations.

He has written and presented on various insurance, reinsurance, and arbitration topics and writes "Insurance Coverage for Data Breaches and Unauthorized Privacy Disclosures," updated annually in PLI's Proskauer on Privacy. He teaches a short course on insurance at Duke Law School and is a volunteer mediator and member of the board of directors of the Center for Conflict Resolution in Chicago.

Upcoming Seminars and Webinars

Seminars

March 5

**Reinsurance Beyond APH :
A New World Order
Choate, Hall & Stewart LLP
Boston, Massachusetts**

Webinars

January 25

What are "CAT" Bonds and How Do They Differ from Insurance and Reinsurance?

February 21

The Year in Review: A Discussion of Significant 2017 Cases Arbitrators Need to Know

Members on the Move

MCIC Vermont announced the selection of **Loreto "Larry" Ruzzo** as its senior counsel, effective September 1, 2017. As senior counsel, Ruzzo will support the mission of MCIC Vermont and the implementation of key legal strategies and operations to achieve specific company business objectives. He has been in private practice for the past four years serving buyers, sellers, and intermediaries in the commercial property and casualty insurance industry, with an emphasis on medical professional liability, workers compensation, and related exposures of healthcare providers and institutions. He has also served in executive legal leadership roles at Willis Corroon Corp., Willis Re Inc., FOJP Service Corp., and Hospitals Insurance Company.

Freeborn & Peters LLP is pleased to announce that **Sean Thomas Keely** has joined the firm's New York office as a partner in the Litigation Practice Group and a member of the Insurance and Reinsurance Industry Team. His addition continues the significant expansion of Freeborn's reinsurance and insurance coverage and defense practices and the firm's geographic reach over the last 16 months. Keely is a member of the Education Committee of ARIAS•U.S. and has presented and served as chair at seminars and workshops for certified reinsurance arbitrators and industry practitioners.

Elaine Caprio of Caprio Consulting, **Sherry Merber** of Arch Reinsurance Company, and **Teresa Snider**, a partner with Butler, Rubin, Saltarelli & Boyd LLP, were named to Intelligent Insurer's list of influential women in re/insurance in 2017. Building on the previous year's editions, the 2017 special report features new profiles of female executives excelling in and changing the risk transfer industry.

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

MEMBERSHIP APPLICATION

ARIAS U.S.

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FEES AND ANNUAL DUES

Membership Type	Dues Amount
ARIAS Company Type (Number of Members)	
(A) Law Firms, Consulting & Actuarial Firms (1 - 5)	$1,850
(B) Law Firms, Consulting & Actuarial Firms (6 - 10)	$2,500
(C) Law Firms, Consulting & Actuarial Firms (11 +)	$5,000
Insurance/Reinsurance Companies (1 - 15)	$1,850
Individual Membership	$450

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.

PAYMENT INFORMATION

Payment by check: Enclosed is my check in the amount of $_______________

Please make checks payable to ARIAS•U.S. (Fed. I.D. No. 13-3804860) and mail with registration form to:
By First Class mail: ARIAS•U.S., 6599 Solutions Center, Chicago, IL 60677-6005
By Overnight mail: ARIAS•U.S., Lockbox #776599, 350 E. Devon Ave., Itasca, IL 60143

Payment by credit card: Fax to 703-506-3266, or mail to ARIAS•U.S., 7918 Jones Branch Dr., Suite 300, McLean, VA 22102.

Please charge my credit card in the amount of $___________

☐ AmEx ☐ Visa ☐ MasterCard

EXP. | SECURITY CODE

ACCOUNT NO.

CARDHOLDER'S NAME (PLEASE PRINT)

CARDHOLDER'S ADDRESS

SIGNATURE

AGREEMENT

By signing below, I agree that I have read the ARIAS•U.S. Code of Conduct and the Bylaws of ARIAS•U.S. and agree to abide and be bound by the *ARIAS•U.S. Code of Conduct* and the By-Laws of ARIAS•U.S. The Bylaws are available at www.arias-us.org under the "About ARIAS" menu. *The Code of Conduct* is available under the "Resources" menu.

SIGNATURE OF INDIVIDUAL
OR CORPORATE MEMBER APPLICANT

ARIAS U.S.

AIDA Reinsurance & Insurance Arbitration Society
7918 Jones Branch Dr., Suite 300 • McLean, VA 22102
Phone: 703-506-3260 • Fax: 703-506-3266
Email: info@arias-us.org

BOARD OF DIRECTORS