feature

ARIAS•U.S. Announces Company Project to Improve Arbitration

This article will be included in the advance materials sent to registrants for the ARIAS•U.S. 2011 Fall Conference, to prepare them for the discussions that will take place in various sessions.

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The degree to which we serve our constituent companies is critically important to our existence.

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ARIAS•U.S. exists to promote "improvement of the insurance and reinsurance arbitration process for the international and domestic markets."[2] As members of this society, we cannot be content with espousing lofty goals and aspirations, however. We need to make actual progress. The degree to which we serve our constituent companies is critically important to our existence. Accordingly, we must evaluate continually and objectively what ARIAS•U.S. can and does accomplish. For some critics, complaints about the state of arbitration in our industry provide evidence that perhaps ARIAS•U.S. is falling short of its goals. Moreover, it is open to question whether ARIAS•U.S. possesses the capacity to effectuate real change. We do not administer or control arbitrations and do not set the requirements for how insurance and reinsurance arbitrations must be conducted. Nor does ARIAS•U.S. determine who will serve as arbitrators, because most arbitration clauses do not require the use of certified arbitrators. Notwithstanding these challenges and limitations, this article will discuss some ways in which ARIAS•U.S. does influence the process and will introduce a task force involving our constituent companies that we hope will foster additional improvement.

Does ARIAS•U.S. Improve Arbitration?

To consider how ARIAS•U.S. might encourage improvements to the arbitration process, it may be helpful to start by identifying what ARIAS•U.S. is and does. ARIAS•U.S. is a non-profit organization with nearly 1,000 members from locations throughout most of the United States and in other parts of the world. Several leading insurers and reinsurers with business in the United States belong to ARIAS•U.S., as do over 250 arbitrators and many lawyers and firms that practice in the area of insurance and reinsurance. ARIAS•U.S. is affiliated with the Association Internationale de Droit des Assurances ("AIDA"), "a non-profit international association, formed in 1960, for the purpose of promoting and developing at an international level, collaboration between its members with a view to increasing the study and knowledge of international and national insurance law and related matters."[3] Our Board of Directors consists of nine members elected from three institutional backgrounds: ceding companies, reinsurers, and law firms. Although not required, several of our current Board members are also certified arbitrators. Much of our focus has been on educating and qualifying arbitrators. Thanks to the contributions of many, we have a code of ethics and a practical guide for arbitral proceedings that includes several procedural forms often used in arbitration. Courts in the United States have mentioned ARIAS•U.S. in over fifteen decisions. The conferences we conduct in the spring and fall each year are well attended. Distinguished individuals have provided keynote addresses at our conferences, including two prominent insurance company CEOs, an Associate Justice of the United States Supreme Court and two former United States Senators.

ARIAS•U.S. developed an All-Neutral Panel selection program, a Newer Arbitrator Program, and a Qualified Mediator Program for our members' use. Our members, however, have rarely used these procedures.

Over the past four years, the Board has adopted significant changes based on recommendations from the Long Range Planning Committee. Among other things, we upgraded the requirements for arbitrator certification, added ongoing educational requirements in the form of seminars and ethics modules, and created a certification process for umpires.[4] We also issued several new guidelines to expand upon the ethical considerations in the Code of Conduct with respect to pre-appointment interviews,

disclosures, appointments of party-arbitrators, and ex parte communications.[5] We are launching an Ethics Discussion Committee charged with providing additional information and education about ethical issues and concerns. One may ask, however, whether any of these steps have caused arbitrations to become more fair and efficient or improved the quality of arbitral decisions.

The vast majority of reinsurance disputes proceed under agreements that call for tripartite arbitration but do not specify any particular set of rules or procedures to govern. Thus, the participants and the rules they adopt in each arbitration are the key determinants of how the proceedings will run. The ARIAS•U.S. Practical Guide has certainly influenced arbitration practice, including suggested forms for an umpire questionnaire, an agenda for the organizational meeting, and hold harmless and confidentiality agreements. Moreover, our strong focus on educating and training recognizes that the arbitrators are responsible for managing arbitrations. From time to time, various articles in our magazine and programs at our conferences have also addressed ways in which the parties and counsel can improve the process. Nevertheless, our ability to influence a particular arbitration remains indirect, and we have generally refrained from adopting prescriptive rules.[6] Thus, although ARIAS•U.S. has been an indirect force for improvement and some of its work has clearly been beneficial, ARIAS•U.S. has not been able to "fix" a system that it does not govern.

What More Can ARIAS•U.S. and Others Do to Improve Arbitration?

Despite the efforts of ARIAS•U.S. and others, much room remains for improvement in the conduct of insurance and reinsurance arbitrations. Anecdotal evidence suggests that, if anything, the level of dissatisfaction with these arbitrations may have grown in recent years.[7] For example, the rampant jockeying over umpire selection reinforces the view that the choice of umpire determines the outcome.[8] Many harken back to a time when arbitrations were simpler, cheaper, and – not coincidentally – far less legalistic.[9] Deservedly or not, lawyers often receive a lion's share of the blame for the current state of arbitration. To borrow a wry observation from Larry Brandes: lawyers have tried to destroy reinsurance arbitration but have succeeded only with the help of others. The parties control a significant part of the process, and they may ultimately receive that which they are willing to tolerate. Likewise, arbitrators share in some of the criticism, if nothing else, for failing to save the parties and lawyers from themselves. In short, blame abounds, but solutions do not. What more can be done to improve arbitration?

In response to the serious concerns about the arbitration process, the Board of ARIAS•U.S. is inviting a number of company representatives to analyze and discuss the current state of the process, and the role of ARIAS•U.S., with an eye toward transformational changes. To be sure, these are not easy issues, and we do not expect to find quick answers. Nor do we want to create any additional programs to improve arbitration that remain underutilized by our membership. We believe it will be worthwhile for this group to discuss whether ARIAS•U.S. should advance clearly delineated improvements and efficiencies to the current arbitration process.

We write not only to advise our members of this task force but to invite your suggestions and ideas. We enjoy a wealth of experience and collective wisdom among our many members. If you have any thoughts that you think should be considered as part of this project, please e-mail us.

Although we do not approach these discussions with any preconceived set of solutions, some alternative ideas do come to mind, including: increasing the use of all-neutral panels; reclaiming elements of the original process; and employing mediation during arbitration proceedings.

All-Neutral Panels

One idea we think worthy of careful consideration is all-neutral panels. All-neutral panels are, of course, by no means new and have long been the

CONTINUED ON PAGE 4

Board Creates Ethics Discussion Committee

By Eric S. Kobrick

The ARIAS-U.S. Board of Directors is pleased to announce the formation of an Ethics Discussion Committee (the "Committee"). The Committee was created following a recommendation from the Long Range Planning Committee. The Committee is charged with providing information and education about ethical issues and concerns. It will not opine on specific issues arising in pending arbitrations. Instead, the Committee will offer guidance about ethics issues of general interest to the membership.

The Committee proposes to accomplish this objective in two principal ways: First, the Committee intends to prepare ethics hypotheticals for the Quarterly in which ethics issues will be raised and discussed. The Committee hopes to solicit suggestions from the membership on topics to be addressed. Second, the Committee intends to lead ethics sessions at the ARIAS•U.S. Fall and Spring Conferences. Towards that end, the Committee is already working with the co-chairs of this fall's conference to incorporate an ethics component into the program.

The Committee Chair is Eric Kobrick. The other Committee members are Mark Gurevitz, Elizabeth Mullins, John Nonna, James Rubin, Daniel Schmidt, and Mary Kay Vyskocil.

Eric S. Kobrick is a Deputy General Counsel and the Chief Reinsurance Legal Officer at American International Group, Inc. He is also a member of the ARIAS•U.S. Board of Directors, served on the ARIAS•U.S. Long Range Planning Committee, and is an ARIAS•U.S. Certified Arbitrator.

Party-arbitrators occupy an uncertain and ill-defined role: many arbitrators subscribe to the view of our Code of Ethics, which encourages party-arbitrators to act independently, fairly, and without advance commitments to their appointing parties, yet courts allow party-appointed arbitrators to behave as partisan advocates with no pretense of objectivity.

CONTINUED FROM PAGE 3

practice in the United Kingdom and in other countries. In 2003, the American Bar Association and the American Arbitration Association adopted a default rule in favor of all-neutral panels.[10] In the insurance and reinsurance context, John Nonna advocated in favor of all-neutral panels in a paper that he presented in the First Quarter 1994 ARIAS•U.S. Quarterly.[11] ARIAS•U.S. put in place a neutral-selection procedure in 2004.[12] Despite these efforts and the many perceived benefits of the all-neutral approach,[13] parties appear to be unwilling or unable to increase the use of this approach in insurance and reinsurance arbitrations.

Should ARIAS•U.S. do more to promote all-neutral panels? Are there conditions under which companies would be willing to commit to using all-neutral panels for all or some categories of their disputes? There may be a range of answers to these questions. Certainly, the party-arbitrator system has recognized benefits,[14] and the relative merit of all-neutral panels is open to debate.[15] At the same time, many perceive that the party-arbitrator system has significant problems. Party-arbitrators occupy an uncertain and ill-defined role: many arbitrators subscribe to the view of our Code of Ethics, which encourages party-arbitrators to act independently, fairly, and without advance commitments to their appointing parties,[16] yet courts allow party-appointed arbitrators to behave as partisan advocates with no pretense of objectivity.[17] In these circumstances, party-arbitrators may want to remain independent and maintain a reputation for integrity but feel torn by concerns of loyalty to the appointing party, the desire for reappointments, and the need to counterbalance advocacy from the other party-arbitrator.[18] In some instances, the absence of clear lines can produce a "'race to the bottom'" in which the party-arbitrators respond and reciprocate with ever-higher levels of advocacy.[19] Moreover, the widespread element of confidentiality in private arbitration compounds the lack of clarity, leading to increased concerns about unpredictability and the inability to expose and correct potential abuses.[20] Against this backdrop, a serious discussion of an all-neutral system, with truly independent and impartial arbitrators, is one idea worthy of consideration.[21] This discussion would address the specific circumstances under which the parties may agree to utilize this type of system.

Recapturing Beneficial Elements from the Original Process

Arbitration was originally the preferred dispute-resolution procedure in the reinsurance industry because it was perceived to be an efficient process with industry professionals as the decision makers.[22] Back then, discovery was extremely limited. The arbitrators were frequently non-lawyers who served as active officers of insurance and reinsurance companies. The process worked well for many years. Are there ways to reinstitute this process for certain types of disputes? Can active business officers in the reinsurance industry whose companies are members of ARIAS•U.S. be encouraged to serve as arbitrators? The task force might develop ways to reduce costly and time-consuming discovery and to recapture a less legalistic process.

Mediation during the Arbitration Process where Appropriate

Another idea would be for the arbitration panels to consider encouraging the parties to explore the use of mediation at critical junctures during the arbitration process.[23] At the organizational meeting, the schedule for the case can include the parties' discussions on whether a mediation session should be held after discovery, before the hearing, etc. The mediation, if held, would not impede the arbitration timetable, but instead would be conducted alongside the arbitration process as an alternative method for the parties to attempt to resolve all or at least some of the items in dispute before the hearing is conducted.

Conclusion

Justice Alito, a keynote speaker at our Spring Conference in 2008, noted in an opinion last year that "parties are 'generally free to structure their arbitration agreements as they see fit.'"[24] For that same reason, parties are able to correct and improve arbitral procedures. Sometimes, however, parties need some help. ARIAS•U.S. exists to provide that assistance. To that end, we are initiating a project among our member companies to focus on whether ARIAS•U.S. can have a further role in the process to improve insurance and reinsurance arbitrations, and if so what improvements should be advanced

to address some of the complaints. Although the three ideas identified above are worthy of discussion, the Board has made no decision to promote these suggestions or to abandon the existing party-arbitration process. Rather, we want to afford an opportunity for the buyers of arbitral services to participate in serious and creative discussions and provide their views on whether and if so how ARIAS•U.S. could assist with fixing some of the vexing problems in arbitrations. These are important issues, and we hope to serve our members by acting as a forum and continuing our work of improving the arbitration process.▼

1 The opinions expressed in this article are not intended nor should be considered as reflecting the opinions of the authors' employers.

2 The quoted text appears at our website under the heading "About ARIAS•U.S." (http://www.arias-us.org/index.cfm?a=2.) This sentence summarizes six objectives of our society set forth in section 1 of the by-laws. (http://www.arias-us.org/index.cfm?a=6.)

3 Information about AIDA is available at http://www.aida.org.uk/about.asp.

4 See http://www.arias-us.org/index.cfm?a=300

5 See http://www.arias-us.org/index.cfm?a=380.

6 *Compare* ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure (available at: http://www.arias-us.org/index.cfm?a=37) with Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (available at: http://www.arbitrationtaskforce.org/images/2009-Procedures_V7.pdf.)

7 *See* Linda Dakin-Grimm & M. Benjamin Valeric, *A Case Against Reinsurance Arbitration?*, National Underwriter, Vol. 106, No. 36 (Sept. 2, 2002) (available at: http://www.milbank.com/NR/rdonlyres/3EA1BAAA-9C47-4AF1-B23B-958170BAF23D/0/050624_020902eprint.pdf); Brian Winn and Earl Davis, *Arbitration of Reinsurance Disputes: Is There A Better Way?*, Dispute Resolution Journal (October 2004); Celeste M. King, *Reinsurance Arbitration: A Flawed Dispute Mechanism*,18th Annual Insurance Coverage Litigation Committee Midyear Program (Feb. 26, 2010) (available at: http://www.wwmlawyers.com/images/uploads/00143647.PDF).

8 See Charles W. Fortune, *Maintaining the Integrity of the Arbitration Process: The Parties' Dilemma*, ARIAS Quarterly, Vol. 17, No. 2 (2010)

9 Rhonda L. Rittenberg and David A. Thirkill, *Results of Our Arbitration Survey*, ARIAS Quarterly, Vol. 12, No. 3 at 17 (2005) (reporting survey results, including that "a large majority, 82 percent, of clients and, 75 percent, of arbitrators felt that the arbitration process itself has become too 'legalistic.'")

10 *See* American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (2003) (http://www.adr.org/sp.asp?id=32124&printable=true).

11 John Nonna and Marc Abrams, *Of Cabbages and Kings*, ARIAS U.S. Quarterly, Vol. 11, No. 4 at 16 (4th Q. 2004).

12 Access to the ARIAS•U.S. process for selecting an all-neutral panel is available at: http://www.arias-us.org/index.cfm?a=91.

13 *See, e.g.*, Nonna, *Of Cabbages and Kings*, *supra*; Anthony M. Lanzone, *Impartial, Independent, Neutral Arbitrators v. Non-Neutral Party Appointed Advocates*, 54 Fed'n Def. & Corp. Couns. Q. 381 (2004) (arguing in favor of all-neutral panels as reflected in international proceedings and changes to the AAA rules and maintaining that: (a) ex parte communications do not enhance fairness and discourage candor among panel members; (b) a party-arbitrator does not need to act as an advocate, because the party already has counsel; (c) neutral arbitrators improve the fairness of the process; and (d) the better way to inform the parties about the panel's reasoning is to require a reasoned award.)

14 *See, e.g.*, David J. McLean and Sean-Patrick Wilson, Article, *Is Three A Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 Pepp. Disp. Resol. L.J. 167 (2008) (noting that, among other things, party-arbitrators increase the parties' comfort with the process and perception that they will be heard, may add substantive expertise to the panel's analysis of the issues, and may improve the channels of communication with the parties). The values of a party-arbitrator in enhancing the parties' belief in and understanding of the process may be additionally enhanced in international arbitrations between parties from disparate cultures. *See* Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l L.J. 59, 65-68 (1995).

15 *See* Kathryn P. Broderick, *Pitfalls in Moving to All-Neutral Reinsurance Arbitration Panels*, 54 Fed'n Def. & Corp. Couns. Q. 373 (2004) (identifying as pitfalls to all-neutral panels: (a) loss of access to party-arbitrators' experience; (b) loss of an advocate on the panel; and (c) loss of access to information on the reasons for the panel's decision).

16 ARIAS•U.S. Code of Ethics, Canon II (" Party-appointed arbitrators are obligated to act in good faith with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly."); *see* Nick J. DiGiovanni and Michael A. Knoerzer, *Ethics Issues in Reinsurance Arbitration*, ARIAS•U.S. Quarterly, Vol. 15, No.1 at 2 (1st Qtr. 2008) (providing an extensive analysis of ethical issues in reinsurance arbitration, including the uncertain role of the party-arbitrator); John H. Mathias, Jr. and Adam C. G. Ringguth, *What's Wrong with Arbitration?*, ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 3-5, 2011 (available at: http://apps.americanbar.org/litigation/committees/insurance/docs/2011-cle-materials/03-WhatWrongArbitration/03aArbitration.pdf) (identifying uncertainties over the ethical rules that govern the conduct of non-neutral arbitrators and calling for re-examination of the party-appointment system).

17 *See, e.g.*, *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. Ill. 2002) ("in the main party-appointed arbitrators are supposed to be advocates.") (italics in original); *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815 (8th Cir. 2001) (Despite evidence that a party-arbitrator disclosed the substance of panel deliberations and a draft decision, the appellate court reversed vacatur of the award because the losing party "knew from the agreements to arbitrate that the party arbitrators would be partial in the conflict-of-interest sense of that word."); *Sunkist Soft Drinks v. Sunkist Growers*, 10 F.3d 753, 759 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994) (a party arbitrator's participation in meetings with witnesses, suggesting lines of testimony, help select consultants, and advise to an expert witness about his testimony was "not only unobjectionable, but commonplace.")

18 See Daphna Kapeliuk, Article, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47, 90 (Nov. 2010) (concluding that reputational concerns provide a key incentive toward impartiality by elite investment arbitrators).

19 *See* J. Nonna, *supra* n. 9, at 17.

20 *See, e.g.*, Seth H. Lieberman, Note, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye that is "Nonneutral Neutrals"*, 5 Cardozo J. Conflict Resol. 215, 224 (2004).

21 *See* William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629 (2009) (discussing independence and impartiality in arbitrators).

22 *See* Larry P. Schiffer, ARIAS•U.S. Quarterly, Vol. 17, No. 4 at 10 (4th Q. 2010) (discussing traditional reinsurance arbitrations).

23 *See* John D. Feerick, *The Role of Mediation in Dispute Resolution*, ARIAS U.S. Quarterly, Vol. 16, N. 1(1st Q. 2009); Neal Moglin, Dan Sails, & Jan Schroeder, *Would Greater Use of Mediation Improve U.S. Reinsurance Dispute Resolution? It Seems to be Working Elsewhere*, ARIAS•U.S. Quarterly, Vol. 14, No. 2 (2d Q. 2007).

24 *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1770 (2010) (citations and internal quotations omitted).

To that end, we are initiating a project among our member companies to focus on whether ARIAS•U.S. can have a further role in the process to improve insurance and reinsurance arbitrations, and if so what improvements should be advanced to address some of the complaints.