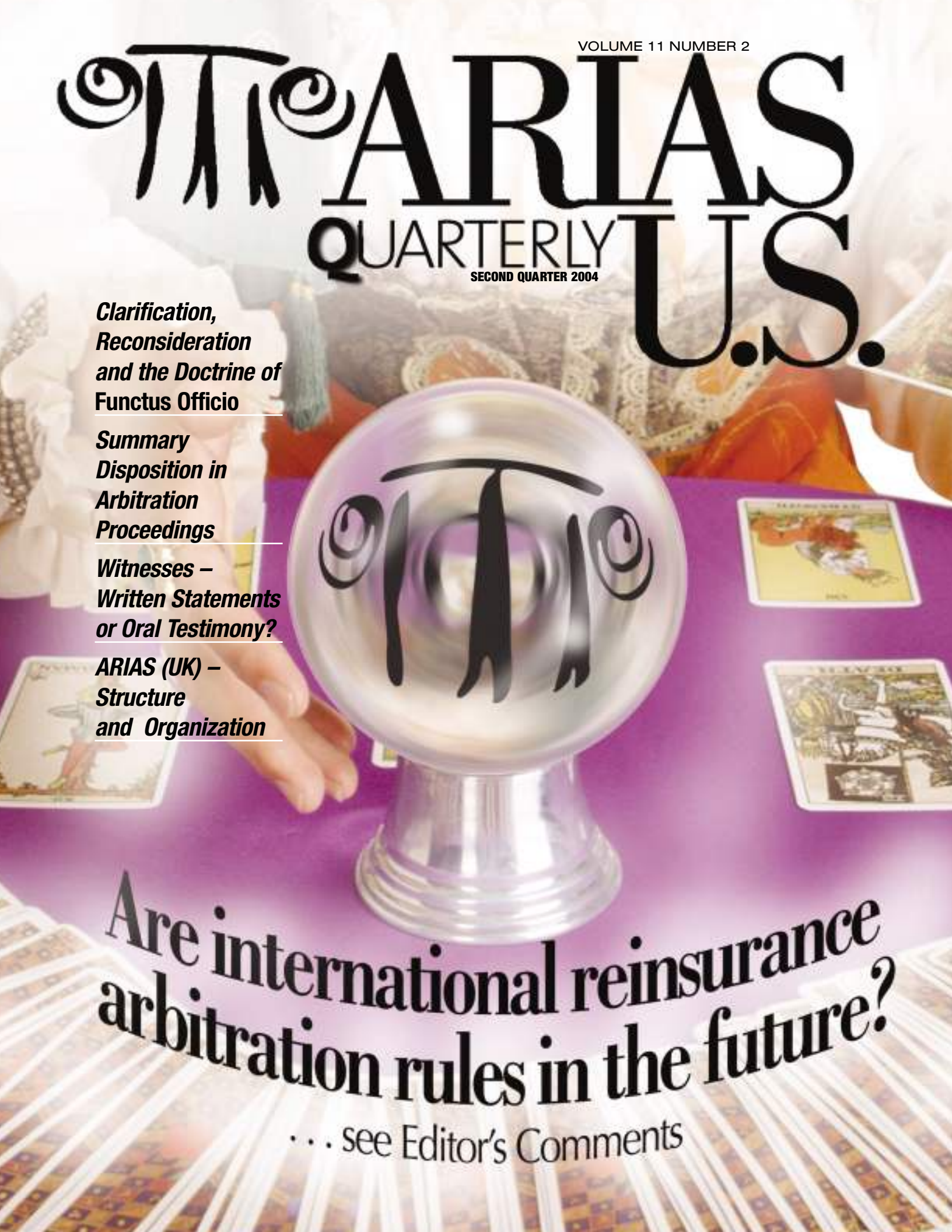
VOLUME 11 NUMBER 2

ARIAS QUARTERLY U.S.

SECOND QUARTER 2004



***Clarification, Reconsideration and the Doctrine of* Functus Officio**

Summary Disposition in Arbitration Proceedings

Witnesses – Written Statements or Oral Testimony?

ARIAS (UK) – Structure and Organization

Are international reinsurance arbitration rules in the future?

. . . see Editor's Comments

editor's comments

T. Richard Kennedy

Those of you who have been involved with arbitrations in other countries undoubtedly realize that procedures there can be very different from those in the United States. The powers of the arbitral tribunal, form and rules of pleadings, scope of permissible discovery, hearing procedures, and likelihood of judicial intervention are some of the items that oftentimes can lead an experienced U.S. arbitrator or counsel feeling somewhat bewildered and dependent for guidance on colleagues in the foreign jurisdiction.

Likewise, a non-U.S. arbitrator or counsel in an arbitration here may feel considerable unease adjusting to procedures that are very different from those in his or her own country. Fortunately, we have means of addressing some of the differences through AIDA, which has chapters in over fifty countries, as well as existing and proposed national chapters of ARIAS.

With approval several years ago of the ARIAS-U.S. Board of Directors, I have been exploring through AIDA the idea of collaboration with ARIAS chapters in other countries to achieve more uniform procedures in international insurance and reinsurance disputes. Progress has been slow with several meetings to date with representatives of the existing chapters in the UK and France. The meetings have been useful in learning more about each other's operating procedures. We also have been providing information and encouragement to individuals interested in forming ARIAS chapters in other countries, most notably Germany, Australia and South America.

While in London recently, I had opportunity to attend an ARIAS-UK program, which was presented as part of the Fortieth Anniversary Colloquium of the British Insurance Law Association. Among the distinguished program panel members were Chairman Johnnie Veeder, QC; Lord Justice of Appeal John Thomas, who – while serving as Senior Presiding Judge of England and Wales – acts also as Vice President of ARIAS-UK; and Queens Counsels Adrian Hamilton and Gavin Kealey.

I was encouraged to receive an enthusiastic response from the ARIAS-UK panel members to my inquiry regarding the possibility of developing international procedural rules or guidelines that could be used in international insurance and reinsurance arbitrations. Justice Thomas, in particular, said such rules would be very helpful in overcoming procedural differences among the domiciliary countries of major insurance and reinsurance companies. He encouraged undertaking efforts toward uniform procedures. Nevertheless, Justice Thomas cautioned that the present procedural differences are so substantial that uniform rules are unlikely to be achieved "in my lifetime." Others in the audience were more sanguine, expressing the view that international rules almost certainly could be achieved within the lifetime of the Justice. We will continue to explore this topic through AIDA and the ARIAS national chapters.

Beginning with this issue, the Quarterly will seek to provide readers with more information regarding insurance and reinsurance arbitrations outside the U.S. Included in this edition is an article by Jonathan Sacher, one of our new International Editors, describing the organization and operation of ARIAS-UK. An interesting development there is that ARIAS-UK has begun a training program for mediators and soon will publish a list of qualified mediators in addition to its arbitrator listing. Debra Roberts in the current issue discusses differences between oral testimony of witnesses, which is most prevalent in the U. S., and written statements of witnesses, often used in the UK and other foreign countries. An upcoming issue will feature a report by our other new International Editor, Christian Bouckaert, on the French chapter of ARIAS.

Feature articles in this issue include "Clarification, Reconsideration and the Doctrine of Functus Officio" by Thomas A. Allen and Robyn D. Herman, and "Summary Disposition in Arbitration Proceedings" by David M. Raim and Nancy E. Monarch. I commend each of them to you as informative and thought-provoking expositions. ▼

letter to the editor

June 16, 2004

Editor, ARIAS•U.S. Quarterly

Re: Discovery from Intermediaries

I write to thank those attendees of the Spring Meeting who signed my petition on the above topic to the National Association of Insurance Commissioners and to inform them of the result of our efforts. Initially, some explanation is in order.

Many practicing attorneys and arbitrators are frustrated by the effort to obtain documents and/or testimony by intermediaries prior to the hearing. Some intermediaries simply refuse to cooperate, notwithstanding their central role in putting the parties together, designing the deal, drafting the contracts and handing the flow of funds and communications between the parties. Unfortunately, there are gaps in the Federal Arbitration Act which prevent a court from enforcing a pre-hearing subpoena. The result, too often, is a severe disservice to the arbitration panel and the parties before it.

The petition, referenced above, was to the Reinsurance Task Force of the NAIC asking it to explore regulatory solutions to this problem. For instance, the NAIC has adopted a Model Reinsurance Intermediary Act by which intermediaries are licensed and otherwise regulated. This Act has been adopted in most states and is part of the NAIC's system for accreditation of state insurance departments. It may be possible to amend this or other relevant Model Act to have the desired effect.

At the June NAIC meeting, I presented the issue, along with the petition, to the Task Force. In keeping with its usual practice, the Task Force referred it the Interested Persons Working Group (previously called advisory committee) for review and comment. ARIAS members can make their thoughts on point known to the Interested Persons Working Group by writing to its chair:

Robert Graham,
SVP and Asst. General Counsel
General Reinsurance Corporation
695 East Main, Stamford, CT 06904-2350
Email: rgraham@genre.com

I will follow this matter at the Working Group and NAIC levels and will endeavor to keep the membership informed of developments.

Very truly yours, Robert M. Hall

Editorial Policy

ARIAS•U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution.

All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to byankus@cinn.com.

Manuscripts are submitted at the sender's risk, and no responsibility is assumed for the return of the material. Material accepted for publication becomes the property of ARIAS•U.S. No compensation is paid for published articles.

Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

Copyright Notice

contents

VOLUME 11 NUMBER 2

Editor's Comments — Page 2

Table of Contents — Page 4

FEATURE:
Clarification, Reconsideration and the Doctrine of *Functus Officio*
BY THOMAS A. ALLEN AND ROBYN D. HERMAN — Page 5

ARIAS Members on the Move — Page 9

News and Notices — Page 10

FEATURE:
Summary Disposition in Arbitration Proceedings
BY DAVID M. RAIM AND NANCY E. MONARCH — Page 12

FEATURE:
Witnesses – Written Statements or Oral Testimony?
BY DEBRA ROBERTS — Page 20

FEATURE:
ARIAS (UK) – Structure and Organization
BY JONATHAN SACHER — Page 22

IN FOCUS: Recently Certified Arbitrators — Page 24

Case Notes Corner
BY RONALD S. GASS — Page 31

Invitation to Join ARIAS•U.S. — Page 34

Membership Application — Page 35

ARIAS•U.S. Board of Directors — Page 36

feature

Clarification, Reconsideration and the Doctrine of *Functus Officio*

This article is based on a paper presented at the ARIAS•US 2003 Fall Conference.

THOMAS A. ALLEN
ROBYN D. HERMAN
White and Williams LLP

Note: This article has been prepared for educational purposes and the statements made herein do not necessarily reflect the views of White and Williams LLP or its clients.

Upon issuance of "final and binding" awards, arbitration panels are considered to have completed their work and are "functus officio", or powerless to re-examine the merits of the issues adjudicated. In spite of this doctrine, the dispute resolution process may continue in several manners after issuance of an award. Once an award has been issued, a party may seek to confirm, vacate or modify an award in federal court[1], or seek clarification directly from the arbitration panel[2] where there is some ambiguity or obvious mistake of fact on the face of the award. This paper addresses the relationship between clarification, reconsideration and the doctrine of *functus officio*, examining those situations where clarification of an award is requested directly by the parties or on remand from a federal court.

The Doctrine of *Functus Officio*

Once an arbitration panel has issued a final and binding arbitration award, by default the panel becomes "*functus officio*" and lacks any further power to act.[3] *See e.g., Colonial Penn Ins. Co. v. The Omaha Indem. Co.,* 943 F.2d 327, 331 (3rd Cir. 1991) (finding "[a]s a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to re-examine that decision); *see also Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 991 (noting that *functus officio* was "applied strictly at common law to prevent an arbitrator from in any way revising, re-examining or supplementing his award").

The Supreme Court offered a concise explanation of the doctrine in *Bayne v. Morris*, 68 U.S. (1 Wall.) 97, 99 (1863) *quoted in Office & Professional Employees International Union v. Brownsville General Hospital,* 186 F.3d 326, 331 (3rd Cir. 1999) ("OPEIU"):

> "Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end".

Latin for "a task performed", the common law doctrine was created during an era of judicial hostility towards arbitrators and the arbitration process, but has been routinely applied in federal cases brought pursuant to the Federal Arbitration Act. *See e.g., Glass, Molders, Pottery, Plastics and Allied Workers International Union v. Excelsior Foundry Co.,* 56 F.3d 844, 846 (7th Cir. 1995) (stating that the doctrine "originated in the bad old days when judges were hostile to arbitration and ingenious in hamstringing it"); *see also, Colonial Penn Ins. Co.,* 943 F.2d at 331 (noting that the doctrine has been routinely applied in federal cases brought under the FAA despite its common law origin). The *OPEIU* court further explained that the doctrine was motivated by a perception that arbitrators could be more susceptible to outside influences pressuring for a different outcome because they lacked the institutional protection afforded judges, and a concern that the "ad hoc nature" of arbitral tribunals would make them less amenable to re-convening than a court. *See OPEIU*, 186 F.3d at 331; *see also La Vale Plaza, Inc. v. R.S. Noonan, Inc.,* 378 F.2d 569, 572 (3rd Cir. 1967) (stating that the policy behind the doctrine was an "unwillingness to permit someone who is not a judicial officer ... to re-examine a final decision ... because of the potential evil of outside communication and unilateral influence which might affect a new conclusion").

The doctrine even applies to partial awards that are final only as to some of the issues submitted. *See e.g., Clarendon National Ins. Co. v. TIG Reins. Co.*, 183 F.R.D. 112, 115 (holding that the doctrine of *functus officio* applies to situations where the award is "final as to one issue, but not as to others"). Although there has been some suggestion in recent years that the doctrine is outdated and may have

CONTINUED ON PAGE 6

Thomas A. Allen

Robyn D. Herman

"Arbitrators exhaust their power when they make a final determination on the matters submitted to them."...

Thomas A. Allen is a partner in the Philadelphia office of White and Williams LLP. He is the Chairman of the firm's Reinsurance Practice Group. Robyn D. Herman is an associate in the Philadelphia office of White and Williams LLP and a member of the Reinsurance Practice Group. Mr. Allen and Ms. Herman specialize in reinsurance matters.

CONTINUED FROM PAGE 5

"outlived its usefulness", absent agreement of the parties or application of a recognized exception, the panel is powerless to act with respect to any issues for which a final award has been rendered. *See id.; see also, Excelsior Foundry,* 56 F.3d at 847 (noting that "the case for the exceptions [to the rule] seems stronger than the case for the rule").

Exceptions to the Doctrine of *Functus Officio*

Once a final award has been issued, although the panel is powerless to re-visit the merits of the issues addressed in the arbitration or to reconsider the award, certain exceptions to the doctrine permit the panel to correct obvious mistakes and/or clarify ambiguities in the award. Specifically, the exceptions allow an arbitrator to "correct a mistake which is apparent on the face of his award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award." *Clarendon*, 183 F.R.D. at 116 *quoting International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Silver State Disposal Service, Inc.* 109 F.3d 1409, 1411 (9th Cir. 1997).

The generally recognized exceptions to the doctrine have been stated as follows:[4]

> An arbitrator can
>
> (1) correct a mistake which is apparent on the face of his award;
>
> (2) decide an issue which has been submitted but which has not been completely adjudicated by the original award; or
>
> (3) clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation.
>
> *Brown v. Witco Corp.,* 340 F.3d 209, 219 (5th Cir. 2003).

The exceptions were narrowly drawn to prevent parties from attempting to persuade arbitrators to overturn adverse awards. *See Teamsters Local 312 v. Matlack, Inc.,* 118 F.3d 985, 992 (3rd Cir. 1997) (noting that the scope was "narrowly drawn to prevent arbitrators from engaging in practices that might encourage them to change their reasoning about a decision, to redirect a distribution of an award, or to change a party's expectations about its rights and liabilities contained in an award"). Accordingly, the limited nature of the exceptions requires that each case be considered in light of the underlying rationale to determine whether one of those enumerated above applies. *See Teamsters Local 312*, 118 F.3d at 992.

The first exception is designed to allow arbitrators to correct clerical or mathematical errors that are readily apparent on the face of the award, but does not apply to situations where extraneous facts must be considered to determine whether there was a mistake. *See Colonial Penn Ins. Co.,* 943 F.2d at 332 (extending the first exception to allow for the consideration of extraneous facts could subvert the policies underlying the exceptions to the *functus officio* doctrine).

The second exception allows panels to complete awards where the final decision does not address all of the issues that were submitted for adjudication. In creating this exception, the courts rationalized that the arbitrator's function was not completed and that issues remained open to the panel for determination. *See e.g., M & C Corp. v. Behr & Co.,* 326 F.3d 772, 782 (6th Cir. 2003) *quoting Green v. Ameritech Corp.,* 200 F.3d 967, 977 (6th Cir. 2000) (recognizing that "a remand is proper, both at common law and under the federal law of arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award").

The final generally recognized exception, applicable whether or not enforcement is sought under the FAA, allows an arbitrator to clarify an award that is ambiguous on its face or is determined to be ambiguous when the parties attempt enforcement. *See e.g., M & C,* 326 F.3d at 783 quoting Green, 200 F.3d at 977 (observing that "courts usually remand to the original arbitrator for clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation").

Courts have also recognized that clarification or amendment should be allowed where both parties consent to such amendment or clarification by the arbitrator(s) within a reasonable amount of time after a final award has been rendered. *See e.g. Brown,* 340 F.3d at 219 (holding that absent any contractual provision or formal arbitration rule to the contrary, an arbitrator may exercise his power to clarify the terms of an award when he is mutually asked to do so by the parties without objection and in a reasonable amount of time).

...certain exceptions to the doctrine permit the panel to correct obvious mistakes and/or clarify ambiguities in the award.

Clarification

Clarification of arbitration awards to remove ambiguities or correct obvious mistakes is not barred by the doctrine of *functus officio*. Panels are free to clarify final awards following direct requests by the parties (made within a reasonable time) or on remand from federal courts asked to take action with respect to the award. In accordance with *functus officio*, however, the panel's freedom is limited to a clarification of the prior award rather than reconsideration of the submitted issues. *See e.g., American Centennial Ins. Co. v. Arion Ins. Co.*, No. 88 Civ. 1665, 1990 U.S. Dist. LEXIS 4209 (S.D.N.Y. April 13, 1990) (allowing clarification but not modification of final arbitration award); *see also, Excelsior Foundry*, 56 F.3d at 847 (recognizing exceptions to the doctrine of *functus officio* for clarification or completion but not alteration of arbitral awards).

Clarification by Party Request to the Panel

As long as there is no contractual provision or formal arbitration rule expressly to the contrary, arbitrators are free to clarify final awards when asked to do so by affected parties . *See Brown,* 340 F.3d 209 at 219 (stating that such requests could be made by the parties and noting that they should be made in a timely manner). *See also Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 720 (8th Cir. 1999) (recognizing an exception to the doctrine of functus officio where the parties consent to clarification). It is unclear, however, whether a joint request or consent of both parties is necessary to seek clarification, or whether an opportunity for each party to respond is all that is required. We have not uncovered any published decisions addressing this specific issue, however, in our opinion, an opportunity to respond should be all that is necessary in order for a party to request clarification; requiring the consent of both parties before seeking clarification would simply hinder the arbitration process, and likely lead to additional litigation.

Equally unsettled is the "reasonable amount of time" available for seeking clarification from the panel, whether such relief is sought directly by the parties or on remand from a district court. A recent decision of the Fifth Circuit suggests that it would apply the three month limitation for challenges to awards under the FAA, but the Second Circuit has held that such limitation has no effect on a District Court's remand for clarification.[5] *See Brown,* 340 F.3d 209 at 219 (finding that a request made within the three month limitation period was timely); *cf., Hyle v. Doctor's Assoc., Inc.*, 198 F.3d 368, 372 n.1 (2nd Cir. 1999) (holding that the District Court's authority to remand was not barred by the three month limitation, finding that the three month limit to vacate, modify or correct an award was not applicable to a remand for clarification, and further stating that the statute of limitations might be tolled by the mistake in the arbitration award).

Clarification On Remand from Federal Courts

In addition to clarifying arbitration awards at the request of the affected parties, arbitration panels may clarify awards on remand from federal courts. Where a District Court has been asked to confirm, enforce, vacate or modify an arbitration award containing any ambiguity, the award should be remanded to the arbitration panel for clarification and a determination of arbitrator intent. *See e.g., M & C,* 326 F.3d 772 (holding that ambiguous awards should be remanded so that a District Court will know what it is being asked to enforce without imposing its own interpretation or clarification, and noting that remanding an arbitration award for completion is not meant to re-open the facts of the case, but rather to allow an arbitrator to fulfill his duties and apply his reasoning to the facts of the case).

Remanding an ambiguous arbitration award to the issuing panel avoids the court's misinterpretation of the award and is more likely to give the parties the award for which they bargained. *See Colonial Penn Ins. Co.,* 943 F.2d at 334. Such remand must, however, remain tailored within the constraints of *functus officio* and its exceptions, preventing the panel from revisiting the merits of the issues on which clarification is sought. *See e.g., La Reunion Francaise v. Martin,* 93 Civ. 7165, 1995 U.S. Dist LEXIS 7435 at *6 (S.D.N.Y. June 1, 1995) ("When an award is remanded for clarification, the arbitrator is limited in his review to the specific matter remanded for clarification and may not rehear or redetermine those matters not in question"). Courts have similarly prohibited panels from acting on or clarifying those portions of an award that have already been confirmed or vacated by a federal court, noting that such review or clarifi-

CONTINUED ON PAGE 8

Panels are free to clarify final awards following direct requests by the parties (made within a reasonable time) or on remand from federal courts asked to take action with respect to the award.

CONTINUED FROM PAGE 7

cation would absurdly allow an arbitration panel to conduct appellate review of a federal district court decision. See Legion Ins. Co., 198 F.3d at 720 (holding that *functus officio* bars arbitrators from clarifying an award after the District Court has acted on it); *see also, Brown,* 340 F.3d at 221 ("Once a court of competent jurisdiction has confirmed that an arbitration decision is unambiguous and binding on the parties, the arbitrator becomes *functus officio* with respect to that portion of the arbitration award and lacks authority to reconsider those aspects of his decision that are unambiguous and binding"). In at least one instance, however, clarification following District Court action was allowed by the federal court. *See Clarendon,* 183 F.R.D. at 116 (holding that the doctrine of *functus officio* was not violated where the panel corrected an obvious mathematical error in a portion of the arbitration award that had been confirmed by the District Court and not submitted to the panel on remand, finding that the "the spirit and basic effect of the award was not modified".

Reconsideration

Absent express contractual language or agreement of the parties, reconsideration of final arbitration awards is prohibited by the doctrine of *functus officio*. *See e.g., Massachusetts Cas. Ins. Co. v. North American Reassurance Co.*, No. 89 C 7744, 1990 U.S. Dist. LEXIS 481 at *9 (N.D. Ill. Jan. 17, 1990) ("The functus offcio doctrine prohibits an arbitrator from reconsidering or amending an award once a final decision has been rendered"). Unlike clarification, reconsideration of "final awards" expressly violates the doctrine (and its narrow exceptions) by requiring panels to revisit the merits of adjudicated issues. Further, allowing such review would be in sharp contrast to the "final and binding" award provided for in most arbitration agreements and would weaken the implications of finality afforded to arbitral decisions in general. Absent any other agreement providing for the right to seek reconsideration, following an award, parties may either accept the panel's decision or seek relief in the form of vacatur or modification in the appropriate federal or state court.

ALTERNATE PROCEDURES

Arbitration Agreement Provisions and Draft Awards

Parties may choose to avoid the constraints of *functus officio* and other post-award difficulties by preparing for such contingencies in the drafting of arbitration agreements. In order to avoid these difficulties in the future, drafters of arbitration agreements could include one or more of the following provisions: the right to seek and obtain post-award clarification, completion or reconsideration from the panel; an allowance for the panel to issue draft awards for circulation and correction prior to rendering a final award; and/or panel retention of jurisdiction for a limited amount of time to handle post-award issues on an expedited basis without resort to litigation.

There is one very practical alternative to avoid ambiguous and incorrect awards and all the problems of *functus officio*, that probably should be used more often than it is. That alternative is the panel's issuance of a draft award, soliciting commentary within stated parameters. In situations where the math of an award is complex, or where the panel wants to be sure that its award clearly addresses everything it should, the issuance of a draft award has proved to be a very useful step.

In situations where the math of an award is complex, or where the panel wants to be sure that its award clearly addresses everything it should, the issuance of a draft award has proved to be a very useful step.

Similarly, it can be highly practical sometimes for a panel to issue a decision in principle, stating that it will retain jurisdiction for a stated period of time (long enough for the parties either to agree on an application of the principle or to return to the panel for direction).

Conclusion

The old doctrine of *functus officio* remains in effect, applicable to all arbitration panels upon issuance of final and binding arbitration awards. Specific exceptions to the doctrine allow arbitrators to complete or clarify ambiguous awards or to correct mistakes that are apparent on the face of the award, but do not allow a panel to re-visit the merits of the issues adjudicated. In the right circumstances, panels would do well and consider practical alternatives, such as those identified above, to minimize the chance of an incorrect, ambiguous, or incomplete award that may or may not be subject to change.

---

1 Such motions are beyond the scope of this paper, and may be made under §§9, 10 and 11 of the Federal Arbitration Act (9 U.S.C, §1 et seq.), or other applicable statute.

2 Please note that for purposes of this paper we will refer to arbitration "panels", as panels are typically used in the course of reinsurance arbitrations.

However, the standards applicable for review or clarification by an arbitration panel equally apply in instances where a single arbitrator is involved, such as in the context of labor arbitrations.

3 See discussion infra concerning alternative procedures that parties may incorporate in order to avoid the need for clarification or modification of an award, and avoid application of the functus officio doctrine.

4 *See, e.g. Cecilia M. Di Cio, Dealing with Mistakes Contained in Arbitral Awards, 12 Am. Rev. Int'l Arb. 121* (2001), n. 43 noting that the exact formulation of the exceptions to the functus officio doctrine vary among the federal circuit courts. Specifically, the Eighth Circuit formulation differs from that adopted by the Second, Third, Fifth, Sixth and Ninth, formulating the exceptions as applicable where (1) mistakes are evident on the face of the award and (2) where both parties consent to clarification / amendment. *See also Local P-9, United Food and Commercial Workers Int'l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1394 (8th Cir. 1985); Legion Ins. Co. v. VCW, Inc., 198 F.3d 718, 720 (8th Cir. 1999).

5 Although this discussion concerns clarification by party request, due to the confidential nature of most arbitrations, we have been unable to find cases concerning the temporal limitations for clarification outside of published judicial opinions; therefore, the time limitations imposed by district courts seeking clarification on remand are instructive in the context of direct party requests as well. ▼

members on the move

In each issue of the Quarterly, we list employment changes, re-locations, and address changes, both postal and email, that have come in over the quarter, so that members can adjust their address books and Palm Pilots.

Do not forget to notify us when your address changes. If we missed your change here, please let us know, so we will be sure to catch you next time.

Recent Moves and Announcements

Robert J. Bates, Jr.'s new address is Bates & Carey LLP, 191 N. Wacker Drive, Suite 2400, Chicago, IL 60606. Phone/e-mail/fax remain the same.

Peter Bickford has relocated his office to 140 East 45th Street, 17th Floor, New York, NY 10017. All other information remains as before.

Christian Bouckaert recently announced that he had left Norton Rose, Paris to form a new law firm with several associates. His new address and numbers are Bouckaert Ormen Passemard Sportes, 47 rue Dumont d'Urville, 75116 Paris, France, phone + (33) 01.70.37.39.03, fax + (33) 01.70.37.39.01, email christian.bouckaert@bopslaw.com

Richard E. Cole has launched a new company, named Dana Point Financial, Inc., of which he is President. He has located in San Clemente, where his mailing address is: 814 Vista Marea, San Clemente, CA 92675. Email is rcole@dpfin.com

Changes

Thomas B. Leonardi
tblnorthington@direcway.com

John Dunn
Justdunn@bellsouth.net

Anthony DiPardo
dipardo@burtandscheld.com

Tim Rivers
trivers@scpie.com

news and notices

Golf Tournament Is Not Rained Out!

In a surprising turnaround from last year's wash out in Bermuda, The ARIAS-U.S. Open Golf Tournament was completed on June 10 at The Breakers in Palm Beach, Florida. Seventy-three players executed a shot-gun start at 1:00 p.m., after the course had been in a lightning hold for just over an hour. The weather held off after that just long enough to complete the course. The luncheon on the Ocean Lawn was not so lucky as rain came half-way through and The Breakers' staff executed a miraculous shuffle of the lunch into the pre-conference area after half of the attendees had gone through the buffet lines.

At the dinner that night, Paul Walther, Golf Chairman awarded prizes to the winners and Eric Kobrick announced the winners of the First Annual ARIAS-U.S. Tennis Tournament.

Record Attendance at Spring Conference in Palm Beach

The largest ARIAS•U.S. Spring Conference to-date took place at The Breakers in Palm Beach, Florida June 9-11. The total of 267 attendees (and 45 spouses) was well beyond the previous attendance of 175 attendees reached last year in Bermuda (of course, with more capacity, Bermuda probably could have gone up to 200).

This year's conference, entitled "Who Wants to Be a Super Arbitrator? Interacting on Discovery, Ethics, and Case Management" included elements of interactivity on all three days. Wireless keypads allowed participants to register their views on the issues presented and to learn the collective opinion of the entire group as each question was raised. A report on the conference will be included in the third quarter issue of the Quarterly.

New Practical Guide Completed

The fully revised and updated *Practical Guide to Reinsurance Arbitration Procedure 2004* began going out to members in early June. The fifty-page booklet has been undergoing extensive revision for the past year and a half, with contributions coming from a broad cross-section of the Society, but especially from the Forms and Procedures Committee, under the co-chairmanship of Tom Allen and Tom Orr. This is the first revision of the guide since it was first published in 1998. All individual members and corporate designated representatives should have received a copy. Additional copies of the guide will also be available for purchase at a cost of $50, by email or fax request to the Executive Director using a credit card, or by regular mail.

Arbitrator Training Workshop Returns to Tarrytown on September 9

The second workshop in the new format (six simultaneous mock arbitrations) is scheduled for September 9-10, 2004 at Tarrytown House in Tarrytown, New York. The February workshop, which was described in the last issue of the Quarterly, was rated as very successful by all who attended.

Registration has been set for July 21 at 10:00 a.m. on the website. This registration will be for ARIAS members only, who have not yet attended one of these intensive workshops.

As with the February workshop, the September event will have capacity for 54 students at one time, which should allow every eligible member to attend who has not yet done so. If there are still openings after the July 21 registration period, a second registration on July 28 will be announced by email and on the website for those who have already participated and would like to return for refresher training.

Mark your calendars now for May 4-6.

Next spring, ARIAS•U.S. members will be gliding along "Venice's Grand Canal." The 2005 Spring Conference will be held at The Venetian Hotel, one of Las Vegas's premier attractions.

The Venetian offers the largest standard guest rooms in the world (Guinness Book); all are suites, with sunken living rooms. It is the third largest hotel in the world, with 4,049 suites. With the vast array of restaurants and attractions, it offers plenty of places to go and things to do.

The Venetian is home to a version of the Guggenheim Museum, a version of Canyon Ranch, and a version of Madame Tussaud's Wax museum. It has a mini-Grand Canal (630-feet long) and St. Mark's Square, tower and all.

Details of the conference will be announced in February. Information about hotel reservations will be on the website calendar later this year.

New Certifications/Umpires

At the **May 5 Board meeting**, the following members were certified as ARIAS•U.S. Arbitrators. Biographies of newly certified arbitrators begin on page 22 of this issue of the Quarterly.

- Hugh Alexander
- Bernard R. Beckerlegge
- Robert C. Bruno
- John A. Dore
- Paul R. Fleischacker
- James P. Galasso
- Richard S. March
- Roger M. Moak
- David Nichols
- Alfred O. Weller
- Eugene T. Wilkinson

At the same meeting, the following two members were confirmed for the ARIAS•U.S. Umpire List.

- Charles W. Havens III
- Jeremy R. Wallis

At the **June 9 Board meeting**, the following four members were certified as ARIAS•U.S. Arbitrators. Their biographies will be included in the next issue of the Quarterly.

- John Chaplin
- Soren N.S. Laursen
- Thomas A. Player
- David L. Beebe

At the same meeting, the following member was confirmed for the ARIAS•U.S. Umpire List.

- Eugene T. Wilkinson

Promoting to Other Members

Members are asked to refrain from using our member contact information for broad-based solicitations. With everyone fighting the proliferation of spam, use of member email addresses to contact a large number of members may well be detrimental to any business relationship.

Bert Thompson

We note with sorrow the passing of Bert Thompson, after a long illness. Bert was one of the early members of ARIAS-U.S. ▼

SPECIAL ANNOUNCEMENT

To All ARIAS•U.S. Members,

At its meeting on March 4th, the ARIAS•U.S. Board of Directors discussed and subsequently adopted an amendment to the Certification Criteria to be effective for arbitrator certification applications received after January 1, 2005. The amendment imposes a three-year window for qualifying conferences (new limitation) and arbitrations (increased from two years).

The amendment to Section 2b of the Certification Criteria is as follows:

b. Arbitration Experience - Have completed, within three years preceding the date the completed application is received by ARIAS•U.S.:

(i) Three ARIAS•U.S. conferences or workshops [or two ARIAS•U.S. conferences or workshops and one conference sponsored by A.R.I.A.S. (UK)]; or

(ii) Two ARIAS•U.S. conferences or workshops and one completed insurance/reinsurance arbitration as arbitrator or umpire; or

(iii) One ARIAS•U.S. conference or workshop and two such arbitrations.

For purposes of this paragraph, an arbitration is "completed" only if there has been a Final Award following an evidentiary hearing or the granting of summary judgment.

This amendment reflects changes in the organization since the Criteria were first adopted, mainly that we are offering more opportunities for members to attend qualifying conferences and the belief that our certified arbitrators should be exposed to the most current views on important arbitration issues.

We are giving substantial advance notice of this change so as not to prejudice imminent certification applications.

CHARLES M. FOSS
Chairman of the Board of Directors
ARIAS•U.S.

feature

Summary Disposition in Arbitration Proceedings

This paper was originally presented to the 2004 ARIAS•U.S. Spring Conference

By DAVID M. RAIM
and NANCY E. MONARCH
Chadbourne & Parke LLP

David M. Raim

Nancy E. Monarch

...while arbitrators should consider dispositive motions carefully, they should be willing to grant such motions where appropriate.

David Raim is a partner in the Washington, DC office of Chadbourne & Parke LLP. He specializes in the reinsurance area and has handled many arbitrations, litigations and mediations. Nancy Monarch is a staff attorney at Chadbourne & Parke LLP.

Introduction

Motions for summary disposition can play an important role in the adversarial process. They have the potential to eliminate costly and extensive discovery, encourage settlements and promote the speedy and efficient resolution of disputes.[1] Although dispositive motions have been common in litigation, it is generally believed that they have been used infrequently and granted sparingly in reinsurance arbitration proceedings.

The reluctance to submit motions for summary adjudication may be due in part to the absence of procedural rules authorizing such motions and the belief that awards based on the outcome of such motions could be vulnerable to challenge by courts. These concerns, however, should not impede practitioners from submitting dispositive motions in appropriate circumstances. Parties often elect arbitration as the means to resolve their disputes because they expect that those disputes will be resolved more expeditiously in the arbitral forum.[2] Motions for summary adjudication can further this goal when full evidentiary hearings are not appropriate.[3] Courts have upheld the power of arbitration panels to summarily dismiss a party's claims or defenses when warranted, based on the arbitrators' broad authority over the conduct of the proceedings. Recent decisions make it clear that arbitrators can decide cases on documents and argument without live testimony or a full evidentiary hearing, if the evidence omitted is not legally relevant or is cumulative. Requests for summary awards can eliminate specious claims and may be especially useful in proceedings where a threshold issue can determine the outcome, or narrow the dispute, by eliminating factual or legal issues.[4] In some cases, submission of a motion may require a claimant to give assurances that he will prove certain matters at the hearing in order to sustain his burden of proof or serve to educate the panel.[5] A request for summary award may provide a basis for dismissal at any point in the arbitral process.

One factor potentially weighing against the use of motions for summary disposition in arbitration is the difficulty of appealing such rulings. In civil litigation, the broad right to appeal errors of law provides a check on decisions made by the trial court, including those made on summary adjudication. By contrast, in the arbitral context, courts can overrule awards only on very narrow, specific grounds.[6] Arbitrators thus may be more cautious about deciding disputes in a summary fashion, in order to ensure that parties have ample opportunity to present their cases during what is likely to be their only real opportunity to be heard. However, parties who agree to resolve their disputes through arbitration have accepted the lack of appeal inherent in the entire process. Therefore, while arbitrators should consider dispositive motions carefully, they should be willing to grant such motions where appropriate.

Dispositive motions in the arbitration context often take the form of the same type of motions filed in civil litigation, such as motions to dismiss for failure to state a claim, motions for judgment on the pleadings, motions for summary judgment and motions for a directed verdict. The civil litigation motions refer to situations where there are no genuine issues of material fact in dispute and the case can be resolved as a matter of law. However, in most arbitrations, the panel is not asked to rule as a matter of law, and awards are not overturned for errors of law.[7] These motions grafted from the Federal Rules (or similar state rules) therefore do not translate precisely to the arbitral forum and can be misleading. Consequently, it has been noted that a more appropriate term may be a request for summary disposition.[8] As noted below, this is also the term employed by JAMS in its arbitration rules. In any event, pre-hearing dismissal motions seek disposition of disputes where an evidentiary hearing would be superfluous. As with similar motions in court proceedings, dismissal motions in the arbitral forum may address

only part of the claims or parties. Granting a motion for partial relief can benefit the parties by narrowing discovery, making the proceedings more focused and efficient and possibly encouraging settlement.[9]

Authority for Arbitrators to Consider Motions for Summary Disposition

There is ample authority supporting the granting of motions for summary disposition. Although there is no express statutory authority under the Federal Arbitration Act ("FAA") [10] for an arbitrator to act in response to a dispositive motion, arbitrators are generally assumed to have all discretionary authority necessary to conduct the proceedings in a manner that is not expressly prohibited by the arbitration agreement between the parties or the FAA.[11] The Revised Uniform Arbitration Act ("RUAA"), approved in 2000, expressly permits arbitrators to decide a request for summary disposition based solely on documentation, after a party submitting the request gives notice and opposing parties have a reasonable time to respond.[12]

In addition, the American Arbitration Association ("AAA") Commercial Arbitration Rules give arbitrators wide latitude to conduct the proceedings and do not prohibit the use of dispositive motions. Specifically, R-30(b) gives the arbitrator the discretion to "conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."[13] The rules also allow the arbitrator to vary the procedures set forth for presentation of evidence and questioning of witnesses, as long as the parties are treated with equality and "each party has the right to be heard and is given a fair opportunity to present its case."[14] The AAA Procedures for Large, Complex Commercial Disputes also appear to permit summary adjudication by allowing arbitrators to "take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution" of the cases.[15]

The Comprehensive Arbitration Rules propounded by JAMS go one step further and explicitly authorize rulings on motions for summary disposition. Rule 18 ("Summary Disposition of a Claim or Issue") provides that an arbitrator "shall decide a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."[16] Similarly, the Reinsurance Association of America's Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes ("Procedures") specifically authorize consideration of summary disposition motions by reinsurance arbitration panels.[17] Section 13.1 of the Procedures ("Summary Disposition and Ex Parte Hearing") provides:

> [t]he Panel may hear and determine a motion for summary disposition of a particular claim or issue, either by agreement of all Parties or at the request of one Party, provided the other interested Party has reasonable notice and opportunity to respond to such request.[18]

However, the Note to § 13.1 does state that by authorizing the arbitration panel to grant summary disposition, the parties "do not intend to waive their rights under the Federal Arbitration Act to contest the appropriateness of such action, where such rights have been reserved."[19]

Arbitrators generally have the authority to conduct proceedings as they see fit. "It is well settled that Federal courts give great deference to an arbitrator's decision to control the order, procedure and presentation of evidence."[20] Indeed, arbitrators have considerably more discretion over rules and procedures than do federal courts.[21] Certainly the parties may agree upon appropriate procedures by contract, but where they do not, arbitrators decide procedural matters and determine the meaning of procedural rules.[22]

Furthermore, consistent with the goals of speed and efficiency in arbitration, arbitrators are encouraged to take appropriate action to simplify and expedite proceedings.[23] Unless otherwise restricted, this mandate leaves arbitrators free to consider and grant motions for summary adjudication.

The power of arbitrators to grant summary disposition may be restricted by arbitration agreements that explicitly limit such authority. The FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms,"[24] and parties may stipulate by con-

CONTINUED ON PAGE 14

...consistent with the goals of speed and efficiency in arbitration, arbitrators are encouraged to take appropriate action to simplify and expedite proceedings. Unless otherwise restricted, this mandate leaves arbitrators free to consider and grant motions for summary adjudication.

CONTINUED FROM PAGE 13

tract the rules under which their arbitration will be conducted.[25] Arbitrators generally are required to follow any procedures set forth in the parties' agreement.[26] Therefore, a contract provision prohibiting summary adjudication in the arbitration proceeding potentially precludes such action.

Misinterpreting an arbitration contract's procedural or substantive provisions, however, does not necessarily provide grounds for vacating an award.[27] In fact, courts will not overturn an award unless the opinion runs contrary to contract language on which there is no reasonable difference of opinion.[28] Thus, unless the contract unambiguously precludes a summary award, the granting of a dispositive motion is unlikely to be overturned because of the arbitrator's failure to abide by procedural rules in the contract.

Courts have confirmed summary awards

Court decisions are making it increasingly clear that an arbitration panel can grant a motion for summary adjudication without an evidentiary hearing. It is evident from these decisions, however, that judges still scrutinize summary rulings by arbitrators, and are cautious in their support of this method of resolution. In all of the cases confirming summary decisions, the courts agreed with the arbitrators that an evidentiary hearing was not necessary, because any excluded evidence either was duplicative or not material to the issues in dispute. Alternatively, the courts vacating summary awards determined that summary adjudication was inappropriate because it resulted in prejudice to a party by the failure to receive pertinent evidence.

The authority of arbitrators to decide motions for summary disposition is usually litigated in court proceedings to vacate or confirm the award. There are very limited grounds for courts to vacate arbitral awards. Under Section 10(a) of the FAA, a court can vacate an award only in the following circumstances:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[29]

The RUAA cites similarly narrow grounds for vacating an arbitral award.[30] Although not codified in the FAA, the RUAA or state arbitration acts, courts have recognized two additional bases for vacating awards. Courts also will vacate awards that result from a "manifest disregard of the law" [31] or a violation of public policy.[32]

Challenges to an arbitration panel's decision to grant a motion for summary disposition generally fall into two categories. Parties contend that the arbitrators lacked the authority to grant the dismissal motion (exceeded their powers), and/or that the panel engaged in misconduct by improperly refusing to hear evidence. Court decisions have made clear that misbehavior cognizable under Section 10(a)(3) "must amount to a denial of fundamental fairness of the arbitration proceeding" in order to justify overturning an award.[33]

Several federal courts considering motions to vacate refused to find that issuance of a summary award and the absence of a full evidentiary hearing constituted arbitrator misconduct in violation of Section 10(a)(3). Recently, in *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.,* No. 01 C 5226, 2004 WL 442640 (N.D. Ill. March 8, 2004), the federal district court confirmed an arbitration panel's summary award. As explained by the Court, the panel had granted Sphere Drake's motion for judgment on the pleadings based on All American's admission in its position statement that its broker did not have the authority to bind All American, and therefore the contracts at issue were not valid. *Id.* at *3. In its motion to vacate, All American argued that it was denied a fundamentally fair hearing because the panel gave undue weight to the alleged "admission," exceeded its authority by deciding a legal issue reserved for the courts and a factual issue not before it, and exhibited a manifest disregard for the law by misinterpreting Illinois contract law. *Id.* at *4.

...a contract provision prohibiting summary adjudication in the arbitration proceeding potentially precludes such action.

In affirming the panel's award, the court did not specifically address whether or not the panel had the authority to decide the matter by ruling on the motion for judgment on the pleadings. However, the court's opinion clearly assumes that the panel had this power and rejects each of All American's purported grounds for vacatur.

In three cases involving NASD proceedings, federal district courts addressed the question of summary disposition directly and determined that arbitrators have the power to grant motions to dismiss without a full factual hearing. In *Sheldon v. Vermonty*, 269 F.3d 1202 (10th Cir. 2001), the plaintiff brought claims against several brokerage firms in connection with an allegedly worthless stock that he had purchased. The defendant firms filed motions to dismiss plaintiff's claims for failure to state a claim. After hearing argument from the parties by telephone, but without holding an evidentiary hearing, the panel granted the motions and dismissed all of the plaintiff's claims with prejudice. The district court confirmed the award and the plaintiff appealed, arguing that the panel was required to permit discovery and hold an evidentiary hearing before dismissing the claim. *Id*. at 1205.

The Court of Appeals affirmed the district court and rejected the plaintiff's arguments. The court noted that although the NASD's rules do not specifically address whether arbitrators can grant motions to dismiss, they do not prohibit such procedures. The court held that "if a party's claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing." *Id*. at 1207. The arbitration proceeding was fundamentally fair because the plaintiff had the opportunity to fully brief and argue the motions to dismiss. *Id*.

The Court of Appeals noted that its ruling was consistent with the district courts' opinions in *Warren v. Tacher,* 114 F. Supp. 2d 600 (W.D. Ky. 2000) and *Prudential Securities, Inc. v. Dalton,* 929 F. Supp. 1411 (N.D. Okla. 1996), that also had specifically addressed this issue. In *Warren v. Tacher*, the plaintiffs claimed that the arbitrators committed misconduct and exceeded their powers in violation of Section 10 of the FAA by dismissing claims against a brokerage company prior to discovery and without an evidentiary hearing. *Warren v. Tacher*, 114 F. Supp. 2d at 601-02. The court disagreed. The court reasoned that while granting of a motion to dismiss usually means that the arbitrator "refused to hear evidence," that, by itself, is insufficient to vacate the award. *Id* at 602. The party opposing the motion also must show that the excluded evidence was material to the panel's determination and that "the arbitrator's refusal to hear the evidence was so prejudicial that the party was denied fundamental fairness." *Id*. The court noted that the plaintiffs did in fact have a "hearing" because they had the opportunity to respond to the motion to dismiss and were represented by counsel at oral arguments. *Id*. They were "not entitled to costly full-blown discovery when it would not change the outcome and the claim could be decided on a pre-hearing motion." *Id*. Because the plaintiffs failed to demonstrate how any evidence they would have obtained in discovery would alter the panel's decision, the court affirmed the dismissal. *Id*. at 603.

In *Prudential Secs. v. Dalton,* the district court recognized the authority of a NASD arbitration panel to dismiss facially deficient claims, but found that dismissal was improper based on the facts of the case. Dalton, a former employee of Prudential, contended in the arbitration that the company included false and defamatory information concerning a customer claim on his termination notice, violated fiduciary duties owed to him and tortiously interfered with his future economic advantage. *Prudential Secs. v. Dalton,* 929 F. Supp. at 1416. Prudential filed a motion to dismiss to which Dalton responded. Dalton previously had moved to compel discovery regarding Prudential's allegedly tortious conduct, but the panel did not rule on the motion. Instead, after a pre-hearing conference, the panel dismissed Dalton's claim. *Id*. at 1416-17.

Dalton moved to vacate the award. He argued, among other things, that the panel was guilty of misconduct by refusing to allow a complete presentation of evidence pertinent and material to the controversy, and exceeded its powers by considering and granting the motion to dismiss, in violation of Section 10 of the FAA. *Id*. Importantly, the court first stated that the authority of arbitrators to grant dismissal motions in appropriate cases was clear:

CONTINUED ON PAGE 16

The court held that "if a party's claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing."

CONTINUED FROM PAGE 15

[t]he Arbitration Code, which sets forth the ground rules of arbitration, contains no provision for the filing of a motion to dismiss for failure to state a claim. It is also noted the Code does not prohibit such a motion. Because arbitration proceedings are recognized as informal, and not bound by the strict rules of the law and equity courts, in the appropriate case after hearing an argument, arbitrators would undoubtedly have authority to dismiss a claim which, on its face, does not state a claim entitling the claimant to relief, whether frivolous or not.

Id. at 1417. However, based on the facts, the court found that the panel was guilty of misconduct by refusing to hear evidence pertinent and material to the controversy, and exceeded its power in granting the motion without hearing such evidence. *Id.* Dalton's claim was not facially deficient, and he had raised material factual issues. Id. Dalton was denied fundamental fairness because the panel did not hear his motion to compel production of documents, or provide him "the opportunity to present factual evidence at a hearing relative to the factual issues presented by his claim." *Id.*

In *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes,* the district court agreed that NASD arbitrators have the power to grant dismissal motions and confirmed a summary award. In that case, the claimants alleged ERISA violations, unauthorized and excessive trading, fraudulent concealment, negligent misrepresentation, constructive fraud, violation of NASD fair conduct rules and lack of supervision. *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d at 250. Respondents submitted motions to dismiss on the grounds of lack of standing and preemption. *Id.* The panel invited the parties to submit memoranda and documents for consideration of the motions, scheduled oral argument and ordered that no witnesses would be permitted to testify or to present evidence during the argument. *Id.* Following the argument, the panel granted the motions to dismiss all claims. *Id.* at 250-51.

Moving to vacate, claimants argued, among other things, that the arbitrators were guilty of misconduct in refusing to hear pertinent evidence. *Id.* at 251. The district court rejected this assertion and noted that arbitrators need not follow the rules enforced in court proceedings and that courts will not vacate arbitral awards unless fundamental fairness is violated. *Id.* The court explained that arbitrators have "broad discretion as to whether to hear evidence at all and need not compromise speed and efficiency, the very goals of arbitration, by allowing cumulative evidence," as long as each party is permitted to present its evidence and argument. *Id.* Confirming the summary award, the court found that the evidence in question already had been presented to the Panel by written submissions, and noted that "[t]he law requires only that the parties be given an opportunity to present their evidence, not that they be given every opportunity." *Id.* at 251-52. The court further explained that the panel need not address every question presented in the dispute on a motion to dismiss and that "there is no misconduct in dismissing a claim — and not receiving evidence — on matters unnecessary to disposition of the claim." *Id.* at 252.[34] Consequently, the decision not to hear testimony was not unfair and there was no misconduct pursuant to Section 10(a)(3). *Id.*[35]

The court further explained that the panel need not address every question presented in the dispute on a motion to dismiss and that "there is no misconduct in dismissing a claim — and not receiving evidence — on matters unnecessary to disposition of the claim."

In *International Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000), the Fourth Circuit vacated an arbitrator's summary award for lack of fundamental fairness where it was evident that the claimant was prohibited from submitting evidence that was directed to a material factual dispute. The union had filed a grievance alleging that the company assigned to non-union members certain work that belonged to union members under the governing collective bargaining agreement. The grievance procedure provided that if the parties failed to resolve a dispute under the first two "steps" of the procedure, the grievance proceeds to "Step 3" and the parties' representatives attempt to negotiate a solution. *Id.* at 386. If the parties fail to reach agreement at "Step 3," the matter is referred to "Step 4," where an arbitrator "shall conduct a hearing in order to hear testimony, receive evidence and consider arguments" and decides the case. *Id.* at 387. The grievance eventually proceeded to the hearing stage. At the outset of the hearing, the arbitrator accepted joint exhibits and heard the company's summary judgment argument and the union's opening statement. *Id.* at 387. In its statement, the union distinguished the facts of the dispute from a previous case involving the parties, and attempted to offer testimony, submit

evidence and present arguments in support of its position. The company then requested that the case be remanded to "Step 3." Without hearing testimony or argument, or considering the evidence the union sought to submit, the arbitrator granted the request. *Id.* Later, before conducting the full arbitration hearing, the arbitrator concluded that the decision in the prior proceeding involving the same parties controlled the outcome of this case and issued an award dismissing the grievance. *Id.*

The district court vacated the award, finding that the union was denied a full and fair hearing. *Id.* at 387-88. The Fourth Circuit affirmed the decision. The appellate court noted that the parties had "affirmatively acknowledged the existence of factual disputes" and that the arbitrator had not determined that the evidence that the union was prepared to offer was cumulative, irrelevant or immaterial. *Id.* at 389. On the contrary, the union had claimed that its evidence would distinguish its case from the decision ultimately relied upon by the arbitrator and that the evidence was in fact "highly material and relevant." *Id.* at 390. The court ruled that given these circumstances, it was clear that the union was deprived of a full and fair hearing. *Id.*

Courts interpreting state arbitration statutes also have confirmed summary awards. For example, in *Pegasus Const. Corp. v. Turner Const. Co.*, 929 P.2d 1200 (Wash. Ct. App. 1997), the Washington Court of Appeals affirmed the trial court and refused to vacate an arbitral award issued on a motion to dismiss. Pegasus argued that the arbitrator was guilty of misconduct under the governing Washington statute by failing to hear evidence regarding the merits of its construction claim.[36] The arbitrator had considered the parties' written and oral submissions in connection with the motion to dismiss. After concluding that neither party had complied with the contract's mandatory dispute resolution procedures, the arbitrator dismissed all claims. *Id.* at 1201. The Court of Appeals concluded that the arbitrator was not required to hear evidence that was not pertinent and material to the dispositive issue — compliance with the contract terms regarding claims. *Id.* at 1202. Because the appeal was based solely on the failure of the arbitrator to hear evidence regarding the merits of the claim, the arbitrator's failure to receive it did not constitute misconduct. *Id.* at 1203.

The court also rejected the argument that the arbitrator's failure to provide a full hearing on the merits violated the AAA's Construction Industry Arbitration Rules. The relevant rules provide in part:

> [t]he complaining party shall...present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence.
>
> * * *
>
> [t]he arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary.

Id. at 1203. The court found that the rules permitted the arbitrator to vary the procedures employed to conduct the proceeding as long as the parties were allowed to submit "material and relevant" evidence. *Id.* The rules did not, however, mandate a full hearing of all evidence regarding the merits of a claim "where a dispositive issue makes this unnecessary." *Id.*

Similarly, in *Schlessinger v. Rosenfeld, Meyer & Susman,* 40 Cal. App. 4th 1096 (Cal. Ct. App. 1995), the appellate court affirmed a lower court's confirmation of an arbitration award based on a summary adjudication. The dispute in Schlessinger concerned the payment due an attorney pursuant to the partnership agreement after his resignation. During the preliminary hearing, the arbitrator invited the parties to submit motions for summary judgment. The parties filed cross-motions on the question of whether the agreement's restrictions on competition were valid, which included memoranda of points and authorities, declarations and other supporting documentation. *Id.* at 1101. After a telephonic hearing, the arbitrator granted the law firm's motion in part, finding that an agreement may exact a reasonable toll, but that the issue of the toll's "reasonableness" could not be resolved on the basis of motions and would require submission of evidence. *Id.* at 1101-02. After a second round of motions, the arbitrator found that the tolls were reason-

CONTINUED ON PAGE 18

...the Fourth Circuit vacated an arbitrator's summary award for lack of fundamental fairness where it was evident that the claimant was prohibited from submitting evidence that was directed to a material factual dispute.

CONTINUED FROM PAGE 17

able as a matter of law. In light of these rulings, the parties resolved the remaining issues by stipulation. The arbitrator issued a final award in favor of the law firm, incorporating his summary adjudication rulings. *Id.* at 1102-03.

Schlessinger moved to vacate the award, arguing that his rights were substantially prejudiced by the arbitrator's refusal to receive material evidence and hear live testimony. *Id.* Affirming the district court, the court of appeals noted that the lack of explicit authorization for summary adjudication in the state statute and the AAA rules does not mean that the procedure is precluded. *Id.* at 1104. The court found that "the arbitrator had implicit authority to rule on such motions." *Id.*37 In addition, the arbitrator's obligation to "hear evidence" under the California statute does not mean that evidence must be orally presented or that live testimony is required. *Id.* at 1105. The court concluded that the summary disposition did not preclude Schlessinger from offering any material evidence and therefore he "had a fair opportunity to present his case." *Id.* at 1111.

The court specifically stated, however, that it did not intend its ruling to be an endorsement of motions for summary adjudication in arbitrations. The propriety of such motions depends on multiple factors, including "the nature of the claims and defenses, the provisions of the arbitration agreement, the rules governing the arbitration, the availability of discovery, and the opportunity to conduct adequate discovery before making or opposing a motion." *Id.* at 1112. The court emphasized that, especially in the absence of explicit procedures authorizing such motions, the party opposing a motion must be "afforded a fair opportunity to present its position." *Id.*

Conclusion

Dispositive motions can streamline the arbitral process by eliminating specious claims and defenses. Although procedures sanctioning such motions are not common, granting summary disposition has been found to be well within arbitrators' broad authority over the control of the proceedings. Courts have confirmed summary awards where claims or defenses are facially deficient and where there is no relevant or material evidence necessary for disposition of the claim. Although arbitrators likely are still wary of the practice and courts will carefully scrutinize summary rulings, submission of dispositive motions can be a successful and appropriate tactic in the arbitral forum.

1 *See* 10A Charles Alan Wright, *Federal Practice and Procedure* § 2712 (3d ed. 1998) (summary judgment defeats "dilatory tactics resulting from the assertion of unfounded claims" and allows parties to be "accorded expeditious justice").

2 *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (referring to parties' election of "simplicity, informality, and expedition of arbitration") (quoting *Mitsubishi Motors Corp. v. Soler Chrylser-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

3 Of course, motions for summary disposition are not always advantageous. Motions which ultimately are not dispositive of the case, or do not dispose of any issues or parties, can cause unnecessary delay and expense. When not well-grounded, such motions defeat, rather than promote, the arbitral goal of expeditious resolution.

4 *See* Carl M. Sapers and David A. Hoffman, *Dispositive Motions in Arbitration Proceedings*, 47 Arb. J. 51, 51 (Mar. 1992) (noting that dispositive motions can substantially shorten proceedings, especially in cases where a claim is time-barred, the specific claim is not arbitrable under the contract, or the right to arbitration has been waived).

5 See Marianne Bretton-Granatoor, *Pre-Hearing Motions to Dismiss Securities Arbitration Claims Brought by Customers in Securities Arbitration 2001*, at 859, 861 (PLI Corp. Law and Practice Course, Handbook Series No. B0-0158, 2001).

6 *See* discussion below regarding limited circumstances under which arbitral awards can be vacated.

7 Although courts have recognized "manifest disregard of the law" as a non-statutory basis for vacating arbitration awards, this ground presupposes something beyond or different from mere error of the law or the failure on the part of the arbitrator to understand or apply the law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986); *Carte Blanche (Singapore) PTE, Ltd. v. Carte Blanche Int'l*, 888 F.2d 260, 265 (2d Cir. 1989).

8 *See, e.g., Conference, Uniform Arbitration Act - 2000*, Pepp. Dispute Resolution L.J. 323, 380 cmt.3 (2003); 2 Thomas H. Oehmke, *Commercial Arbitration* § 86:4 (3d ed. 2004).

9 *See* Michael G. Shannon, *Pre-Hearing Motions to Dismiss Securities Arbitration Claims*, in Securities Arbitration 1999, at 401, 414 (PLI Corp. Law and Practice Course, Handbook Series No. 30-0092, 1999).

10 Federal Arbitration Act, 9 U.S.C. § 1 et seq.

11 Terry L. Trantina, *An Attorney's Guide to Alternative Dispute Resolution (ADR):* "ADR 1.01," in Arbitration of Consumer Financial Services Disputes 29, 72 (PLI Corp. Law and Practice Course, Handbook Series No. 30-0002, 1999). *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (stating that "'procedural' questions which grow out of [a] dispute and bear on its final disposition should be left to the arbitrator").

12 Prior to revision, the Uniform Arbitration Act lacked a specific provision concerning summary disposition. Section 15 of the Revised Act now provides that:

> (b) An arbitrator may decide a request for summary disposition of a claim or particular issue:
>
> (1) if all interested parties agree; or
>
> (2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

See also Timothy J. Heinsz, T*he Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. Dispute Resolution 1, 11 (2001) (discussing change in provision).

13 American Arbitration Ass'n, *Commercial Arbitration Rules and Mediation Procedures* R-30(b) (2003).

14 *Id.* R-30(a).

15 *Id. Procedures for Large, Complex Commercial Disputes* L-4(a) (2003).

16 Judicial Arbitration and Mediation Services, Inc., *Comprehensive Arbitration Rules and Procedures Rule* 18(a) (2003).

17 The Procedures were drafted by the reinsurance dispute resolution task force, which was charged with stipulating procedures to be utilized by the insurance and reinsurance industries for resolution of their contract disputes. In this effort, the task force incorporated existing practices and recommended procedures intended to result in greater fairness and certainty to the parties. Reinsurance Ass'n of America, *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes* (2001) (prefatory comments to Procedures), available at www.reinsurancearbitrators.com.

18 Reinsurance Ass'n of America, *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes* § 13.1 (2001).

19 *Id.*

20 *Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994).

21 *See First Preservation Capital v. Smith Barney, Harris Upham & Co.*, 939 F. Supp. 1559, 1565 (S.D. Fla. 1996) (confirming arbitrator's expansive authority over proceeding).

22 *See Bell Atlantic-Pennsylvania, Inc. v. Communications Workers of Am., Local 13000*, 164 F.3d 197, 201-02 (3d Cir. 1998) (determining that once the court rules that the underlying dispute is arbitrable, all procedural issues, including the question of which arbitration procedure applies, are within the purview of the arbitrator); *Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. at 165-66 (finding panel's decision to call individual as its own witness and permit his testimony reasonable and insufficiently prejudicial to vacate award); *Raytheon Co. v. Computer Distribs., Inc.*, 632 F. Supp. 553, 558 (D. Mass. 1986) (refusing to "second-guess and reverse" arbitrators' interpretation of governing AAA Rules; finding their interpretation to be reasonable and within their latitude to construe ambiguous language).

23 *See, e.g., PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 995 (8th Cir. 1999) (finding arbitrators comments about length of hearing to be consistent with general policies underlying arbitration and not evidence of bias); *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17, 21 (2d Cir. 1962) (finding arbitrator's conduct of the hearing appropriate, explaining that arbitrator "should act affirmatively to sim-

plify and expedite the proceedings before him, since among the virtues of arbitration which presumably have moved the parties to agree upon it are speed and informality"); *Cearfoss Const. Corp. v. Sabre Const. Corp.,* No. 89-1223, 1989 WL 516375 at *4 (D.D.C. Aug. 14, 1989) (upholding arbitrator's exclusion of evidence and noting that arbitrators are expected to take actions to expedite the proceedings).

24 *Volt Info. Sciences v. Leland Stanford Junior Univ.,* 489 U.S. 468, 478 (1989).

25 *See Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57 (1995) (noting that arbitration under the FAA is a matter of consent, not coercion, and parties are free to limit both the issues they arbitrate and the rules governing the arbitration); *Baravati v. Josephthal, Lyon & Ross, Inc.,* 28 F.3d 704, 709 (7th Cir. 1994) (stating that parties can stipulate to whatever procedures they want to govern the arbitration of their disputes).

26 *See Gateway Techs., Inc. v. MCI Telecomms. Corp.,* 64 F.3d 993, 996 (5th Cir. 1995) (upholding parties' agreement to permit expanded review of the arbitration award by federal court); *New England Utils. v. Hydro-Quebec,* 10 F. Supp. 2d 53, 63-65 (D. Mass. 1998) (permitting expanded judicial review of arbitration award pursuant to contract between the parties); *Western Employers Ins. Co. v. Jeffries & Co.,* 958 F.2d 258, 262 (1992) (finding that panel exceeded its authority by failing to issue findings of fact and conclusions of law as proscribed by the parties' contract).

27 *See Eljer Mfg. v. Kowin Dev. Corp.,* 14 F.3d 1250, 1256 (7th Cir. 1994) (stating that mere error in the interpretation of the law does not provide grounds for disturbing an arbitration award); *O.R. Secs., Inc. v. Professional Planning Assocs., Inc.,* 857 F.2d 742, 747 (11th Cir. 1988) (noting that "more than error or misunderstanding with respect to law" is necessary for courts to find manifest disregard of the law sufficient to overturn an arbitral award) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d at 933.

28 *See Employers Ins. of Wausau v. National Union Fire Ins. Co.,* 933 F.2d 1481, 1486 (9th Cir. 1991) (stating that a panel's interpretation of a contract must be sustained if it is plausible); *Federated Dept. Stores v. J.V.B. Indus., Inc.,* 894 F.2d 862, 866 (6th Cir. 1990) (opining that an arbitrator's misinterpretation of the contract will not, in itself, vitiate the award; arbitrator must disregard clear and unambiguous language); *Synergy Gas Co. v. Sasso,* 853 F.2d 59, 64 (2d Cir. 1988) (noting that although an award should draw its essence from the contract, "as long as an arbitrator is even arguably construing or applying the contract" even serious error will not suffice to overturn his decision) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

29 9 U.S.C. § 10(a).

30 *See* Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law*, J. Dispute Resolution 1, 63 Appendix 1, RUAA § 23 (2001) (listing grounds for vacating an award which include arbitrator corruption or fraud, evident partiality, misconduct or abuse of power). State statutes provide similar grounds for vacatur. *See, e.g.*, N.Y. C.P.L.R. § 7511(1) (McKinney 2004); Cal. Civ. Proc. Code § 1286.2 (West 2004).

31 *See 2* Thomas H. Oehmke, *Commercial Arbitration* § 39:8 (3d ed. 2004) and cases cited therein.

32 *See id.* § 39:9 and cases cited therein.

33 *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes,* 37 F. Supp. 2d 248, 252 (S.D.N.Y. 1999).

34 Federal courts generally will not find misconduct under Section 10(a)(3) unless arbitrators exclude evidence that is material and pertinent and the exclusion has a prejudicial effect. *See Marshall & Co. v. Duke,* 941 F. Supp. 1207, 1212 (N.D. Ga. 1995) (finding that panel's decision to cut off hearings did not violate Section 10(a)(3) where party did not demonstrate any prejudice arising from exclusion of additional testimonial evidence); *Roche v. Local 32B-32J Service Employees Int'l Union*, 755 F. Supp. 622, 624-25 (S.D.N.Y. 1991) (concluding that hearing was fair and denying motion to vacate where arbitrator gave plaintiff opportunity to present documents and testimony and considered pertinent evidence); *Burdette v. FSC Secs. Corp.*, No. 92-1030, 1993 WL 593997, at *4-5 (W.D. Tenn. Dec. 15, 1993) (affirming award granting motion for summary judgment submitted during hearing and finding no arbitral misconduct, where testimony excluded by panel was not relevant to dispositive issue).

35 Other federal courts have reached the same conclusion that the "hearing" mandated by Section 10 of the FAA does not necessarily require oral presentation or live witness testimony. *See, e.g., Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.,* 822 F.2d 833, 842 (9th Cir. 1987) (holding that arbitrator's refusal to hold an oral hearing on issue of contractual intent was fair because evidence was amenable to presentation in written form); *Cragwood Managers, L.L.C. v. Reliance Ins. Co.*, 132 F. Supp. 2d 285, 287-89 (S.D.N.Y. 2001) (applying Section 10(a)(3) standard for misconduct to the panel's interim award of security and confirming the award; stating that the resolution of disputed facts based on documentary evidence will not be vacated unless unreasonable or fundamentally unfair); *Griffen Indus. v. Petrojam, Ltd.*, 58 F. Supp. 2d 212, 220-21 (S.D.N.Y. 1999) (affirming award based on documents and written submissions and opining that lack of oral hearings does not amount to a denial of fundamental fairness); *InterCarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp.,* 146 F.R.D. 64, 72-74 (S.D.N.Y. 1993) (noting that failure to hear testimony may have compromised fullness of hearing but did not preclude confirmation of award, because there were no factual issues in dispute requiring a full hearing with live testimony; "hearings will not be required just to see whether real issues surface"); *Lancer Ins. Co. v. Tooling Mfgs. Ins. Co.,* No. 89 Civ. 8279, 1990 WL 124344, at *2 (S.D.N.Y. Aug. 20, 1990) (finding award in reinsurance arbitration based on written submissions, affidavits and documents without oral hearing fundamentally fair, where there was no evident prejudice from the absence of live testimony). *But see British Ins. Co. of Cayman v. Water Street Ins. Co.,* 93 F. Supp. 2d 506, 517-19 (S.D.N.Y. 2000) (granting motion to confirm interim award of security based solely on written submissions, but noting that issuance of a final award without further development of the record would raise issues of fundamental fairness).

36 Like Section 10(a)(3) of the FAA, the Washington statute directs courts to vacate awards if an arbitrator is "guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any misbehavior, by which the rights of any party have been prejudiced." *Id.* at 1202 (citing RCW 7.04.160(3)).

37 *See also Stifler v. Seymour Weiner, M.D., P.A.,* 488 A.2d 192, 195 (Md. Ct. Spec. App. 1985) (confirming arbitrator's grant of summary judgment, despite the absence of explicit authorization for the procedure in the governing statute, where the statute of limitations had run on the claim and there was "no reason to waste time, effort, and money on a full-scale trial on the merits of the claim"). ▼

Although arbitrators likely are still wary of the practice and courts will carefully scrutinize summary rulings, submission of dispositive motions can be a successful and appropriate tactic in the arbitral forum.

feature

Witnesses– Written Statements or Oral Testimony?

By Debra J. Roberts

Debra J. Roberts

From the standpoint of the witness, the narrative format allows for a recital of the facts in writing, with time to collect thoughts and write them clearly, as compared to the oral question-and-answer process, which can be, and often is, pressure-filled and combative.

Debra J. Roberts is an ARIAS-U.S. certified arbitrator, and also serves as expert witness and consultant to the international (re)insurance industry. Her firm, Debra Roberts & Associates, Inc., is based in San Diego, California.

Almost all reinsurance arbitrations include the important element of obtaining testimony from witnesses. This can be in the form of counsel deposing the witness (which may be videotaped for playback for the panel) and the resulting transcript provided to the panel; or in the form of a written statement, or affidavit, produced by the witness for the panel. Most American reinsurance arbitrations make use of the deposition method, while the prevailing method in the U.K. is written statements. In cases where expert witnesses are used, the expert usually provides a written report first (both in the U.S. and the U.K.), then he or she may be questioned by counsel prior to the hearing (U.S.), or during the hearing (U.S. or U.K.), or both (U.S.). While both written and oral testimony are intended to accomplish the same result, i.e., obtaining information from people involved in the events relevant to the dispute, there are significant differences in the methodology that bear a closer look.

Much of the recent criticism of American reinsurance arbitrations focuses on the time-consuming discovery process, which includes both documentary disclosure as well as witness testimony, and is one area where the arbitration can become quite bogged down. In U.S. arbitrations there are no formal guidelines or limitations such as those set forth in the Federal Rules of Civil Procedure. Most panels are reluctant to impose limitations on the amount of discovery, and it is uncommon to see any restrictions upon the length of deposition testimony or expert reports. The length of time for discovery and the amount of documentation produced varies from case to case; but in some instances, it has become extraordinary in both the length of time involved and the tonnage of paper produced. Obviously, one practical guideline is that the discovery process should be "appropriate" to the size and nature of the dispute, but that really leaves a lot of leeway to define what is meant to be "appropriate". By contrast, U.K arbitrations adhere to the Civil Court requirement that disclosure of documents should be "proportionate", i.e., to the sums at stake, the importance of the issue, and the time and cost of identification and production. However, there is still a subjective element involved in deciding exactly how to adhere to this requirement.

The author is grateful to Anthony Temple QC for his assistance

While written witness statements and oral depositions are both methods of obtaining sworn testimony from the witnesses, the two methods are quite different. An analysis of the differences points out some of the advantages and disadvantages of each method. Written statements allow each fact witness to set forth the facts and events in a narrative format, sworn and attested to for truthfulness. This method has the advantage of being well organized and thought-out in advance, and has the added feature (advantage or disadvantage?) of being reviewed by the lawyers before being presented to the other party. Oral testimony, in contrast, involves the witness being questioned by the attorneys from both sides of the case, but mostly by the opposing side's counsel. The witness is sworn in and a court reporter is present to transcribe the proceedings.

From the standpoint of the witness, the narrative format allows for a recital of the facts in writing, with time to collect thoughts and write them clearly, as compared to the oral question-and-answer process, which can be, and often is, pressure-filled and combative. In general, being deposed is not a pleasant experience for the witness.

From the panel's point of view, the narrative format of the written statements allows for easier comprehension of the facts and events from that of the witness's perspective, with the caveat that it has "passed through" the attorneys. Especially in complex cases where there are several

parties to the arbitration and dozens upon dozens of fact witnesses and several expert witnesses, witness statements are much easier to read through and get a gist of things than a similar number of deposition testimony transcripts (even if those are summarized). Witness statements have the advantage of offering a more concise and coherent telling of the information.

Many arbitrators have struggled through lengthy deposition testimony transcripts (typos and all), straining to understand precisely what information the attorneys are trying to obtain from the witness. Deposition testimony is useful when the questions are good, and when they follow a logical thought pattern, and when the witness is articulate and able to express complete thoughts under fire. But, let's face it, all of those elements rarely occur together in real life. Few witnesses are able to formulate answers on the spot that are as clear and as well-put as they would be in a written format. In a similar fashion, few attorneys ask questions in a way that elicits the complete factual history in a clear, logical way. Some attorneys just aren't that well prepared, and others have watched too many courtroom dramas on American TV.

In contrast, some attorneys may argue that the opportunity of being able to question a fact witness is golden, and a written statement from the witness may not address all of the points that counsel would pursue in oral questioning. It also may be argued that counsel and the panel gain insight from a face-to-face session with a witness, and the ability to exert some verbal pressure on the witness to extract information that might otherwise be withheld is highly desirable. Another obvious advantage of deposing a witness is the immediacy of the answers, stripped of any opportunity for editing or review.

Having the initial witness testimony in the form of a written statement does not preclude counsel having a later opportunity to question the witness, either prior to, or during, the hearing. In the case of expert witnesses, after their initial reports are exchanged, each could provide a "reply" report, which responds to points made by the other, which is usually done in the U.K. Counsel would still have an opportunity to question the experts, either prior to, or during, the hearing. In all cases where written statements are provided first, the follow-up questioning will generally be more abbreviated than that of an initial deposition. In addition, by requiring all written statements to be produced simultaneously by a certain date, each party has the advantage of seeing all the witness testimony produced at one time, in a narrative format, and at an earlier deadline (one would think) than the completion of the same number of depositions.

In the final analysis, there are pros and cons for each method. Perhaps a sensible compromise is to require the production of witness statements initially and, in light of the quality of those statements, then decide whether a pre-hearing deposition is necessary on an individual basis. In many cases it would not be, but in some few cases it would likely be extremely valuable. It would be most useful for arbitrators to treat these tools as flexible, not inflexible, solutions to the process of evidence gathering. ▼

In the final analysis, there are pros and cons for each method. Perhaps a sensible compromise is to require the production of witness statements initially and, in light of the quality of those statements, then decide whether a pre-hearing deposition is necessary on an individual basis.

feature

ARIAS (UK) – Structure and Organization

Jonathan Sacher

The Society's officers comprise, in the main, members of the legal profession and include eminent judges and barristers as well as senior solicitors...

Jonathan Sacher is the senior reinsurance and insurance partner at top 15 City of London law firm, Berwin Leighton Paisner. He is a former Chairman of the British Insurance Law Association, one of the UK chapters of AIDA.

By Jonathan Sacher

As a new International Editor of the ARIAS-U.S. Quarterly, I thought in my first article I would set out some of the background of ARIAS (UK), its structure, organization and standard form Arbitration Clause.

ARIAS (UK) was formed in 1991 and is one of two UK-based chapters of AIDA (Association Internationale de Droit des Assurances), the other being the British Insurance Law Association.

The three institutional market founders of ARIAS (UK) were Lloyd's, LIRMA (now known as the International Underwriting Association) and BIBA, the brokers' association. Each of these bodies is represented on the Committee of ARIAS (UK). Prominent firms of lawyers and accountants also played an important role in the establishment of ARIAS (UK). The Society's officers comprise, in the main, members of the legal profession and include eminent judges and barristers as well as senior solicitors well versed in the area of dispute resolution. The Hon. Secretary has a market, rather than legal, background and the nine Committee Members, in addition to the three institutional founding member representatives, have a mixture of legal and market expertise. The Society's officers and Committee Members are elected, or re-elected, at its Annual General Meeting, normally held in May.

CURRENT OFFICERS:

President:
The Rt. Hon. Lord Mustill

Vice President:
Sir John Thomas

Chairman:
V.V. Veeder, Q.C.

Vice-Chairmen:
J.S. Butler
I. Hunter Q.C.,
J.F. Powell

Hon. Secretary:
T.G. Fairs

Administration Secretary:
D.A. Holmes

MEMBERS OF THE COMMITTEE:

N.P. Demery (Lloyd's Representative)

R.J.H. Glynn (BIBA Representative)

E.R. Jaggers (IUA Representative)

A.H. Kay (Solicitor)

Professor N. Legh-Jones Q.C.

R.T. Morgan (Market)

P.J.H. Rogan (Solicitor)

H.G. Simons (Market)

Sir Alan Traill (Market)

The prime objective of ARIAS (UK) is to provide a panel of independent arbitrators and mediators who have been suitably trained in dispute resolution procedures, to deal with the growth of disputes in the worldwide insurance and reinsurance market.

One of the aims of ARIAS (UK) is stated to be "the promotion and assistance in the development of insurance and reinsurance dispute resolution through arbitration and other means, and to make us more responsive to the needs of the industry worldwide."

The ARIAS (UK) Panel

The Panel of ARIAS (UK) arbitrators, comprises persons who have in the main occupied senior positions in the reinsurance market as underwriter, broker or claims executive. There are also some who have credentials in other areas of expertise relating to insurance and reinsurance, such as accountancy and the law.

Most of the Panel members are based in England but there are increasing numbers elected who are based in other parts of Europe, the USA or elsewhere.

In order to be appointed to the panel, each applicant makes a written approach in a prescribed form to the Society. This is scrutinised by an accreditation committee and then submitted to the full Committee. Once admitted, panel members are, to supplement their knowledge, expected to attend the Society's tutorials and conferences. Panel membership currently comprises about 100, most of whom chose to have their particu-

lars included in the Society's Directory which was first published in 2003. This is in the process of being reissued in parallel with the up-dating and expansion of the Society's website (www.arias.org.uk) to accommodate individual member's information for those who require this to be included. Of the Society's current panel membership, 65 are experienced in underwriting and/or general management, 16 have legal qualifications, 11 have broking backgrounds and 5 claims and 3 accountancy backgrounds.

Mediation

In response to an expanding demand for suitably qualified mediators, ARIAS (UK) has embarked on a major initiative in conjunction with Nottingham Law School to provide a course to its members for those aiming to achieve ARIAS (UK) mediator accreditation status. Some 18 of the Society's panel members registered for the recent accreditation course and it is expected that similar arrangements will be made in future years.

The Membership

Members of ARIAS (UK) (as distinct from Panel members), comprise both corporate bodies and individuals. Apart from the main market institutions such as Lloyd's and the International Underwriting Association, and brokers associations, there are insurers, reinsurers, brokers, lawyers, accountants and other advisers, from the UK and abroad.

Members receive periodic newsletters, tutorials and lectures given by Judges, practising lawyers, and the London Court of International Arbitration. ARIAS (UK) also acts as the appointer of arbitrators where the arbitration clause provides.

ARIAS (UK) has a standard form arbitration clause and set of Rules which are now often referred to in London market reinsurance placements/slips by words such as "Arbitration – ARIAS (UK) Rules."

The standard ARIAS (UK) arbitration clause is as follows:

"All disputes and differences arising under or in connection with this contract shall be referred to arbitration under ARIAS Arbitration Rules.

The Arbitration Tribunal shall consist of three arbitrators, one to be appointed by the Claimant, one to be appointed by the Respondent and the third to be appointed by the two appointed arbitrators.

The third member of the Tribunal shall be appointed as soon as practicable (and no later than 28 days) after the appointment of the two party-appointed arbitrators. The Tribunal shall be constituted upon the appointment of the third arbitrator.

The arbitrators shall be persons (including those who have retired) with not less than ten years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisers serving the industry.

Where a party fails to appoint an arbitrator within 14 days of being called upon to do so or where the two party-appointed arbitrators fail to appoint a third within 28 days of their appointment, then upon application ARIAS (UK) will appoint an arbitrator to fill the vacancy. At any time prior to the appointment by ARIAS (UK) the party or arbitrators in default may make such appointment.

The Tribunal may at its sole discretion make such orders and directions as it considers to be necessary for the final determination of the matters in dispute. The Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure when making such orders or directions.

The seat of arbitration shall be .....

The proper law of this contract shall be the law of ....."

ARIAS (UK) has an excellent reputation in the London Insurance and Reinsurance market and has now become the pre-eminent dispute resolution body for that market. ▼

Members receive periodic newsletters, tutorials and lectures given by Judges, practising lawyers, and the London Court of International Arbitration. ARIAS (UK) also acts as the appointer of arbitrators where the arbitration clause provides.

in focus

Recently Certified Arbitrators

Hugh Alexander

Bernard R. Beckerlegge

Hugh Alexander

Hugh Alexander has been a lawyer in the insurance industry since 1971. During this period, he has worked for an insurance department, two insurance holding companies, and now is a partner in a law firm that bears his name representing insurance companies, insurance brokerage companies, and producers.

Mr. Alexander began his career as an attorney for the Nebraska Insurance Department. When he left the Department to go in-house for an insurance holding company, he was General Counsel at the Department. His first in-house experience at Foremost Insurance Group allowed him to develop skills in personal lines business as well as special risk and program business. He later became Vice President and General Counsel to Foremost Life Insurance Company. At that time, Foremost Life was a leader in credit insurance products and in life insurance specialty markets.

Mr. Alexander moved on to become Vice President and General Counsel at First Great West Holding Company. At First Great West, he continued to represent the life subsidiary in its credit, life and health markets and developed skills in long haul trucking products and in personal lines property and casualty insurance products in the property and casualty subsidiaries.

In 1985, he opened his own private practice law firm specializing in corporate insurance and insurance regulatory matters. As an insurance corporate and regulatory lawyer, he has represented insurers and program managers in their reinsurance activities. His skills include drafting and negotiating reinsurance treaties and in the representation of his clients in subsequent interpretation and coverage issues.

Mr. Alexander has served as a director of both private and public life insurance companies. He is also the co-founder of the Federation of Regulatory Counsel, a professional association of insurance regulatory counsel throughout the United States. He has been the President and Editor since its inception and has been a board member as allowed by the By-laws of FORC. Hugh Alexander and his wife live in Steamboat Springs, Colorado; he continues to manage the law firm on a daily basis. In addition to his private practice, he has served as an expert witness on coverage issues for the past 10 years.

Bernard R. Beckerlegge

Bernard Beckerlegge is a lawyer with nearly 30 years of experience in the life and health insurance industry, having served as general counsel for several different insurance organizations. His areas of expertise include contract wording, claims and litigation, marketing and distribution, mergers and acquisitions, and regulatory matters.

Prior to assuming roles as an arbitrator and insurance consultant, from 1995 to 2001, he held the position of Senior Vice President and General Counsel of Keyport Life Insurance Company where he was responsible for all legal, regulatory and compliance matters for the company and its subsidiaries. He was particularly involved with the acquisition and formation of domestic and offshore subsidiaries, which developed and marketed sophisticated institutional stable value products and hedge fund-based products for the offshore market, and the reinsurance of certain of those products.

Before joining Keyport Mr. Beckerlegge was General Counsel of Golden American Life Insurance Company, a start-up company focused exclusively on variable products for the institutional and retail markets. There he was actively involved with the corporate governance of the holding company and its insurance and broker-dealer subsidiaries, with distribution and joint venture agreements, and with state and federal matters concerning the sale and distribution of registered and private placement products.

Mr. Beckerlegge's insurance experience began with the Prudential Insurance Company. During the early portion of his 14 years with Prudential, he was involved primarily with the company's individual and group life and health business. Subsequently, he became the lead counsel in the company's acquisition of a banking institution and its conversion to a "non-bank bank". He later served as liaison with Prudential Reinsurance, primarily involved with litigation and arbitration matters.

Mr. Beckerlegge received his J.D. from Boston College Law School after graduating from Brown University with an A.B. in English. He has been a member of the Massachusetts Bar since 1971.

in focus

Robert c. Bruno

Howard D. Denbin

John A. Dore

Robert C. Bruno

Robert Bruno has spent over 25 years in the property and casualty insurance and reinsurance industry. He is currently President and CEO of the Unione Italiana Reinsurance Company of America. Mr. Bruno graduated from Bernard M. Baruch College, New York in 1978 where he earned his Bachelor's Degree in Accounting.

Mr. Bruno began his insurance claims career with Liberty Mutual Insurance Company in 1978 as a claims adjuster. In this capacity, he gained hands-on training in the investigation and evaluation of various types of property and casualty claims, with a heavy emphasis in construction losses. Mr. Bruno was transferred into Suit Group, with primary responsibility being conferencing litigation cases at the Civil and Supreme Courts within the five boroughs of New York. In 1981, he was promoted to Manager of the Suit Group Unit.

Prior to joining Unione in May of 1989, Mr. Bruno held claims management positions with the Home Insurance Company (Home Office Department) and Metropolitan Reinsurance Company where he gained valuable experience in the handling of high exposure, complex casualty claims. He was hired at Unione to be Senior Claims Officer where he was directly responsible for the development and formation of the Claims Department. In 1994, he was named President in charge of overseeing the run-off administration, at which he continues to serve. Aside from his administrative responsibilities, Mr. Bruno directly supervises loss exposures with special attention to contractual compliance issues, reserve analysis and auditing. In addition, he is directly involved in reinsurance collection and commutation activities. Mr. Bruno also currently holds the position as Senior Consultant for Resolute Management Company which is part of the Berkshire Hathaway Group.

Mr. Bruno participated in the IRU and had served in the past on its' conference program committee. He is an active member of the Excess/Surplus Lines Claims Association.

Robert C. Bruno received his CPCU designation in 1992. He is married and has three sons.

Howard D. Denbin

Howard Denbin has over 20 years experience as an attorney in the insurance and reinsurance industry, specializing in all aspects of dispute resolution, including arbitration, litigation and mediation.

Mr. Denbin is currently Assistant General Counsel of Resolute Management Inc., recently joining that company when it assumed handling of certain long tail claim obligations of the ACE Group of companies. In this position, Mr. Denbin is responsible for all legal activities regarding reinsurance claims, collections and disputes. Prior to assuming this position, Mr. Denbin held similar positions at ACE, as well as predecessor operations of the CIGNA Property and Casualty companies. At ACE, Mr. Denbin also had responsibility for reinsurance contract wordings and supporting business operations in negotiating and placing reinsurances.

Mr. Denbin began his reinsurance career in 1985 at the boutique law firm of Lanzone & Kramer, where he was involved in all aspects of reinsurance arbitration and litigation, as well as counseling reinsurance industry clients on a wide variety of reinsurance issues. He left the firm (and New York) in 1988 to join the law department at CIGNA in Philadelphia. Prior to that, he was a trial lawyer prosecuting and defending property damage insurance defense and subrogation cases. He has tried cases (successfully) to a jury.

Mr. Denbin is a member of the Reinsurance Industry Arbitration Task Force, and admitted to practice law in the Commonwealth of Pennsylvania and the State of New York, as well as the federal courts in the Southern and Eastern Districts of New York.

John A. Dore

John Dore has spent 30 years in the property and casualty insurance and reinsurance industry. The last nineteen years have been spent as President and CEO of several mid-tier property/casualty insurance companies, including American Country Insurance Company and The First Reinsurance Company of Hartford.

Over the last ten years, Mr. Dore has been involved in the purchase and sale of several entities, including American Country Holdings, Inc. and Financial Institutions Insurance Group, Ltd., where he was president of these NASDAQ listed insurance holding companies.

Mr. Dore currently is President of Sheridan Ridge Corporation, an insurance and reinsurance consulting firm. Mr. Dore also serves as Chairman of the Executive Committee and a member of the board of directors of Homestead Insurance Company.

Mr. Dore began his career with Crum & Forster in 1974 on the underwriting side and regulatory side. He was a founding member of Chicago Underwriting Group (a unit of Old Republic) in 1983 and was President of Virginia Surety

in focus

Michael W. Elgee

James P. Galasso

Klaus-Heinz Kunze

Company, Inc. (Aon) in 1986. Throughout his career, Mr. Dore has been involved in the negotiation and purchase of reinsurance products, including the London market.

Since 1999, Mr. Dore has participated in six arbitrations, including one as an umpire and five as a party-appointed arbitrator. These arbitrations have involved underlying issues, such as medical malpractice liability, other professional liability and asbestos issues.

Mr. Dore has a B.A. from Yale University and an MBA from Northwestern University's Kellogg Graduate School of Management.

With over 30 years of experience, Mr. Dore brings a well-rounded knowledge of the property and casualty insurance and reinsurance business, with an underwriting, financial and regulatory perspective.

Michael W. Elgee

Michael Elgee's career in the life and health reinsurance field has spanned over 35 years and has given him an in-depth knowledge of life and health insurance and reinsurance.

For the last 29 years, until his retirement in August 2003, he was employed by General and Cologne Life Reinsurance of America (formerly Cologne Life Reinsurance Company and, currently, General Re Life and Health). He joined Cologne in 1974 as an Underwriting Associate, was promoted to Second Vice President Claims in 1977 and was appointed Vice President, Secretary and General Counsel in 1992.

As General Counsel, Mr. Elgee was responsible for all legal issues affecting Cologne and its subsidiaries. He was specifically responsible for litigation, compliance, and the drafting and interpretation of reinsurance treaties.

Before joining Cologne, Mr. Elgee was an Underwriting Associate at the Knights of Columbus, Patriot Life (American General of New York), Guardian Life and Life of Connecticut.

Mr. Elgee graduated from Fairfield University with a B.A. and the University of Bridgeport School of Law with a J.D. He is a member of the Connecticut and American Bar Association and is Of Counsel to the Eastern Claims Conference.

James P. Galasso

James Galasso is a Fellow in the Society of Actuaries (1977) and a member of the American Academy of Actuaries (1979). He has over thirty years experience in various life and health insurance capacities.

Mr. Galasso founded Actuarial Modeling in 2000 and currently serves as its President. Actuarial Modeling is an actuarial consulting firm specializing in health insurance, managed care, and innovative health care product offerings (e.g. Consumer Driven Health Plans, Disease Management, and Health Savings Accounts). His services include both actuarial consulting and Expert Witness testimony/support for disputes involving complex health care services and transactions. He received his certification by ARIAS•U.S. as an arbitrator in May, 2004.

Mr. Galasso served as a Partner with Ernst & Young LLP ("E&Y") from 1996 through 2000, leading E&Y's Southeast actuarial healthcare practice. In addition to leading the more complex actuarial audits, he also led several actuarial health care consulting initiatives that involved large merger & acquisition transactions for which E&Y provided advice and due diligence.

In 1986, Mr. Galasso accepted a senior officer position with MetLife and was promoted to Chief Financial Officer of MetLife's Group Department in 1990. In this capacity, he assumed the actuarial and financial responsibilities for MetLife's medical/managed care, group life, long term care, group short/long term disability, and group dental product offerings. MetLife divested its health care operations in 1996 and formed MetraHealth (a joint venture with the Travelers Insurance Company). Jim was appointed the Chief Financial Officer of MetraHealth, then the largest health care company in the United States. Shortly after its formation, UnitedHealthcare purchased MetraHealth.

James Galasso graduated from the State University of New York at Stony Brook in 1972 with a double math major and joined MetLife, serving in various actuarial capacities in both MetLife's individual life/annuity and group insurance departments.

Klaus-Heinz Kunze

Klaus Kunze is Managing Director of Depfa Bank plc in New York. He is responsible for all worldwide insurance & reinsurance activities and operations. Until September of last year, Mr. Kunze was Senior Vice President, Claims worldwide of the Hannover Reinsurance Group. For 23 years, he was actively involved in all aspects of Hannover Re's claims management and, as General Counsel, was responsible for all commutations and other forms of dispute resolution. He co-operated closely with corporate

underwriting (P&C business, A&H and Life business worldwide) for treaty and facultative business, actuarial, financial, etc. He handled all litigation and arbitration cases involving the Reinsurance Group.

Mr. Kunze has extensive knowledge of underwriting, accounting and coverage issues with a major focus on problems emanating from the U.S. and London market. He is a regular speaker at insurance and reinsurance seminars and conferences worldwide, and has lectured at the University of Hannover about insurance and reinsurance related problems. He is author of numerous articles covering reinsurance/insurance related topics. He has acted as arbitrator and umpire in various market disputes in the UK and the United States for more than ten years.

Mr. Kunze finalized his legal studies at Bonn University. He is a member of the Bar and admitted to the High Court of Hannover. He is also member of the Reinsurance Working Party of AIDA.

Richard S. March

Richard March, a graduate of the University of Pennsylvania's Wharton School (1962) and Law School (1965), is an attorney with 39 years of experience in the property-casualty insurance industry, while in both private practice for 31 years with the Philadelphia law firm of Galfand, Berger, Lurie, Brigham & March and as Senior Vice President and General Counsel of United National Insurance Company and its affiliated companies, in Bala Cynwyd, PA since 1996. While still in private practice, Mr. March also served as an officer in varied positions with United National.

While in private practice, Mr. March served as trial counsel and/or advisor to numerous insurance companies relative to insurance defense, coverage and policy form issues. He also acted as an arbitrator in over one-hundred disputes involving uninsured/underinsured motorist coverage.

At United National Mr. March is responsible for and manages all activities and operations in the Legal, Regulatory and Claims departments. This includes the management of dispute avoidance and/or disputes with reinsurers, MGAs, TPAs, brokers and insureds. His duties also include providing legal counsel on regulatory, corporate and contract issues, as well as being an advisor to the executive management team. Following United National's holding company parent becoming a public company in 2003, Mr. March has also managed the expansion of staff and compliance relative to increased obligations arising from its change from private to public ownership.

Mr. March is a licensed attorney in the Commonwealth of Pennsylvania and he is admitted in all Pennsylvania state courts, the U. S. District Court for the Eastern District of Pennsylvania and the U. S. Court of Appeals for the Third and Eleventh Circuits. He is a member of the American Bar Association, the Pennsylvania Bar Association and the Philadelphia Bar Association.

Roger M. Moak

With over 30 years of experience as an attorney – almost 20 as an insurance industry general counsel – Roger Moak now provides services to the industry as an arbitration umpire, party arbitrator, mediator, expert witness, regulatory counsel, and consultant.

Mr. Moak is a graduate of Cornell University and Georgetown University Law Center. He began his legal career in 1970 as a law clerk with Speiser, Shumate, Geoghan, Krause, Rheingold & Madole in Washington, D. C. while at law school. Upon his graduation, he moved to the firm's New York office where he handled a wide variety of litigation and corporate matters, and became a member of Speiser & Krause, P. C. in 1978.

He left the law firm in 1980 to head the Legal Department of Insurance Services Office (ISO). ISO is the property-casualty insurance industry's largest licensed advisory and statistical organizations. He was Senior Vice President and General Counsel of ISO until 1991.

Mr. Moak became Senior Vice President, General Counsel and Corporate Secretary of The Home Insurance Companies, including U.S. International Reinsurance Company (collectively The Home), after they were acquired by Trygg-Hansa in 1991. Among other accomplishments at The Home, he served for a year as The Home's chief corporate claims officer while still serving as general counsel.

He remained general counsel of The Home when he became Executive Vice President, General Counsel and Corporate Secretary of Risk Enterprise Management Limited (REM), a member of Zurich Financial Services, following the Trygg-Hansa/Zurich transaction of 1995. As part of REM's senior management, he, not only concentrated on The Home's eight voluntary run-off under regulatory supervision, but also helped REM develop into a TPA with some 160 clients, making it viable without The Home.

Mr. Moak is admitted to practice law in New York, in the District of Columbia, and before

Richard S. March

Roger M. Moak

in focus

Timothy C. Rivers

Savannah Sellman

many U. S. Courts, including the Supreme Court. He has been active in several professional organizations in addition to ARIAS•U.S., including the American Bar Association, the New York County Lawyers' Association, the International Association of Insurance Receivers, the District of Columbia Bar, and the Association of Corporate Counsel. He has been appointed to five three-year terms on the Committee on Insurance Law of the Association of the Bar of the City of New York, including one term, from 1996 to 1999, as Chairman. He was elected President of The Insurance Federation of New York, Inc. (IFNY) in 1998 and has been re-elected each year since.

Timothy C. Rivers

Timothy Rivers is a veteran of 35 years in the reinsurance profession both as a Broker and Underwriter. His career began in 1969 at the reinsurance brokerage firm of Balis & Company, Inc. (subsidiary of Guy Carpenter & Company, Inc.), Philadelphia, PA. There he learned the functions of the Treaty and Facultative Reinsurance brokerage business and was elected Assistant Vice President – Treaty Account Executive. In 1981, Mr. Rivers joined the reinsurance brokerage firm of Booth, Potter, Seal & Company (subsidiary of Rollins Burdock & Hunter now AON), Philadelphia, PA as Vice President – Treaty Account Executive. He was also in charge of the firm's in-house Property and Casualty Facultative Binding Authorities. In 1984, he joined the reinsurance brokerage firm of Willcox Incorporated, New York, NY, then a subsidiary of Johnson & Higgins, and was promoted to Executive Vice President – Treaty Reinsurance Operations. In 1997, as a result of the merger of Johnson & Higgins and Marsh & McLennan, Mr. Rivers was elected Managing Director of Guy Carpenter and became a member of the U.S. Operating Committee of Guy Carpenter & Co., Inc., New York.

In August 1999, Mr. Rivers joined The SCPIE Companies, Los Angeles, CA, as Senior Vice President to develop an Assumed Reinsurance Underwriting Division to write a select account of worldwide Property, Casualty, Accident & Health and Marine Treaty reinsurance business for SCPIE. He also established a Lloyd's Capital Provider vehicle for SCPIE as a method for doing select Capital Investments in various Lloyd's Syndicates. In addition to his responsibilities for all Ceded and Assumed reinsurance transactions within The SCPIE Companies, he is currently involved in a Transitional Service Agreement with Goshawk Reinsurance Limited, Hamilton, Bermuda, and has established Goshawk USA Incorporated, a service Company, to develop a U.S. presence for Goshawk Reinsurance Limited.

Resulting from his long, varied and continuing active reinsurance carrier, Mr. Rivers has developed an in-depth knowledge of worldwide Property, Casualty, Accident & Health Treaty and Facultative issues, both from the perspective of a Broker and Underwriter. Mr. Rivers continues to be a student of the "custom and practice", both past and present, of the worldwide Reinsurance Industry,

Savannah Sellman

Savannah Sellman is a partner in the San Francisco office of Hancock Rothert & Bunshoft, an international law firm, which also has offices in London, England; Los Angeles, California; and Lake Tahoe, California.

Ms. Sellman has worked in the insurance and reinsurance fields for twenty-nine years, representing insurance and reinsurance companies, corporate policyholders and government regulatory agencies. Her practice is full service, encompassing underwriting and risk assessments; insurance and reinsurance contract negotiation and drafting; claims handling, including coverage advice; counseling management and boards of directors; and representation in litigation, arbitration and other alternative dispute forums. Ms. Sellman specializes in professional liability (primarily health care and medical, including managed care organizations, hospitals, health systems and physicians; lawyers; and architects and engineers) and environmental matters (asbestos, pollution, and health hazard, including clergy sexual misconduct).

Prior to joining Hancock Rothert & Bunshoft, Ms. Sellman was Vice-President and General Counsel of Norcal Mutual Insurance Company, Secretary and General Counsel of the Pennsylvania Medical Society Liability Insurance Company, Deputy Attorney General for the Pennsylvania Department of Justice and Assistant Attorney General for the Pennsylvania Department of Insurance. She began her career in 1975 with a judicial clerkship for the Honorable William Lipsett, of the Pennsylvania Court of Common Pleas. Ms. Sellman has taught business law and real estate law at the college level. She has spoken extensively on current insurance and reinsurance issues, both domestically and internationally, including at the 2002 ARIAS Spring meeting in Puerto Rico and at the 2002 and 2003 Mealey's Reinsurance Summits.

in focus

Barry Leigh Weissman

Barry Leigh Weissman is a partner in the law firm of Alschuler Grossman Stein & Kahan LLP concentrating primarily in the areas of insurance and reinsurance litigation. He is one of the few reinsurance specialists in California. He earned a B.A. degree in 1970 at University of California, Davis and his law degree in 1973 from University of Santa Clara Law School.

Mr. Weissman represents clients in a variety of complex commercial matters, including insurance-backed film-financing, securities, actions involving business enterprise, California Business Code Section 17200 issues, and of course reinsurance arbitrations. He has represented large national and international corporations, insurance companies, banking, and financial institutions. His practice encompasses all phases of litigation in both state and federal courts, as well as alternative dispute resolution proceedings, including mediations and arbitrations. He has served as an arbitrator for the American Arbitration Association since 1978.

During his almost 30 years of practice, Mr. Weissman has been involved in numerous professional associations. He currently serves as the legislative liaison on the California State Bar Insurance Committee and on its reinsurance subcommittee, and also serves on several committees of the National Association of Insurance Commissioners. He previously served on the California State Senate Advisory Commission on Malpractice Insurance, and as a member of the American Bar Association's General Practice, International Law, and Litigation Sections.

Mr. Weissman is admitted to practice before the United States District Courts for the Central, Southern, and Northern Districts of California, the Supreme Court of the United States of America, and all of the state courts of the State of California, the State of New York and the District of Columbia.

Mr. Weissman authored the two-volume book set California Pleadings and Practice Forms, Callaghan and Company, 1986. He also has authored a wide range of articles on reinsurance topics and issues. He frequently speaks on reinsurance issues. Included among his speaking engagements are various Mealey's conferences, the American Bankers Association on issues arising from Gramm-Leach-Bliley as it relates to insolvencies of insurance companies and banks. He organized the California State Bar presentation on Insurance Insolvencies at the joint meeting with the American Bar Association.

Alfred O. Weller

Alfred O. Weller is a consulting actuary with Muetterties, Bennett and Associates, Inc. (MBA Actuaries, Inc.). His career includes executive positions with the National Council on Compensation Insurance, the Continental Insurance Companies (now part of CNA), Frank B. Hall & Co., Inc. (now part of AON), BRI Coverage Corporation, Fred. S. James and Co., Inc. (now part of Marsh), Ernst & Young, the Workers Compensation Reinsurance Bureau (WCRB), the Insurance Services Office (ISO), and most recently MBA Actuaries, Inc.

In his over three decades of experience, Mr. Weller has developed expertise in many areas of commercial insurance and reinsurance from many perspectives. He has been active in workers' compensation, medical malpractice and professional liability, surety and financial guaranty, and other commercial lines from both a primary and reinsurance viewpoint. His work includes bureaus, insurers, reinsurers, self-insurers, brokers, and accounting firms. He was head actuary at two brokerages and President of the Workers Compensation Reinsurance Bureau (the oldest and largest excess workers compensation pool). He has worked with individual insured, association and program business. He was one of the first actuaries to become active in captive insurers and alternative markets. He has seen domestic and international business, in-force and runoff business, individual commutations and portfolio transfers.

Mr. Weller is a Fellow of the Casualty Actuarial Society, a Fellow of the Conference of Consulting Actuaries, and a Member of the American Academy of Actuaries. He is active in these societies having served on Boards of Directors, Committees and Task Forces. Among his publications is a 1989 paper on Generalized Bondy Development that won the 1989 Actuarial Practitioners Award. Within ARIAS-US, Al is a member of the Mediation Committee.

Barry Leigh Weissman

Alfred O. Weller

in focus

Eugene T. Wilkinson

Eugene T. Wilkinson

Eugene T. Wilkinson is the managing principal in The Wilkinson Group, LLC, providing consulting services to the insurance and reinsurance community. Additionally Mr. Wilkinson serves as an arbitrator and expert witness in insurance and reinsurance matters. Starting with an insurance underwriting trainee position in 1972, Mr. Wilkinson has been continuously involved in accident and health, medical, life, disability, special risk, workers compensation, HMO, Provider Excess and related lines of business. Following a brief stint as an employee benefits consultant, Mr. Wilkinson joined Duncanson & Holt, a manager of specialty reinsurance pools in 1976. Leaving in 1983 to form his own management company (Management Facilities Corporation), he later formed an insurance company (Warren Life Insurance Company), serving as its chief executive officer and several managed care and underwriting operations, (Formost, Inc., Managed Care Options, Subrogation Recovery Services) primarily focused on reinsurance and services to reinsurance operations.

The management company provided turn-key underwriting, administration, marketing, data management, systems, claims and claims management, statement preparation (GAAP and Statutory), actuarial, rate development, reserve setting and reserve management, and managed care services for reinsurance portfolios. Mr. Wilkinson is credited with introducing direct managed care vendor relationships with reinsurers to provide maximum coverage within controlled spending budgets. Where desired vendor capability was not available, Mr. Wilkinson hired experienced managed care industry executives and created a specialty managed care company to service the reassurance industry. In addition to the traditional lines of reinsurance, Mr. Wilkinson was an early participant and developer of Health Maintenance reinsurance and Provider Excess insurance, ultimately forming separate companies to focus on these specialty markets. During his active career, Mr. Wilkinson has handled thousands of facultative and treaty reinsurance accounts covering a full spectrum of coverage options.

Starting in 1999 through 2003, Mr. Wilkinson sold the various entities to major publicly traded companies and focused on consulting, arbitration and expert witness work. A past speaker at Self Insurance Institute of America and Society of Actuaries meetings, Mr. Wilkinson is a graduate of Ohio University, attended the Stern School of New York University and holds a Chartered Life Underwriter designation. Mr. Wilkinson has participated in several panels as an arbitrator and umpire.

"Meet Us in Las Vegas."

May 4-6, 2005 is the date for the ARIAS•U.S. Spring Conference.

Mark your calendar and save the date.

You won't want to miss these three great days at The Venetian.

Second Circuit Rules that Reinsurer Must Follow Cedent's Post-Settlement Allocation

RONALD S. GASS*
The Gass Company, Inc.

In an important and long-awaited decision, the U.S. Court of Appeals for the Second Circuit ruled that the follow-the-settlements doctrine extended to a cedent's post-settlement allocation decisions regardless of whether an inquiry would reveal an inconsistency between that allocation and the cedent's pre-settlement assessments of risk as long as the allocation meets the typical follow-the-settlement requirements of good faith, reasonableness, and coverage within the applicable policies.

In this case, the cedent wrote excess insurance for Owens-Corning Fiberglass Corporation ("Owens-Corning") between 1974 and 1983 covering portions of the insured's 2nd, 3rd, 4th, and 5th excess layers (collectively ranging from $26 million to $251 million). The bulk of the facultative reinsurer's certificates reinsured the 2nd ($26 million to $76 million) layer and all provided that the "liability of the Reinsurer . . . shall follow that of the Company."

Facing imminent exhaustion of its products liability coverage in the wake of a flood of asbestos-related lawsuits, Owens-Corning sought an additional set of policy limits from its insurers by characterizing many of its asbestos-related claims as "non-products" claims. Prior to concluding an alternative dispute resolution proceeding against the cedent under the Wellington Agreement, the parties settled (including a policy buyback) for $335 million. During its settlement negotiations, the cedent had prepared an exposure analysis showing a range of potential Owens-Corning non-products exposure outcomes which would have pierced the 2nd and higher excess layers.

The federal district court ruled that the follow-the-fortunes doctrine (as it was referred to by the district court) prevented the reinsurer from contesting its cedent's post-settlement allocation of loss among reinsurers using the so-called "rising bathtub" approach, i.e., horizontal exhaustion. Because its total 2nd layer exposure for the 10-year coverage period was $345 million, the entire Owens-Corning loss settlement (minus the amount allocated for the policy buyback) of $332 million was allocated to that layer, a $49 million share of which was billed to the reinsurer.

On appeal to the Second Circuit, the reinsurer argued that the follow-the-settlements doctrine did not bind a reinsurer to anything other than the cedent's settlement decisions and not to a settlement allocation inconsistent with the cedent's own pre-settlement analysis. It also disputed the cedent's decision to allocate the entire settlement to the 2nd excess layer, when it clearly eliminated exposure to the upper layers as identified and quantified by the cedent's pre-settlement analysis.

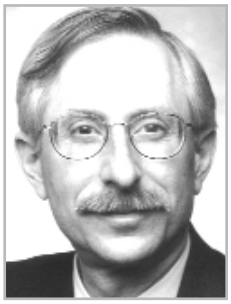
Upholding the cedent's allocation, the Second Circuit cited the "main rationale" for the follow-the-settlements doctrine: "[T]o foster the 'goals of maximum coverage and settlement' and to prevent courts, through 'de novo review of [the cedent's] decision-making process,' from undermining 'the foundation of the cedent-reinsurer relationship.'"

The court of appeals rejected the reinsurer's contention that the cedent's post-settlement allocation must match its pre-settlement analyses: "But it is precisely this kind of intrusive factual inquiry into the settlement process, and the accompanying litigation, that the deference prescribed by the follow-the-settlements doctrine is designed to prevent. Requiring post-settlement allocation to match pre-settlement analyses would permit a reinsurer, and require the courts, to intensely scrutinize the specific factual information informing settlement negotiations, and would undermine the certainty that the general application of the doctrine to settlement decisions creates."

CONTINUED ON PAGE 32

case notes corner

Case Notes Corner is a regular feature on significant court decisions related to arbitration.



Ronald S. Gass

The court of appeals rejected the reinsurer's contention that the cedent's post-settlement allocation must match its pre-settlement analyses:...

*Mr. Gass is an ARIAS•U.S. Umpire and an ARIAS•U.S. Certified Arbitrator. He may be reached via email at rgass@gassco.com or through his Web site at www.gassco.com.

The Second Circuit also rejected the reinsurer's argument that the amounts billed by the cedent were outside the terms of the parties' reinsurance contracts. This contention was based on the theory that, by deciding to settle with Owens-Corning, the cedent had considered potential loss exposure piercing the excess layers above the 2nd layer reinsured by the reinsurer. Therefore, the reinsurer should not be liable for that portion of the settlement paid to release the risk attributable to those upper layers. This argument, the court observed, "confuses risk of loss, and loss." As a contract of indemnity, the reinsurance covered only the loss actually incurred by the cedent, not risk of loss. Allocation of the entire $332 million non-product Owens-Corning settlement to the 2nd layer using the cedent's horizontal exhaustion allocation method did not violate the terms of its reinsurance contract and was within the definition of "loss" contemplated by the insurance contracts.

North River Insurance Co. v. ACE American Reinsurance Co., 361 F.3d 134 (2d Cir. 2004).

Third Circuit Rules that FAA Does Not Authorize Use of Pre-Hearing Non-Party Document discovery Subpeonas in Arbitrations

In a noteworthy non-reinsurance Federal Arbitration Act ("FAA") discovery ruling that may significantly curtail the use of pre-hearing non-party document subpoenas in arbitrations, the U.S. Court of Appeals for the Third Circuit held that the FAA does not authorize arbitration panels to issue such subpoenas. Instead, if a party wants to discover non-party documents, it must seek a panel subpoena requesting that the non-party representatives appear in person before the arbitrator(s) and bring the documents with them.

In this action for breach of a non-solicitation clause in an employee separation agreement, which included an arbitration clause, the employee's former employer requested and received subpoenas from an arbitration panel seeking documents to be produced prior to the hearing by two of the employee's subsequent employers. When both non-parties refused to comply, the former employer sought to enforce the subpoenas in federal district court pursuant to the FAA.

Reversing the district court's holding that the FAA authorized arbitration panels to issue subpoenas on non-parties for pre-hearing document production, the Third Circuit adopted a position similar to precedent established in the neighboring Fourth Circuit but contrary to the rule prevailing in the Eighth Circuit and several district courts.

Finding that the language of Section 7 of the FAA to be unambiguous, the Third Circuit observed that the power conferred on arbitrators to compel the production of documents by a non-party was strictly limited to the authority granted by the FAA, i.e., to "summon in writing any person to attend before [the arbitrators] or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case." The power to summon a non-party "to bring" items "with him," according to the court, "clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier." Hence, the panel's subpoena power is restricted "to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."

Concluding that such a literal reading of Section 7 actually furthers arbitration's goal of resolving disputes in a timely and cost-efficient manner, the Third Circuit suggested that its interpretation may "in the long run" discourage the issuance of large-scale subpoenas to non-parties given the time, money, and effort that subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. The court also rejected the Fourth Circuit's "special need" exception for the issuance of non-party document subpoenas (i.e., that there must be a showing of unusual circumstances or special need or hardship) because the court lacked any statutory authority to confer such a power.

Despite what some may perceive as inefficiencies in forcing non-parties to appear at an arbitration proceeding during which the documents are to be produced, the Third Circuit reasoned that "[t]his slight redistribution of bargaining power is unlikely to have any substantial effect on the efficiency of arbitration" and might in fact "facilitate efficiency by reducing overall discovery in arbitration." Convening and adjourning an arbitration panel is not an "insurmountable obstacle," according to the court, and the costs will be "slight" in comparison to amassing and transporting a huge volume of documents. In his concurring opinion, one member of the three-judge panel commented on the court's cost and efficiency rationale observing that non-party witnesses could be compelled to appear before a single arbitrator (as opposed to all three) and that the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.

In an aside, the Third Circuit found unpersuasive the non-parties' argument that the district court could not enforce subpoenas for company representatives to appear with documents at an arbitration proceeding if the requested documents were located outside of the 100-mile radius of the place in which the production or inspection was to be made. First, the court noted that the applicable Federal Rule of Civil Procedure did not imply that a witness subpoenaed to testify may not also be directed to bring documents that are located beyond the court's territorial limits. Second, the term "production" referred to the delivery of documents, not their retrieval. Thus, the district in which the "production" is to be made is not the one in which the documents are housed but the district in which the subpoenaed party is required to turn them over.

Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004). ▼

Save the Date!

ARIAS•U.S. Fall Conference and Annual Meeting

November 11-12, 2004

ARIAS U.S.

Do you know someone who is interested in learning more about ARIAS•U.S.?

If so, pass on this letter of invitation and membership application.

An Invitation...

The growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) gives testimony to the acceptance of the society since its incorporation. Through conferences, seminars and literature, and through its certification process, ARIAS•U.S. is realizing its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of the end of June 2004, ARIAS•U.S. was comprised of 371 individual members and 64 corporate memberships, totaling 677 individual members and designated corporate representatives, of which 185 have been certified as arbitrators.

The society offers its *Umpire Appointment Procedure*, based on a unique software program created specifically for ARIAS•U.S., that randomly generates the names of umpire candidates from a list of 54 ARIAS•U.S. certified arbitrators who have served on at least three completed arbitrations. The procedure is free to members and available at a nominal cost to non-members.

New for 2003 was the "Search Arbitrator" feature on the ARIAS•U.S. website, www.arias-us.org, that searches the detailed experience data of our certified arbitrators. The resulting list is linked to arbitrator profiles, with specifics of experience and current contact information.

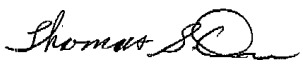
In recent years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York City, Puerto Rico, Palm Beach, and Bermuda. The Society has brought together many of the leading professionals in the field to support the educational and training objectives of ARIAS•U.S.

ARIAS•U.S. recently published Volume V of its *Directory and Certified Arbitrators Listing*. The society also publishes the *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the Quarterly review, special member rates for conferences, and access to certified arbitrator training are among the benefits of membership in ARIAS•U.S.

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the membership area of the website; an application form is at the end of this Directory and online. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at info@arias-us.org or 914-699-2020, ext. 116.

Join us, and become an active part of ARIAS•U.S., the industry's preeminent forum for the insurance and reinsurance arbitration process.

Sincerely,



Charles M. Foss
Chairman

Thomas S. Orr
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
35 BEECHWOOD AVENUE
MOUNT VERNON, NY 10553

Complete information about ARIAS•U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a current calendar of upcoming events, and online registration for meetings.

FAX: (914) 699-2025

(914) 699-2020, ext. 116

email: byankus@cinn.com

NAME & POSITION _____

COMPANY or FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ FAX _____

E-MAIL ADDRESS _____

Fees and Annual Dues: Effective 2/28/2003

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE:	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*:	$250	$750
FIRST-YEAR DUES AS OF APRIL 1:	$167	$500 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1:	$83	$250 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

* Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $150 per individual, per year. Names of designated corporate representatives must be submitted on corporation/organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
35 Beechwood Avenue, Mt. Vernon, NY 10553

Payment by credit card (fax or mail): Please charge my credit card:

☐ AmEx ☐ Visa ☐ MasterCard in the amount of $_____

Account no. _____ Exp. ____/____/____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

Online membership application is available with a credit card at www.arias-us.org.

ARIAS U.S. Board of Directors

Administration

ARIAS QUARTERLY U.S.
35 Beechwood Avenue
Mount Vernon, New York
10553