AIDA REINSURANCE & INSURANCE ARBITRATION SOCIETY

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Inside:

Reinsurance arbitrations:

UK and US Perspectives

By Simon Twidger

For reasons which are possibly no longer valid in today's highly competitive and 'less traditional' marketplace, arbitration has remained the chosen means of dispute resolution for the worldwide reinsurance industry. Most of these arbitrations take place in England or the US. However, to arbitrate a reinsurance dispute in England can be a very different proposition from arbitrating that dispute in the US. This is despite the fact that many arbitration clauses contained in treaty wordings concluded in both these jurisdictions seek to 'disengage' the arbitrators from applying any particular set of legal principles to their determination of the dispute providing, for instance, that the arbitrators should interpret the contract as an honourable engagement.

This article will highlight four of those differences.

COMMENCEMENT OF PROCEEDINGS: CHOOSING AN ARBITRATOR

Under the terms of the typical arbitration clause found in most treaty wordings, the arbitration tribunal/panel consists of three persons. Each party appoints one arbitrator and the two arbitrators appoint the 'neutral' umpire or third arbitrator.

In commercial court proceedings neither party is involved in the selection of a judge. In arbitration proceedings on the other hand, with the usual tripartite arbitration tribunal, there is the opportunity for each party to select at least one of the individuals to determine the dispute.

That initial decision may prove critical to the eventual outcome of the arbitration. To differing degrees, it is often the case that each party will attempt to select an arbitrator which it considers, for whatever reason and whether rightly or wrongly, will be predisposed to its position on the dispute.

Normally, the first issue to be addressed is to identify an arbitrator who meets any requirements set forth in the arbitration agreement such as an "executive officer of an insurance or reinsurance company" or a person "employed in, or retired from, a senior position in insurance or reinsurance underwriting". Despite the provisions of the Arbitration Act (see below), lawyers are asked to select an arbitrator who, the party considers, may be instinctively in favour (or, at least not adverse) to its position in the dispute. This said, and aside from a general view of the person's position in the market, how can one determine a potential arbitrator's viewpoint on the dispute in question? What can he/she be asked and what can he/she be told?

• The English position

It is usual to have minimum contact with a potential arbitrator, save for a general discussion to include whether the potential arbitrator is prepared to act, whether he has an actual or potential conflict with any of the parties to the dispute and to ascertain his level of fees. It is not normal to provide details of the dispute to forward any documents (save for, perhaps, the contract containing the arbitration clause) or to ask the potential arbitrator for his opinion on the dispute.

This practice reflects a constant theme in the development of arbitration law in England (and confirmed most recently in the Arbitration Act 1996) that "the object of arbitration is to obtain the fair resolution of disputes by an *impartial tribunal* [emphasis added] (section 1 of the Arbitration Act 1996). English law requires the arbitrator to

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Calendar 1998 - 1999

FOURTH QUARTER 1998

November 5 — Annual Meeting / New York Conference

FIRST QUARTER 1999

February 11 — One Day Seminar - Philadelphia, PA

SECOND QUARTER 1999

April 22 - April 24 — Spring Conference - Marriott, Marco Beach, Marco Island, Fl.

June 24 — One Day Seminar - San Francisco, CA

THIRD QUARTER 1999

September 14 — One Day Workshop - Philadelphia, PA

FOURTH QUARTER 1999

November 4-7 — Annual Meeting & Conference - New York City, NY

SAVE THE DATES:

ARIAS•U.S. 1999 CALENDAR OF EVENTS

APRIL 22 - 24, 1999

Spring Conference - Marco Beach, FL

JUNE 24, 1999

One Day Workshop - San Francisco, CA

SEPTEMBER 14, 1999

One Day Workshop - Philadelphia, PA

NOVEMBER 4-6, 1999

Annual Meeting and Conference -New York, NY

Challenging Arbitrator Bias:

When Can You Seek Help From The Court?

Introduction

What can you do when you believe your opponent in an arbitration has appointed a biased arbitrator? Can you seek relief from a court before the arbitration concludes? Or do you first have to spend the time and resources to complete the arbitration and then move to vacate the award for bias after the proceedings have concluded?

Where the arbitration agreement is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., the party who goes to court to remove an arbitrator for bias will face uncertain results for two reasons: (1) the FAA does not expressly authorize courts to disqualify an arbitrator for bias prior to the conclusion of an arbitration; and (2) the case law addressing this issue is inconsistent.

Indeed, some courts have held that a party cannot seek judicial disqualification of an arbitrator before the arbitration is completed. In those cases, the party must proceed with the arbitration and then challenge the arbitrator's bias by moving to vacate the award — but only after the arbitration is completed. Other courts have suggested that pre-award disqualification of an arbitrator may be appropriate in certain circumstances. Those courts allowing pre-award challenges have based their rulings, in large part, upon either overt misconduct by the arbitrator or the wording of the specific arbitration provision at issue in the dispute.

Courts on both sides of the issue purport to base their rulings on considerations of what will best serve the purpose of arbitration: providing a quick, efficient and less costly procedure for resolving commercial disputes. Those courts opposed to pre-award court intervention generally note that courts should not allow one party to delay the arbitration by inserting the court into the process because arbitration is supposed to provide an expedient resolution of disputes outside the court system. On the other hand, courts supporting pre-award judicial review note that it may be more costly and more time-consuming to require a party to proceed with an arbitration when it objects to its opponent's arbitrator in those cases where the objecting party is virtually certain to file a motion to vacate.

Nonetheless, despite their conflicting views, these court opinions make clear that reinsurers and other arbitrating parties (and their counsel) need to draft arbitration clauses carefully and make prompt objections to arbitrator bias.

Pre-Award Disqualification Under The FAA Is Limited

Your ability to obtain judicial review of an arbitrator's bias before an arbitration ends may be limited if you rely solely on the FAA. The FAA does not give courts much "pre-award" power. As noted above, the FAA does not expressly grant general authority to courts to review an arbitrator's qualifications before the conclusion of the arbitration. While § 5 of the FAA empowers the court to appoint an arbitrator, this authority is limited to three specific circumstances: (1) when the arbitration agreement fails to provide a method for the appointment of an arbitrator; (2) when a party fails to follow the selection method set forth in the arbitration agreement; or (3) when there is some other "lapse" in the selection of an arbitrator. (See, 9 U.S.C. § 5). If your case does not fit into one of these categories, you cannot rely on § 5 to obtain a pre-award judicial review of an arbitrator's bias.

Several courts have considered the issue of pre-award disqualification in the context of § 10 of the FAA. Most courts have concluded that a pre-award review by the court of the arbitrator's partiality is not available under § 10 and that § 10 requires that the arbitration award be entered before a party can challenge an arbitrator's bias in court.

For example, in Aviall, Inc. v. Ryder System, Inc., 913 F. Supp. 826 (S.D.N.Y. 1996), affirmed, 110 F. 3d 892 (2d Cir. 1997), Aviall sought to disqualify the accounting firm of KPMG Peat Marwick ("KPMG") selected by Ryder (Aviall's former parent) to arbitrate a dispute involving the parties' spin-off. Aviall argued that KPMG's relationship with Ryder as its regular outside auditor and KPMG's conduct regarding the dispute at issue demonstrated partiality that disqualified KPMG from arbitrating the dispute. The Second Circuit agreed with the district court's holding that, under § 10 of the FAA, the court could not entertain a motion challenging an arbitrator's bias until after the arbitration is completed.

... some courts have held that a party cannot seek judicial disqualification of an arbitrator before the arbitration is completed.

Similarly, in Old Republic Ins. Co. v. Meadows Indem. Co., Ltd., 870 F. Supp. 210 (N.D. Ill. 1994), Judge Aspen stated that § 10 of the FAA does not provide a pre-award remedy for arbitrator bias or partiality; instead the complaining party must proceed with the arbitration and seek relief after the arbitration is completed. In that case, Old Republic sought to have Meadows' arbitrator disqualified for his alleged bias, noting two earlier unrelated lawsuits in which Old Republic and Meadows' arbitrator were adversaries. The court refused to consider the challenge, ruling that it had no jurisdiction under the FAA to make a pre-award review

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Reinsurance arbitrations: UK and US perspectives

Continued from page 1

be impartial (sections 1 (a), 24(1)(a) and 33(1)(a)) and great care is taken in any preliminary discussions with a potential arbitrator to ensure that no doubt can be cast over his ability to act judicially.

• The US position

It is considered perfectly legitimate and, in fact, normal, for a party to review the substance of the dispute in very broad terms with a potential arbitrator before appointing that person. A great deal of time is spent by lawyers for each of the parties to the arbitration identifying an arbitrator whom they consider will be predisposed to that party's position and will have sufficient gravitas to be persuasive in that his views will be accepted by the umpire.

Before making the appointment as arbitrator, it has been known for the party to actually ask the candidate whether he supports the party's position if the facts and circumstances as represented to him turn out to be accurate. However, even if that candidate makes 'the right noises' and is appointed, in arbitration proceedings conducted by professional persons of integrity, this does and should not mean that his ultimate views and his vote are predetermined. Most reputable arbitrators will not hesitate to 'vote their conscience' and will consider any advocacy responsibilities to the party appointing him to have been discharged if he has enabled that party's position to be fully and fairly presented to the panel. Indeed, this position is supported by the accepted fact that the majority of awards issued by arbitration panels in the US are decided by a unanimous arbitration panel.

There should be no exparte contact by either party with any member of the tribunal.

THE ROLE OF THE PARTY-APPOINTED ARBITRATOR

Once the party-appointed arbitrator has been nominated, and subject to his meeting any qualification provision in the contract, being 'disinterested' in the outcome of the arbitration, and having no conflicts which prevent him from acting, there can be a marked difference in his role depending on whether the arbitration takes place in England or the US.

• The English position

In exercising the judicial function of arbitrator, the party-appointed arbitrator is in no sense the delegate of the person who appointed him. In principle, and in practice, he stands neutrally between the two parties, owing equally to both parties the overriding duty to act fairly.

There should be no exparte contact by either party with any member of the tribunal. All communications and correspondence with the arbitration tribunal should be disclosed and copied to the other party. Of course, in the close-knit reinsurance community where the arbitrator and the parties are engaged in the same business, meetings outside the context of the arbitration may be hard to avoid. If so, the arbitrator would be well advised to ensure that the other party to the reference is made aware (in advance, if possible) so that he has the opportunity to object or make appropriate inquiries.

• The US position

In US reinsurance arbitration proceedings, the position can be very different. Unfortunately, most reinsurance contract wordings provide no guidance as to the obligations of a party-appointed arbitrator. However, it is commonly accepted that the role of the party-appointed arbitrator is, at least to some extent, as an advocate for the party which has appointed him. Indeed, the important distinction between the party-appointed arbitrator to be found in England and the party-appointed arbitrator in the US is the possibility for exparte contact.

Normally, for at least part of the arbitration proceedings, it will be perfectly proper for there to be confidential communications between a party and/or its counsel and the party-appointed arbitrator without the other panel members or the other party having knowledge of the timing or substance of those discussions. In order to ensure that neither party is operating on a set of false assumptions, the panel will set very clear rules as to whether exparte communications are permissible and, most importantly, when they should cease. This is usually, at the latest, at the commencement of the substantive hearing on the merits, but can be as early as the filing of briefs or even following the initial organizational meeting.

PLEADINGS OR BRIEFS?

The method of identifying and defining the issues in a reinsurance arbitration is certainly more formal in England than in the US.

• The English position

English reinsurance arbitration proceedings usually adopt formal pleadings along the same lines as those required in court proceedings. Indeed, one of the major criticisms of the English arbitration system has been the fact that arbitration proceedings are conducted in a rigid, formal way, often simply mirroring court procedures. Consequently, many reinsurance practitioners (including cedents, reinsurers and retrocessionaires) have questioned the continued use of arbitration in England.

It is hoped that the advent of the new Arbitration Act

1996 will change that. Section 34 (1) (c) of the Act provides that, unless the parties agree otherwise, the tribunal may decide "whether any and if so what form of written statements of claim and defense are to be used, when these should be supplied, and the amended." Hopefully, this will signal a mood swing in favour of less formal pleadings. The submission of repeatedly amended pleadings and extensive requests for Further and Better Particulars are surely inconsistent with the principles underpinning the new Arbitration Act and arbitration in general.

• The US position

US arbitration panels usually strive to persuade the parties to agree on a list of issues to be determined in the arbitration. This is normally agreed before, or at, the initial organizational meeting of the panel, at which the briefing, discovery and hearing schedules are set. Essentially, each party will brief those issues and those briefs, and reply briefs, will be exchanged simultaneously between the parties and submitted to the panel. The briefs are far less formal than the English form of pleadings and reflect the reality of seeking to persuade and influence a US arbitration panel comprised of arbitrators and an umpire highly experienced in the reinsurance industry.

THE FORM OF THE AWARD

Whereas English arbitration proceedings usually conclude with a detailed arbitration award, US arbitration proceedings often conclude with a few terse statements setting out the decision without any reference to the basis for that decision.

• The English position

Unless the parties otherwise agree (or have been deemed to agree) to dispense with reasons for the arbitration award, it is a legal requirement in England that reasons be given (section 52 (4) Arbitration Act 1996). As stated in The Departmental Advisory Committee Report on Arbitration Law (February 1996), endorsed as an official commentary to the Act: "To our minds, it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision." If the parties agree to dispense with reasons for the tribunal's award, then that agreement will also be considered as an agreement of the parties to exclude the right to appeal to court on any question of law arising out of that award (section 69).

• The US position

There is no general requirement that arbitrators explain the reasons for their award. Normally, US reinsurance arbitration panels do not issue detailed awards. The reasoning is that the shorter the award the harder it is to challenge it in the courts under the Federal Arbitration Act.

CONCLUSION

There are important differences between US and English reinsurance arbitrations. Although the legal principles may be similar, an understanding of the procedural nuances is essential before participating in such proceedings on either side of the Atlantic.®

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Although ARIAS•U.S. believes certification is a significant and reliable indication of an individual's background and experience, it should not be taken as a guarantee that every certified member is an appropriate arbitrator for every dispute. That determination should be preceded by a review of several factors, including but not limited to, the applicable arbitration provision, potential conflicts or bias and the type of business involved in the dispute. In addition, ARIAS•U.S. wishes to acknowledge that its certified arbitrators are not the only qualified arbitrators.

As noted above, The Society is gratified that many of the most respected practicing arbitrators have chosen to join ARIAS•U.S. There are others who are similarly qualified and experienced, but who have not chosen to join at this time.

NOW AVAILABLE. . .

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ARIAS•U.S. DIRECTORY

Includes listing of ARIAS•U.S. Certified Arbitrators

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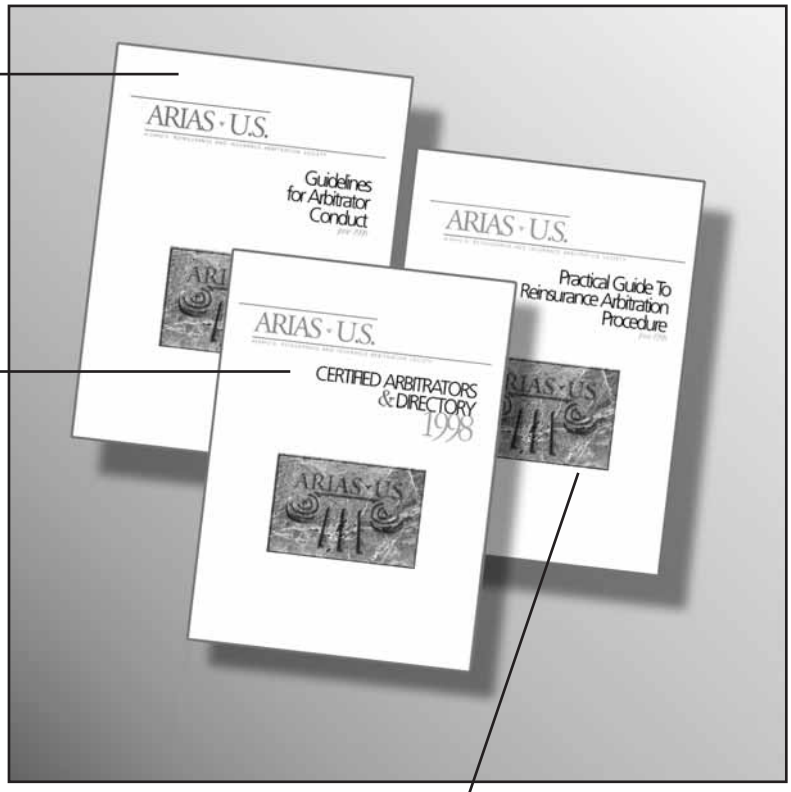

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BERMUDA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE

SERVICES FOR ARBITRATIONS UNDER THE UNCITRAL ARBITRATION RULES

PROCEDURES FOR CASES UNDER THE UNCITRAL ARBITRATION RULES

To facilitate the conduct of arbitration cases that the parties have agreed to conduct under the UNCITRAL Arbitration Rules, BICAC will:

(a) perform the functions of the appointing authority set forth in the UNCITRAL Arbitration Rules whenever:

(i) BICAC has been so designated by the parties either in the arbitration clause of their contract or in a separate agreement, or

(ii) the parties have agreed to submit a dispute to BICAC under the UNCITRAL Arbitration Rules without specifically designating it as the appointing authority, and

(b) perform the administrative services described in these pages when called for by the contract, or when requested by all parties or by the arbitral tribunal.

SERVICES AS APPOINTING AUTHORITY

Appointment of sole or presiding arbitrator

1. When requested to appoint a sole or presiding arbitrator, BICAC will follow the list procedure set forth in the UNCITRAL Arbitration Rules (Article 6 (3)).

In selecting arbitrators, BICAC will carefully consider the nature of the case, as described in the Notice of Arbitration, in order to include in the list persons having appropriate professional or business experience, language ability and nationality.

When appointing a sole or presiding arbitrator under the UNCITRAL Arbitration Rules, BICAC will designate a person of a nationality other than the nationalities of the parties, unless otherwise provided by written agreement of the parties. All appointments shall be made by the Executive Director of BICAC.

Appointment of a "second" arbitrator in 3-arbitrator cases

2. Under article 7 of tile UNCITRAL Arbitration Rules, when 3 arbitrators are to be appointed, each party is to appoint one arbitrator, but if a party falls to do so, the other party may request that the appointment of the second arbitrator be made by the appointing authority.

In accordance with the UNCITRAL Arbitration Rules, the Executive Director, when appointing a second arbitrator, will utilize the list procedure once again. All appointments shall be made by the Executive Director of BICAC.

Decisions on challenges to arbitrators

3. Under article 10 of the UNCITRAL Arbitration Rules, all arbitrators—including those appointed by one party—are required to be impartial and independent. Article 10 provides that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

Article 12 of the UNCITRAL Arbitration Rules requires that contested challenges may be decided by the appointing authority. When deciding challenges at the request of any party, BICAC will appoint a special committee, consisting of 3 persons, a majority of whom will be of nationalities different than that of either party, to make the decision.

Appointment of substitute arbitrators

4. The UNCITRAL Arbitration Rules provide that a substitute arbitrator will be appointed if an arbitrator dies or resigns during an arbitration proceeding, or if a challenge against him is sustained (Articles 12 (2) and 13). In such cases, BICAC will perform the same function in appointing a substitute arbitrator as described above with respect to other arbitrators.

Fees of Arbitrators

5. The UNCITRAL Arbitration Rules provide that the fees of arbitrators shall be reasonable in amount, taking into consideration the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case (Article 39 (2)). The Rules provide that parties may request the appointing authority to provide to the arbitrators and parties a statement setting forth the basis for establishing fees that is customarily followed in cases in which the appointing authority acts (Article 39 (3)). BICAC has no schedule of fees for arbitrators and will not provide that service.

See UNCITRAL Arbitration Rules…
Continued on page 8

UNCITRAL Arbitration Rules

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ADMINISTRATIVE SERVICES

Upon the request of all parties or the arbitral tribunal, BICAC will provide the following administrative services:

Communications

6. Upon request, all oral or written communications from a party to the arbitral tribunal—except at hearings—may be directed to BICAC which will transmit them to the arbitral tribunal and to the other party.

Agreement by the parties that BICAC will administer a case constitutes consent by the parties that, for purposes of compliance with time requirements of the UNCITRAL Arbitration Rules, any written communications shall be deemed to have been received by the addressee when received by BICAC. When transmitting communications to a party, BICAC will do so to the addresses set forth in the Notice of Arbitration or such other address as has been furnished by a party, in writing, to BICAC.

It is recommended that the parties consider the advantage of a pre-arbitration meeting to determine many of the administrative and procedural decisions respecting the arbitration before the first hearing takes place. BICAC can assist with such a meeting.

It is recommended, to avoid unnecessary delays, that parties exchange documentary evidence and lists of witnesses before the hearing. It is also useful and customary to provide the arbitral tribunal with copies of all initiating documents before the hearing. BICAC can assist with this exchange.

Hearings

7. Upon request, BICAC will assist the arbitral tribunal to establish the date, time and place of meetings and hearings, giving such advance notice of them to the parties as the tribunal may determine pursuant to the UNCITRAL Arbitration Rules (Article 25, paragraph 1).

Hearing rooms

8. Upon request, BICAC will provide a hearing room, witness waiting room and counsel rooms at BICAC. If a hearing room is not available at BICAC, BICAC will, upon request, arrange a hearing room elsewhere at another location in Bermuda. The cost of rooms provided by BICAC in its offices or arranged by BICAC outside its offices will be billed separately and not included in its fee for administrative services. Requests for rooms should be made as soon as possible to ensure a booking.

Transcripts

9. Upon request, BICAC will make arrangements for reporter transcripts of meetings or hearings. The cost of reporter transcripts will be billed separately and not included in the fee for administrative services. BICAC requests 2 to 3 weeks notice of such requests.

Interpretation and translation

10. Upon request, BICAC will make arrangements for the services of interpreters or translators. The cost of interpretation or translation will be billed separately and not included in the fee for administrative services. BICAC requests 3 to 4 weeks' notice of such a request.

Deposits against costs

11. Upon request, BICAC will hold advance deposits to be made on account of arbitrators' fees and the costs of the arbitral proceedings. BICAC does not fix the amount of fees of arbitrators and has no schedule for fees for arbitrators.

BICAC may, from time to time, pay to the arbitral tribunal from any deposit it holds against costs any amount it considers reasonable and appropriate for fees earned or expenses incurred by the arbitral tribunal in the arbitral proceedings.

After the arbitral tribunal has established the costs and who is to pay them, BICAC will apply the proceeds of the advance deposit towards any of its unpaid administrative fees and charges, shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties in accordance with the order of costs made by the arbitral tribunal.

Other services

12. Upon request, BICAC will provide other appropriate administrative services which may or may not be included in its fee for administrative services. Please consult the Executive Director of BICAC for further information.

The kinds of services which can be provided are as follows:

(a) secretarial support and clerical assistance;
(b) videoconferencing;
(c) long distance and local telephone access and telefax facilities;
(d) photocopying and other usual office services;
(e) temporary and permanent exhibit and document storage.

ADMINISTRATIVE FEES

Appointing authority and administrator

13. For full service as appointing authority and administrator, the fee of BICAC is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed.

Amount of Claim/Counter-Claim	*Amount of Fees*
Up to $50,000	**3% (min. $500)**
$50,000 to $100,000	**$1,500 plus 2% of excess over $50,000**
$100,000 to $250,000	**$2,500 plus 1% of excess over $100,000**
$250,000 to $500,000	**$4,001 plusof excess over $250,000**
Over $500,000	**$5,250 plus 1/2% of excess over $500,000 to a maximum of $30,000**

Where no amount in dispute can be stated at the time of filing, the administrative fee is $500, subject to adjustment in accordance with the above as soon as an amount can be disclosed.

Time for payment

14. The claimant shall submit a non-refundable fee of $500 to BICAC on the giving of the notice of request for arbitration. The fee is deductible from the amount of administrative fees set out in the schedule in section 13.

The first 50% of the administrative fees is due and payable to BICAC as an advance against fees within 30 days after BICAC receives the notice of request for arbitration.

Each party shall pay one-half of the first 50% of the administrative fees. The second 50% of the administrative fees is due and payable to BICAC as an advance against fees as soon as the arbitral tribunal has been constituted. Each party shall pay one-half of the second 50% of the administrative fees.

The arbitration shall not proceed until the advance against fees is deposited with the BICAC. If one party fails to pay the required fees, the other party may pay the total fees required.

Appointing authority only

15. For services as appointing authority only, the fee of BICAC is $200. This fee is non-refundable and payable to BICAC on the request to act as appointing authority.

Apportionment of fees among parties

16. The UNCITRAL Arbitration Rules provide that the costs of arbitration include the fees and expenses of the appointing authority. Any administrative services provided by BICAC or arranged by BICAC constitute assistance required by the arbitral tribunal and are deemed to be costs of the arbitration (Article 38 (c) and (f)). These costs of the arbitration are, under the UNCITRAL Arbitration Rules, in principle, borne by the unsuccessful party; the arbitral tribunal, however, may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case (Article 40).

Fees and charges subject to change.

UNCITRAL Model Law on International Commercial Arbitration (1985)

Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong, Hungary, India, Iran (Islamic Republic of), Kenya, Lithuania, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine, within the United States of America: California, Connecticut, Oregon and Texas; and Zimbabwe.

ARIAS•U.S. CONFERENCE APRIL 16-18, 1998

MARRIOTT CASTLE HARBOUR

BERMUDA

From Our Photo File...

A LOOK BACK AT ARIAS•U.S. SPLENDID BERMUDA CONFERENCE

Thomas A. Allen

Eugene Wollan

ARIAS•U.S. organizational meeting

Daniel E. Scmidt, IV

Left and below:
Break-out session over a two-day period provides an opportunity for individual interpretation and an exchange of viewpoints among colleagues.

COCKTAILS ANYONE...

Attendees relaxed over pool side cocktails after an intense day featuring a mock arbitration.

When Can You Seek Help From The Court?

Continued from page 3

of the arbitrator's qualifications. The court went on to note that even if it did have authority to disqualify an arbitrator before the completion of the arbitration, it would do so only in those rare cases where the bias was overt, rather than a mere potential.[2]

However, on the same day that judge Aspen ruled in Old *Republic*, the court in *Evanston v. Kansa*, 94 C 4957 (N.D. Ill. October 17, 1994), Mealey's Reinsurance, Vol. 5, No. 14, § A (11/23/94), reached a contrary result, based in part upon § 10. In that case, Evanston alleged that Kansas arbitrator was an officer of a co-reinsurer participating in the same reinsurance contracts as Kansa and, in that capacity, the arbitrator had refused to pay Evanston's claims on the grounds of purported misrepresentation and mismanagement. The evidence also indicated that prior to the arbitration Kansas arbitrator had access to and reviewed Evanston's confidential records relating to the contracts at issue. Kansas arbitrator even admitted that he was predisposed toward Kansas view of the dispute and thus might not be "neutral."

Ruling that the court had jurisdiction over Evanston's pre-award challenge, Judge Nordberg noted that "the ability of a court to consider arbitrator bias after the arbitration process is concluded [under § 10 of the FAA] suggests that a court may make a similar inquiry before the process begins." *Id.* at A-3. The court expressed particular concern that if Kansa's arbitrator remained in the arbitration, it was likely that any award would be vacated on appeal in light of the evidence that he was biased.[3]

It does not appear, however, that *Evanston* (or cases with similar holdings) provides any guarantee that a court will accept jurisdiction over a dispute regarding arbitrator bias prior to the completion of the arbitration. Indeed, the court in CNA dismissed the above-quoted comment from Judge Nordberg as mere "dicta."

Impact Of Your Arbitration Clause On Pre-Award Disqualification

Despite cases like *Aviall* and *Old Republic*, a pre-award judicial review of arbitrator bias (even the "appearance" of bias) is still possible in some cases. The same courts that debate whether §10 provides a basis for pre-award review, agree that pre-award relief may be appropriate under the specific terms of the parties' arbitration agreement and general contract principles. Indeed, these courts appear willing to review the alleged arbitrator bias before the end of the arbitration in cases where the arbitration agreement requires "neutral" or "impartial" arbitrators because, under §4[4] and §5 of the FAA, courts have the power to order that an arbitration proceed in the manner provided for in the arbitration agreement.

For example, in *Evanston*, the parties' arbitration agreement required that the party-appointed arbitrators be "disinterested." Evanston complained that Kansa failed to comply with that contractual requirement because its proposed arbitrator was not "disinterested." The court held that §4 and §5 authorized it to enforce the express terms of the parties' arbitration agreement and the court could therefore rule on the question of "disinterest" before the conclusion of the arbitration.

In CNA, one of the most recent cases to examine this question, the London Market Reinsurers ("London") moved to disqualify the arbitrators chosen by CNA. The parties' reinsurance contracts required them to submit disputes to a tripartite panel (of two arbitrators and an umpire) composed of "managing officials" and "executive officers" of insurance companies. CNA commenced arbitration proceedings against London and selected two executives of Travelers Insurance Company ("Travelers") as its party arbitrators. London objected to CNA's selections because Travelers was involved in several reinsurance disputes with London.

It does not appear, however, that Evanston (or cases with similar holdings) provides any guarantee that a court will accept jurisdiction over a dispute regarding arbitrator bias prior to the completion of the arbitration. Indeed, the court in CNA dismissed the above-quoted comment from Judge Nordberg as mere" dicta."

Before the parties selected an umpire, London asked the district court to disqualify CNA's arbitrators on the grounds of bias and partiality because: (1) the claims between Travelers and some of the London reinsurers were similar to the present disputes; (2) the arbitrators designated by CNA were personally involved in the disputes between Travelers and London; and (3) Travelers had an attorney-client relationship with the law firm representing CNA in the arbitration.

CNA argued that the district court did not have jurisdiction over the motion to disqualify because, according to CNA, the only provision in the FAA that authorizes the court to address arbitrator bias is §10, which allows only for *post-award* challenges. As noted above, the court agreed with CNA on this issue and held that "to the extent [London's] motions assert jurisdiction under § 10 of the FAA, the motions are denied." 1997 WL 461035 at 4.

However, the court also considered whether any other authority allowed it to review the arbitrator's alleged bias before the completion of the arbitration. Noting the terms of the parties' arbitration agreements and § 4 of the

FAA, the court held that because it could enforce the terms of the parties' arbitration agreements, it also had jurisdiction to review a challenge to an arbitrator's impartiality before the completion of an arbitration proceeding.

The court went on to deny London's motion to disqualify CNA's arbitrators, noting that the arbitration agreements specifically required insurance industry personnel and did not expressly require "neutral" arbitrators. The court commented that the parties themselves "appear to have anticipated that the party-nominated arbitrators might be so sympathetic to the nominating party's interests that an 'umpire' would be necessary." The court also stated that "by requiring the arbitrators to be current 'executive officers' of other insurance companies (which could be expected to have some kind of business relationship as competitors, allies, or adversaries of some or all of the parties to the arbitration), the parties should have reasonably anticipated that a conflict of interest might arise." Thus, because the arbitrators from Travelers were managing officials/executive officers of an insurance company, CNA's selections complied with the parties' agreement and were not subject to disqualification.

In summary, the one guarantee derived from these cases is that there are no guarantees on the issue of pre-award judicial intervention. Where there is clear evidence of overt misconduct or collusion, the court may consider a pre-award motion to disqualify under § 10 of the FAA. In cases of institutional bias or an "appearance" of bias that does not rise to blatant misconduct, the court is likely to look to the terms of the parties' arbitration agreement to determine whether it can consider a motion to disqualify and whether the alleged bias violates the arbitration contract.

Protecting Your Ability To Obtain Pre-Award Relief

Parties seeking to create and preserve an ability to obtain pre-award judicial review of arbitrator bias should consider the following approaches:

1. ***Address the issue in your arbitration clause.*** The lesson of cases like *Evanston* and CNA is that the terms of your arbitration agreement may determine whether you are entitled to have a court rule on arbitrator bias before the end of the arbitration. Accordingly, you should consider whether to include a provision in your arbitration agreement expressly stating that the parties may obtain judicial review of alleged arbitrator bias prior to the conclusion of the arbitration in the event that the parties are unable to resolve the issue themselves.[5] However, the language of such a provision should specifically describe the circumstances under which such a motion can be made. A specific provision will discourage attempts aimed at stalling the arbitration proceedings, rather than resolving the question of bias.

Most courts have concluded that a pre-award review by the court of the arbitrator's partiality is not available under §10 and that § 10 requires that the arbitration award be entered before a party can challenge an arbitrator's bias in court.

Alternatively, parties may consider including a requirement that the arbitrators be "disinterested", "neutral" or "impartial." Under the rationale expressed in *Evanston*, such a contractual requirement may authorize a pre-award claim of arbitrator bias. Parties using such a provision in their arbitration agreement might also consider defining these terms in the context of their contract, or providing examples of the types of conduct or prior relationships that would warrant removal of an arbitrator for bias; these will help the parties (and eventually the court) to determine whether sufficient bias exists. Otherwise, parties risk that an adversary (or judge) may define "bias" narrowly and thereby exclude the conduct complained of as a reason for removal (e.g., limiting "bias" to cases where arbitrators have a financial interest in the outcome). Moreover, although it may seem wise to select arbitrators familiar with the reinsurance industry or another relevant business, there is a corresponding increase in the risk that candidates will have prior relationships that have created biases. One way to guard against that situation may be to require that the arbitrators be "neutral" as well as members of the relevant industry.

You may also create a procedure whereby the parties name multiple arbitrator candidates and submit written disclosures regarding each candidate's background and contacts with the parties. Each party can then select a certain number of candidates from the pool and appoint those candidates who "overlap" in the parties' selections to arbitrate the dispute. This cooperative process may help to avoid the appointment of a biased arbitrator.

2. ***Object to the Appointment of the Biased Arbitrator.*** Even if you suspect that you do not have a clear case for pre-award relief from a court, you should nevertheless object on the record in the arbitration proceedings to the bias or prejudice of the arbitrator as soon as you learn of any reason to challenge the arbitrator's partiality. Indeed, if a party does not object within a reasonable time after learning of potential bias, that party risks waiving its right to challenge (albeit at a later date) the arbitration award on that ground. "[A] party may not sit idle through an arbitration proce-

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When Can You Seek Help From The Court?

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dure and then collaterally attack that procedure on grounds not raised before the arbitrators when the result turns out to be adverse...This rule even extends to questions, such as arbitrator bias, that go to the very heart of arbitral fairness." *Marino v. Writers Guild of America, East, Inc.,* 992 F.2d 1480, 1484 (9th Cir. 1993), *cert. denied*, 510 U.S. 978 (1993). Moreover, as a practical matter, if you object at the first sign of bias, your opponent may simply elect to choose a different arbitrator in order to avoid both (1) the risk of pre-award litigation, and (2) a motion to vacate a favorable award at the end of the arbitration.

3. ***Consider state arbitration laws.*** Your analysis of the law governing the disqualification of an arbitrator should not end with the FAA. You should also consider whether applicable state arbitration laws allow pre-award judicial intervention. State law may supplement the FAA to the extent that it does not conflict with the FAA, and state statutes and common law may provide additional guidance on the issue of arbitrator disqualification.[6]

Conclusion

Members of the reinsurance industry and other businesses have embraced arbitration as an efficient and effective means of resolving disputes without the delays and costs associated with court proceedings. That efficiency and effectiveness, however, can be undermined when uncertainty regarding procedural issues, including pre-award review of arbitrator bias, stalls the arbitration process and detracts from the substantive issues of the parties' dispute. Accordingly, parties are well advised to give early consideration to such issues and to address them in their arbitration agreements in order to preserve the benefits of arbitration.

FOOTNOTES:

1. Section 10 authorizes the district court to vacate an arbitration award where the award was procured by corruption, fraud, or undue means, or where the arbitrators were biased. 9 U.S.C. § 10.
2. See also Matter of Arbitration Between Certain Underwriters at Lloyd's, London and Continental Casualty Company, 1997 WL 461035, *4-4 (N.D. Ill. 1997) ("CNA") (holding that court is not authorized to review arbitrator's alleged bias under § 10 prior to the conclusion of the arbitration); Roth v. Carvel Corp., 905 F. Supp. 196, 198 (S.D.N.Y. 1995) (court rejected motion to disqualify arbitrator for bias, noting that "questions of bias typically are for the arbitrator in the first instance, subject to review on application to confirm or vacate an award").
3. See also Third National Bank in Nashville v. Wedge Group, Inc., 749 F. Supp. 851 (M.D. Tenn. 1990) (court disqualified Wedge's arbitrator prior to arbitration because proposed arbitrator was Wedge's accountant and owed a fiduciary obligation to Wedge); Metropolitan Property and Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885 (D. Conn. 1991) (court permitted pre-award motion to disqualify based upon arbitrator's misconduct and impropriety). However, several cases have distinguished Wedge and Metropolitan on the grounds that they involve actual "misconduct" or "impropriety" by an arbitrator, not just "potential" or "institutional" bias. Accordingly, a party with strong proof of arbitrator misconduct may prevail under § 10, while a party struggling with the "mere" appearance of bias should not rely on § 10 for pre-award judicial review.
4. Section 4 provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition [the] Court... for an order directing that such arbitration proceed in that manner provided for in such agreement."
5. Of course, the parties cannot create federal court jurisdiction over the dispute simply by including such a provision in their arbitration agreement — the controversy must also meet the requirements for federal question or diversity jurisdiction.
6. For a discussion of the applicability of state arbitration laws to reinsurance disputes, please refer to the Winter 1998 issue of Lord, Bissel & Brook's Reinsurance & Arbitration Law Newsletter.

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