



MEDIATION AS A FIRST STEP IN THE ADR PROCESS

by Therese Arana Adams

The objective of this paper is to explore the value and appropriateness of the mediation process as an alternative to arbitration in a reinsurance contract dispute. Following a brief explanation of reinsurance as a business we will then explore the similarities and differences of mediation and arbitration to distinguish which process may be more useful in the reinsurance dispute context.

The reinsurance business is conducted mainly between insurance and reinsurance companies. The reinsurer shares in the risks that the insurance company has assumed from individual policyholders. The reinsurance contract usually encompasses a portion of the all the risks assumed by the insurance company. The contract liabilities and consideration are often in the millions of dollars. The reinsurance contract is referred to as a "treaty."

The reinsurance treaty was the quintessential "gentleman's" agreement. For most of the twentieth century, reinsurance contracts were consummated with a hand-

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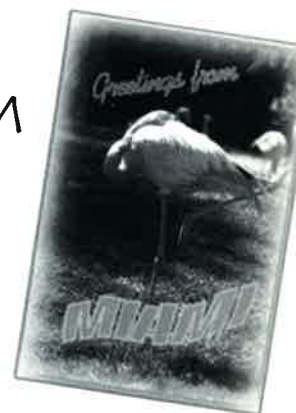


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When The Other Side Will Not Arbitrate:

JUDICIAL APPOINTMENT OF UMPIRES AND ARBITRATORS

by Robert M. Hall, Esq.
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Commentary reprinted from the April 25, 1996 issue of The Report [Mr. Hall is a partner in the Washington, D.C. office of Rudnick & Wolfe where he practices insurance and reinsurance law. The views expressed herein are his solely. Responses to this commentary are welcome.]

Introduction

Many reinsurance contracts involving U.S. insurers contain arbitration clauses because arbitration is considered to be faster, simpler and cheaper than litigation of disputes. In addition, the use of experienced industry executives as arbitrators is thought to produce results which are more reflective of the business climate in which the dispute arises.

Regardless of whether these

hypotheses are accurate, there are a number of situations in which one party to the arbitration agreement uses the umpire or arbitrator appointment process as a means of interminable delay or refusal to arbitrate. This paper is designed to explain the remedies of the party who wishes to go forward with the arbitration.

Arbitration Clauses

The typical arbitration clause calls for each party to choose an arbitrator who shall be a disinterested, current or former executive officer of an insurer or reinsurer. Once chosen, the arbitrators are to select a mutually agreed upon umpire. Some contracts provide no time limits for appointment of arbitrator or umpire and no methodology to select an umpire. This is unsurprising given the fact of partisan arbitrators which, some believe, make the selection of the umpire critical to the outcome of the arbitration.

Some reinsurance contracts try to remedy the umpire selection problem

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Letter from the Editorial Board

Dear Members:

The ARIAS•US Quarterly Editorial Board invites you to send us articles on topics that are of interest to those involved in insurance and reinsurance arbitrations, as well as letters in response to previously published papers. Our goal is to provide a forum for highlighting and discussing significant arbitration issues, as we believe this will foster the objectives of the Society.

All such correspondence should be sent to the Editor, Stephen H. Acunto, Chase Communications, P.O. Box 9001, Mount Vernon, New York 10553. The Editorial Board reserves the right to decide what will be published and when publication will occur. Any substantive editing will be made only with the permission of the author.

If you have any questions or ideas on how to make the Quarterly more beneficial for the membership, please contact Bob Mangino or me. Thank you.

Sincerely,

Daniel E. Schmidt, IV
Chairman, Editorial Board



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shake and were often years in the making. The personal relationships developed by the parties were just as important as the business transaction itself. Long term relationships were key to successful reinsurance transactions, as one year's catastrophes (i.e. earthquake, hurricane) could wipe out years of a reinsurer's profits. The reinsurer would only be "made whole" through continued renewals in the succeeding years. The clauses found in the treaties such as "utmost good faith" and "follow the fortunes" were an outgrowth of the customs and usage in the industry.

Vague contract terms such as "any business assumed by the ceding company as third party liability" or "any risks wherever situated" started to catch up with the reinsurance industry by producing large losses starting with asbestos in the 1970's and has continued with



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environmental losses in the 1980/90's.

Catastrophic losses never before anticipated by reinsurers started coming through their claims departments. As losses mounted, relationships became strained and insolvencies became commonplace. The most notorious insolvencies were Mission Insurance Company and Transit Casualty, which cost policyholders, reinsurers and state insolvency funds millions of dollars. The method the reinsurance industry employed in adjudicating this onslaught of disputes was arbitration.

Traditionally, reinsurance contracts include a standard arbitration clause calling for binding arbitration to settle any disputes between the parties. The

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JUDICIAL APPOINTMENT OF UMPIRES AND ARBITRATORS

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with a provision designed to prevent an impasse in choosing an umpire. Typically, each side proposes a slate of candidates and then may strike the other side's candidates until one candidate for each side is left. If there is no agreement between the remaining candidates, one is selected by lot or similar methodology.

Some reinsurance contracts attempt to remedy the problem of delay by requiring the respondent to select an arbitrator within a certain time period. If one is not chosen, the petitioner can select a second arbitrator and the two so chosen can select an umpire.

There are a variety of situations in which the contractually mandated method for selection of arbitrators and umpires breaks down. Typically this occurs when the contract in question does not contain appropriate impasse avoidance mechanisms or when a party simply refuses to go forward with the arbitration. Obviously, this undercuts the purpose of the agreement to arbitrate and puts the dispute back into a litigation context which the parties contracted to avoid.

Federal Arbitration Act

The Federal Arbitration Act 9 U.S.C. § 1 et seq. (hereafter "FAA") states a strong preference for arbitration over litigation when the parties have agreed contractually to arbitrate disputes. Other than as noted below, neither the FAA nor case law interpreting the FAA make any distinction in application between insurance and non-insurance cases.

The FAA allows a district court to order arbitration when a party fails or refuses to comply with a contractual arbitration agreement:

A party aggrieved by the failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement....The court shall hear the parties, and...shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

Once the arbitration has commenced, the primary remedy¹ for failure to appoint an arbitrator or umpire is § 5 of the FAA. With respect to a contract that

contains an agreement to arbitrate:

[I]f no method [of selecting an umpire or arbitrator] is provided therein, or if a method be provided and any party thereto shall fail to avail himself of such a method, or if for any reason there shall be a lapse in naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein....

This power to appoint an arbitrator or umpire is not limited, as is § 4, to a U.S. district court.

The United States Supreme Court has given broad application to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) involved a conflict between arbitration pursuant to the FAA and a state statute. The Court noted that in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10. The Court went on to rule that the FAA creates a body of federal substantive law which was applicable in state and federal courts. *Id.* at 11.

It appears, however, that the scope of the FAA is limited by the reverse preemption contained in the McCarran-Ferguson Act (hereafter "McCarran-Ferguson").² *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995) dealt with the interaction between an arbitration clause in a reinsurance treaty and a provision of the Kentucky Liquidation Act that superseded such provision.³

The Stephens court found that reinsurance falls within the definition of the "business of insurance" for McCarran-Ferguson purposes and then went on to examine whether the Kentucky statute was enacted for the purpose of regulating insurance. The court concluded that it was so intended:

The Liquidation Act "protects" policyholders — whether they are individual policyholders of ceding insurance companies — by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one price of that mechanism.

Id. at 45. Thus, state anti-arbitration laws⁴ relating to insurance company receiverships appear to be the only material limitation on the power to enforce arbitration clauses in reinsurance con-

tracts pursuant to the FAA.

Waiver Of Arbitration Rights

Perhaps the threshold question for the party seeking a prompt resolution of the dispute is whether to litigate or arbitrate. If both parties prefer to litigate, notwithstanding the arbitration clause, there is no impediment in the FAA to litigation under these circumstances. Litigation is also possible if one party has waived its rights to arbitrate by actions contrary to the arbitration agreement. If such a waiver has taken place, the party seeking a prompt resolution may choose to litigate or arbitrate the dispute.

To this effect see *Galt v. Sparks*, 376 F.2d 711 (7th Cir. 1967). After the petitioner demanded arbitration, a panel was selected to hear the dispute. Thereafter, the respondent sought an injunction to halt the arbitration proceedings due to related litigation. The court ordered that the arbitration go forward but observed:

[the respondent's] motion to enjoin the arbitration proceedings was a repudiation of its own promise to arbitrate, giving [the petitioner] an election to put an end to the arbitration clause or to insist upon its performance.

Appointment When One Party Refuses To Participate

In a non-reinsurance case, two parties had agreed on arbitration by an accounting firm to be mutually agreed upon. When a dispute arose, one party simply refused to cooperate in selecting an arbitrator. The court appointed an accounting firm to serve as arbitrator. *CAE Industries Ltd. v. Aerospace Holdings Co.*, 741 F. Supp. 358 (S.D.N.Y. 1989). To the same effect, see *In re Neptune Maritime, Ltd. v. Isbrendtsen, Ltd.*, 559 F. Supp. 531.

Schultze and Burch Biscuit Co., v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987) involved a non-reinsurance contract which provided merely that "all disputes under this transaction shall be arbitrated in the usual manner." The court found that this language was not too vague to be enforced and appointed an arbitrator pursuant to the FAA.

Appointment To Resolve On Impasse

Pacific Reins Mgt. Corp., v. Ohio Reins Corp., 814 F.2d 1324 (9th Cir. 1987) involved the arbitration of multiple reinsurance contracts. Some contracts contained a provision for selecting the umpire by drawing lots and some did not. After a five month impasse over selection of the umpire, the district court appointed one. The court of appeal ruled

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qualifications of the arbitrators are stated and usually require that arbitrators must be a present or former reinsurance/insurance officer. A panel of three arbitrators is the norm, each side appointing a party arbitrator and the appointed arbitrators then selecting an umpire. While currently there is much discussion on whether arbitrators should be advocates or completely neutral, in practice today, reinsurance arbitrators are still very much advocates for their party.

One of the difficulties with reinsurance disputes, is that often the individuals that were involved in negotiating the treaty in question, are no longer with the companies or are unwilling to testify or

be deposed. Furthermore, older treaty files often lack vital documentation and the proverbial "cocktail napkin" is all that is in the file to record the terms and conditions. Additionally, a decision to accept a participation on a reinsurance treaty is taken at one level of management and may encompass "commercial considerations" which are known only to the parties. Dispute resolution decision-making is often taken at another level of management whose knowledge of the transaction is confined to the contents of the file. Embarrassment and saving face are often critical considerations, especially when the President of a company becomes aware of a decision which was made by a treaty underwriter, and has cost the company millions of dollars.

Mediation is typically defined as a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants

reach their own agreement for resolving a dispute or planning a transaction.¹ Mediation's two main assumptions are that 1) all parties can benefit through a creative solution to which each agrees; and 2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it. Since the mediator has no authority to impose a solution, mediation's greatest value is that it can generate processes and results that are more attractive to some parties than traditional adversarial approaches. Mediation is most valuable when parties have more than one connection and wish to have a continuing relationship.

Like the mediation process, a reinsurance arbitration usually requires strict confidentiality, and arbitrators usually request a hold harmless agreement from

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Judicial Appointment

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that the impasse was a lapse in the appointment of an umpire which allowed the district court to appoint an umpire pursuant to § 5 of the FAA.

The court found that a similar lapse occurred in *Astra Footwear Industry v. Harwyn Int'l, Inc.*, 442 F. Supp. 907 (S.D.N.Y. 1978). In this non-reinsurance case, the entity named to act as arbitrator had ceased to act in that capacity. The court appointed another arbitrator.

In *re Employers Ins. of Wausau v. Jackson*, 509 N.W.2d 147 (Wis. Ct. App. 1993), *aff'd*, 527 N.W.2d 681 (Wis. 1995), *recons. denied*, 534 N.W.2d 88 the reinsurance contract contained a provision allowing the petitioner to appoint a second arbitrator if the respondent did not do so in thirty (30) days. The reinsurer was sixteen (16) days late in appointing its arbitrator and the cedent appointed a second arbitrator. The reinsurer refused to recognize the umpire selected by the cedent's two arbitrators and a two year impasse developed. The appellate court found that the lower court was within its discretion to appoint the second arbitrator selected by the cedent and the umpire selected the two

arbitrators who were appointed by the cedent. See also *Universal Reins. Corp. v. Allstate Ins. Co.*, 16F.3d 125 (7th Cir. 1994) wherein the court affirmed the appointment of a second arbitrator by the petitioner when the respondent's choice was five (5) days late due to a secretarial error.

Conclusion

While the case law is still evolving, there appears to be strong precedent under the FAA for a state or federal court to appoint an umpire or arbitrator when: (1) one party refuses to appoint an arbitrator or cooperate in selection of an umpire; or (2) the parties reach an impasse in selection of an umpire. This serves to increase the effectiveness of arbitration as a faster and less costly alternative to litigation.

Endnotes

1. One other remedy is § 3 of the Uniform Arbitration Act which has been adopted in a variety of states. This provides:

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed upon method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to extend his succession has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers for

one specifically named in the agreement.

Unfortunately, there is very little case law applying this provision. See *In re Cres Rivera Concrete Co.*, 21 B.R. 153 (D.N.M. 1982) in which a bankruptcy court appointed an arbitrator pursuant to New Mexico's version of the Uniform Arbitration Act.

2. "[N]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any states for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

3. Ky. Rev. Stat. Ann. § 304.33.010(b) provided:

If there is a delinquency proceeding under this subtitle, the provisions of this subtitle shall govern those proceedings, and all conflicting contractual provisions contained in any contract between the insurer which is subject to the delinquency proceeding and any third party, including, but not limited to, the choice of law or arbitration provisions, shall be deemed subordinated to the terms of this subtitle.

This statute was repealed in early 1996.

4. In addition to the Kentucky statute cited in note 3 above, see Wis. State. Ann. § 645.59.

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- pollution and insurance
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the company who appoints them. Arbitrators are usually selected by the companies' in-house or outside counsel according to the criteria stated in the arbitration clause. In represented mediations, the mediator(s) are selected by the parties and/or their counsel. This is where the similarities between mediation and arbitration end.

According to most reinsurance arbitration clauses, the parties agree in advance to arbitrate any disputes arising out of the contract and be bound to the decision of the arbitration panel. In the absence of binding or mandated mediation, mediation is a voluntary process which can be abandoned by the parties at any time. Furthermore, the parties to a mediation do not lose their rights to arbitrate or litigate the dispute should the mediation fail; parties are not obligated to accept any settlement offer made as a result of mediation.

There are significant legal consequences which flow from the type of Alternative Dispute Resolution (ADR) used. An arbitrator's award, for example, is enforceable in accordance with federal or state statutes, but an agreement reached through mediation is enforceable only if it satisfies the requirements of contract law.² Parties must be willing to accept the non-adjudicative role of the mediator.

One of the major differences between using the mediation process or arbitration is the communication between the parties. In a reinsurance arbitration, once the arbitrator has been appointed there is "radio silence" (no ex-parte communication) between the party arbitrator and party counsel. Party counsel cannot even "bounce" ideas off their arbitrator. While not all arbitrations are conducted in this manner, this is the preference, as party attorneys insist that this preserves the integrity of the process by having the arbitrators make their decision based solely on the information formally provided to them. The parties are rarely directly part of the process, as they participate only through counsel. In mediation, the parties play a major role in the process and in coming to the solution, even if represented by counsel. It is necessary that the party representative (a company employee) be empowered with

decision-making capability. There would be a direct, albeit informal dialog between the parties and their counsel in mediation. Since the reinsurance contract by its very nature implies a long term relationship, the mediation process would allow those personal contacts to be a part of a solution which could further strengthen the relationship. Barring some insurmountable personality conflict, mediation offers an opportunity for further client contact and communications and perhaps an opportunity for additional or new information to surface which may not have come forth under more formal proceedings.

Although arbitration does not require strict adherence to procedure, arbitrators do set limits on brief length, discovery and other procedural issues. Once these parameters have been set, they are usually adhered to; change being permitted only on a showing of undue prejudice. In the mediation process, there are no procedural standards which must be upheld. While there is format to the mediation process, flexibility is paramount. The mediation process urges and facilitates the parties to arrive at a solution and that often occurs far outside procedural boundaries.

By the provisions of a reinsurance treaty arbitration clause, most arbitrators must have subject matter expertise. While there is a major on-going debate on whether it is necessary that a mediator have certain subject matter expertise in order to be effective in his/her role, insofar as a reinsurance dispute is concerned it appears that the subject matter expertise is important. One of the roles of a mediator is to engender an atmosphere of trust. By being able to speak the "language" of the business and use the appropriate vocabulary, the mediator in this context provides an environment in which the parties would feel that they are being understood and thus receiving a fair hearing. As mentioned above, current reinsurance arbitration practice involves the appointment of a party arbitrator and a neutral umpire. While party arbitrators are advocates for their party, they reserve their final vote based on the facts presented.

In mediation, the mediator is neutral and impartial. This neutrality is fundamental to the process. The facilitator role of the mediator can only be achieved when the mediator is impartial, otherwise the parties will sense favoritism or unfairness and the objectives of the mediation will be defeated.

A reinsurance arbitrator is vetted using a lengthy questionnaire developed to

Although arbitration does not require strict adherence to procedure, arbitrators do set limits on brief length, discovery and other procedural issues.

assure no conflicts of interest. A similar process could be used to ascertain if a mediator has any conflicts of interest with the parties or the subject matter of the dispute itself.

Another issue is whether the same person who has facilitated a mediation which did not produce an agreement should later be appointed a party arbitrator in the same dispute. While mediation statutes generally protect information and settlement proposals discussed in mediation as being inadmissible, a mediator privy to such information may find it difficult to be a fair and impartial participant in a subsequent process be it arbitration or litigation. Each situation needs to be accessed on a case by case basis.

The ADR movement has grown dramatically and has received impetus from the judicial and legal community not only for its contributions in alleviating court dockets and expediting the dispute resolution in general, but providing substantial cost savings to the parties. While arbitration is less costly than litigation both in time and legal costs, mediation can further reduce legal expenses since usually only one mediator is used and therefore less time is needed to arrange meetings between the participants.

Other important roles of a mediator which are not available to the arbitrator are:

1) Since the mediator is physically present with the parties, the mediator can act as a catalyst and should lend a constructive posture to the discussions rather than cause further misunderstanding and polarization.

2) The mediator is also an educator. He/She must know the desires, aspirations, working procedures, political limitations and business constraints of the parties. Subject matter expertise may be necessary if the mediator finds a need to educate the parties on specific technical areas which may be subject to misunderstanding.

Continued on page 8

ARIAS•U.S. Certification Procedures



At its first Annual Meeting, the Membership of ARIAS•U.S. approved proposed Certification of Arbitrators procedures.

We present them in full:

ARIAS•U.S. Objectives

The following are the objectives of ARIAS • U.S.

1. To promote the integrity of the arbitration process in insurance and reinsurance disputes.
2. To promote just awards in accordance with industry practices and procedures.
3. To certify objectively qualified and experienced individuals to serve as arbitrators.
4. To provide required training sessions for those persons certified as arbitrators.
5. To propose model rules of arbitration proceedings and model arbitration clauses.
6. To foster the development of arbitration law and practice as a means of resolving national and international insurance and reinsurance disputes in an efficient, economical and just manner.

ARIAS•U.S.

CERTIFICATION OF ARBITRATORS

1. GENERAL STATEMENT

ARIAS•U.S. seeks to certify for its members' use knowledgeable and reputable professionals for service as panel members in industry arbitrations.

2. CRITERIA FOR CERTIFICATION

As a minimum of consideration, each candidate should:

- a. **Industry experience** – have at least ten years of significant specialization in the insurance/reinsurance industry. This specialized experience can be obtained with insurance and reinsurance companies and brokers or with accounting, actuarial, consulting, law, loss adjusting firms or government service, or any combination thereof.
- b. **Arbitration experience** – have completed at least one ARIAS•U.S. seminar or workshop and two other seminars/workshops and/or insurance/reinsurance arbitrations as arbitrator or umpire for a total of at least three seminars/workshops or arbitrations within two years preceding the date the completed application is received by ARIAS•U.S. Attendance at a foreign ARIAS seminar or workshop (U.K., France, etc.) would be acceptable for these purposes.
- c. **Membership in ARIAS•U.S.** – be an individual member of ARIAS•U.S.
- d. **Sponsors** – be sponsored in writing by a person who satisfies the foregoing criteria for certification. Either the sponsor or the candidate for certification can initiate the certification process by requesting a pre-application letter from the Board of Directors. Besides issuing the sponsoring letter, the sponsor should also arrange for two seconding letters from persons who satisfy the same criteria. Upon receipt of satisfactory sponsor and seconding letter, ARIAS•U.S. will mail an application to the candidate. ARIAS•U.S. certification is available to all candidates regardless of geographic location.

3. CERTIFICATION DETERMINATION

- a. After receiving completed applications together with sponsor and seconding letter from the Administrator of ARIAS•U.S., and any other information deemed appropriate by the Board of Directors, the Board, in its sole judgment and absolute discretion, will evaluate each application and determine certification in light of the above criteria. Any dispute with respect to such determination shall be resolved by binding arbitration in accordance with the By-laws of ARIAS•U.S.
- b. Certification of a candidate requires the affirmative vote of at least two-thirds of the full membership of the Board of Directors.
- c. A copyrighted list of certified arbitrators will be maintained by ARIAS•U.S. for use by its members and shall not be published or distributed outside of the membership.

Certification Programs

4. APPLICATION FOR CERTIFICATION

The application for certification must be on forms provided by ARIAS•U.S. and will contain the following information:

- a. name, address, telephone and fax, home and office.
- b. present and prior business affiliations.
- c. number of **completed** insurance/reinsurance arbitrations as arbitrator or umpire and related information including, with respect to the three most recently completed arbitrations, the names of the other arbitrators and the date of completion.
- d. number of **completed** insurance/reinsurance arbitrations as outside counsel and related information including, with respect to the three most recently completed arbitrations, the names of the arbitrators and the date of completion.
- e. areas of specialty.
- f. number of years of industry experience as defined in 2.a., above.
- g. education – college and graduate.
- h. work and military history.
- i. licenses, professional associations.

- j. ARIAS seminars and workshops attended.
- k. criminal convictions/disciplinary rulings.
- l. statement by applicant that he/she will agree to abide by the By-laws of ARIAS•U.S., including the provisions covering arbitration of disputes; that the information provided is subject to verification; and that the applicant agrees that the information is accurate to the best of his/her knowledge, information and belief.
- m. other information as determined by the Board of Directors.

5. MAINTENANCE OF CERTIFICATION

In order to maintain certification, an individual must:

- a. have attended or participated in at least one ARIAS seminar or workshop within the two years immediately preceding recertification.
- b. maintain membership in ARIAS•U.S.
- c. apply bi-annually for certification on forms provided by ARIAS•U.S.

To Join ARIAS•U.S.: Use the form provided on page 7



AIDA Reinsurance & Insurance Arbitration Society

Box 9001 • Mt. Vernon, NY 10552-9001
Tel: 800-951-2020 • Fax: 914-699-2025

Membership Application

ARIAS•U.S. is a not-for-profit corporation organized principally as an educational society dedicated to improving reinsurance and arbitration panels and procedures. The Society provides education for arbitrators, attorneys, insurers and reinsurers in practices and procedures which will improve the arbitration of commercial disputes. The Society, through seminars and publications, seeks to make the arbitration process meet the needs of today's insurance/reinsurance marketplace by:

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

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

Name & Position: _____

Company or Firm: _____

Street Address: _____

City, State, Zip: _____

Phone, Fax: _____

Fees and Annual Dues:

	Individual	Corporation & Law Firm
Initiation Fee:	\$500.00	\$1,500.00
Annual Dues:	<u>\$250.00</u>	<u>\$750.00</u>
Total	\$750.00 <input type="checkbox"/>	\$2,250.00 <input type="checkbox"/>

Amount Enclosed: \$ _____

Return this application with check for Initial Fee and Annual Dues to:

ARIAS•U.S. Membership Committee
Stephen H. Acunto
Chase Communications
P.O. Box 9001 Mount Vernon, NY 10552

Mediation as a First Step...

Continued from page 6

3) The mediator must be a translator, as his/her role is to convey each party's proposals in a language that is both faithful to the desired objectives of the party and formulated to insure the highest degree of receptivity by the listener.

4) The mediator may also expand the resources available to the parties. As the needs dictate, expert technical help may be needed, i.e. accounting, legal, systems.

5) The mediator often becomes the bearer of bad news and can help cushion the expected negative reaction to such a rejection by preparing the parties for it in private conversations.

6) The mediator is an agent of reality. Persons often become committed to advocating one and only one solution to a problem and the mediator is in the best position to inform a party that its objective is simply not obtainable through those specific negotiations.

Some may argue that an arbitration decision is easier for the parties to accept

as the final adjudication of the matter. Settlement facilitated through mediation can also offer substantial justice that may be responsive to the parties' needs. Legitimacy is achieved through consent. Greater flexibility of procedure and remedy, fosters a communication process that can be more direct and less formal than in a hearing room or courtroom. The argument in favor of settlements is the fact that if parties make their own agreement they are more likely to abide by it, and it will have greater legitimacy than a solution imposed from without.

The most appropriate inquiry is under what circumstances is mediation more appropriate than arbitration, or vice-versa? While this question cannot be answered with a generalization and the answer will be based on the particular facts of each case, when counsel is assisting a client in making a choice of a dispute dissolution process, should mediation be considered as a first step?

When should mediation not be used? Some suggested answers to this question are: 1) when an authoritative ruling is necessary and 2) when the courts must adjudicate and provide clear guidance for all.³

When the issues have an impact on the public or when even in a private dispute,

there is a need for authoritative third-party ruling, mediation may not be appropriate. Another reason might be when there is a need of adjudication for good rule making. However, over 90% of all cases (both civil and criminal) are currently settled and taken out of the system and thus, are unavailable for common law rule making.⁴

In conclusion, mediation is one of the ADR processes which is available to counsel in assisting clients in resolving disputes. Should the relationships and facts of the situation present an opportunity to use mediation, this may prove to be the most satisfying and productive process to best serve the client.

The author is an ARIAS-US certified arbitrator, principal consultant for Arana Re-Insurance Consultants and chief mediator for Adams Mediation Services.

1 Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, 91 (1987)

2 Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, 7 (1987)

3 Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, 18 (1987)

4 Supra at 19

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