

## feature

# New York Court Appoints Umpire from ARIAS•U.S. List



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The New York County Supreme Court recently appointed two ARIAS-certified arbitrators as an umpire and an alternate, respectively, in a contested application to appoint an umpire. This case is the most recent of seven cases where the authors have petitioned the courts seeking the appointment of arbitrators or umpires in arbitration proceedings arising from loss sensitive insurance programs. In each instance the court was urged to appoint ARIAS-certified arbitrators.

In the most recent of these cases, ARIAS•U.S. was itself put at issue. In that proceeding, we urged the court to consider ARIAS-certified arbitrators and the responding party urged the court not to appoint ARIAS arbitrators. We presented the court with a showing of the comprehensive quality of ARIAS certification requirements and the rigorous standards that ARIAS mandates. The court then “reviewed candidates” from the ARIAS•U.S. Directory and appointed the two individuals from that directory.

## The Nature of the Disputes

In each of seven arbitration cases where we asked a court for an ARIAS-certified appointment, an insurer was seeking to enforce obligations arising from a loss-sensitive insurance program. The common element in these programs is that the economic cost of losses within a specified retention amount remains with the insured.

Although the forms of agreement varied (some involved loss indemnity agreements, deductibles or self-insured retention policies, while others involved retrospective rated premium), each agreement

contained an arbitration clause that included an arbitrator selection clause similar to the following:

The Arbitrators and Umpire shall be active or retired executive officials of Fire or Casualty Insurance or Reinsurance Companies, active or retired Risk Management Officials in the same or similar industries or active or retired executive officials of Insurance Brokers or Insurance Agents. If either of the parties fails to appoint an Arbitrator within one (1) month after being required by the other party in writing to do so, or if the Arbitrators fail to appoint an Umpire within one (1) month of a request in writing by either of them to do so, such Arbitrator or Umpire, as the case may be, shall at the request of either party be appointed by a Justice of the Supreme Court of the State of New York.

The disputes that arose under these programs had characteristics similar to disputes between a ceding company and a reinsurer in that the insurer sought recovery of losses paid and/or security for losses anticipated. However, unlike reinsurance disputes, these insureds had no significant experience with insurance arbitration, and thus had an apparent discomfort or distrust of the process.

Under these circumstances, the insureds hesitated to name party-appointed arbitrators and/or failed to select an umpire by agreement. While requests to the courts to appoint arbitrators or umpires may be unusual in a reinsurance context, as noted above, we found it necessary to file these seven proceedings against insureds within the last five years. In doing so, we asked the courts to appoint arbitrators or umpires from the ARIAS•U.S. Directory of Certified Arbitrators, and this effort has been successful in either obtaining such an appointment or, alternatively, settling the dispute on the merits.

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## ARIAS•U.S. Certification in the Courts

ARIAS•U.S. certification requirements have been acknowledged in at least one published judicial decision. *Sphere Drake Insurance Limited v. All American Life Insurance*, 2002 WL 1008464 (N.D.Ill. May 17, 2002), acknowledged ARIAS•U.S. to be “an organization formed to promote the improvement of the insurance/reinsurance process and to provide the training necessary to serve effectively on an insurance/reinsurance panel.” (*Id.*, fn 1.) *Sphere Drake*, however, did not involve a judicial request to appoint an arbitrator or umpire. Rather, the *Sphere Drake* court was called upon to confirm or set aside an award. While the trial court in *Sphere Drake* did set aside the award at issue, that decision was reversed by the United States Court of Appeals, which also acknowledged the arbitrator’s ARIAS experience, and reinstated the award. *Sphere Drake Insurance Limited v. All American Life Insurance*, 307 F.3d 617, 619 (7th Cir. 2002).

*Sphere Drake* is the only published decision we are aware of that addresses -- and validates with approval -- ARIAS certification. While *Sphere Drake* involved the enforcement of an award, this article addresses cases brought specifically to request judicial appointment of arbitrators or umpires where the appointment process has failed.

### The Most Recent Case

The most recent of the cases we have brought involved two separate applications to “a Justice of the New York Supreme Court” at different points in time. In the first instance, the insured had failed to respond to a Demand for Arbitration that included a demand that it name a party-appointed arbitrator. Our client then filed a petition to compel arbitration and to have the court appoint an arbitrator, asking the court to consider the ARIAS•U.S. Directory of Certified Arbitrators as a resource for the appointment. In that instance, before the court reached a decision, the insured agreed to

participate in arbitration and it appointed a non-ARIAS member as its party-appointed arbitrator. The insurer appointed an ARIAS-certified arbitrator.

Subsequently, the parties and the party-appointed arbitrators were unable to agree upon an umpire. The insurer moved again for judicial assistance, seeking appointment of an umpire pursuant to the parties’ agreement and pursuant to both Section 5 of the Federal Arbitration Act (9 U.S.C. §5) and Section 7504 of New York’s Civil Practice Rules and Law (CPLR §7504). In this second motion, our client’s petition again referenced ARIAS. That application described ARIAS’ objectives, submitted excerpts from ARIAS certification requirements and attached the 2001 ARIAS•U.S. Directory of Certified Arbitrators as an exhibit.

Nonetheless, the insured objected to the court giving consideration to ARIAS. The insured suggested that ARIAS membership would imply a bias in favor of the insurance industry and thus characterized ARIAS as non-neutral. Our reply brief to the court responded:

ARIAS exists to promote fair and efficient arbitrators. . . . It has certified all of [Insurer’s] candidates under the detailed and rigorous standards set forth in the ARIAS directory [which were submitted as an exhibit to the Court]. The directory states:

ARIAS•U.S. seeks to train and certify knowledgeable and reputable professionals for service as panel members in industry arbitrations. Certification is for a term of two years after December 31 of the year of certification or recertification and may be maintained as indicated below.

. . . ARIAS certification is a particularly valid basis upon which to select an arbitrator or Umpire because it provides a source of individuals that have qualifications that go beyond the parties’ agreement to select qualified individuals.

While our adversary was distrustful of persons connected to the insurance indus-

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# ARIAS•U.S. Promoted In Court...

CONTINUED FROM PAGE 19

try, “the lady doth protest too much” (Hamlet, Act 3, 2, 230), and the court was plainly not persuaded. Rather, the court stated that it had “reviewed candidates from the list maintained by ARIAS•U.S.” and ordered the appointment of an ARIAS-certified arbitrator as umpire. The court said that its appointee “meets all the necessary qualifications and has substantial experience as an arbitrator and umpire.” The court also named another ARIAS-certified arbitrator as an alternate, in the event the first-named individual was unable or unwilling to serve.

## Other Cases

In six other cases our clients have moved before courts in New York to appoint either arbitrators or umpires in similar circumstances. In support of these applications, we submitted the ARIAS Directory to assist the court in identifying and selecting qualified arbitrators. In one of these matters, after we had submitted the ARIAS Directory, the court required each side to submit five specific nominees for the court to consider. We then submitted five names from the ARIAS Directory, and the respondent submitted five names from other sources. The court selected one of the ARIAS individuals that we nominated.

In the other five matters, judicial appointment was ultimately not required, yet in each instance a positive result was achieved by submitting the ARIAS Directory to the court. In one case, the respondent selected an ARIAS-certified arbitrator after receiving the ARIAS list as part of our client’s motion. In another, the parties agreed to an ARIAS-certified umpire after a motion was argued, but before it was decided. In a third case, the parties again agreed to select an ARIAS-certified umpire after a motion had been filed. A fourth case was settled on its merits before the motion to appoint was decided.

The remaining case, *National Union Fire Ins. Co. v. Younger Brothers*, 2001 WL 669042 (S.D.N.Y., June 13, 2001), resulted in a published decision. In *Younger*, we again sought to compel arbitration and to appoint an arbitrator. The *Younger* court ordered that arbitration to proceed. However, the United States District Court would not rule on the request to appoint an arbitrator. That court determined that the language in the agreement that “a Justice of the Supreme Court of the State of New York” shall appoint should be followed literally. Thus, the federal court deferred that issue to the New York state court. After this decision was issued, and before the New York state court needed to act, the parties resolved the dispute without further proceedings.

## CONCLUSION

In each of seven cases filed in court, submission of the ARIAS-certified arbitrator directory assisted the court or the parties to reach a positive result. Twice the court selected ARIAS-certified individuals to serve as umpires and three times the parties selected ARIAS-certified individuals as arbitrators or umpires after the ARIAS directory was put before the court. In these cases, we made it clear that we would not consent to the mutual appointment of an umpire who was less qualified than an ARIAS-certified arbitrator. The remaining cases were resolved without the need to complete the arbitration process. Thus, it appears that the ARIAS•U.S. Directory of Certified Arbitrators has been a useful tool to assist our clients and the courts to advance arbitration and to advance the resolution of insurance disputes. ▼

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