



2019 **ANNUAL  
MEETING**  
& EXHIBIT

October 27-30  
Toronto, Canada

## Session 180: The Changing Environment of Life Insurance and Reinsurance Arbitrations in 2019

[SOA Antitrust Compliance Guidelines](#)

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# The Changing Environment of Life Insurance and Reinsurance Arbitrations in 2019

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Susan E. Mack, Co-Founder – ARIAS-US

Denis W. Loring, FSA, MAAA

Mike Boot, FSA, MAAA



# SOCIETY OF ACTUARIES

## Antitrust Compliance Guidelines

Active participation in the Society of Actuaries is an important aspect of membership. While the positive contributions of professional societies and associations are well-recognized and encouraged, association activities are vulnerable to close antitrust scrutiny. By their very nature, associations bring together industry competitors and other market participants.

The United States antitrust laws aim to protect consumers by preserving the free economy and prohibiting anti-competitive business practices; they promote competition. There are both state and federal antitrust laws, although state antitrust laws closely follow federal law. The Sherman Act, is the primary U.S. antitrust law pertaining to association activities. The Sherman Act prohibits every contract, combination or conspiracy that places an unreasonable restraint on trade. There are, however, some activities that are illegal under all circumstances, such as price fixing, market allocation and collusive bidding.

There is no safe harbor under the antitrust law for professional association activities. Therefore, association meeting participants should refrain from discussing any activity that could potentially be construed as having an anti-competitive effect. Discussions relating to product or service pricing, market allocations, membership restrictions, product standardization or other conditions on trade could arguably be perceived as a restraint on trade and may expose the SOA and its members to antitrust enforcement procedures.

While participating in all SOA in person meetings, webinars, teleconferences or side discussions, you should avoid discussing competitively sensitive information with competitors and follow these guidelines:

- **Do not** discuss prices for services or products or anything else that might affect prices
- **Do not** discuss what you or other entities plan to do in a particular geographic or product markets or with particular customers.
- **Do not** speak on behalf of the SOA or any of its committees unless specifically authorized to do so.
- **Do** leave a meeting where any anticompetitive pricing or market allocation discussion occurs.
- **Do** alert SOA staff and/or legal counsel to any concerning discussions
- **Do** consult with legal counsel before raising any matter or making a statement that may involve competitively sensitive information.

Adherence to these guidelines involves not only avoidance of antitrust violations, but avoidance of behavior which might be so construed. These guidelines only provide an overview of prohibited activities. SOA legal counsel reviews meeting agenda and materials as deemed appropriate and any discussion that departs from the formal agenda should be scrutinized carefully. Antitrust compliance is everyone's responsibility; however, please seek legal counsel if you have any questions or concerns.

# Presentation Disclaimer

*The positions espoused by each of Susan E. Mack and Denis W. Loring are for presentation purposes only, and do not necessarily reflect their views or those of the parties which have appointed them as consultants, arbitrators, expert witnesses and umpires or in any other capacity. The Society of Actuaries underscores that the presentation is intended for educational purposes only. The Society of Actuaries does not endorse or approve, and assumes no responsibility for, the content, accuracy or completeness of the information presented. Attendees should note that the sessions are audio recorded and may be published in various media, including print, audio and video formats without further notice.*

# Susan E. Mack

Partner

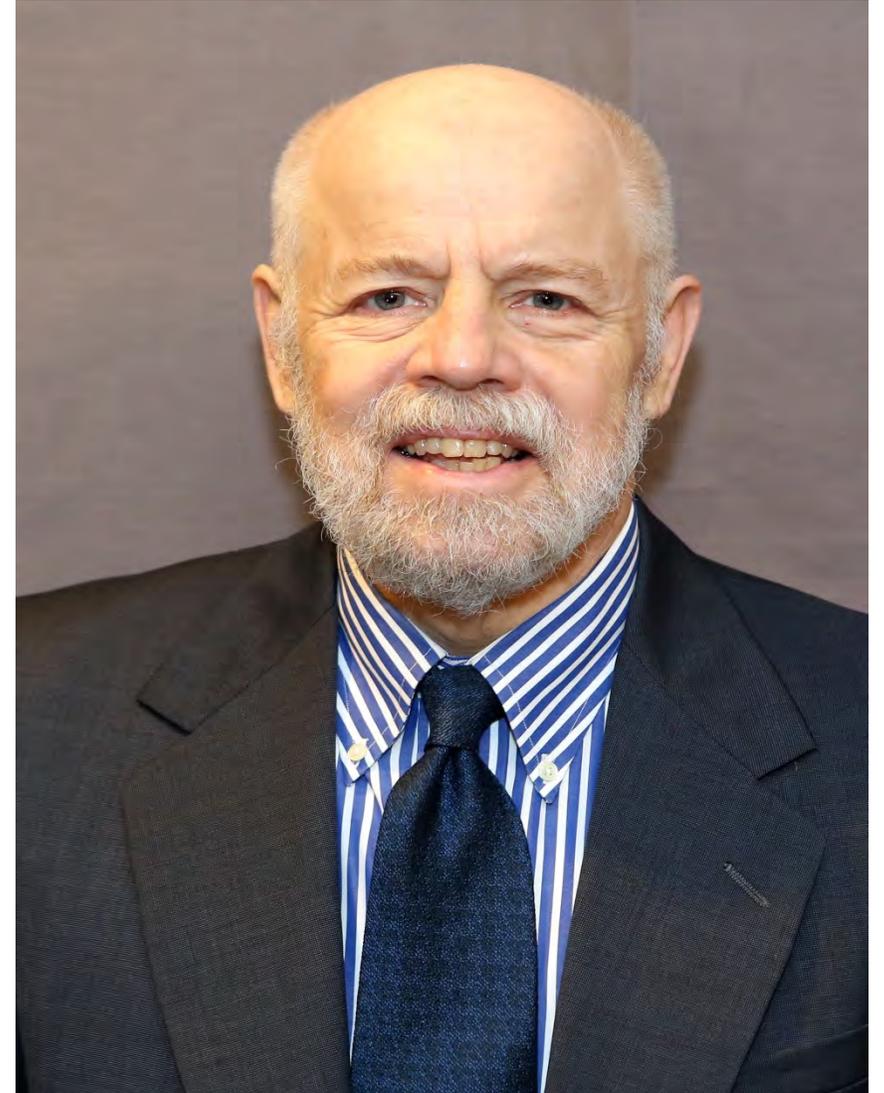
Adams and Reese LLP

Co-Founder and Certified  
Umpire and Arbitrator-  
ARIAS-US



# Denis W. Loring

FSA, MAAA,  
Certified Umpire and  
Arbitrator – ARIAS-US



# Mike Boot

FSA, MAAA



# Agenda – The Changing Environment of Life Insurance and Reinsurance Arbitration in 2019

- What You Need to Know about ARIAS-US
  - History and Purpose
  - Differences from Other Arbitration Societies
- Why Do We Need Arbitrators Anyway?
  - There's a Fight Just About to Happen!
  - Mack/Loring – Two Arbitrators Show How It's Done
- Plunging into that Sea: Arbitrator Opportunities
  - How to Become a Certified Arbitrator

# What You Need to Know about ARIAS-US

- History

- Founded in 1994, ARIAS-US was founded to address the need for qualified arbitrators in escalating asbestos, pollution and health hazard (APH) disputes between property/casualty insurers and their reinsurers
- Intended as a neutral society, the initial directors consisted of three insurers' counsel (including Ms. Mack), three reinsurers' counsel and three retained counsel

- Purpose

- Certifies arbitrators and umpires and provides arbitration-related education

# ARIAS-US – Differences from Other Arbitration Societies

- ARIAS-US Specializes in the Resolution of Insurance and Reinsurance Disputes
  - Besides life, ARIAS-US handles health reinsurance disputes and disputes between property-casualty insurers and their reinsurers, large commercial policyholders and managing general agents (MGAs)
  - ARIAS-US also qualifies mediators of insurance and reinsurance disputes
- Most typically, ARIAS-US arbitrations consist of a three person panel
  - Two party-appointed arbitrators and a neutral “umpire”
  - Neutrality not required initially of party-appointed arbitrators
    - Ex Parte communication allowed to limited extent
- Unlike American Arbitration Association, there is no case administrator

**So, why should you contemplate a present or future career as an arbitrator?**

**The Industry ...  
and ARIAS-US Needs Your Help.**

# The Road to An Arbitration

**The Reinsurance Relationship is based on two key principles:**

- Utmost good faith
- Follow the fortunes

# Anatomy of a Life Reinsurance Dispute

- The cedent seeks a quote; reinsurer is willing.
- The cedent provides data; the reinsurer analyzes.
- The reinsurer quotes; the cedent accepts.
- The treaty is executed; the business flows.

# The business tanks!



# The Reinsurer cries:

## No utmost good faith!

- Material non-disclosure!
- Material misrepresentation!
- You sold us a bill of goods!

## Rescind!

# The Cedent cries:

## You won't follow the fortunes!

- Inadequate due diligence!
- Deliberate underpricing!
- You're just trying to get out of a bad deal!

**Pay! With punitive damages!**

Oh dear.



# Forms of Dispute Resolution

- Negotiation
- Expert determination
- Mediation
- Arbitration
- Litigation

# Mediation

- Neutral facilitator attempts to achieve consensus on an outcome
- Good faith effort to reach agreement
- No formal structure
- Limited duration
- Not in common use – but should be

# Litigation

- Most formal and structured
- Rules and procedures most familiar to counsel
- Usually precluded by mandatory arbitration clause
- Requirement to arbitrate enforced by the courts

# Arbitration

- Usually mandated by the treaty
- Once a semi-formal, relationship-based procedure
- Now, outwardly similar to a trial ...
- ... but in actuality very different

# The Arbitration Process

- Demand for arbitration
- Selection of the arbitrators
- Selection of the umpire
- Organizational Meeting
- Final Hearing
- Deliberation, Ruling and Award

# The Uniqueness of Arbitration

- Judgment by experts
- Panel determines rules and procedures
- Confidential and does not constitute precedent (as legal cases do!)
- Ruling typically based on industry custom and practice
- Decision final, legally enforceable, cannot be appealed  
(except for corruption, fraud, bias, evident partiality, obvious misconduct under the Federal Arbitration Act – 9 U.S. Code Title 9)

# Sea Change in Life Reinsurance Disputes

- Historically, life reinsurance disputes were resolved in a different manner than P&C disputes, leading to fewer arbitrations
- In the decades prior to the late 1990s, life reinsurance disputes were extremely rare
- Most market participants from that era were never involved in an arbitration, or at most one or two, often relating to an insolvency or scandal
- When disputes arose, they tended to be resolved via negotiated resolution, with perhaps concessions or accommodations going forward or on other contracts

# 1990s and Early 2000s

- Disputes increased gradually but still remained infrequent
- Disputes were varied in subject matter rather than centered on industry-wide issues
- Life companies were drawn into the workers' comp carve-out scandals of the late 1990s

# Post 2010 Activity

- Far greater (and increasing) levels of arbitrations since 2010
- Typically larger amounts in dispute than P&C
- Drivers of increases:
  - Placement of Stranger-Owned Life Insurance (STOLI)
  - Variable Annuity Guarantees and Associated Losses
  - Run-offs / Divestitures / Consolidation
  - Increase in Older Age Coverages and Large Resulting Losses
  - Very Large Reinsurance Losses from Highly Competitive Era from Late 1990s-2004
  - YRT Rate Increases

# Current Challenges

- Few ARIAS-US accredited and experienced arbitrators with a background in the life insurance/reinsurance industries and resulting impacts
- Companies' lack of experience with reinsurance disputes
- Disputes are often focused on treaties negotiated 15-20+ years ago – unavailable witnesses, fading memories, sparse records

# YRT Rate Increase Disputes

- Overview of YRT Reinsurance
  - Historical development
- The NY position regarding deficiency reserves and the resulting development of clauses
- Historic custom and practice and industry expectations
- Increasing numbers of disputes over the past decade

# YRT Rate Increase Disputes (cont.)

- Typical arguments by cedents
- Typical arguments by reinsurers
- Features of these disputes:
  - Focus on contract language and industry custom/exceptions
  - The role of custom and practice experts
  - Regulatory issues

# YRT Rate Increase Disputes (cont.)

- Rates guaranteed for one year only and guaranteed not to exceed valuation net premium for any year thereafter
- Require notification and acceptance

# Other Issues Causing Disputes

- Variable Annuities/Annuity Guarantee issues stemming from 2008 economic downturn
- Reinsurer challenges to cedents' underwriting and pricing practices
- Stranger-Owned Life Insurance (STOLI)
- Life administration disputes/E&O issues
- Misrepresentation claims regarding original pricing assumptions and age/distribution cohorts within treaties
- Large individual death claims

# Takeaways and Conclusions

- The current state of relationships between life insurers and life reinsurers differs from all earlier periods
- Many more executives with genuine life insurance and reinsurance experience are needed as arbitrators – avoid the opportunity for “gaming the system”

# Plunging Into that Sea – Arbitrator Opportunities

- Potential Differences between stringent Reinsurance Contract Requirements and more liberal ARIAS-US Requirements
  - Life insurance company or reinsurance company length of service is important
- Unlike Other Arbitration Societies, ARIAS-US Roster Not Confined to Attorneys and Former Judges

# ARIAS-US: How to Become a Certified Arbitrator

- Certified Arbitrator Requirements
  - ARIAS-US Member in Good Standing (\$450 per annum)
  - Must have 10 or more years of insurance/reinsurance specialization
  - Attendance at ARIAS-US Intensive Training Workshop
  - Two Credits – See next slide
- Keeping the Certification Updated
  - Every two years:
    - Attend an ARIAS-US Spring or Fall Meeting
    - On-line Ethics Course
    - Three live webinars or one in-person education seminar or faculty service at an ARIAS-US conference or other event

# ARIAS-US: How to Become a Certified Arbitrator (Two Credits Available)

- Party's employee manager with principal responsibility for insurance or reinsurance arbitration
- Lead trial counsel in insurance and reinsurance arbitration
- Company representative at insurance and reinsurance arbitration
- Attendance at ARIAS-US seminar (other than Fall or Spring Meetings) or three webinars (equivalent to one seminar)
- Serve as faculty member at ARIAS-US conference workshop or seminar (only one credit available)

# QUESTIONS?

