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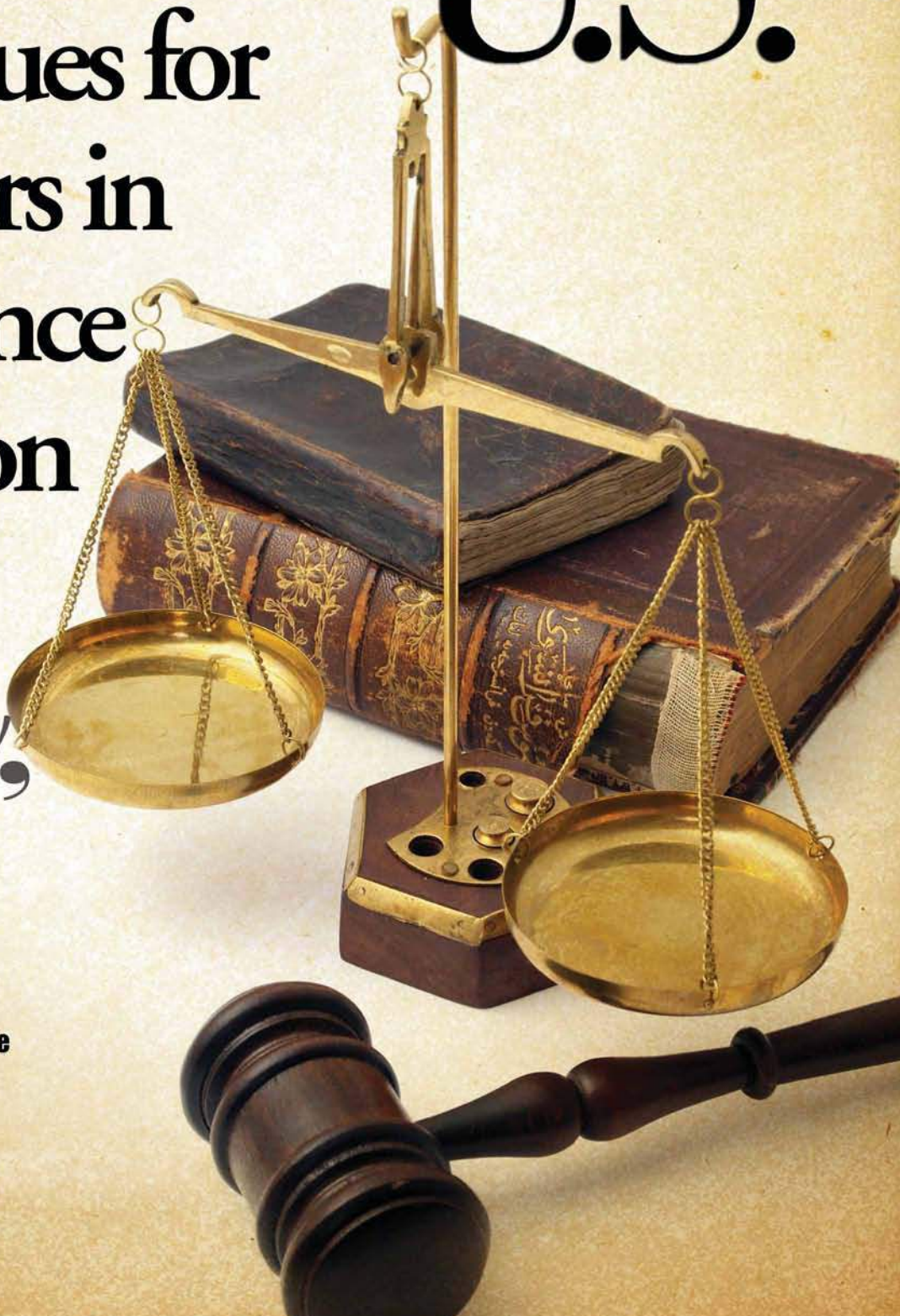
Ethics Issues for Arbitrators in Reinsurance Arbitration

"...act in good faith with integrity and fairness"



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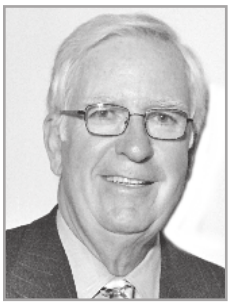

Ethics is the focus of the lead article and the cover of this issue. Promotion of ethical values has been a hallmark of the work of ARIAS-US since the founding of the organization. The Ethics Committee has been one of our most important entities. Our Code of Conduct includes the stipulation that arbitrators must observe high standards of ethical conduct. Deliberations at our meetings and business programs, as well as writings in our publications, frequently center on the perceived right or best thing to do in particular circumstances.

I suggest that, in a broad sense, the Society seeks to promote and uphold in our field of endeavor the ethical values that have existed in Western civilization since at least the time of the Greek culture in 300 BC. If I recall correctly from distant college days, Aristotle taught that the practice of ethical virtues was essential to the individual's attainment of the good life, i.e., fulfillment of one's potential, self respect, etc. Later philosophers and ethicists suggested that practice of ethical values is necessary for the good not only of the individual, but also society as a whole. In the case of business, ethics has been deemed essential to the smooth functioning of the business structure. We have glaring examples in recent times of how disregard of ethical virtues can lead to the dysfunction or even complete breakdown of business operations.

So too it is with dispute resolution. If those involved in the process fail to observe ethical standards, then the whole system just may not work. The continued viability of arbitration to resolve industry disputes depends in major part on arbitrators with industry experience exercising independent judgment according to their personal and professional integrity. A high standard of ethical conduct on the part of arbitrators is essential to properly serve the parties and the process.

Our lead article, *Ethics Issues for Arbitrators in Reinsurance Arbitrations*, by Nick Di Giovanni and Michael Knoerzer, is an interesting discussion of ethical standards that should be kept in mind by arbitrators, as well as certain conduct that can raise questions of propriety or even the possibility of an award being vacated. Considered also are obligations of attorneys confronted with perceived arbitrator misconduct. The article should be read by all persons involved in reinsurance arbitrations.

In *Electronic Discovery and Reinsurance Arbitration: An Update*, authors Rick H. Rosenblum and McLean Jordan provide an important review of the major differences between paper and electronically stored information, electronic discovery rules under Federal statutes, updates to the fourteen Sedona Principles, and the possible effect of discovery language common in reinsurance contracts. Included with the article is a sample litigation holding letter, which may be useful in informing persons in control of potentially discoverable information about the scope of their duties to preserve that information when litigation or arbitration is imminent or underway.

Daniel J. Neppl, in *Subpoena Power of a Panel*, considers the important question of whether, and to what extent, arbitrators can order prehearing discovery from non-parties. The author clearly sets out the different conclusions currently standing among the lower Federal courts on the question, and offers suggestions as to what future developments may be in store.

In *Case Notes Corner*, Ron Gass does his usual superb job of analyzing a recent judicial decision noteworthy to arbitrators and counsel. The decision reviewed deals with the functus officio doctrine and the finality of certain interim or partial awards.

Please let us hear from you as to what you like or do not like about the Quarterly and what we can do to improve the publication. I look forward to seeing you at the spring meeting.

T. Richard Kennedy

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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 trk@trichardkennedy.com .

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feature

Ethics Issues for Arbitrators in Reinsurance Arbitration

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Even party-appointed arbitrators...are bound to "act in good faith with integrity and fairness..."

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This article is based on a presentation at the ARIAS•U.S. Fall Conference, November 1, 2007.

A. Applicable Ethical Rules

Arbitrators worldwide have a duty to provide the parties a just resolution to their dispute. The principles of impartiality and independence are fundamental to the arbitration system. "Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties."[1]

Even party-appointed arbitrators, who often exhibit some predisposition toward the party that appointed them, are bound to "act in good faith with integrity and fairness" and "should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly."[2] If an arbitrator cannot meet that obligation, she must refuse to accept an appointment.[3]

Ethical Codes adapted by bar and arbitration associations provide ethical floors that arbitrators cannot breach. For example, arbitration organizations generally impose a duty of disclosure on potential arbitrators. Under the ethical rules of ARIAS-US, candidates for arbitrator must make a reasonable effort to disclose any financial or professional interests in the proceeding, as well as past "financial, business, professional, family or social" relationships that others could view as likely to affect their judgment.[4] The American Arbitration Association requires similar disclosure to be made directly to the association, who then communicates the information to the parties and, if appropriate, others involved.[5] The London Court of International Arbitration requires its arbitrators to furnish a written résumé of professional positions, both past and present, and declare that there are no other circumstances known that would give rise to doubts of their impartiality or independence.[6] This rule includes a continuing duty to disclose conflicts as they may arise during the arbitration.[7]

These obligations, either expressly or implicitly, require the arbitrator to disclose other appointments to serve as an arbitrator when that service is a type that could cast reasonable doubt on the arbitrator's impartiality. The JAMS rules of ethics provide that an arbitrator is "not preclude[d] . . . from serving as an Arbitrator or in another neutral capacity with a party, insurer, or counsel involved in the prior Arbitration, provided that appropriate disclosures are made about the prior Arbitration to the Parties to the new matter."[8]

But how do these disclosure rules affect a potential umpire's ability to serve as a neutral when she or he has previously served in a party-appointed capacity? In such a case, will any amount of disclosure and agreement absolve the bias caused by the arbitrator's prior interest? The answer to that question depends on two issues (1) whether the role of a party-appointed arbitrator is that of a neutral or an advocate?; and (2) what degree of bias will the rules or courts allow in subsequent arbitrations?

B. The Role of a Party-Appointed Arbitrator

Parties are, of course, entitled to agree that their appointed arbitrators will serve as neutrals, but such a structure is seen by some to violate the essence of party-appointed arbitrators: to have one's "side" be represented on the arbitral board.[9] Indeed, Because reinsurance arbitrations so widely embrace the tripartite arbitral board structure, "there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', at least in the sense that the third

arbitrator or a judge is."[10]

The degree of neutrality of party-appointed arbitrators certainly varies along a continuum among bar and arbitration organizations. Under the rules of several U.S. arbitration organizations, party-appointed arbitrators are presumed to be neutral. For example, the American Arbitration Association and American Bar Association's Joint Rules of Ethics imposed a presumption of neutrality in their 2004 revision. In its introductory note, the code reads:

> The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. . . . This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise.[11]

Similarly, the London Court of International Arbitration, mandates that all arbitrators operating under their ethical rules remain impartial and independent of the parties.[12] When the parties agree to nominate an arbitrator, the LCIA court will analyze their résumé and may refuse the appointment if they find the arbitrator is not suitable, independent, or impartial.[13]

Other governing rules permit the parties to waive such neutrality. For example, the Revised Uniform Arbitration Act views party-appointed arbitrators as neutrals by default, but allows agreement of the parties to dictate the relationship. The neutrality rules of RUAA are completely waivable, and no separate provision governs non-neutral arbitrators.[14] The parties may agree to appoint arbitrators in a non-neutral capacity, or may allow an individual with a direct interest in the outcome of the proceeding to serve in a neutral capacity.[15] The AAA rules for Commercial Arbitration specify that party-appointed arbitrators must meet the qualifications for impartiality and independence, unless the parties specifically agree that the arbitrators are not subject to those rules.

Notwithstanding these presumptions of neutrality espoused in the AAA, LCIA and RUA, the reinsurance industry in the U.S. has generally presumed that party appointed arbitration must be "disinterested" but need not be neutral or impartial.

C. Can They Ever Serve As Neutrals Again?

Given the acceptance in the reinsurance industry of non-neutrality and the continuum of neutrality among other arbitration institutions, once an arbitrator serves as a party-appointed arbitrator, is he or she precluded from serving in a neutral capacity thereafter? The answer to that question must necessarily be "no."

One of the great benefits of arbitration is that the panels generally consist of individuals with knowledge and expertise in the insurance or reinsurance industry. Arbitrators are typically in tune with normal business practices and usually can see the long-term consequences of a course of action more easily than a judge with limited reinsurance experience.[16] But, as the Seventh Circuit recently highlighted, "[t]he more expertise the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties."[17] Moreover, the limited pool of qualified arbitrators makes repeat nominations nearly inevitable.[18]

Yet many parties to arbitration will willingly trade a tabula-rasa of impartiality for the added benefits of an arbitrator with expertise in the area.[19] Arbitration rules often allow parties to make that tradeoff. For example, under JAMS rules, the comprehensive conflicts disclosures inform the parties of potential bias and predisposition of potential neutrals. If parties wish, they may waive the conflict and proceed with the arbitration.[20]

The AAA/ABA ethics rules note that an arbitrator is not necessarily prejudiced by knowledge of the parties, expertise in the business, or views on the issues to be decided. However, "an arbitrator must not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."[21] If the arbitrator possesses a conflict, it is not unethical to serve as an arbitrator if the parties have "consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts."[22]

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It is generally accepted that ARIAS arbitrators are, for the most part, a group of ethically minded persons who closely follow the ethics guidelines – as well as their own personal code of integrity and honesty – without the need for binding ethics rules.

Even with full disclosure and waiver by the parties, some conflicts are not readily sidestepped. The JAMS rules provide that "[i]f the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver."

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Even with full disclosure and waiver by the parties, some conflicts are not readily sidestepped. The JAMS rules provide that "[i]f the conflict of interest casts serious doubt on the integrity of the process, an Arbitrator should withdraw, notwithstanding receipt of a full waiver."[23] The IBA's rules state that past business relationships will act as a bar to acceptance of appointment if "they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment."[24]

Courts will also intercede to vacate awards based on corruption "evident partiality," or other narrow grounds outlined under 9 U.S.C. § 10. Evident partiality is more than just the appearance or risk of impartiality;[25] there must be evidence that is "powerfully suggestive of bias."[26]

For example, in *Borst v. Allstate Insurance Company*, the court held that "[e]vident partiality cannot be avoided simply by a full disclosure and a declaration of impartiality. In challenges to an arbitrator based on evident partiality where the disputed relationship is fully disclosed . . . courts must remove an arbitrator prior to the arbitration, or vacate an arbitration award . . . when a reasonable person would have serious doubts about the impartiality of the arbitrator."[27] In this case, the arbitrator was a member of the law firm that handled a great deal of legal work for the insurance company appearing in the arbitration. Although the arbitrator assured the other party that "whenever I serve as an arbitrator I base my decisions on the evidence," the court found this insufficient to overcome the strong appearance of partiality in the decision.[28]

Parties in reinsurance arbitrations often sacrifice the traditional notion of a disinterested arbitrator to obtain the benefits of having their claim adjudicated by individuals with expertise in the industry. As a result, arbitrators often have predispositions on the issues arising in the cases. Further, the limited pool of qualified arbitrators leads to overlap in appointments, which can result in an individual serving as a party-appointed arbitrator in one matter, and as umpire in front of the same parties in another matter. Arbitration organizations generally treat this phenomenon with a degree of tolerance, but will prohibit appointments when the conflict appears too severe. Ultimately, courts may be called upon to intercede if the arbitration award exhibits "evident partiality."

Thy Brother's Keeper: What Obligations Do Attorneys Have with Regard to Arbitrator Misconduct?

ARIAS has invested substantial time and thought into the question of arbitrator ethics. ARIAS arbitrators are called to act under ethics guidelines. As the introduction to the ARIAS Guidelines make plain, the Guidelines are merely aspirational, they are not binding rules imposing a duty upon arbitrators:

> Nothing in these Guidelines is intended to or should be deemed to establish new or additional grounds for judicial review of arbitration appointments or arbitration awards nor establish any substantive legal duty on the part of arbitrators.

It is generally accepted that ARIAS arbitrators are, for the most part, a group of ethically minded persons who closely follow the ethics guidelines - as well as their own personal code of integrity and honesty - without the need for binding ethics rules. It is for this reason that many conclude that guidelines are sufficient.

Some - especially those who have experienced what they consider to be arbitrator misconduct - believe that guidelines are suitable for some, but not all, arbitrators and that only ethics rules can be counted upon to consistently ensure ethical conduct by arbitrators. It is for this reason that a number of practitioners, and parties, have called upon ARIAS to consider formalizing the ethics guidelines into a body of rules.

Certainly, "guideline" is a much more comforting word than is "rule". Anyone who has seen the *Pirates of the Caribbean* knows that even pirates are set at ease when the Pirates' Code is described as "bein' more like guidelines than actual rules."[29]

The debate continues and the guidelines remain aspirational. But are there no binding rules that govern arbitrator ethics? A review of attorney ethics rules suggests that there might be.

The Role of Attorneys' Code of Ethics

In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. . .

.

The following passage, taken from New York Ethical Consideration 7-20, reflects a general responsibility of attorneys to see that adjudicative processes are fair and efficient. As an Ethical Consideration, and not a Disciplinary Rule, it is not formally adopted by the New York courts. It, like the ARIAS guidelines, is merely "aspirational".

Depending upon the jurisdiction in which the attorney practices, however, there do exist rules binding upon attorneys operating within the arbitration process. These rules can be fairly read to indirectly impact, though not directly govern, arbitrations and arbitrators. These rules exist within the various codes of attorney conduct enforced across the various States. Many states closely follow a form of the ABA Model Rules of Professional Conduct (New York and California notably do not). While not purporting to govern the conduct of arbitrators, the Model Rules do govern the conduct and responsibility of attorneys in arbitration.

ABA Model - Rule 3.3: Candor toward the Tribunal

ABA Model Rule 3.3, entitled "Candor toward the Tribunal" discusses an attorney's obligations towards a "Tribunal."[30] As you might expect, an attorney has an obligation not to misrepresent facts to the Tribunal, or to allow his client to misrepresent facts to the Tribunal. Rule 3.3(a). However, Rule 3.3(b) enforces upon the attorney an obligation to remedy fraudulent conduct committed by any other "person":

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) is both narrow and broad. It is narrow in the respect that it imposes upon attorneys an obligation only with regard to "criminal or fraudulent conduct." Pursuant to Model Rule 1.0 (d), "fraudulent" "denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Thus, negligence, or even negligent misrepresentation or negligent non-disclosure, would likely not trigger an obligation under Rule 3.3(b).

However, where there is criminal or fraudulent conduct, the attorney has a broad obligation to act in the respect that if fraudulent conduct will be, is, or has been committed by any person (not just the lawyer or the lawyer's client), in a manner "related to the proceeding" (not just a fraudulent misrepresentation to the tribunal itself).

The word "person" seems plainly broad enough to include the arbitrators themselves. The clause "related to the proceeding" seems plainly broad enough to include not only witness testimony, but all aspects of the proceeding, including the arbitrator selection process and arbitral disclosures. Can 3.3(b) fairly be read to impose upon an attorney a burden to take remedial measures where the person committing the fraudulent conduct is one of the arbitrators? The answer to this question seems to be "yes." After all, the attorney's obligation is not only to his clients, but to the adjudicatory process itself. (ABA Model Rule 3.3, comment 12).

Consider a hypothetical situation in which a lawyer knows (perhaps from an arbitrator's disclosure in a prior matter) that his party-appointed arbitrator has failed to disclose a disqualifying conflict. Does the lawyer have an obligation as a matter of professional ethics to take reasonable remedial measures? If the lawyer concludes there is a fraudulent non-disclosure combined with a purpose to deceive, the answer is "yes." The same obligation would be triggered in respect of the other party's arbitrator or the umpire.

Or consider yet another hypothetical wherein Party A has made known its view that it seeks an umpire who has not worked for either Party A or Party B in the past. By agreement of the parties, an umpire who has not worked for either party is chosen. Before the first arbitration goes to hearing, Party B (using a different attorney) retains the umpire as its party-appointed arbitrator in a second arbitration. The attorney for Party B in the first arbitration suggests that, in light of Party A and Party B's mutual agreement in the first arbitration, the umpire should disclose this second retention. The umpire declines. Is the attorney for Party B under an obligation to take "reasonable remedial measures"? It would seem likely.

A. What Is a "Reasonable Remedial Measure"?

A strict interpretation of the above-described rule would not make attorneys very popular if they were forced to tattle on their clients or the arbitrators at the first whiff of misconduct. Fortunately, the rule does not require this reaction, at least not right away. According to Comment 10 to the rule, it is contemplated that the attorney will first "remonstrate" with the offending person. If that is unsuccessful, the attorney must take further remedial action. This action might include the attorneys' withdrawal from the matter (if the attorney is caught between exposing a client confidence and honoring the rule) or advising the tribunal of the attorney's concern. It is for the tribunal itself to then determine what should be done. Comment 10 to Rule 3.3.

B. How Long Does the Obligation Endure?

An attorney's obligation to take reasonable remedial measures is not indefinite. According to Comment 13:

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> the conclusion of the proceeding is a reasonable definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

This rule balances the goal of having fair hearings with the goal of seeing matters finally concluded after a certain period of time. For arbitrations, it would seem reasonable that an attorney would be bound under Rule 3.3 through any award confirmation proceedings and until appeals are exhausted or the time for appeal has passed.

C. Specific Rules Concerning Ex Parte Communications

Of special application to arbitrations is Rule 3.5, which is titled "Impartiality and Decorum of the Tribunal." Rule 3.5 provides in part:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order . . .

In addition to this specific rule against unauthorized ex parte communication, Rule 3.4, entitled "Fairness to Opposing Party and Counsel" provides in part:

> A lawyer shall not:
>
> * * *
>
> (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists . . .

Everyone who has spent any time at ARIAS meetings knows about Panel rulings permitting and disallowing, ex parte communications. Depending upon the rules in force in the jurisdiction you are in, unauthorized ex parte communication may not only be a violation of the Panel's ruling, but a violation of professional ethics. Such a violation would require "reasonable remedial measures," possibly including advising the Panel.

D. An Additional Application of Ethics Rules to Arbitrators

In addition to the indirect impact that attorneys ethics rules may have upon arbitrators, there can be a direct impact as well. It bears noting that many ARIAS arbitrators are themselves attorneys. Most States' ethics rules apply not only to attorneys acting as attorneys, but to attorneys acting in any capacity whatsoever. For example, New York's Disciplinary Rule 1-102 broadly prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation" as well as "conduct that is prejudicial to the administration of justice." DR 1-102 (22 NYCRR §1200.31). DR 1-102 is widely perceived to "govern every aspect of a lawyer's life, whether or not the lawyer is acting as a lawyer and whether or not the misconduct arises out of the lawyer's practice. It covers a lawyer's professional, business, social, and private life." Simon's New York Code of Professional Responsibility at 22 (Thompson 2005).

If an arbitrator is a New York lawyer, then this applies to you. The standard falls far below criminal conduct or fraud, but includes matters as general as "dishonesty" and "deceit" or any conduct that is "prejudicial to the administration of justice." The bar is low.

Does a Hold Harmless Agreement Trump the Ethical Violations of an Arbitrator?

A. General Arbitral Immunity

Unlike professionals in the medical, financial, or legal field, who bear the risk of liability for missteps in their professional practice, arbitrators enjoy broad immunity from suits arising from the discharge of their arbitral duties.[31] This immunity stems from the principle that the arbitrator role is "functionally comparable" to that of a judge.[32] Like judicial immunity, the immunity we afford arbitrators "protects the finality of judgments by discouraging inappropriate collateral attacks and also protects judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants."[33]

While immunity exists, it certainly does so along a continuum - ranging from absolute immunity to none whatsoever. The Revised Uniform Arbitration Act ("RUAA") states that immunity protects an arbitrator "to the same extent as a judge of a court" of the state in which the action is brought. Similarly, the International Chamber of Commerce ("ICC") Rules of Arbitration provide extensive arbitrator immunity, stating that "[n]either the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration."[34]

Other bodies afford immunity but with exceptions. Under the rules of the London Court of International Arbitration ("LCIA"), arbitrators are immune from suit unless their actions constitute "conscious and deliberate wrongdoing."[35] This language of immunity is echoed by the American Arbitration Association ("AAA")'s International Rules.[36] U.S. courts have also interpreted immunity for arbitrators to extend over acts occurring within the scope of the arbitral process"[37] including those performed by arbitration organizations as well as the arbitrators themselves.[38]

However, certain civil law jurisdictions, such as France, do not treat arbitrators as a quasi-judicial body. Instead, arbitrators can be held liable for any acts or omissions in violation of the arbitration agreement.[39]

B. Intersection with Hold Harmless

With such widespread immunity afforded to arbitrators in the U.S. and internationally, what is the purpose of signing a hold harmless agreement?

One major reason that hold harmless agreements are requested by arbitrators is that they tend to include a provision requiring the parties to cover the arbitrator's litigation fees for defending a lawsuit. ARIAS•US recommends the use of these agreements because arbitration panels generally consist of individuals in the field acting in their personal capacity. To encourage their continued participation, "[t]hese individuals should ... receive assurances that their personal assets are not at risk."[40]

The Northern District of Illinois recently described a hold harmless agreement as if "codif[ying] (or perhaps, more accurately, solidif[ying]) the immunity accorded to arbitrators as a quasi-judicial body."[41] The New York Court of Appeals has held that hold harmless agreements "enforce a necessary implied obligation."[42] The power of these agreements, then, is often coextensive with the level of immunity afforded to an arbitrator.

C. Does This Extend to Ethical Violations?

Courts are exceedingly reluctant to abrogate arbitrator immunity, even in cases where the arbitrator shows bias, incompetence, or misconduct.

For example, in *Olson v. NASD*, the plaintiff brought suit against his arbitrator, the arbitration association, and his employer when he discovered that one of the arbitrators who presided over his age discrimination suit had an ongoing business relationship with his employer. The court dismissed his claim on the basis of arbitral immunity, even though the appointment of the biased arbitrator violated the arbitration association's own rules for panel selection.[43]

Likewise, in *Austern v. Chicago Board Options Exchange, Inc.*, the court dismissed the plaintiffs' suit to vacate a judgment that had been rendered against them *ex parte*. The plaintiffs, residents of Israel, alleged that they had not received notice of the arbitration hearing. The plaintiffs also alleged that the panel was improperly selected (comprised wholly of individuals involved in the securities industry when the arbitration rules required a majority to not be involved with securities).[44] The court found that the defects in notice and panel selection were "sufficiently associated with the adjudicative phase of the arbitration to justify immunity."[45] Further, "[r]educing the [arbitration organization's] immunity based on the arbitral deficiencies present here would merely serve to discourage its sponsorship of future arbitrations — a policy that is strongly encouraged by the Federal Arbitration Act.[46]

Courts will also extend arbitrator immunity to actions occurring before and sometimes after the arbitration. For example, in a recent 11th Circuit case, the Plaintiff had arbitrated a claim in front of the National Association of Securities Dealers ("NASD") arbitrators and lost. He later contacted the NASD to retrieve a document he had presented during the hearing, and was alerted that an unidentified person had absconded with the exhibits from his hearing. After the hearing, the exhibits and audiotapes had been moved to the front desk of the hotel where the hearing had taken place. Someone purporting to be a representative of NASD picked the boxes up, but NASD could not locate them, nor did any of its employees admit to picking the items up. Deciding the issue of arbitral immunity in the first instance, the Eleventh Circuit stated that arbitral immunity extends to actions related to the decision-making process. Although the mishandling of evidence occurred after the award had been rendered, the court found that the plaintiff's claim constituted "little more than a veiled attack on the decision rendered against him" and was thus subject to arbitral immunity.[47]

The hold harmless agreement does not provide carte blanche for illegal or coercive conduct. U.S. courts have subjected arbitrators to criminal liability for fraud or corruption.[48] Courts have treated arbitrator nonfeasance as removed from the arbitration process and thus not covered by immunity. In *Morgan Phillips v. JAMS/Endispute, LLC*, the court found that the arbitrator's withdrawal and refusal to render an award, allegedly in order to coerce a settlement, was inconsistent with his quasi-judicial role as an arbitrator and not protected by to immunity.[49] Similarly, the Fifth Circuit found that an arbitrator of contract disputes lost his claim to immunity, because in failing to make timely decisions, "he [lost] his resemblance to a judge."[50]

With this broad immunity extending to acts of misconduct, bias, and corruption, it is rare case that a hold harmless agreement is put to the test. When courts look beyond the

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Everyone who has spent any time at ARIAS meetings knows about Panel rulings permitting and disallowing, ex parte communications. Depending upon the rules in force in the jurisdiction you are in, unauthorized ex parte communication may not only be a violation of the Panel's ruling, but a violation of professional ethics.

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issue of arbitral immunity to such contract provisions, they tend to honor the terms of the party's agreement. For example, in *Jlm Marketing v. Bloomer*, the court dismissed the plaintiff's claims for malfeasance and negligence on the basis of both arbitral and contractual immunity[51] On the latter issue, the court noted that the parties had agreed to conduct the arbitration under the AAA's rules. Under the AAA, arbitrators and the AAA are fully immune from suit for acts and omissions connected to the arbitration. Because "'[t]he American Arbitration Rules ... are not secondary interpretive aides that supplement [the court's] reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself,'" the court dismissed the suit on the basis of contractual immunity.[52]

D. How Do You Spell Relief?

Individuals who receive improper awards will find their relief in a vacated judgment instead of a suit for damages.[53] Section Ten of the Federal Arbitration Act provides for vacancy and rehearing of judgments that are procured by corruption, fraud, or undue means, subject to arbitrator bias or corruption, or whose outcome is otherwise prejudiced by the misconduct of arbitrators.[54]

RUAA imposes similar grounds vacating judgment under state law.[55] RUAA additionally holds parties who bring suit responsible for litigation costs and attorney's fees, should the arbitrator or arbitration organization be found immune or protected from testifying.[56]

As for the unethical arbitrators, their punishment lies in discharge or disciplinary actions of the organization under whose rules they operate.▼

1 *See* International Bar Association Rules of Ethics for International Arbitrators, Rule 3.1, *available at* http://ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf.

2 *See* ARIAS•US Guidelines for Arbitrator Conduct, Cannon IV(1), *available at* http://www.arias-us.org/index.cfm?a=26.

3 *See, e.g.*, AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *available at* www.finra.org.

4 ARIAS•US Guidelines for Arbitrator Conduct, Cannon IV(1), *available at* http://www.arias-us.org/index.cfm?a=26.

5 *See* American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, R-16, *available at* http://www.adr.org/sp.asp?id=22440#R13.

6 London Court of International Arbitration, Rules, Article 5.3, *available at* http://www.lcia-arbitration.com/.

7 *Id.*

8 Judical Arbitration and Mediation Services ("JAMS") Arbitrators Ethics Guidelines, Article V(D) *available at* http://www.jamsadr.com/arbitration/ethics.asp.

9 *See* id.

10 *See* Astoria Medical Group v. Health Ins. Plan of Greater New York, 11 N.Y.2d 128, 134 (N.Y. 1962).

11 *See* AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Note on Neutrality, available at www.finra.org.

12 London Court of International Arbitration, Rules, *available at* http://www.lcia-arbitration.com/.

13 *Id.*, Article 7.1.

14 *See* The Revised Uniform Arbitration Act § 4(A); 11.

15 *See id*. section 11, cmt. 1.

16 *See, e.g.*, Sphere Drake Ins. Co. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002).

17 ***Id.***

18 *See* In re Arbitration Between Dow Corning Corp v. Safety Nat. Casualty Co., 355 F.3d 742, 750 (8th Cir. 2003).

19 *See, e.g.*, Sphere Drake Ins. Co., 307 F.3d at 620.

20 The structure of nomination for third party neutrals adds a separate anti-bias element, in that the party-appointed arbitrators must work together to decide on a mutually-agreeable candidate. In theory, this structure prevents either side of the arbitration from obtaining an undue influence over the panel as a whole. However, this process is only as good as the quality of disclosures made by the arbitrators, and the party-appointed arbitrators' ability to reach agreement. On the second issue, many arbitration agreements specify that the scientific process of narrowing the decision to two candidates, then "drawing lots" be employed to absolve any impasse.

21 AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Comment to Cannon I, *available at* www.finra.org.

22 *Id*. Cannon I.

23 Judical Arbitration and Mediation Services ("JAMS") Arbitrators Ethics Guidelines, Article V(D) *available at* http://www.jamsadr.com/arbitration/ethics.asp.

24 *See* International Bar Association Rules of Ethics for International Arbitrators, Rule 3.4, *available at* http://ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf.

25 *See, e.g.*, Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617 (7th Cir. 2002).

26 Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989)

27 2006 WI 70 (Wis. 2006).

28 *See id*.

29 And no, this is not a sly reference to arbitrators being like pirates. Pirates are motivated by money and are frequently at sea. They have nothing in common with arbitrators.

30 Pursuant to ABA Rule 1.0 (m), "tribunal" is defined to include arbitrators.

31 See *Peter B. Rutledge*, Toward a Contractual Approach for Arbitral Immunity, 39 GA. L. REV. 151, 152-53 (2004).

32 See *The Revised Uniform Arbitration Act § 14, cmt 1;* Corey v. New York Stock Exch., *691 F.2d 1205, 1209* (6th Cir. 1982).

33 Austern v. Chicago Bd. of Option Exchange, Inc., *898 F.2d 882, 885-86 (2d Cir. 1990) (internal quotations omitted).*

34 *International Chamber Of Commerce Rules of Arbitration, art. 34,* available at *http://www.iccwbo.org/court/english/arbitration/rules.asp*.

35 See *The London Court of International Arbitration, Arbitration Rules*, available at *http://www.lcia-arbitration.com*.

36 See *American Arbitration Association-International Dispute Resolution Procedure, Section 35,* available at *http://www.adr.org/sp.asp?id=28144#Exclusion*.

37 See *The Revised Uniform Arbitration At § 14, cmt. 1.*

38 See Olson v. NASD, *85 F.3d 381 (8th Cir. 1996);* Corey, *691 F.2d at 1209.*

39 See *Rutledge*, supra *note 1, at 204*.

40 See *ARIAS•US , PRACTICAL GUIDE, Ch. 3.7, cmt. a*, available at *www.arias-us.org/index.cfm?a=40*.

41 See, e.g., Pac. Employers Ins. Co. v. Moglia, *365 B.R. 863, *9 (N.D. Il. 2007).*

42 Indemnity Ins. Co. of America v. Mandell, *817 N.Y.S. 2d 223, 224 (N.Y. 2006).*

43 See *85 F.3d 381, 382-83 (8th Cir. 1996).*

44 Austern v. Chicago Bd. Options Exchange, Inc., *898 F.2d 882, 885 (2d Cir. 1990).*

45 Id. *at 886.*

46 Id.

47 Pfannestiel v. Merrill Lynch, Pierce, Fenner & Smith, *No. 04-1274, 2007 U.S. App. LEXIS 3700, *7-10 (11th Cir. Feb. 20, 2007).*

48 See, e.g., L&H Airco, Inc. v. Rapistan Corp., *446 N.W.2d 372, 378 (Minn. 1989).*

49 See *140 Cal. App. 4th 795, 803 (Cal. Ct. App. 2006).*

50 Ernst, Inc. v. Manhattan Construction Co., *551 F.2d 1026 (5th Cir. 1977).*

51 *2005 Conn. Super. LEXIS at *11-13.*

52 Id. (*quoting* C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., *532 U.S. 411, 419 n.1 (1991)).*

53 See *9 USC § 10 (2007).*

54 Id. *§ 10(a).*

55 *The Revised Uniform Arbitration Act § 23(a).*

56 Id. *§ 14(e).*

news and notices

Justice Alito is Keynote Speaker at Spring Conference

The Honorable **Samuel A. Alito, Jr**., Associate Justice of the United States Supreme Court, will give the keynote address to the 2008 ARIAS Spring Conference at Amelia Island on May 7. Justice Alito will speak in mid-afternoon on the first day of the three-day event.

Complete details of the conference are in the announcement brochure on the home page of the ARIAS website at www.arias-us.org .

ARIAS Makes Special Arrangements for Ground Transportation in Florida

While taxis would normally be available at the airport, the Players Championship golf tournament is in Ponte Vedra Beach, near Jacksonville, during our conference and is expected to draw up to 50,000 spectators. Taxis and car services will be stressed to handle the demand. To avoid having that event interfere with ours, we have made advance arrangements with Dana's Limousine Service to handle transporting our attendees in both directions **on the main travel days**.

Based on the flight information you provide, Dana's will have cars, vans, or motor coaches meeting the flights and taking you directly to the hotel at 60% of the cost of individual taxis. **There is a form at the back of the announcement brochure that must be faxed with a signature to make the reservation**. The charge will go to your hotel bill.

For service on other days, Dana's will take reservations on the phone. Be sure to check the brochure, so that you understand the details of each alternative. All reservations must be made by April 29, one week before arrival. To ensure availability, earlier reservations are recommended.

ARIAS Spring Conference Ready to Go

Co-Chairs **Elaine Caprio Brady** (Liberty Mutual), **Michael Knoerzer** (Clyde & Co.) and **Matthew Allen** (Eversheds) have been working since early December to define the content and line up the faculty for this year's Spring Conference. The announcement brochure with full agenda, speakers and panelists, and registration information was sent to all members and is on the website home page.

The brochure also contains information about transportation, activities, and restaurants at the hotel and in the surrounding area.

Of course, golf and tennis tournaments are again on the schedule. **Jim Stinson** (Sidley Austin) will be handling this year's golf tournament, as Paul Walther is on the disabled list (disabled by a tight schedule in the weeks before the event); **Eric Kobrick** (AIG) will again put together the tennis action. Sign-up forms have been sent to all members and may be accessed through the website.

Ritz-Carlton and Early Registration Deadlines Are April 11

Time is running out to reserve a room and register for the May 7-9 Spring Conference. The early registration deadline is April 11; the final deadline is April 25. The Ritz-Carlton Amelia Island reservation deadline is final; any remaining rooms will be released to general inventory at market rates after April 11.

The ARIAS group rates for the Ritz-Carlton are $275 for Coastline View rooms and $325 for Deluxe Coastline View rooms (high floor). All rooms have balconies. To receive these rates, you must indicate the group code ARIARIA for the Coastline View room or ARIARIO for the Deluxe. Reservations can be made through the hotel's online reservation system, which links from the ARIAS Calendar page for the 2008 Spring Conference (it is too long for you to key in).

If you prefer to phone, the reservation number is **1-800-241-3333**. To receive the ARIAS group rates, be sure to mention that you are with ARIAS or indicate the group code.

The Coastal Deluxe Rooms are limited (50 out of the 400 in the peak night room block), so they are on a first-come, first-reserved basis. In both price categories, rooms are available for several days before and after the conference at the group rate on the same basis.

The hotel's main number is 904-277-1100.

Board Certifies Six New Arbitrators; Ernst Added to Umpire List

At its meeting in New York on **January 17,** the Board of Directors added **Charles S. Ernst** to the ARIAS Umpire List, bringing the total to 90.

At the same meeting, the Board approved certification of six new arbitrators, bringing the total to 330. The following members were certified; their respective sponsors are indicated in parentheses.

- **Spiro K. Bantis** (James Phair, John Diaconis, Donald DeCarlo)
- **Ellen K. Burrows** (Richard Shusterman, Thomas Allen, Daryn Rush)
- **Harry P. Cohen** (David Thirkill, Mark Megaw, Jonathan Rosen)
- **Thomas P. Stillman** (Ian Hunter, Paul Dassenko, James Stinson)
- **Brian E. Williams** (Patrick O'Brien, Peter Chaffetz, Linda Dakin Grimm)
- **Lawrence Zelle** (Eugene Wollan, Paul Dassenko, Daniel Schmidt, IV)

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Board Approves Two New Mediators

Also at its meeting on **January 17,** the Board of Directors approved two applicants as ARIAS•U.S. Qualified Mediators. They were **John M. Kwaak** and **Andrew S. Walsh**.

The Qualified Mediator Program was established in 2006 to provide a means for ARIAS•U.S. Certified Arbitrators with mediation training to be easily contacted for service in mediation of disputes. The Qualified Mediator Program section of the website includes a full explanation of how recognition may be obtained, along with links to the contact information of those who have been approved.

Member Services Committee Launches Mentoring Program

In mid-December, ARIAS•U.S. announced its new Mentoring Program, which was developed by the Member Services Committee. The program is designed to give New Arbitrators (ARIAS members who have not yet served on at least one panel from inception through award as either an umpire or a party-appointed arbitrator) the ability to seek advice and assistance directly from experienced ARIAS•U.S. Certified Arbitrators on issues relating to arbitration procedure, case management, ethics and practice management and development.

The program is not designed, nor shall it be used, to provide substantive legal advice or to recommend rulings in ongoing arbitrations. Rather, it is designed to help new arbitrators navigate their way through what may be an unfamiliar process of setting up and managing a new arbitration practice or managing an arbitration proceeding.

New arbitrators seeking assistance under the program may contact ARIAS by email at **mentor@arias-us.org**. The message should include name, general subject matter of the request, and time sensitivity of the request.

The Committee has contacted prospective mentors and has developed a list of those who are ready to assist. Mentors will be assigned on a rotating basis, depending on their work load and availability. Once ARIAS staff has identified an available mentor, the new arbitrator will be put in touch with that mentor. All communication between them will be confidential.

The Committee will track the degree to which the Program has been helpful and will modify it as needed.

Website Indices Give Access to Ten Years of ARIAS Quarterlies

The indices for searching through back issues of the Quarterly on **www.arias-us.org** are updated after the publication of each issue. All issues of the Society's journal for the past ten years can be searched for articles using several different approaches.

The Search by Issue index allows you to scan back through the issues to see the names of articles contained in each one. *Search by Title* lists all article titles alphabetically, *Search by Author* lists author names alphabetically and *Search by Keyword* gives you a list of all articles that address subjects related to that word.

In every index, the name of the issue in which the article appeared is linked to a PDF of that issue.

If you have not looked at this feature of the website, you should. It is an easy way to access this valuable archive of relevant literature. Just click on the **ARIAS•U.S. Quarterly** button in the left side navigation to reveal the indices.

Dues Payments

Members are reminded that 2008 dues are due. If you are not sure whether you have paid, please email Christina Claudio at **claudio@cinn.com** to find out.

March Intensive Workshop Returned to Tarrytown

The Intensive Arbitrator Training Workshop, which was in Marina del Rey, California last September, returned to Tarrytown House Estate and Conference Center, its most often-used venue, on March 10-11. A full complement of 27 arbitrator students interacted with thirteen attorneys in the three hearing rooms.

The law firms **Bates & Carey LLP, Crowell & Moring LLP, and Foley & Lardner LLP** provided the attorneys to argue various aspects of the dispute in three 75-minute mock arbitrations sessions. Experienced arbitrators **Linda Martin Barber**, **Ron Gass**, and **Dick White** provided instruction before and after the mock sessions. They were joined by Board members **David Robb**, **George Cavell**, and **Mary Kay Vyskocil** in giving guidance and critiques as the mock sessions proceeded.

Robert F. Hall

Robert F. Hall, an arbitration veteran and longtime ARIAS member, passed away due to a heart attack on January 22 at his home in Bluffton, South Carolina. In the words of John Cole, who was serving on a panel with him, "Bob was very active in arbitration, a very well respected former claim executive and professional, and a fine gentleman."

feature

Electronic Discovery and Reinsurance Arbitration: An Update

Rick H. Rosenblum
McLean Jordan

I. Introduction

"[T]he rules of discovery must change as society changes, technology increases, and the virtual 'distance' between business and individuals who interact is shrinking ..."[1] With over ninety percent of all information created today originating in electronic formats[2], production and discovery rules must evolve to accommodate the advances in information creation, storage, and sharing.

Reinsurance arbitrators are not immune from the challenges presented by new and demanding issues developing from the boom in electronic information. In some ways, reinsurance arbitrators face particularly vexing electronic discovery issues, as discovery standards and guidelines within the realm of reinsurance are vague, if they exist at all . While the U.S. federal courts developed an initial set of general rules relating to e-discovery with the institution of the December 1, 2006, amendments to the Federal Rules of Civil Procedure, arbitrators are frequently free to eschew those mandates. Rather, reinsurance arbitration panel members (as well as parties arguing for a particular discovery result) may turn to a variety of resources to inform their discretion when determining a discovery protocol or a discovery dispute in a given matter.

This paper, which builds upon an article published in the *ARIAS•U.S. Quarterly* in 2006 by Peter R. Chaffetz and Andreas A. Frischknecht entitled *Electronic Discovery in Arbitration*,[3] will discuss the major differences between paper and electronically stored information, and e-discovery rules under the Federal Arbitration Act and the Federal Rules of Civil Procedure. In addition, we will present updates to the fourteen Sedona Principles, reference discovery language common in reinsurance treaties and contracts, and conclude with an example litigation holding letter, which may prove useful in communicating with those who may control potentially discoverable information about the scope of their duties to preserve that information when litigation or arbitration is imminent or has been initiated. Additionally, our appendices provide the revised Sedona Principles, a helpful chart cross referencing e-discovery topics with the Federal Rules of Civil Procedure and the Sedona Principles, and a model litigation hold letter.

II. How Electronic Document Production is Different

In deciding what discovery standards to employ and how to implement a discovery protocol in a given reinsurance dispute, it is helpful to evaluate some of the key differences between paper production and e-discovery. The Sedona Conference Working Group on Electronic Document Retention & Production ("Sedona Conference"), known for its fourteen Sedona Principles[4], created a list of six of these differences.[5]

First, the volume of electronically stored information available for e-discovery is far greater than traditional paper documents.[6] A single large entity can store millions of e-mails and electronic files each day.[7]

Second, paper documents are more easily disposed of than electronically stored information and files.[8] Computer users who "delete" files normally have not actually "destroyed" them; they have been tagged as out of use and may or may not be written over at a later time.[9] Electronic files may persist long after a user deletes his or her own file.

Third, data stored electronically may change form automatically as part of the storage process.[10] Routine manipulation of an electronic file, such as moving it from one

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Rick H. Rosenblum

McLean Jordan

In some ways, reinsurance arbitrators face particularly vexing electronic discovery issues

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This article is based on a presentation at the ARIAS•U.S. Fall Conference, November 1, 2007.

The December 1, 2006 Federal Rules of Civil Procedure amendments moved electronically stored information onto "equal footing" with traditional paper discovery rules.

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folder to another, can also change "metadata" within files.[11] This metadata, the fourth noted difference between paper and electronic information storage, is "hidden" information about file characteristics such as date of creation, revision history, and authorship.[12] Metadata's relevance in reinsurance arbitration proceedings may vary drastically. While metadata may provide crucial information in some claims, in other cases it may provide little material evidentiary value.[13]

Fifth, electronic information may be useless independent of its environmental backdrop.[14] Often to understand electronic information, one needs to know the context and format of the material.[15] Data storage systems also evolve, making "legacy" data stored under older systems difficult to recover.[16]

Finally, electronic information may be deposited in many locations, such as hard drives, network servers, and back-up tapes.[17] However, software allows for quicker and more sophisticated file searching than could be done by individual persons.[18]

These six distinctions show some of the factors reinsurance arbitrators should evaluate when choosing how to proceed with e-discovery issues. These difference also bring into sharp focus the economics of discovery, as a party tasked with gathering electronically stored information could have an expensive task ahead of itself. The parties will certainly argue over, and present evidence about, expense associated with responding to requests for electronic discovery, thus testing the panel to cobble together an arrangement that protects the parties abilities to present their respective cases, protect confidential or privileged information, and avoid unnecessary or undue expense.

This paper will next discuss discovery and e-discovery guidelines available for reinsurance arbitrators.

III. Discovery Rules Under the Federal Arbitration Act

The Federal Arbitration Act ("FAA"), enacted in 1925[19], leaves open many questions about the scope of discovery in arbitration. The language of the FAA addresses discovery procedures only briefly and vaguely. Some may argue the lack of explicit discovery rules under the FAA is itself an expression of Congressional intent. To the extent the FAA does refer to discovery, that mention is found in Section 7, which provides that "[t]he arbitrators selected . . . may summon in writing any person to attend before them 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."[20]

While § 7 clearly provides arbitrators the ability to summon non-parties and produce documents at hearings, courts are split as to whether § 7 allows arbitrators to order parties to produce documents *before* hearings.[21] The Sixth and Eighth Circuits allow arbitrators to issue pre-hearing discovery subpoenas on non-parties, while the Third and Fourth Circuits interpret § 7 as preventing pre-hearing discovery subpoenas on non-parties.[22]

Although the guidance provided by the FAA is minimal, recent amendments to the Federal Rules of Civil Procedure address e-discovery issues directly.

IV. E-Discovery Under the Federal Rules of Civil Procedure

The December 1, 2006 Federal Rules of Civil Procedure amendments moved electronically stored information onto "equal footing" with traditional paper discovery rules.[23] Rule 16(b)(5) provides that scheduling orders should include provisions for e-discovery and disclosure, in an attempt to remind courts to address e-discovery matters early in litigation.[24] Similarly, Rule 26(f) requires parties to discuss e-discovery issues at least twenty-one days before the scheduling conference.[25] Comments to Rule 26(f) also suggest that parties familiarize themselves with information systems involved in production and develop a discovery plan accordingly, paying particular attention to data preservation issues.[26]

The Rules also allow parties to test or sample electronically stored information.[27] The Rules permit parties to request different forms of production for different document types, acknowledging that producing all electronically stored information in one format could prove unnecessarily costly.[28] However, if the form of production is not specifically indicated, the responding party must produce the information in a

"reasonably usable" manner or in the form it is usually maintained.[29]

E-discovery is narrowed under Rule 26(b)(2)(B), which limits production of materials "not reasonably accessible because of undue burden or cost."[30] However, the court may nevertheless order discovery if good cause is shown.[31] The amendments allow the court to balance the costs and burdens associated with some e-discovery against the potential benefits of discovery.[32]

Finally, while sanctions may be imposed for e-discovery violations, Rule 37(f) prohibits sanctioning of parties who fail to provide electronically stored information as a result of routine, good-faith system operations.[33] This Rule protects destruction of evidence that occurs without culpable conduct.[34] Of course, there is no specific analog under the FAA or elsewhere to Rule 37's authorization of discovery sanctions, and there are no requirements that parties certify they have complied with and/or responded to discovery requests in good faith. Still, a panel has inherent authority to enforce its orders.

Thus, the amendments to the Federal Rules of Civil Procedure target e-discovery issues directly. But even with these recent changes, many e-discovery procedural questions remain unanswered. For the past four years, courts have used the Sedona Principles to fill in some of the gaps.

V. Sedona Principles

The original Sedona Principles were developed in early 2003 by a group of attorneys and practitioners familiar with e-discovery matters who were concerned that a system developed for paper discovery would not translate to e-discovery.[35] The fourteen Sedona Principles were "'intended to complement the Federal Rules of Civil Procedure, which provide[d] only broad standards, by establishing guidelines specifically tailored to address the unique challenges posed by electronic document production.'"[36] "The rules do not answer many of the most vexing questions judges and litigants face. They do not govern a litigant's conduct before suit is filed, nor do they provide substantive rules of law in such important areas as the duty of preservation or the waiver of attorney-client privilege."[37] The Sedona Principles provide guidance to attorneys facing e-discovery issues, but maintain enough flexibility to adjust to exceptional circumstances.[38]

Since Mr. Chaffetz's and Mr. Frischknecht's article was published in the *ARIAS•U.S. Quarterly*, the Sedona Conference has revised the original fourteen Sedona Principles. The Second Edition Sedona Principles are provided in Appendix A. New language found in the Second Edition Sedona Principles reflects both the changes in the Federal Rules of Civil Procedure and the evolution of technology itself.[39] Rules twelve (metadata) and fourteen (sanctions) have been substantially revised.

In choosing e-discovery guidelines for reinsurance arbitrations, it is helpful to understand the relationship between the Sedona Principles and the Federal Rules of Civil Procedure. The original Sedona Principles influenced both academic and judicial responses to e-discovery issues. As one court noted in 2005, " . . . neither the federal rules nor case law provides sufficient guidance on the production of metadata, [so] the Court next turns to materials issued by the Sedona Conference . . . The Court finds two of the Sedona Principles . . . particularly helpful in determining whether Defendant was justified in scrubbing the metadata from the electronic spreadsheets."[40]

In turn, after the Federal Rules of Civil Procedure e-discovery amendments, the Second Edition Sedona Principles were shaped by the language of the new rules.[41] Today, even with the amended rules, courts reference the Sedona Principles as a "leading resource on dealing with electronic discovery."[42]

Because of this interplay between the Sedona Principles and the rules, reinsurance arbitrators should consider both guidelines when formulating a response to e-discovery issues.

VI. Discovery Language Common in Reinsurance Treaties and Contracts

An "access to records" clause is one of the most significant contract rights a reinsurer retains through a reinsurance agreement.[43] The clause typically reads, "The Reinsurer or its designated representatives shall have access at any reasonable time to all records of the Company which pertain in any way to this reinsurance."[44]

One commentator observed that access to records clauses may have originated from the context of treaty reinsurance: "'The cedant's obligation to provide information to the reinsurer . . . moved from being an active one, as it is under facultative reinsurance, to a passive one. Instead of the active obligation to provide information when each individual risk was accepted or each claim was made, the cedant had a passive obligation to allow its reinsurer to inspect the books and records.'"[45] This commentator notes, however, that despite the difference between treaty and facultative reinsurance contracts, the access to records provisions typically are identical.[46]

The standard clause allows the reinsurer to review whether the ceding business is complying with the terms and conditions of the reinsurance agreement.[47] Arbitration panels may include more detailed provisions in procedural guidelines. For example, the panel may require parties to cooperate in document exchange.[48] The panel may also order disclosure of relevant documents, call for depositions, obtain witness lists, and enforce efficiency through limited document production, and witness and expert testimony.[49] Indeed, panels may consider imposing a "good faith" requirement, akin to the requirements under the Federal Rules, upon counsel and the parties in their respective duties to cooperate in answering discovery.

The discovery guidelines in ARIAS's *Practical Guide to Reinsurance Arbitration Procedure* allow panels to exercise "discretion and strike the

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Determining when the duty to preserve attaches, the scope of document preservation, and continued compliance requires communication between attorneys, information systems personnel, and organization leaders.

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appropriate balance . . . between enabling the parties to obtain relevant discovery . . . and protecting the streamlined, cost-effective intent of the arbitration process."[50] The panel may take sensible action in handling e-discovery requests or objections. Comments to the guidelines reinforce the flexibility built into the panel's discovery oversight.[51] Comment B explains that some cases may require substantial panel involvement, while in others such participation may be unnecessary or even inappropriate.[52] Comment E notes the panel's "considerable discretion to limit the amount and type of discovery available to the parties."[53]

Echoing the language of Federal Rule of Civil Procedure 26(b)(2)(B), these guidelines state the panel's objective should be that each party receive "a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense, or delay on the other part(ies)."[54]

VII. Holding Letters

The task of obtaining or retaining electronically stored information for litigation purposes is difficult. Determining when the duty to preserve attaches, the scope of document preservation, and continued compliance requires communication between attorneys, information systems personnel, and organization leaders. Crafting a litigation hold letter to inform key players within an entity of the duty to preserve documents and electronic data also presents challenges and has been called "among the most difficult, and dangerous, aspects of e-discovery."[55]

Litigants are required by law to preserve evidence.[56] This duty originates both from Federal Rule of Civil Procedure 37 and court's power to control its proceedings.[57] Determining when the duty attaches requires identifying the point at which a person or organization reasonably anticipates it will be involved in litigation.[58] While the duty applies to all employees of organizations involved in litigation, it is especially important for senior management and attorneys.[59] But not all documents need be preserved, even once the duty has attached. As Judge Scheindlin wrote in *Zubulake v. UBS*, "preserv[ing] every shred of paper, every e-mail or electronic document, and every backup tape . . . would cripple large corporations . . . that are almost always involved in litigation."[60] Instead, a litigant is under a duty "to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request."[61]

A litigation hold should be disseminated each time the duty to preserve arises.[62] It is especially important that key players in the organization receive the letter, and that it is provided to information systems personnel who can develop a plan to retain all protected data.[63] Some elements the letter should include are: a clear statement of purpose, a description of arbitration and issues involved, guidelines for data to be maintained, the importance of complying with the litigation hold including penalties for violations, and contact information for those overseeing the hold.[64] Personnel changes, data storage and maintenance changes, and complacency may reduce the effectiveness of the litigation hold letter over time.[65] Therefore, it is important to remind organizations of their duty to preserve documents on a regular basis.[66] A sample litigation hold letter is included in Appendix C.

Sanctions for failure to comply with the duty to preserve data and documents can be severe. In *Coleman Holdings, Inc. v. Morgan Stanley & Co.*, an unfavorable discovery violation finding eventually led to a $1.57 billion judgment against Morgan Stanley.[67] Other repercussions include default judgments, adverse inferences, and exclusion of evidence.[68] If arbitrators follow the trend in the court system, it seems likely that deliberate discovery violations could be punished severely.

VIII. Conclusion

While electronic data storage has become more routine in the operation of virtually every business, guidelines for managing e-discovery in arbitration are still developing. Reinsurance arbitrators will best be served by using a variety of resources to keep abreast of the movement to adapt a paper based system to the e-world in order to ensure that all parties to an arbitration receive a fair hearing in an economically viable and feasible forum.

Appendix A - Sedona Principles: Second Edition[69]

1. Electronically stored information is potentially discoverable under Fed. R. Civ. P. 34 or its state equivalents. Organizations must properly preserve electronically stored information that can be reasonably anticipated to be relevant to litigation.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.
3. Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party's rights and responsibilities.
4. Discovery requests for electronically stored information should be as clear as possible, while responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.
6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were adequate.
8. The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.
9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.
10. A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information.
11. A responding party may satisfy its good faith obligation to preserve and produce relevant electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.
12. Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.
13. Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared or shifted to the requesting party.
14. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

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Appendix B[70]

Topic of Discussion	Sedona Principle	Federal Rule(s)	Sedona Comments
Discovery Scope	Principles 1, 2, 5, 6, 8, 9, 11	Rule 34(a)	Comments 1a, 2a, 2b, 2c, 3a, 5a, 6c, 8a, 9a, 9b, 11a, 11b
Preservation Obligations	Principles 1, 3, 5, 6, 8, 9, 12	N.A.	Comments 1c, 2c, 3a, 3d, 5a, 5b, 5c, 5d, 5e, 5g, 5h, 5i, 6a, 6b, 6d, 6e, 6f, 8c, 9b, 12a, 12b, 14a
Form of Preservation	Principle 12	N.A.	Comments 12a, 12b
Metadata	Principle 12	N.A.	Comments 6f, 12a, 12b, 12c, 12d
Form of Production	Principles 4, 12	Rule 34(b)	Comments 3b, 4a, 12a, 12b, 12d
Meet and Confer	Principle 3	Rule 26(f)	Comments 1d, 2e, 3a, 3b, 3c, 3d, 4a, 4c, 5a, 7a, 9a, 10a, 12c
Initial Disclosure	Principle 3	Rule 26(a)(1)	Comment 3d
Preservation Orders	Principle 5	N.A.	Comment 5f
Discovery Requests	Principle 4	Rule 34(a)	Comments 3b, 4a, 4b
Tiered Production	Principle 8	Rule 26(b)(2)(B)	Comments 2c, 8a, 8b, 9a
Cost-Shifting	Principle 13	Rule 26(b)(2)(B)	Comments 2c, 13a, 13b, 13c
Proportionality Limits	Principle 2	Rule 26(b)(2)(C) (was Rule 26(b)(2)(b)	Comments 2a, 2b, 13b
ID of Unsearched Sources	Principle 4	Rule 26(b)(2)(B)	Comments 2c, 3a, 4b, 8b
Inadvertent Privilege Production	Principle 10	Rule 26(b)(2)(5)	Comments 10a, 10d
Spoliation Sanctions	Principle 14	N.A.	Comments 14a, 14b, 14c, 14d, 14e, 14f
Safe Harbor	Principle 14	Rule 37(f)	Comments 14b, 14d, 14f
Nonparty Discovery	Principle 13	Rule 45	Comments 7b, 13c

Appendix C - Sample Holding Letter

_____

_____

_____

Re: [Case Name] - Data Preservation

Dear _____:

This firm represents CLIENT in connection with the above referenced matter recently filed against PLAINTIFF for _____.

CLIENT is in the process of initiating discovery against PLAINTIFF and will soon be forwarding subpoenas to each of you requiring the production of documents and other materials that may lead to admission of relevant evidence in the above matter. Accordingly, please be advised that CLIENT believes that you may be in possession of paper documents and electronically stored information that will be an important and irreplaceable source of discovery and/or evidence during the course of the above proceeding. As such, federal law and the rules of discovery require the preservation of all documents and electronic information on each of your individual computers as well as ORGANIZATION'S computer system. This includes, but is not limited to, e-mail and other electronic communication, internet usage, files and network access information.

As you may be aware, the laws and rules prohibiting the spoliation of evidence apply to electronically stored evidence in the same manner that they apply to other forms of evidence, such as paper documents. Due to its format, electronic information is easily deleted, modified or corrupted. Accordingly we request that you take all reasonable steps necessary to preserve this information until the final resolution of this matter. These steps must include, but are not limited to:

* discontinuing all data destruction;
* preserving any relevant hardware unless an exact replica of the file (i.e., a mirror image) is made;
* preserving passwords, decryption procedures (and accompanying software), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software; and
* maintaining all other pertinent information and tools needed to access, review and reconstruct all requested or potentially relevant electronic data.

Electronic Files. Each of you has an obligation to preserve all digital or analog electronic files in electronic format, regardless of whether hard copies of the information exist. This includes preserving:

* active data (i.e., data immediately and easily accessible on your systems today);
* archived data (i.e., data residing on backup tapes or other storage media); and
* deleted data (i.e., data that has been deleted from a computer hard drive but is recoverable through computer forensic techniques.

Emails. You also have an obligation to preserve all potentially relevant internal and external emails that have been sent or received. Email must be preserved in electronic format, regardless of whether hard copies of the information exist.

Internet Activity. You also have an obligation to preserve all records of internet and web browser generated files in electronic format, regardless of whether hard copies of the information exist. This includes internet and web browser generated history files, caches and "cookies" files stored on backup media.

Activity Logs. You further must preserve all hard copies of electronic logs documenting computer use by you.

Supporting Information. You must preserve all supporting information relating to the requested electronic data and/or media including: codebooks, keys, data dictionaries, diagrams, handbooks, or other supporting documents that aid in reading or interpreting database, media, email, hardware, software, or activity log information.

Offline Data Storage. Offline data storage includes, but is not limited to, backup and archival media, floppy diskettes, magnetic, magneto-optical, and/or optical tapes and cartridges, DVDs, CD ROMs, and other removable media. You should immediately suspend all activity that may result in the destruction or modification of any of the data stored on any offline media. This includes overwriting, recycling or erasing all or part of the media. This request includes, but is not limited to, media used to store data from personal computers, laptops, mainframe computers and servers.

Physical Documents. The rules of discovery, as you may know, also require the preservation of physical documents and related evidence and forbids tampering with or destroying such evidence, whether located at ORGANIZATION or elsewhere.

Each of the foregoing requests and obligations applies equally to ORGANIZATION as it is undoubtedly in possession of documents, data and other information that will be relevant to this case. I thank you in advance for your cooperation and request that this correspondence be forwarded to the appropriate technical personnel within ORGANIZATION so that they may take any steps necessary to preserve physical or electronic data.

To the extent that you have any questions regarding your obligations in connection with the foregoing, please feel free to contact me.

Sincerely,

CONTINUED ON PAGE 18

Litigants are required by law to preserve evidence. This duty originates both from Federal Rule of Civil Procedure 37 and court's power to control its proceedings. Determining when the duty attaches requires identifying the point at which a person or organization reasonably anticipates it will be involved in litigation.

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1 *See* Dean W. Sattler, Comment, *Is There a Compelling Interest to Compel? Examining Pre-Hearing Subpoenas Under the Federal Arbitration Act*, 27 PACE L. REV. 117, 138 (2006).
2 *See* SEDONA CONF. WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROT., THE SEDONA PRINCIPLES: SECOND EDITION (June 2007) [hereinafter SEDONA PRINCIPLES: SECOND EDITION] , *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (discussing best practices recommendations and principles for addressing electronic document production).
3 *See* Peter R. Chaffetz & Andreas A. Frischknecht, *Electronic Discovery in Arbitration, ARIAS•U.S. Q., 4th Quarter 2006,* at 2.
4 *See* Part V and Appendix A, infra.
5 *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 2-5.
6 *See id*. at 2.
7 *See id*.
8 *See id*. at 3.
9 *See id*.
10 *See id*.
11 *See id*.
12 *See id*. at 3-4; see also Chaffetz, supra note 3, at 2.
13 *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 4.
14 *See id*.
15 *See id*.
16 *See id*.
17 *See id*. at 5.
18 *See id*.
19 *See* Lowell Pearson, *The Case for Non-Party Discovery Under the Federal Arbitration Act,* DISP. RESOL. J., Aug.-Oct. 2004, at 46.
20 Federal Arbitration Act, 9 U.S.C. § 7 (2000).
21 *See* Pearson, *supra* note 19, at 48.
22 *See* Sattler, *supra* note 1, at 119-20 (citing Am. Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir. 1999); Sec. Life Ins. Co. of Am. v. Duncanson & Holt, 228 F.3d 865, 870 (8th Cir. 2000); Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); COMCAST Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999)).
23 *See* FED. R. CIV. PRO. 34 & advisory committee's note ¶1 (2006).
24 *See* FED. R. CIV. PRO. 16(B)(5) & advisory committee's note ¶1.
25 *See* FED. R. CIV. PRO. 26(f).
26 *See* FED. R. CIV. PRO. 26 advisory committee's notes ¶¶ 20, 22
27 *See* FED. R. CIV. PRO. 34(a) & advisory committee's note ¶6.
28 *See* FED. R. CIV. PRO. 34(b) & advisory committee's note ¶6.
29 *See* FED. R. CIV. PRO. 34(b)(ii) & advisory committee's note ¶13.
30 FED. R. CIV. PRO. 26(b)(2)(B).
31 *See id*.
32 *See* FED. R. CIV. PRO. 26(2)(C) & advisory committee's notes ¶¶ 3-9.
33 *See* FED. R. CIV. PRO. 37(f).
34 *See* FED. R. CIV. PRO. 37(f) advisory committee's note ¶1.
35 *See* SEDONA PRINCIPLES: SECOND EDITION, supra note 2, at iv.
36 Chaffetz, *supra* note 3, at 8 (quoting SEDONA CONF. WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROT., THE SEDONA PRINCIPLES (July 2005), *available at* http://www.sedonaconference.org/dltForm?did=7_05TSP.pdf).
37 *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at iv.
38 *See id*. at v.
39 *See id*. at i.
40 Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 650 (D. Kan. 2005).
41 *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at 6.
42 In re Seroquel Prods. Liab. Litig., 2007 WL 2412946, at *6 (M.D. Fla. 2007).
43 *See* Michele L. Jacobson et al., *The Access to Records and Claims Cooperation Clauses: Their Impact on Discovery in Arbitration Proceedings*, ARIAS•U.S. Q., 3rd Quarter 2006, at 2.
44 *See id*. (quoting Brokers and Reinsurance Markets Association, Contract Wording, http://www.brma.org/contracts/index.htm).
45 *See* Kathryn P. Broderick, *Reinsurer's Access to Cedent's Records*, FED'N OF INS. & CORP. COUNS. Q., Fall 1997, *available at* http://findarticles.com/p/articles/mi_qa3811/is_199710/ai_n8766939/pg_1 (quoting BARLOW LYDE & GILBERT, REINSURANCE PRACTICE AND THE LAW § 18.2 (1993 & 1996 Supp.)).
46 *See id*.
47 *See* Jacobson, *supra* note 43, at 2.
48 *See* Insurance and Reinsurance Dispute Resolution Task Force, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (Apr. 2004), http://www.arbitrationtaskforce.org/images/Procedures2004_final.pdf.
49 *See id.* §§ 11.1-11.5.
50 *See* ARIAS•US , PRACTICAL GUIDE TO REINSURANCE ARBITRATION PROCEDURE § 4.1 cmt. E (rev. ed. 2004), *available at* http://www.arias-us.org/index.cfm?a=41.
51 *See id*. § 4.1 cmts.
52 *See id.* § 4.1 cmt. B.
53 *See id*. § 4.1 cmt. E.
54 *See id.*
55 MICHAEL E. LACKEY, *Litigation Holds: Practical Considerations*, in LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 279, 281 (Practising Law Institute, 2006).
56 *See* Alan M. Anderson, *Issuing and Managing Litigation-Hold Notices*, BENCH & B. MINN., Aug. 2007, at 20.
57 *See id*. at 20 n.1.
58 *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (quoting Fujitsu Ltd. v. Federal Express Corp., 247 F.2d 423, 436 (2d Cir. 1999))).
59 *See* Anderson, *supra* note 56, at 20.
60 *Zubulake*, 220 F.R.D. at 217.
61 Id.
62 *See* Anderson, *supra* note 56, at 21.
63 *See id*. at 22.
64 *See id*. at 22-23.
65 *See* LACKEY, *supra* note 55, at 286-87.
66 *See* Anderson, *supra* note 56, at 23.
67 *See* Chaffetz, *supra* note 3, at 3 (citing Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., No. CA-03-5045 AI, 2005 WL 674885 (Fla. Cir. Ct. App. Mar. 23, 2005)).
68 *See* LACKEY, supra note 55, at 287.
69 *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at ii.
70 This chart was created by the Sedona Conference Working Group on Electronic Document Retention & Production. *See* SEDONA PRINCIPLES: SECOND EDITION, *supra* note 2, at iii.

members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email, that have come in during the last quarter, so that members can adjust their address directories and PDAs.

Do not forget to notify us when your address changes. Also, **if we missed your change below, please let us know** at info@arias-us.org, so that it can be included in the next Quarterly.

Recent Moves and Announcements

Mike Knoerzer has joined Clyde & Co US LLP and is now located in The Chrysler Building, 405 Lexington Avenue, 11th Floor, New York, NY 10174, phone 212-710-3940, fax 212-710 3950, cell 347-602 0811, email michael.knoerzer@clydeco.us .

Steve Kennedy has joined Mike there, same address, and can be contacted at phone 212-710-3935, fax 212-710-3950, email stephen.kennedy@clydeco.us .

Ellen Farrell has gone across town to Crowell & Moring LLP and can be reached at 1001 Pennsylvania Ave., N.W. , Washington, DC 20004, phone 202-624-2952, fax 202-628-5116, email EFarrell@crowell.com .

Robert Bauer has moved from Connecticut to the Far West. His new contact information is PO Box 1474, Dewey, AZ 86327, phone 928-632-8084, cell 203-952-9177, no email address, yet.

Peter Craft is now with Coles, Baldwin & Kaiser, LLC, 1261 Post Road, Suite 300, Fairfield, CT 06824, phone 203-319-0800 ext. 317, fax 203-319-1210, email PCraft@cbklaw.net .

Andy Rothseid has a new location, 916 Black Rock Road, Gladwyne, PA 19035, phone 267-253-3529, fax 610-642-4245, email arothseid@comcast.net .

Ed Phoebus has retired from Shand Morahan and set up shop in Tennessee. His contact information is 140 Cormorant Drive, Vonore, TN 37885, phone 423-664-2779 or 423-884-2070, fax 423-884-2779, cell 630-888-4546, e-mail phoebus@tds.net .

David Knoll has relocated to Thompson Coe's Austin, Texas office. He can be contacted at Thompson Coe Cousins & Irons, LLP, 701 Brazos, 1500 Austin Centre, Austin, Texas 78701, phone 512-703-5090, fax 512-708-8777, cell 832-816-8307, email unchanged at dknoll@thompsoncoe.com .

Two of Butler Rubin's designated representatives have moved...upward. **Julie R. Aldort** and **Mark A. Schwartz** were named partners of the firm as of January 1. Their contact information remains the same.

Marv Cashion has moved on from arbitrations (and ARIAS) to be V.P., Head of Legal & Secretary of Latin Node, Inc., 9800 NW 41st Street, Suite 200, Miami, FL 33136, phone 786-364-2083, mcashion@latinode.com .

Bill Kinney's new address is 252 Eatoncrest Drive, Suite B, Eatontown, NJ 07724. All other contact information remains the same.

John Diaconis has joined Bleakley Platt & Schmidt, LLP. His new contact information is Bleakley, etc., One North Lexington Avenue, White Plains, New York 10601, phone 914-287-6133, fax 914-683-6956, cell 914-523-8085, email jdiaconis@bpslaw.com

Joe Gervasi's new address is 9 Mackenzie Lane North, Denville, NJ 07834, phone 973-784-3454. Email is unchanged.

Anthony Lanzone has made a permanent move from New York to South Carolina. He can be found at 3018 High Hammock Road, Johns Island, SC 29455, phone and fax 843-768-4860. Email is unchanged.

After 23 years, **Tom Stillman** announced his retirement as Senior Vice President and Deputy General Counsel with CNA Insurance Companies to become an arbitrator. Tom can be contacted at tomstillman@aol.com, phone 312 961-4897. Other details are in his website profile and in Recently Certified Arbitrators on page 30.

Email/Website Changes

Caleb Fowler has opened a website at www.calebfowlerarbitrator.com .

feature

Subpoena Power of a Panel

Daniel J. Neppl

Daniel J. Neppl

Federal courts have reached different conclusions on whether, and to what extent, arbitrators can order pre-hearing discovery from non-parties.

Daniel J. Neppl is a partner in the Chicago office of Sidley Austin LLP, where he arbitrates and litigates reinsurance disputes on behalf of ceding companies and reinsurers.

This article is based on a presentation at the ARIAS•U.S. Fall Conference, November 1, 2007.

Parties to reinsurance arbitrations often seek pre-hearing discovery from non-parties, such as reinsurance intermediaries or pool managers. Although parties may contract as to the scope of discovery among themselves, they cannot, in the absence of statutory authority, contract to impose arbitration obligations on non-parties. The principal statutory authority for an arbitration panel's discovery powers over non-parties is the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq*.

The relevant section of the FAA, however, speaks to the arbitral authority to subpoena a non-party to appear "before them" and produce documents. It does not explicitly address an arbitration panel's authority to compel *pre-hearing* discovery from non-parties. Federal courts have reached different conclusions on whether, and to what extent, arbitrators can order pre-hearing discovery from non-parties. This article will consider current case law on this issue and offer some suggestions as to what may be in store for future developments on this important topic.[1]

FAA § 7

The starting point for arbitrators' authority to compel pre-hearing discovery from non-parties is § 7 of the FAA. Section 7 addresses the subpoena powers of arbitrators. Section 7 provides:

> *The arbitrators* selected either as prescribed in this title or otherwise, or a majority of them, *may summon in writing any person to attend before them 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 fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (emphasis added).

Federal courts of appeals that have considered the application of § 7 to pre-hearing discovery from non-parties have reached differing conclusions on the issue.[2] These cases typically take one of the following four views:

(i) § 7 authorizes pre-hearing discovery only upon the showing of a "special need";

(ii) § 7 authorizes arbitrators to compel pre-hearing production of documents from non-parties;

(iii) § 7 does not authorize arbitrators to compel pre-hearing production of documents from non-parties; and

(iv) regardless of whether § 7 does or does not authorize arbitrators to compel pre-hearing discovery from non-parties, arbitrators may compel pre-merits hearing testimony and document production from non-parties if the non-parties personally appear before at least one of the arbitrators.

This article discusses these different views and what they suggest for pre-hearing discovery from non-parties in arbitration.

View No. 1: Pre-Hearing Discovery Allowed Only Upon a Showing of "Special Need"

One view of whether § 7 authorizes arbitrators to compel pre-hearing discovery from non-parties is that arbitrators may do so only upon the showing of a "special need." In *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269 (4th Cir. 1999), the U.S. Court of Appeals for the Fourth Circuit found no implicit power in the FAA for an arbitrator to subpoena pre-hearing discovery from non-parties absent "special need." The arbitral dispute in *COMSAT* arose out of a construction contract. The recipient of a federal grant (Associated Universities, Incorporated) contracted with a construction company (COMSAT Corporation) to build a state-of-the-art telescope. 190 F.3d at 272. Following post-contract changes to the construction specifications, the construction company sought $29 million for costs it allegedly incurred to comply with the additional specifications.

After a dispute arose regarding the construction company's claim for additional monies, the matter was referred to arbitration pursuant to the construction contract. At the construction company's request, the arbitrator issued three subpoenas to the federal agency that had issued the federal grant (the National Science Foundation). The subpoenas sought (a) the pre-hearing production of documents and (b) the depositions of two employees of the federal agency involved in the telescope project. 190 F.3d at 272. The federal agency declined to comply with the arbitrator's subpoenas, and the construction company subsequently filed a subpoena-enforcement action in federal district court in Virginia.

The district court enforced the subpoenas, but the federal appeals court did not. Reversing the district court's order enforcing the subpoenas, the Fourth Circuit[3] interpreted § 7 and determined:

> Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them"; that is, to compel testimony by non-parties at the arbitration hearing.

190 F.3d at 275. Addressing the construction company's argument that the efficiencies of arbitration would be undermined if the subpoenas were not enforced due to the complex nature of the parties' dispute, the Fourth Circuit stated that parties may seek pre-hearing discovery from non-parties only "upon a showing of special need or hardship." 190 F.3d at 276 (citing *Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980)). The Fourth Circuit did not define "special need," but observed that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." 190 F.3d at 276. The Fourth Circuit inferred that the construction company could not make this requisite showing because the construction company had acknowledged that "many if not all of the documents it sought were obtainable" from its adversary or through a Freedom of Information Act request to the federal agency. 190 F.3d at 276.

View No. 2: Pre-Hearing Discovery from Non-Parties Allowed

Another view of whether § 7 authorizes arbitrators to compel pre-hearing discovery from non-parties is that arbitrators may compel pre-hearing production of documents. In *In re Security Life Ins. Co.*, 228 F.3d 865 (8th Cir. 2000), the U.S. Court of Appeals for the Eighth Circuit found that the FAA implicitly authorizes arbitrators to compel pre-hearing discovery from non-parties.[4] The dispute in *Security Life* arose out of a reinsurance contract. A ceding company (Security Life Insurance Company) purchased reinsurance protection for a new group life insurance product, which was managed by a reinsurance pool manager (Duncanson & Holt, Inc.). 228 F.3d at 867. After the ceding company made payments under reinsured policies, it billed its reinsurers.

The reinsurers did not pay their shares of the loss presentation, and the ceding company demanded arbitration against the reinsurance pool manager. 228 F.3d at 868. At the ceding company's request, the arbitrators issued a subpoena to one of the reinsurers (Transamerica Occidental Life Insurance Company) for the pre-hearing production of documents. The reinsurer objected, contending that it was not a party to the arbitration and that the FAA conferred no authority on the arbitrators to issue the subpoena. 228 F.3d at 868.

The ceding company filed a subpoena-enforcement action in federal district court in Minnesota. Construing § 7, the district court enforced the subpoena, determining that the FAA authorized the arbitrators to issue a subpoena for the pre-hearing production of documents to the non-party reinsurer. On appeal, the Eighth Circuit[5] affirmed.

Examining the text of § 7, the Eighth Circuit acknowledged that § 7 does not "explicitly authorize the arbitration panel to require the production of documents for inspection by a party." 228 F.3d at 870. Even though the FAA does not explicitly authorize arbitrators to compel pre-hearing production of

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A pre-hearing subpoena to a non-party to produce documents is often seen by the courts as less burdensome than a subpoena to appear for deposition, especially if the non-party witness will need to appear a second time at the final hearing on the merits.

documents from non-parties, the Eighth Circuit enforced the subpoena. Relying on one of the policies favoring arbitration, the Eighth Circuit stated:

> Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.

228 F.3d at 870-871.

View No. 3: Pre-Hearing Discovery from Non-Parties Not Allowed

A third view of whether § 7 authorizes arbitrators to compel pre-hearing discovery from non-parties is that § 7 does not confer authority on arbitrators to compel pre-hearing discovery from non-parties. In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), the U.S. Court of Appeals for the Third Circuit held that § 7 does not authorize arbitrators to compel pre-hearing production of documents from non-parties. The dispute in *Hay Group* arose out of a post-employment separation agreement. A former employee (David A. Hoffrichter) parted ways with his employer, a management consulting firm (Hay Group, Inc.), and subsequently joined another consulting firm (PriceWaterhouseCoopers). 360 F.3d at 405. The former employee's separation agreement contained a restrictive covenant, which forbade him from soliciting employees of his former employer for one year.

Within the first year after the former employee's separation, his former employer demanded arbitration, alleging violation of the non-solicitation restrictive covenant. At the former employer's request, the arbitrator issued subpoenas to the former employee's subsequent employer and its successor in interest (E.B.S. Acquisition Corporation). The subsequent employer and its successor objected to the subpoenas, contending that § 7 did not authorize the arbitrator to compel pre-hearing production of documents from them because they were not parties to the arbitration.

The former employer filed a subpoena-enforcement action in federal district court in Pennsylvania. Determining that the FAA authorized the arbitrator to issue a subpoena for the pre-hearing production of documents to the non-parties, the district court enforced the subpoena. The non-party appealed, and the Third Circuit6 reversed.

Concluding that § 7 unambiguously resolved the issue, the Third Circuit stated:

> The only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party "to attend before them 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." 9 U.S.C. § 7. The power to require a non-party "to bring" items "with him" 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. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power 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.[7]

360 F.3d at 407 (emphasis added by the Third Circuit). The Third Circuit explicitly disagreed with (a) the "special need" exception described by the Fourth Circuit in *COMSAT* and (b) the "implicit" grant of authority described by the Eighth Circuit in *Security Life*. 360 F.3d at 408-410.

In a concurring opinion, Judge Michael Chertoff explained that the court's literal interpretation of § 7's text "does not leave

arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings." 360 F.3d at 413 (Chertoff, J., concurring). Judge Chertoff explained that § 7 authorizes arbitrators to compel non-party witnesses "to appear with documents before a single arbitrator, who can then adjourn the proceedings." 360 F.3d at 413 (Chertoff, J., concurring). According to Judge Chertoff's concurring opinion, "[t]his gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA." 360 F.3d at 413 (Chertoff, J., concurring).

View No. 4: Pre-Merits Hearing Evidence from Non-Parties Allowed if Arbitrators Personally Attend

A fourth view provides that § 7 authorizes arbitrators to compel pre-merits hearing evidence from non-parties if the non-party's compliance with the subpoena is performed in an arbitrator's physical presence. Consistent with Judge Chertoff's concurring opinion in *Hay Group*, the U.S. Court of Appeals for the Second Circuit, in *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005), held that § 7 authorizes arbitrators to issue subpoenas for the production of documents and oral testimony from non-parties prior to the scheduled "trial-like arbitration hearing on the merits" when the arbitrators are physically present for the document production and testimony. The dispute in *Stolt-Nielsen* arose out of maritime contracts for the shipment of chemicals. 430 F.3d at 569. The chemical developers (Celanese AG, Celanese Ltd., and Millenium Petrochemicals, Inc.) contracted with tanker companies (Stolt-Nielsen SA, Odfjell ASA, and JO Tankers AS and their respective affiliates) to transport chemical products. After two of the tanker companies (Odfjell and JO Tankers) pleaded guilty to criminal conspiracy to "rig bids and fix prices in the parcel tanker market in violation of the Sherman Act," the chemical developers demanded arbitration against those two tanker companies, but not the third (Stolt-Nielsen), alleging "price-fixing, bid-rigging, and other wrongful behavior." 430 F.3d at 569-570.

At the chemical developers' request, the arbitrators issued subpoenas for the pre-hearing production of documents and deposition of a former executive (*i.e.*, a non-party) of one of the tanker companies that had pleaded guilty (the former executive was incarcerated when he was served with the subpoenas). The former executive did not comply with the subpoenas. Declining to enforce the subpoenas, the federal district court in New York reasoned that § 7 "does not authorize arbitrators 'to compel *pre-hearing* depositions of or *pre-hearing* document production from a non-party.'" *Stolt-Nielsen*, 430 F.3d at 570 (quoting *Odfjell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) (emphasis in the original)).

The arbitrators subsequently issued five more subpoenas, including four directed to the third tanker company (Stolt-Nielsen) not named as a respondent in the arbitration demand. The subpoenas directed the tanker company to bring certain documents and "appear and testify in an arbitration proceeding." 430 F.3d at 570. Claiming that the subpoenas were "thinly disguised attempts to obtain pre-hearing discovery," the tanker company asked the federal district court in New York to quash the subpoenas. Rejecting the tanker company's arguments, the district court enforced the subpoenas and, on appeal, the Second Circuit[8] affirmed the enforcement order.

After acknowledging that, in an earlier decision, it had left open the question of whether § 7 authorizes arbitrators to compel pre-hearing discovery from non-parties,[9] the Second Circuit then surveyed the federal case law construing § 7. The Second Circuit nevertheless declined to resolve that open question, stating that it was unnecessary to do so based on the facts presented in the appeal.

Quoting § 7's text, the Second Circuit stated that the FAA empowers arbitrators to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or other paper which may be deemed material as evidence in the case." 430 F.3d at 577 (quoting § 7). Because the non-parties receiving the subpoenas were summoned to testify and produce documents in the physical presence of the arbitrators, the Second Circuit determined that subpoenas literally complied with § 7, which contains broad language "limited only by the requirement that the witness be summoned to appear 'before [the arbitrators] or any of them.'" 430 F.3d at 577 (quoting § 7).

According to the Second Circuit, it did not matter that the non-parties were subpoenaed to produce documents and testify ten months before the scheduled "trial-like merits hearing." 430 F.3d at 580. All that mattered was that at least one of the arbitrators be physically present when the non-party produced documents and testified. In addition to complying literally with § 7, the Second Circuit observed that the reality of arbitral proceedings supported its conclusion because arbitration hearings on the merits "are often continued, frequently with many months elapsing between hearing sessions." 430 F.3d at 580.

The Future of Pre-Hearing Discovery From Non-Parties

The battle over whether arbitrators can compel pre-hearing discovery from non-parties, and in what form, will certainly continue to be waged in the future. Although it is difficult to say how the battle will turn out, a few possible fronts are as follows:

1. Type of Pre-Hearing Discovery: Document Production vs. Depositions

A pre-hearing subpoena to a non-party to produce documents is often seen by the courts as less burdensome than a subpoena to appear for deposition,

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especially if the non-party witness will need to appear a second time at the final hearing on the merits. This rationale was adopted in *Integrity Ins. Co. v. American Centennial Ins. Co.*, 885 F. Supp. 69 (S.D.N.Y. 1995). In that case, a federal district court in New York quashed an arbitrator's subpoena for the pre-hearing deposition of a non-party, but denied a motion to quash a subpoena for production of documents from that non-party. 885 F. Supp. at 73.

More recently, the court in COMSAT expressly rejected the argument that § 7 authorizes arbitrators to compel pre-hearing depositions from non-parties. Lower courts have generally followed this rule. *See, e.g., Procter and Gamble Co. v. Allianz Ins. Co.*, No. 02-CV-5480, 2003 U.S. Dist. LEXIS 26025 (S.D.N.Y. Dec. 3, 2003) (noting that "one court in this District has ruled that an arbitrator may *not* compel non-parties to submit to depositions, and this Court agrees with its reasoning"); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, No. 02-4304 (PAM/JSM), 2004 U.S. Dist. LEXIS 389 at *7 (D. Minn. Jan. 9, 2004) (stating that "the Court does not have the power to enforce the panel's subpoena purporting to compel the pre-hearing deposition of a non-party"); *Gresham v. Norris,* 304 F. Supp. 2d 795 (E.D. Va. 2004) (denying a petition to compel a pre-hearing deposition of a non-party and stating that the moving party "did not include the requisite showing of special need or hardship," as articulated in *COMSAT*); *In re Hawaiian Elec. Indus., Inc.*, No. M-82, 2004 U.S. Dist. LEXIS 12716 (S.D.N.Y. July 9, 2004) (stating that "the Court is convinced that the language of 9 U.S.C. § 7 does not authorize, and was not intended to authorize, the issuance of subpoenas for pre-hearing testimony"); *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403-404 (S.D.N.Y. 2005) (granting a non-party's motion to quash a subpoena for pre-hearing deposition and stating that the "weight of judicial authority favors the view that the Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to issue subpoenas for discovery depositions against third parties").

The court in *COMSAT* also held that § 7 does not confer arbitral authority to subpoena pre-hearing production of documents from non-parties, a holding followed in *Hay Group*. In contrast to the holdings of *COMSAT* and *Hay Group*, several courts have indicated, at least in *dicta*, that the rule applicable to pre-hearing production of documents is in line with the Eighth Circuit's decision in *Security Life*, *i.e.*, that § 7's grant of authority to compel non-parties to produce documents at a hearing implicitly includes the "lesser power" to compel pre-hearing production of documents by non-parties. *See, e.g., Brazell v. American Color Graphics, Inc.*, No. M-82 (AGS), 2000 U.S. Dist. LEXIS 4482 (S.D.N.Y. Apr. 7, 2000) (holding that § 7 authorized the arbitrator to compel pre-hearing production of documents from a non-party); *Procter and Gamble Co.*, No. 02-CV-5480, 2003 U.S. Dist. LEXIS 26025, at *5 (stating that "[a] distinction, however, must be drawn between an arbitrator's power to compel document production before an arbitration hearing, and her power to compel appearances at depositions before an arbitration hearing"); *SchlumbergerSema, Inc.*, No. 02-4304 (PAM/JSM), 2004 U.S. Dist. LEXIS 389 at *7 (holding that "§ 7 of the Federal Arbitration Act allows this Court to enforce the panel's subpoena as to documents, but not as to deposition testimony"); *Hawaiian Elec. Indus., Inc.*, No. M-82, 2004 U.S. Dist. LEXIS 12716, at *4 (same and quoting *Procter and Gamble*); *Atmel*, 371 F. Supp. 2d at 403 (stating that "the power to compel production of documents at a hearing implies the lesser power to require the documents to be produced in advance of the hearing").

2. Pre-Merits or Interim "Hearings"

In addition to arguments advanced by parties and non-parties to obtain or resist pre-hearing discovery and court decisions judging those arguments, courts have also paved the way for arbitrators to be more involved in the process. Despite the "weight of judicial authority" disfavoring the view that § 7 authorizes arbitrators to compel pre-hearing depositions from non-parties, courts in cases like *Stolt-Nielsen* and Judge Chertoff's concurring opinion in *Hay Group* have handed arbitrators the authority to compel non-parties to physically appear before one or more of them - in advance of the "trial-like hearing on the merits" - to ensure compliance with those subpoenas, if warranted by the facts of the dispute. *See Guyden v. Aetna, Inc.*, No. 3:04-CV-16523 (WWE), 2006 U.S. Dist. LEXIS 73353 (D. Conn. Sept. 25, 2006) (indicating that the arbitrator could follow the approach suggested by Judge Chertoff's concurring opinion in *Hay Group* and approved by the Second Circuit in *Stolt-Nielsen*). Thus, federal courts have provided arbitrators with a framework to resolve the inherent tension between parties and non-parties and balance the interests of the parties who seek information material to their arbitral dispute against the interests of the non-parties who seek to avoid the burden and expense of complying with subpoenas. Because that framework allows arbitrators to issue subpoenas to non-parties to appear personally "before them or any of them as a witness" and provide oral testimony or produce documents, even if compliance with the subpoena is called for before the merits hearing, arbitrators can use that testimony or documents as part of their deliberations on the merits.

3. U.S. Supreme Court Involvement

The conflict in whether § 7 confers arbitral authority to issue subpoenas for pre-hearing discovery, and what type, ultimately may be resolved by the U.S. Supreme Court. Because the Supreme Court's docket is largely discretionary, it typically decides cases only when "compelling reasons" exist for it to do so. Sup. Ct. R. 10. One of the characteristics that the Supreme Court has indicated presents a "compelling reason" is a split in authority in the federal circuit courts of appeals. Sup. Ct. R. 10(a). In light of the differing views articulated by the federal circuit courts in the cases described above, perhaps the Supreme Court will accept review of a case construing § 7's scope.

4. Contractual or Legislative Avenues

Finally, in addition to the conventional avenue of litigating over whether they can obtain pre-hearing discovery from non-parties, parties to contracts calling for arbitration may take advantage of other paths to secure pre-hearing discovery from non-parties. Other possible paths include (though this list is not intended to be exhaustive):

(a) adopting the recent amendments to the Reinsurance Intermediary Model Act, see Robert M. Hall, *Discovery From Intermediaries: Winning the Peace*, published in ARIAS•U.S. Quarterly, Vol. 13, No. 4, at 22 (4th Quarter 2006) (describing recent amendments to the Model Act in which reinsurance brokers and managers must comply with subpoenas, in exchange for the right to assert objections, while subjecting them to certain penalties for failure to comply);

(b) amending the FAA to authorize arbitrators to compel pre-hearing discovery from non-parties and provide a consistent enforcement mechanism, *see* Michele L. Jacobson, Robert Lewin, Royce F. Cohen, and Andrew S. Lewner, *Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties - Updated Caselaw and Commentary*, published in ARIAS U.S. QUARTERLY, Vol. 12, No. 3, at 13 (3d Quarter 2005); or

(c) binding intermediaries to the arbitration provisions of reinsurance contracts by making them sign the reinsurance contracts or at least agree in writing to be bound by the arbitration provisions of the reinsurance contracts they place, *id*.

Conclusion

In reinsurance arbitrations, arbitrators frequently authorize pre-hearing discovery of non-parties and issue subpoenas for discovery sought by one or both of the disputing parties. Non-parties frequently comply with those subpoenas. But these situations are the easy ones. The difficult cases arise when a party objects to pre-hearing discovery of a non-party or a non-party refuses to comply with an arbitration panel's subpoena for pre-hearing discovery.

Unless and until the Supreme Court construes § 7 for all federal courts, Congress amends § 7 to expressly authorize or expressly preclude pre-hearing discovery from non-parties, or certain non-parties can be and are made subject to the arbitration provisions in contracts, parties and non-parties will continue to litigate this issue in the federal courts. Whether arbitrators will employ the approach suggested by Judge Chertoff's concurring opinion in *Hay Group* and sanctioned by the Second Circuit in *Stolt-Nielsen* - and to what extent - remains to be seen.▼

1 Federal court enforcement of arbitral subpoenas is beyond the scope of this article, which is worth separate treatment on its own merits. *Compare Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89, 95-96 (2d Cir. 2006) (not enforcing an arbitral subpoena to a non-party more than 100 miles outside the location where the subpoena was returnable), *with Amgen, Inc. v. Kidney Center of Delaware County, Ltd.*, 879 F. Supp. 878, 882-883 (N.D. Ill. 1995) (enforcing an arbitral subpoena to a non-party more than 100 miles beyond where the subpoena was returnable), *remanded on other grounds*, 95 F.3d 562, 568 (7th Cir. 1996), and *In re Security Life Ins. Co.,* 228 F.3d 865, 872 (8th Cir. 2000) (same).

2 Despite the different treatment among the federal circuit courts of appeals, the United States Supreme Court has not addressed the issue of arbitrators' authority to compel pre-hearing discovery from non-parties.

3 The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

4 *See also Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1994) ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").

5 The Eighth Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

6 The Third Circuit has jurisdiction over Delaware, New Jersey, and Pennsylvania.

7 The majority opinion was written by then-Circuit Judge Samuel A. Alito Jr., who is currently an Associate Justice of the United States Supreme Court.

8 The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

9 The Second Circuit decision explicitly leaving this question open is *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999).

Unless and until the Supreme Court construes § 7 for all federal courts, Congress amends § 7 to expressly authorize or expressly preclude pre-hearing discovery from non-parties, or certain non-parties can be and are made subject to the arbitration provisions in contracts, parties and non-parties will continue to litigate this issue in the federal courts.

in focus

Recently Certified Arbitrators

Spiro Bantis

David A. Bowers

Spiro K. Bantis

Spiro Bantis, a partner in the law firm of London Fischer LLP, has been in the insurance/reinsurance industry for more than 23 years having extensive experience in the conduct and resolution of insurance and reinsurance disputes. In the last several years, Mr. Bantis has devoted a significant portion of his practice to providing expert commentary in matters involving insurance and reinsurance issues, as well as serving as an arbitrator in numerous insurance and reinsurance disputes. He also regularly counsels insurance and reinsurance companies and brokers on various aspects of their business, including claims, product development/policy drafting and regulatory.

Prior to joining London Fischer LLP in 2004, Mr. Bantis served as Executive Vice President and General Counsel of Gulf Insurance Group (a member of Travelers) in New York City. In such capacity, he/ was responsible for all legal affairs for Gulf's domestic and international operations, including claims/litigation, corporate mergers and acquisitions, insurance regulatory affairs, product development and underwriting assessment, agency and reinsurance contract drafting and arbitrations.

Prior to first joining Gulf in 1989, Mr. Bantis was an associate with another prominent New York - based law firm, where he represented insurers and reinsurers in various coverage matters.

He is on the Board of Directors of Atrium Insurance Corporation, a New Jersey based reinsurer of mortgage insurance, as well as a member of the Board of the Insurance Federation of New York.

Mr. Bantis is admitted to practice in the New York State Courts, as well as the United States Courts for the Southern and Eastern Districts of New York. He has spoken extensively on insurance and reinsurance issues, including at conferences sponsored by ExecuSummit, PLUS and the Mutual Funds/Investment Management Industry.

David A. Bowers

As Executive Vice President and General Counsel of Zurich North America, David Bowers has been responsible for the Corporate Law function of the North America commercial property-casualty insurance operations of the Zurich Financial Services Group for twenty-two years. The Corporate Law Division establishes legal policies and procedures for the operations, manages large and complex non-claim disputes, bad faith litigation and provides legal counsel to the business and support/service units. Mr. Bowers also shares responsibility for reinsurance claim disputes with the Claims Department.

Prior to joining the Zurich Group, Mr. Bowers was Vice President and Deputy to the General Counsel at CNA Insurance Companies. He was responsible for the components of the Law Department providing legal support to the property-casualty and life-health direct insurance operations, the rate and form filing function and the government and industry affairs operations. Mr. Bowers held various capacities in the CNA law department for nine years.

Prior to joining CNA, Mr. Bowers was Assistant Director and General Counsel of the Ohio Insurance Department, responsible for all operations of the Department as well as its legislative program. During his tenure at the Department, he assumed leading roles in the liquidation of a property casualty as well as a life insurance company. Mr. Bowers held various capacities at the Department for nine years.

Mr. Bowers holds Bachelor of Science and Juris Doctor degrees from The Ohio State University. He also earned a Masters in Management (MBA) from the Kellogg School of Management at Northwestern University, majoring in finance.

Mr. Bowers chaired the American Insurance Association Law Committee as well as the National Committee on Insurance Guaranty Funds. He also served on the Board of Directors of the National Association of Independent Insurers.

Profiles of all certified arbitrators are on the web site at www.arias-us.org

Ellen K. Burrows

Ellen Burrows is a retired partner of the law firm of White and Williams, LLP. During her almost twenty years at the firm, she focused on the litigation and arbitration of complex reinsurance and insurance coverage matters. Beginning in 1991, she was a partner in the firm's Reinsurance Practice Group. She was also chair of its alternative dispute resolution practice committee, drafting various arbitration and mediation protocols for both the firm and clients of the firm.

Ms. Burrows has acted as counsel in numerous, significant reinsurance arbitrations involving a variety of coverage and allocation issues, with a majority of her experience focusing on commercial property and casualty and various long-tail claims. Her expertise includes both substantive issues and procedural concerns inherent in the arbitration arena.

Not only has Ms. Burrows been a frequent speaker at insurance and reinsurance industry seminars, but also she has authored articles for various reinsurance publications. In addition to her insurance and reinsurance practice, she has served as an arbitrator and umpire for the NASD and the NYSE. She has also received mediator training from the CPR Center for Public Resources.

Ms. Burrows currently consults on reinsurance and insurance matters, providing services ranging from contract and claim review and analysis to litigation support and dispute resolution.

Stephen P. Carney

Stephen Carney is of counsel to the law firm of Funk & Bolton, P.A., a Mid-Atlantic based law firm specializing in insurance, reinsurance, regulatory and government affairs matters, with its primary office in Baltimore, Maryland. Prior to joining Funk & Bolton in 2005, he served as Senior Vice President and General Counsel to Medical Mutual Liability Insurance Society of Maryland, a medical liability insurance company, and its wholly owned subsidiary, Professionals Advocate Insurance Company.

Mr. Carney currently serves as an adjunct professor of insurance law at two different law schools (College of William and Mary and the University of Maryland). As general counsel to Medical Mutual and its subsidiary, he advised the management of the company on the broad range of legal and regulatory issues affecting the companies, including issues related to the drafting and interpretation of both external and inter-company reinsurance agreements. Mr. Carney also supervised Medical Mutual's state and federal lobbying activities and, together with NORCAL Mutual Insurance Company's general counsel, supervised the legal activities of the joint venture between Medical Mutual and NORCAL, and the joint venture's acquisition of a Pennsylvania medical liability insurance company in 1998.

Immediately after graduating from law school in 1980, Mr. Carney clerked for a federal district court judge in Virginia. Prior to joining Medical Mutual in 1988, he was an employment law and real estate law associate at the Venable law firm in Baltimore. He is currently developing his ADR practice, focusing in the areas of arbitration and mediation of insurance, reinsurance and business issues. Mr. Carney has served as a board member and officer of various charitable organizations, including the Maryland March of Dimes and the William and Mary Law School Foundation.

Harry P. Cohen

Harry Cohen is a partner in the firm of Cadwalader, Wickersham & Taft LLP. Throughout 23 of his 26 year legal career, Mr. Cohen's practice has been devoted almost entirely to reinsurance dispute resolution. He began his reinsurance career at Miller, Singer, Raives & Brandes, P.C. in 1984 and became a partner of the firm in 1989. The reinsurance group moved together to Rosenman & Colin LLP in 1993 and then to Cadwalader in 2000.

During that period, Mr. Cohen has represented and counseled insurance and reinsurance companies, brokers, agents and others in negotiations, mediations, arbitrations and litigations in matters involving virtually every procedural and substantive issue that relates to the reinsurance relationship and the servicing of that relationship, as well as all issues arising under the Federal Arbitration Act. This has included workers' compensation reinsurance including carve-out and buy-down covers, pre-need and final expense life insurance, finite reinsurance, novations and commutations, fronting arrangements, spirals

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Ellen K. Burrows

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and arbitrage, agency and brokerage disputes, captive insurance and reinsurance arrangements, environmental reinsurance allocations, set-off, extracontractual obligations, follow-the-fortunes and follow-the-settlements, IBNR recoverability, late notice, London Market business and brokers, punitive damages, recovery of declaratory judgment expenses, direct and reinsurance pooling arrangements, security requirements, and service of process upon, and enforcement of judgments against, alien companies. In addition to the reinsurance work, Mr. Cohen has regulatory experience including monolines and premium finance transactions, and has handled direct insurance defense cases, coverage disputes, and disputes between insurance companies and their agents in the property & casualty, life, and accident & health areas.

Mr. Cohen's experience and expertise - ranging from simple business analyses and counseling to managing complex litigation - includes a thorough and extremely broad-based understanding of the wide scope of business, legal, custom & practice, procedural and strategic issues facing reinsurance business professionals. This depth of knowledge and diversity of perspectives allows him to approach, address and resolve issues, problems and disputes in a sound, prudent, efficient and level-headed manner.

Mr. Cohen has been listed in Euromoney's *Guide to the World's Leading Insurance and Reinsurance Lawyers*, Chambers USA's *America's Leading Lawyers for Business*, and *New York Super Lawyers* - Manhattan Edition, and he has been named by his peers to be included in the International Who's Who of Insurance and Reinsurance Lawyers. Mr. Cohen received a Bachelor of Arts in Economics from the State University of New York at Stony Brook and a Juris Doctor from the Boston University School of Law.

Raymond Dowling

Raymond Dowling is a seasoned business executive with nearly 30 years of diversified insurance and reinsurance company experience. He is a Certified Public Accountant and has experience in public accounting, banking, insurance, reinsurance brokering, reinsurance, capital markets and runoff.

Currently, Mr. Dowling is President of Dowling Advisors, Inc., a firm organized to invest and manage insurance/reinsurance companies in runoff and to provide specialized consulting services to the property casualty and reinsurance sector.

Prior to founding Dowling Advisors, Mr. Dowling was Senior Vice President and Chief Reinsurance Officer of Converium Reinsurance (NA), responsible for managing the $2.6 billion reinsurance assumed portfolio after the company was voluntarily put into runoff in 2004. He oversaw the formulation and execution of the runoff plan culminating with the sale of company in late 2006. Prior to runoff, Mr. Dowling was Senior Vice President in charge of the Risk Strategies Division, responsible for underwriting non-traditional reinsurance and managing a book of reinsurance disputes.

Prior to joining Converium in 2003, Mr. Dowling was a Vice President and Principal of Towers Perrin Reinsurance, where he led the firm's efforts developing the finite reinsurance and the capital market practice areas. He led the effort to form a NASD registered broker dealer.

Before coming to Towers Perrin in 1995, Mr. Dowling was Vice President of AIG Reinsurance Advisors, which he helped launch to originate and underwrite non-traditional insurance and reinsurance on behalf of AIG Companies and to evaluate strategic investments.

Prior to joining AIG in 1991, Mr. Dowling was a Vice President at Citigroup, holding various positions in the Global Insurance Division and Consumer Bank International primarily responsible for developing projects to expand the bank's efforts into the insurance industry. He began his career in 1983 at Coopers & Lybrand, auditing insurance and reinsurance companies.

Mr. Dowling received his B.S. in Accounting from St. Francis College in 1978.

William F. Fawcett, Jr.

William Fawcett is an insurance/reinsurance industry executive with demonstrated success with both domestic and international firms. His 20 years of industry experience covers a broad spectrum of business, legal and claim issues in multiple jurisdictions.

Starting his career in private practice, Mr. Fawcett was a successful trial attorney at two nationally recognized firms before

moving in-house with St. Paul Insurance. At St. Paul, he won the Chairman's Award and was promoted through progressively more responsible legal positions, including Group Counsel.

Mr. Fawcett next joined Swiss Reinsurance Corporation in Zürich, Switzerland as Managing Director and Deputy General Counsel. In this position he managed the Financial Services Business Group's global claim operation including the lead in the World Trade Center litigation.

In 2002, Mr. Fawcett joined the start-up operation of Endurance Specialty Holdings, Ltd. As Senior Vice President, he built a successful Claim & Liability Management infrastructure and team of professionals around the world.

Most recently, he was Executive Vice President and Chief Legal Officer for AXA based in New York. His responsibilities included AXA's North American P&C operations.

Mr. Fawcett has a B.A. from Colgate University, a J.D. from the McGeorge School of Law and is completing his M.B.A. at the International School of Management in Paris. He holds professional designations from the American Insurance Institute and is an attorney admitted to practice in several U.S. jurisdictions and the United Kingdom.

Mr. Fawcett also served with the United States Marine Corps from 1982 to 1992 holding numerous positions, including his last billet as a Judge Advocate.

Debra J. Hall

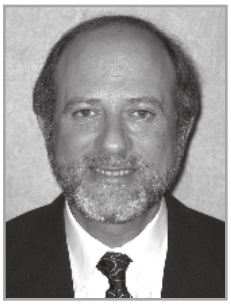
Debra Hall is Senior Vice President and Senior Regulatory Counsel with Swiss Re, one of the world's leading reinsurers. She is responsible for Swiss Re's regulatory policy development for state, federal and international regulatory issues for the Americas as well as select international issues on behalf of the Swiss Re group.

Prior to joining Swiss Re, Ms. Hall was Senior Vice President and General Counsel of the Reinsurance Association of America (RAA), the nation's leading trade association representing the U.S. p/c reinsurance industry. During her 14.5 years as General Counsel with the RAA, Ms. Hall had primary responsibility for developing RAA policy at state, federal and international levels, managing amicus briefs (more than 50 drafted and filed) and other RAA litigation, designing and supervising the management of RAA legal and regulatory publications and providing comprehensive analysis to members on legal/regulatory issues affecting the reinsurance industry. Prior to joining the RAA, Ms. Hall was the Chief General Counsel of the Office of the Special Deputy Receiver in Chicago, Illinois. She was appointed to the Interstate Compact Committee that drafted the Uniform Receivership Law (URL) and was co-editor of the first edition of the NAIC Receiver's Handbook. For seven years, Ms. Hall was a Special Assistant Attorney General, during which she litigated major constitutional issues in state and federal courts and supervised litigation filed against the State of Illinois and its officials.

Ms. Hall has significant experience in numerous reinsurance and receivership issues, including but not limited to: setoff; insolvency clauses; claim estimation/acceleration; follow the fortunes/settlements; credit for reinsurance; pre-answer security; directions; utmost good faith; cut-throughs; preferences and fraudulent transfers.

Ms. Hall is married to Robert M. Hall, a certified reinsurance arbitrator and umpire and the former Senior Vice President and General Counsel of American Re-Insurance Company (now Munich Re America).

Debra J. Hall



Gerald M. Sherman

Gerald M. Sherman

Gerald Sherman has served as Chief Counsel for ING's Group Life and Health Reinsurance business since 2000, when ING acquired the business of ReliaStar Financial Corp. Prior to that time he was Vice President and Associate General Counsel of ReliaStar.

Mr. Sherman has had a 25-year career at ReliaStar and ING. His early work focused on group health insurance, where he served on the Board of the Company's HMO and PPO subsidiaries, and as Chair of the Health Law Section of the Minnesota State Bar Association. Mr. Sherman later assumed oversight of the Company's litigation, and served on the ACLI litigation committee. In his role as Vice President and Associate General Counsel, he assumed responsibility for a wide variety of the Company's legal affairs.

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Thomas P. Stillman

Richard L. Voelbel

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Over ten years ago, Mr. Sherman began to focus on the Company's Group Life and Health Reinsurance Division, including various MGU arrangements and the Company's international and London operations.

Mr. Sherman received a B.A. *cum laude* from the City University of New York in 1973, and a J.D. with honor from the University of Iowa College of Law in 1983, where he served as Articles Editor of the Journal of Corporation Law.

Thomas P. Stillman

Thomas Stillman, until recently Senior Vice President and Deputy General Counsel of the CNA Insurance Companies, was responsible for the company's high exposure reinsurance disputes and other significant litigation. Mr. Stillman has a broad range of experience in major reinsurance and insurance disputes. In the course of his 23 years with CNA, he represented the company in its capacities as both a cedant and reinsurer in property/casualty and life/health cases in the United States, as well as in the London market. He has litigated and counseled senior management concerning a wide array of reinsurance and insurance issues. In addition to disputes between cedants and reinsurers, Mr. Stillman has dealt with controversies with brokers, MGU's, pools, TPA's and captives.

Mr. Stillman was also responsible for major disputes involving antitrust, commercial and employment matters, particularly class actions. His cases have included insurance or reinsurance matters involving policyholders, competitors, agents and brokers, vendors, employees, shareholders, regulators and matters arising out of investments.

Prior to joining CNA, Mr. Stillman's spent 17 years representing clients in complex litigation, in private practice, the government as a prosecutor and as a clinical faculty member at the University of Chicago Law School. He served several terms as Vice Chair of the Insurance Committee of the American Bar Association's Antitrust Section. He has also lectured on class actions and trial practice.

Mr. Stillman has been a member of the trial bar of the Northern District of Illinois and the Court of Appeals for the 7th Circuit. He holds an A.B. from Syracuse University and received his law degree from the University of Chicago Law School.

Richard L. Voelbel

Richard Voelbel, Senior Partner and member of the Executive Committee at the firm Zelle, Hofmann, Voelbel, Mason & Gette LLP, has over 30 years of complex commercial litigation experience in courts around the United States. He has several published opinions and has served as lead counsel on several multi-million dollar insurance and reinsurance disputes, including the litigation and appraisal stemming from the destruction of the World Trade Center complex on 9/11. In addition, over the past 20 years he has been involved in a wide variety of domestic and international alternative dispute resolution matters, both as arbitrator and counsel.

Mr. Voelbel has served as a New York Stock Exchange arbitrator, an ARIAS arbitrator, an AAA arbitrator and as guest speaker to industry groups on the subject of commercial arbitration and other aspects of alternative dispute resolution. He serves as Vice President of Claims for a Bermuda-based insurance company. He has also served as Regional Counsel for extra-contractual claims on behalf of a major property/casualty insurance company, as outside general counsel on insurance matters for a fortune 500 company, and as outside counsel for a major reinsurance intermediary. Mr. Voelbel is a Fellow for the Center for International Legal Studies based in Salzburg, Austria and has spoken worldwide for the organization. Areas of particular experience and interest include complex business disputes, commercial property insurance and reinsurance, class actions, securities, professional liability and ethics.

Mr. Voelbel received his J.D. *cum laude* from the University of Minnesota Law School and holds a B.A., *magna cum laude*, from Macalaster College. He was also a Rotary International Graduate Fellow at St. John's College at Cambridge University. He has led several mission trips to East Africa under the auspices of World Vision.

Lawrence Zelle

Lawrence Zelle has been involved in virtually every facet of insurance and reinsurance as a practicing lawyer with over 45 years of experience. He was an Executive Partner of his former firm Robins Zelle Larson and Kaplan. He is a founding partner and former Executive Partner of his current firm Zelle Hofmann Voelbel & Gette. He has been lead counsel in several cases that have established principles of major significance to the insurance industry and has been recognized as a preeminent property insurance lawyer.

Mr. Zelle has represented insurers and reinsurers in numerous complex disputes involving many disparate areas including: business interruption losses; environmental claims; captive insurers; all risk vs. boiler & machinery; workers comp; surety; D&O; E&O; accident and health; bad faith; product liability; schemes of arrangement; insolvency; and Y2K claims.

Mr. Zelle has counseled and assisted several HPR property underwriters in the drafting of wordings for local and master global policy forms. He has also conducted training classes for claims and underwriting personnel. He has lectured or participated in seminars at the Loss Executive Association, Federation of Defense and Corporate Counsel, The National Forum, PLRB, International Bar Association, Mealey's Annual Insurance Insolvency & Reinsurance Roundtable, and various national, state and local Bar Association events.

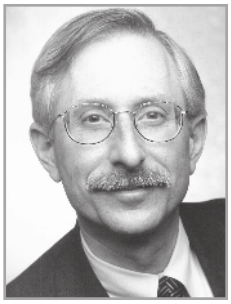
In the course of his career, Mr. Zelle has tried cases in 32 jurisdictions in the United States and has appeared as counsel in arbitrations in Canada, England, Bermuda, South Africa and Bahamas. He has argued over 20 cases involving insurance issues before state and federal appellate courts throughout the United States. He is admitted to the Supreme Court of Minnesota, and the U.S. Courts of Appeal for the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. He has also taught as an Adjunct Professor at the University of Minnesota Law School.

Lawrence Zelle

case notes

The *Functus Officio Doctrine* and The Finality (or not) of Partial "Final" Awards

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


Ronald S. Gass

Ronald S. Gass

On a subsequent cross-motion to vacate the award, the reinsurer argued that the arbitrator was without the power to modify his prior liability award due to the *functus officio* doctrine.

Mr. Gass is an ARIAS-U.S. Certified Arbitrator and umpire. He may be reached via e-mail at rgass@gassco.com or through his Web site at www.gassco.com.

At the parties' request or on their own initiative, panels may bifurcate complex arbitrations into two phases - one to consider liability and the other damages. These panels will typically issue some form of interim award regarding liability and then proceed to the damages phase, after which they will issue a final award that usually completely disposes of the case. However, there are occasions when this pattern is interrupted such as when one party seeks to confirm (or vacate) the liability phase's interim award before the damages phase is heard and decided. This can raise troubling questions about award finality and the panel's power to reconsider its liability phase rulings due to the *functus officio doctrine* (i.e., arbitrators are without further authority or legal competence to reconsider an award because the duties and functions of the original commission were fully discharged - *functus officio* is Latin for "a task performed").

An interesting New York federal district court case recently considered a cedent's attempt to confirm one of two elements of a single arbitrator's "Partial Final Award" on liability and to vacate the other *before* damages were determined. When the court remanded the case to the arbitrator because his award was not deemed "final" without the damages ruling, the arbitrator subsequently reconsidered and modified the second element of his previous liability decision, which resulted in a higher damages award against the reinsurer. On a subsequent cross-motion to vacate the award, the reinsurer argued that the arbitrator was without the power to modify his prior liability award due to the *functus officio* doctrine.

In this case, the reinsurer issued a three-year facultative certificate to a cedent for a 20% share of the cedent's losses in the $15 million excess $5 million layer of an excess umbrella policy the cedent had issued to one of its insureds. When the insured subsequently filed asbestos claims exceeding $6 million and the reinsurer failed to pay its 20% share of the losses ceded to its layer, the cedent initiated an arbitration before a single arbitrator.

In his "Partial Final Award," the arbitrator made two specific liability findings based on his interpretation of the fact cert wording. First, the reinsurer was liable to the cedent for losses incurred on an aggregate basis pursuant to the terms of the underlying policy. Second, the reinsurer was *not* liable to the cedent for the payment of defense costs when no indemnity payment was made by the insured to a third-party claimant. With regard to this second liability finding, the arbitrator ordered the cedent to submit a schedule indicating the indemnity payments subject to the reinsurance and the associated defense costs so that he could determine damages.

Before presenting the arbitrator with the requested damages schedule, however, the cedent petitioned the federal district court to confirm the Partial Final Award's first liability finding but to vacate the second. The reinsurer opposed the petition as premature arguing that there was no "final" award pursuant to the Federal Arbitration Act because damages remained unresolved. Concurring that the cedent's petition might be premature at this stage in the arbitration, the district court remanded the matter to the arbitrator for further proceedings. After holding a hearing on damages and in the course of issuing his final award, the arbitrator reconsidered his second liability finding and expanded it to hold that the reinsurer was liable for the cedent's payment of defense costs to its insured in all cases and not only when it had made a related indemnity payment to a third-party claimant. This increased the reinsurer's liability to $3 million.

When the cedent returned to district court to confirm the final award, the reinsurer cross-

petitioned to vacate it on the ground that the arbitrator was *functus officio* with respect to the second liability finding of the Partial Final Award and thus lacked the power to modify his previous ruling. Applying Second Circuit precedent, the district court observed that an arbitration award is generally not deemed final unless the arbitrator decides both the issue of liability *and* damages. Because the Partial Final Award left the damages issue open, it was not "final" for the purposes of judicial review and confirmation (as the reinsurer had previously argued). To be "final," according to the court, an arbitration award must fully determine each issue so that no further proceedings are necessary to finalize the parties' obligations under the award. This case did not fit one of the recognized exceptions to this general rule, i.e., when the parties *specifically request* the arbitrators to make an immediate determination of liability, leaving the calculation of damages for a later time. Here there was neither a request from the parties for bifurcated rulings nor did the arbitrator give any prior indication that he would defer the issue of damages until a later date.

Another finality exception is when a partial award finally disposes of a separate, independent claim whether or not the parties have asked the arbitrator to decide it separately, i.e., the issue must be clearly severable from the other issues before it may be deemed final and subject to confirmation. The court held that the arbitrator's Partial Final Award required further arbitration on damages to finalize the parties' obligations and that the materials on damages lead the arbitrator to reconsider his interpretation of the reinsurer's liability for defense costs. "The issues of liability and damages," observed the court, "were so intertwined that the evidence for damages bore on the scope of liability."

Because the questions of liability and damages were "inseparable," the arbitrator's initial liability ruling on defense costs was not a final resolution of a separate and independent claim. The court noted that the arbitrator himself ultimately determined that his Partial Final Award was not final when, upon the court's remand, he considered that he had the authority to reconsider his prior partial award in conjunction with the damages hearing evidence, which persuaded him that he had misconstrued the fac cert wording in the first instance. Confirming the final award, the court concluded that the arbitrator's Partial Final Award did not render him *functus officio* and that he, therefore, had the power to reconsider his second liability ruling and to issue a final award.

This case highlights the need for arbitrators to be cautious about how they draft their interim awards so that they are not inadvertently and prematurely dispossessed of the power to modify prior rulings by the *functus officio* doctrine before concluding both the liability and damages phases of the arbitration. Award terminology can play an important role here, and prudence dictates the judicious use of the word "final" (as in "Partial *Final* Award"). If arbitrators intend to retain jurisdiction over a matter that is likely to require interim rulings, perhaps usage of terms like "interim" or "preliminary" in the title and body of the ruling will signal a reviewing court that the arbitrators are expressly retaining the power to amend or modify their prior rulings until such time as their "final" award is rendered. This case also raises the interesting question of how the *functus officio* doctrine applies to declaratory judgment-type awards in which a panel at a party's request expressly seeks to retain the power to modify and fine-tune their declaratory rulings for several months or even years after issuing their "final" award on the merits.

Employers' Surplus Lines Insurance Co. v. Global Reinsurance Corporation — United States Branch, No. 07 Civ. 2521 (HB), 2008 U.S. Dist. LEXIS 8253 (S.D.N.Y. Feb. 6, 2008).

This case highlights the need for arbitrators to be cautious about how they draft their interim awards so that they are not inadvertently and prematurely dispossessed of the power to modify prior rulings by the *functus officio* doctrine before concluding both the liability and damages phases of the arbitration.

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

An Invitation...

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of March 2008, ARIAS•U.S. was comprised of 515 individual members and 121 corporate memberships, totaling 1178 individual members and designated corporate representatives, of which 331 are 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 the list of ARIAS arbitrators who have served on at least three completed arbitrations. The procedure is free to members and non-members. It is described in detail in the Umpire Selection Procedure section of the website.

Similarly, a random, neutral selection of all three panel members from the list of ARIAS Certified Arbitrators is offered at no cost. Details of the procedure are also available on the website.

The website offers the "Search for Arbitrators" feature that searches the detailed background experience of our certified arbitrators. The search results list is linked to their biographical profiles, containing 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, Los Angeles, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Las Vegas, and Bermuda. The Society has brought together many of the leading professionals in the field to support its educational and training objectives.

Each year, the Society publishes the *ARIAS•U.S. Membership Directory*, which is provided to all members. The organization 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 intensive arbitrator training, are among the benefits of membership in ARIAS.

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 and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at info@arias-us.org or 914-966-3180, ext. 116.

Join us and become an active part of ARIAS•U.S., the leading trade association for the insurance and reinsurance arbitration industry.

Sincerely,

Thomas L. Forsyth
Chairman

Frank A. Lattal
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AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
MOUNT VERNON, NY 10552

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, online membership application, and online registration for meetings.

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