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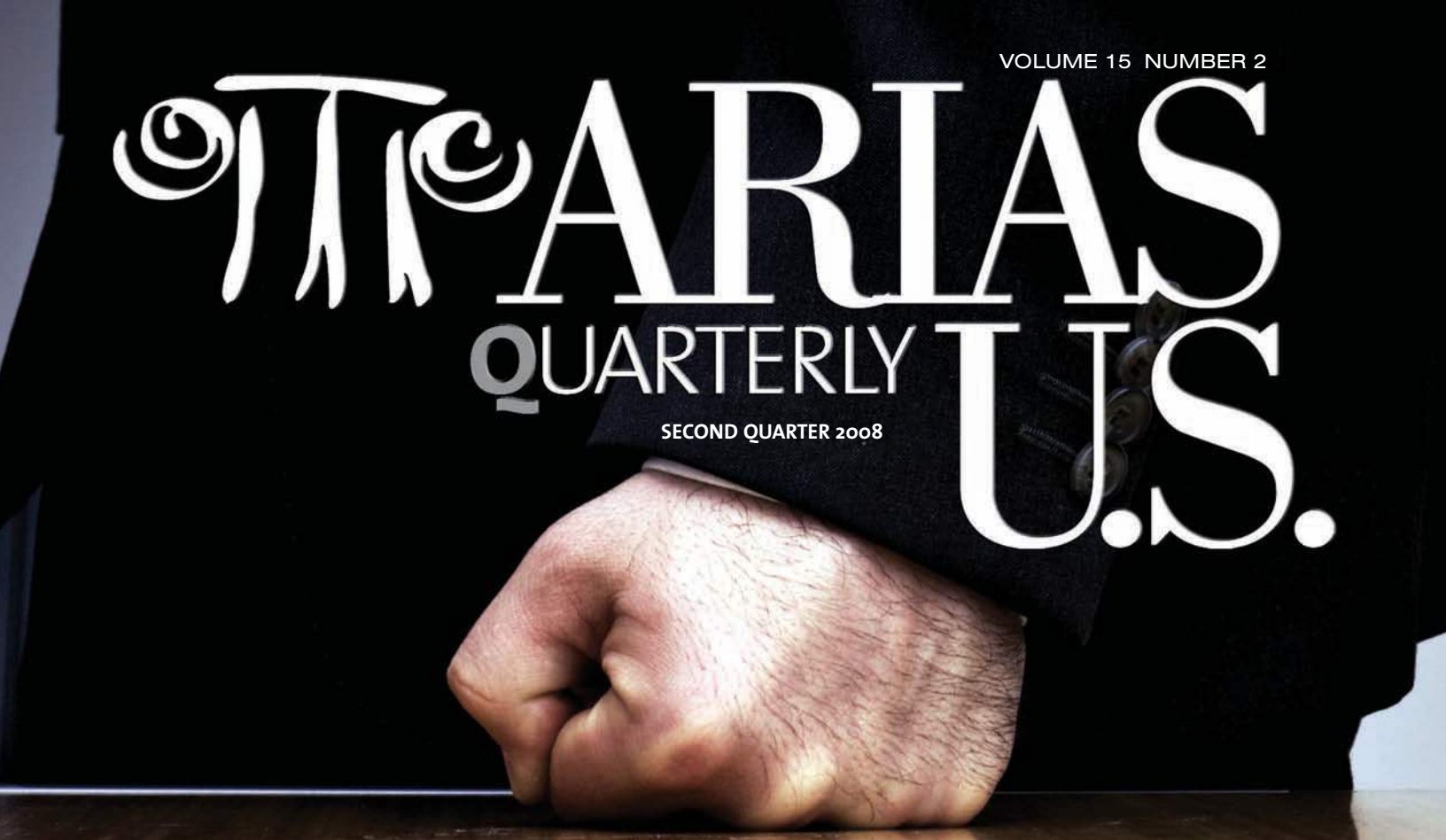

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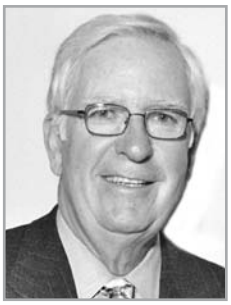

As we all know, a major objective of ARIAS•U.S. is to promote improvement of process in insurance and reinsurance arbitrations. In this issue, your Editors are pleased to provide scholarly articles by our authors that serve to keep our members informed on issues important to the arbitration process.

Can parties to an arbitration agreement stipulate that a panel's award will be subject to judicial review on grounds other than those set forth in the Federal Arbitration Act? Resolving a conflict among the lower federal courts on this question, the United States Supreme Court now has issued a definitive ruling. Our cover feature, *How Final Are Arbitration Awards? The Enforceability of Expanded Judicial Review Clauses*, by Laura Accurso and Rachel W. Petty, provides a thorough discussion of the Federal Arbitration Act provisions regarding judicial review of arbitral awards, the split among the lower federal courts that led to the Supreme Court's ruling, and what standards parties now can expect to be applied when seeking judicial review of a panel's award, regardless of any expanded judicial review clauses in the arbitration agreement.

Whether a reinsurer can exercise its rights under an audit clause after an arbitration has been commenced is often a hotly disputed issue in reinsurance arbitrations. The ceding company may contend that audit provisions are intended for an ongoing reinsurance relationship and not for discovery in an adversary proceeding. Similarly, the cedent may assert that where the reinsurer has defaulted in complying with the terms of the reinsurance agreement, say, by nonpayment of amounts allegedly due, the cedent has no obligation to comply with the audit clause. Nevertheless, a panel sometimes may compel such an audit in order to allow analysis of numbers and procedures in dispute by persons having the requisite knowledge and expertise. But what happens when numerous and complex issues arise in the conduct of the audit?

Gregory H. Horowitz and Carmela Cannistraci, in *The Appointment and Use of "Special Audit Masters" In Reinsurance Arbitrations*, carefully set forth how a Special Audit Master may enhance the reinsurance audit process in arbitration, the role and procedures of the Special Audit Master, and the unique issues the panel and the parties should consider before making an appointment. When confronting numerous and complex audit issues, panels, parties and counsel will find much useful information in this article to accomplish the audit while keeping the arbitration process efficient and on schedule.

Arbitrators at times are called upon to decide whether a new witness, identified shortly before the hearing and not on a party's witness list during the discovery phase of the proceeding, should be allowed to testify over objections of an opposing party. Robert M. Hall, in *Late Named Witnesses: What's a Panel to Do?*, examines recent case law on this issue and suggests important factors to be considered by a panel in considering whether to allow the proposed witness to testify.

On the lighter side, Eugene Wollan in Off the Cuff whimsically lists some of his *Pet Peeves*, which to some degree likely have been shared by all of us at one time or another.

On behalf of the Editors, I want to take this opportunity to wish each of you a most enjoyable and safe summer season.

T. Richard Kennedy

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Editorial Policy

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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

How Final Are Arbitration Awards? The Enforceability of Expanded Judicial Review Clauses

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One area in which arbitration clauses have not received consistent federal judicial treatment is the ability of parties to provide for a particular standard of judicial review.

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Arbitration is a creature of contract, and parties who opt for arbitration generally view it as a way to resolve disputes expeditiously while reducing costs and avoiding the airing of their disputes in a public forum. Indeed, arbitration can be an efficient way to resolve disputes in a non-judicial forum, and it is often the dispute-resolution choice of the reinsurance industry. Because of the prevalence of arbitration clauses in commercial contracts and reinsurance contracts in particular, the treatment and enforceability of these clauses has become increasingly important.

One area in which arbitration clauses have not received consistent federal judicial treatment is the ability of parties to provide for a particular standard of judicial review. Specifically, over the past decade, a conflict has existed in the federal courts about whether parties, who are free to contract for arbitration as a dispute-resolution mechanism, are also free to contract for greater judicial review of arbitral awards than permitted by federal law. The split in authority regarding the enforceability of so-called "expanded review" clauses in arbitration agreements recently made its way to the United States Supreme Court. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, 2008 WL 762537 (U.S. Mar. 25, 2008), the Supreme Court held that the grounds for vacatur and modification of arbitration awards provided by §§ 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., are exclusive, and parties may not contract for expanded judicial review of arbitral awards.

This article discusses the statutory framework for judicial review of arbitration awards under the FAA, federal jurisprudence interpreting and applying expanded review clauses under the FAA, and the impact of the Court's decision in *Hall Street Associates*.

I. The FAA

Enacted in 1925, the FAA is the principal federal statute governing arbitration. By enacting the FAA, Congress intended "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" and place such agreements "upon the same footing as other contracts." *Volt Info. Sci., Inc. v. Board of Trustees*, 489 U.S. 468, 474 (1989) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H. R. REP. NO. 96, 68th CONG., 1st SESS., 1, 2 (1924))). The FAA provides that written agreements to arbitrate "involving commerce ... shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. As recently as this Term, the Supreme Court once again confirmed that the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008).

Consistent with its legislative determination to place private agreements to arbitrate on the same footing as other contracts and enforce those contracts as all other private agreements, Congress enumerated specific situations in which arbitral awards can be confirmed, vacated, or modified. Those situations are codified in §§ 9, 10, and 11 of the FAA. Governing confirmation, § 9 provides, in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9.

Section 10 provides that an arbitral award may be vacated:

> (1) Where the award was procured by corruption, fraud, or undue means;
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. § 10(a).

Finally, § 11 provides that an arbitration award may be corrected or modified:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Id. § 11.

In addition to the statutory standards for vacatur and modification, some courts have also applied the judicially created standard to vacate awards when arbitrators exhibit a "manifest disregard of the law." See *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (stating *in dicta* that an arbitral award in manifest disregard of the law is subject to review), *overruled on other grounds by Rodriquez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989). In *Wilko*, the U.S. Supreme Court stated that "interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. at 436-437 (emphasis added). Some federal courts have interpreted *Wilko* as establishing a judicially created addition to the standards for vacating or modifying arbitration awards. See, e.g., *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc*., 341 F.3d 987, 997 (9th Cir. 2003); *but see George Watts & Son, Inc. v. Tiffany and Co*., 248 F.3d 577, 581 (7th Cir. 2001) (severely restricting the manifest disregard standard).

An inherent tension arises where the policy underlying the FAA ("congressional desire to enforce agreements into which parties had entered," *Byrd*, 470 U.S. at 220), conflicts with the FAA's enumerated standards for judicial review such that the contracting parties agree to a standard of judicial review different than the standards called for under the FAA. Indeed, federal courts have interpreted the FAA as affording very limited judicial review of arbitral awards, but they have also acknowledged contracting parties' undeniable right to structure their own arbitration by agreement, *see, e.g*., Volt, 489 U.S. at 474. Arguably, this latter principle has led some parties to attempt to provide contractually for a standard of judicial review different than the standards set forth in the FAA.

Competing concepts about the purpose of arbitration agreements have littered the discussion of these issues in the courts. Some have argued that the paramount principle at stake is the parties' freedom of contract: that is, where an arbitration agreement adopts a rule departing from the FAA standard, the agreement should be enforced according to its terms, and the rule chosen by the parties should prevail over the FAA standard. *See, e.g., Gateway Techs., Inc. v. MCI Telecomms. Corp*., 64 F.3d 993, 996 (5th Cir. 1995). Litigants and courts in these decisions emphasize the contractual nature of arbitration agreements and that parties should have unfettered autonomy in tailoring their agreements to arbitrate.

Others have argued that expanding the scope of judicial review of arbitration awards can sacrifice the very purpose of respecting and enforcing private agreements to arbitrate. *See Bowen v. Amoco Pipeline Co.,*

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Consistent with its legislative determination to place private agreements to arbitrate on the same footing as other contracts and enforce those contracts as all other private agreements, Congress enumerated specific situations in which arbitral awards can be confirmed, vacated, or modified.

The competing arguments have led to a split in the federal courts of appeals on the issue of whether contracting parties' inclusion of judicial review clauses are enforceable.... A review of the treatment by these federal circuits provides the backdrop for understanding of the Supreme Court's recent decision in *Hall Street Associates*.

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254 F.3d 925, 935 (10th Cir. 2001). Litigants and courts in these decisions have been of the view that expanded judicial review could impair efficiency, flexibility, relative speed, informality, and finality as important attributes of arbitration that would be compromised were judicial review to be expanded. Additionally, these decisions raise concerns about what the litigants and courts describe as the impermissible expansion of federal jurisdiction by private agreement.

The competing arguments have led to a split in the federal courts of appeals on the issue of whether contracting parties' inclusion of judicial review clauses are enforceable. The First, Third, Fourth, Fifth, and Sixth Circuits have expressed the view that expanded review clauses are enforceable.[1] Conversely, the Second, Seventh, Eighth, Ninth, and Tenth Circuits have expressed the view that such clauses are not enforceable.[2] A review of the treatment by these federal circuits provides the backdrop for understanding of the Supreme Court's recent decision in *Hall Street Associates*.

II. The Split in the Circuits

A. Allowing Expanded Judicial Review

Five federal circuits have indicated that expanded judicial review clauses in agreements to arbitrate should be enforced as any other contractual term. These courts have generally concluded that parties may make agreements to expand a federal court's scope of reviewing an arbitral award "because, as the Supreme Court has emphasized, arbitration is a creature of contract." *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995).

The first federal circuit to uphold an agreement calling for expanded judicial review was the Fifth Circuit in *Gateway*. In that case, the parties agreed to arbitration for disputes arising under their contract, but they also agreed that "errors of law shall be subject to appeal." 64 F.3d at 995. A dispute arose, and the matter was referred to arbitration as called for under the contract.

After the arbitrator issued a final award, the prevailing party moved to confirm, while the losing party moved to vacate. The district court refused to review the award for "errors of law," but the Fifth Circuit determined that the district court's decision was incorrect and itself reviewed the award for "errors of law." Reasoning that the FAA's primary purpose is to enforce private agreements to arbitrate according to their terms, the Fifth Circuit vacated the arbitral award because parties may "specify by contract the rules under which that arbitration will be conducted." 64 F.3d at 996 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)). Under the court's reasoning, this includes the freedom to contract for expanded judicial review of arbitration awards.

Other federal circuits have reached similar conclusions. For example, in *Syncor International Corp. v. McLeland*, 120 F.3d 262 (Table), 1997 WL 452245 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998), the Fourth Circuit followed *Gateway*. The agreement calling for arbitration provided that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error." 1997 WL 452245 at *6. After citing "manifest disregard" of the law as the relevant standard, the Fourth Circuit in *Syncor* adopted the reasoning of *Gateway*, determining that, under the expanded review clause, "the district court should have reviewed the arbitrator's legal conclusions *de novo*." *Id*.

Although not exercising expanded review of arbitral awards, three other circuits have expressed the view that such clauses are enforceable contract terms. In *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir.), *cert. denied*, 534 U.S. 1020 (2001), the losing party moved to vacate an arbitral award under the FAA. Opposing confirmation, the prevailing party argued that Pennsylvania's vacatur standards, which are more restrictive than the FAA's vacatur standards, applied because the parties agreed that their contract was "governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania." 257 F.3d at 289. The Third Circuit discussed the FAA standards, as well as the judicially-created "manifest disregard" standard. 257 F.3d at 292. The *Roadway Court* acknowledged that "parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own (including by referencing state law standards)," but ultimately

concluded that this "generic" choice-of-law clause was insufficient to supplant the enumerated standards of judicial review set forth in the FAA. *Id*. at 288, 293.

Similarly, in *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc*., 401 F.3d 701 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005), the Sixth Circuit found that a generic choice-of-law clause was insufficient to displace the FAA's vacatur standards or to exceed the review under "manifest disregard." 401 F.3d at 713. The arbitration agreement provided that it was "governed by the laws of the State of Michigan," 401 F.3d at 703, which applies a "more thorough review" of arbitral awards than does the FAA. *Id*. at 710. Because the court concluded that the parties did not intend to displace the federal standard for vacatur when the only evidence of such intent is a generic choice-of-law provision, it did not apply the broader standard of judicial review. *Id*.

Finally, in *Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp.,* 427 F.3d 21 (1st Cir. 2005), *cert. denied*, 547 U.S. 1071 (2006), the parties likewise included a generic choice-of-law clause, opting for Puerto Rico law, which allows judicial review for errors of law. 427 F.3d at 24. Addressing the question of whether expanded review clauses are enforceable, the First Circuit stated: "We agree with the other circuits that have concluded that the parties can by contract displace the FAA standard of review." *Id*. at 31. However, the court ultimately concluded that the parties had not contractually displaced the FAA's standard of review, reasoning that a generic choice-of-law clause within the arbitration agreement is insufficient to "require the application of state law concerning the scope of review, since there is a strong federal policy requiring limited review." *Id*. at 29.

B. Disallowing Expanded Judicial Review

The flip-side of upholding expanded judicial review clauses, of course, is concluding that such clauses are unenforceable. Five federal circuits have generally been of the view that such contractual provisions impermissibly encroach on congressional power. According to these courts, private parties cannot, broadly speaking, contract for review of arbitral awards on any grounds other than those enumerated by Congress.

The first federal circuit to hold that expanded juridical review clauses are unenforceable was the Tenth Circuit. In *Bowen v. Amoco Pipeline Co*., 254 F.3d 925 (10th Cir. 2001), the parties agreed that the arbitral awards could be judicially reviewed and set aside if "the award is not supported by the evidence." 254 F.3d at 930. Restricting its review to the vacatur standards under the FAA, the Tenth Circuit held that parties may not contract for expanded judicial review, stating that allowing parties to expand judicial review by contract would undermine the FAA's primary goal of "ensur[ing] judicial respect for the arbitration process." *Id*. Furthermore, limited judicial review ensures respect for the arbitration process by preventing "courts from enforcing parties' agreements to arbitrate only to refuse to respect the results of the arbitration." *Id*. Finally, the Tenth Circuit determined that "[c]ontractually expanded standards ... undermine the independence of the arbitration process and dilute the finality of arbitration awards ... [and] place federal courts in the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures." *Id*. at 935.

The Ninth Circuit reached the same result. In *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc*., 341 F.3d 987 (9th Cir. 2003) (en banc), *petition for cert. dismissed*, 540 U.S. 1098 (2004), the parties contracted for resolving disputes by arbitration, but their agreement to arbitrate further provided that the arbitrator's decision could be vacated by a court "(a) based upon any grounds referred to in the [Federal Arbitration] Act, or (b) where the [arbitrator's] findings of fact are not supported by substantial evidence, or (c) where the [arbitrator's] conclusions of law are erroneous." 341 F.3d at 990. After the arbitrators issued an award, the losing party moved to vacate the award, contending that all three grounds were met.

Ultimately, after multiple return trips between the district court and the court of appeals, the Ninth Circuit rejected the argument that parties to arbitration agreements are free to contract for expanded judicial review. In its decision, the Ninth Circuit stated that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." 341 F.3d at 998. The Ninth Circuit also stated that "[b]ecause the Constitution reserves to Congress the power to determine the standards by which federal courts render decisions, and because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision ... private parties may not contractually impose their own standard on the courts." *Id*. at 1000.

In addition to the Ninth and Tenth Circuits, other circuits have questioned - without deciding - whether expanded review clauses are enforceable. In *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc*., 935 F.2d 1501 (7th Cir. 1991), the Seventh Circuit stated that (a) "[f]ederal courts do not review the soundness of arbitration awards" and (b) parties "can contract for an appellate arbitration panel to review the arbitrator's award" if they desire additional review, but (c) they "cannot contract for *judicial* review of [arbitration] award[s]; federal jurisdiction cannot be created by contract." 935 F.2d at 1504-1505.3 Courts and litigants have suggested that the Seventh Circuit's decision in *Chicago Sun-Times* disapproved expanded judicial review clauses. *E.g., Kyocera,* 341 F.3d at 999; *Schoch v. Info USA, Inc*., 341 F.3d 785, 789 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004); *Bowen*, 254 F.3d at 934; Petition for Writ of Certiorari, *Hall St. Assocs*., No. 06-989, at 16 (stating that the Seventh Circuit discussed expanded review clauses without a "definitive holding" as to their enforceability).

The Eighth Circuit has also called into question the validity of expanded review

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clauses. In *Schoch v. Info USA, Inc*., 341 F.3d 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004), the agreement to arbitrate called for the arbitrator to issue an award (a) "consisting of findings of fact and conclusions of law," (b) that is "valid and binding, (c) in which the "Arbitrator has not exceeded his or her authority," and (d) "in accordance with applicable law." 341 F.3d at 787-788. After issuance of an arbitral award, the prevailing party moved to confirm, while the losing party moved to vacate. The losing party argued that the language quoted above triggered a more scrutinizing standard of judicial review.

The Eighth Circuit concluded that the agreement to arbitrate did not "clearly and unmistakably" evince an intent for expanded judicial review. 341 F.3d at 789. In so doing, however, the court stated that the permissibility of contracting for expanded judicial review "is not yet a foregone conclusion'" because "[i]t is not clear ... that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur [under the FAA]. ... Congress did not authorize de novo review of such an award on its merits; it commanded that when the exceptions do not apply, a federal court has no choice but to confirm." *Id*.

Finally, in *Hoeft v. MVL Group, Inc*., 343 F.3d 57 (2d Cir. 2003), the Second Circuit was faced with the opposite of an expanded review clause - a "restrictive review" clause - one that foreclosed any judicial review of the arbitration award. The arbitration agreement provided that the arbitrator's award "shall be binding and conclusive upon each of the parties hereto and shall not be subject to any type of review or appeal whatsoever." 343 F.3d at 60. While acknowledging that some circuits "have enforced private agreements to alter the judicial review to be applied to arbitral awards" by "*rais[ing]* the level of judicial review otherwise available under the FAA," "there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing the substance of an arbitration award at all." *Id*. at 64 (quotation omitted). The Second Circuit declined to enforce the restrictive review clause.

III. Resolving the Conflict in the Circuits: The Supreme Court's Decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*

Acknowledging the split in the federal authority on the issue of whether parties to arbitration agreements may contractually provide for expanded judicial review of arbitral awards, the United States Supreme Court granted *certiorari* in *Hall Street Associates, L.L.C. v. Mattel, Inc*., No. 06-989, 2008 WL 762537 (U.S. Mar. 25, 2008). The Supreme Court agreed to decide whether "the Federal Arbitration Act ('the FAA') precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA." Question presented in *Hall St. Assocs., L.L.C. v. Mattel, Inc.,* No. 06-989 (U.S. May 29, 2007). In its decision, the Supreme Court resolved the split in authority by holding that parties to an arbitration agreement may not contractually provide for expanded judicial review of arbitral awards. *Hall St. Assocs*., slip op. at 9-10.

This dispute at issue in *Hall Street Associates* arose from a property lease between a landlord (Hall Street Associates, L.L.C.) and its tenant (Mattel, Inc.) about who bore the burden for clean-up costs associated with environmental contamination. The lease did not contain an agreement to arbitrate. However, after the dispute arose and the parties were engaged in civil litigation in federal district court in Oregon, they informed the court that they wanted to resolve their dispute by arbitration, which request the district court granted, entering the arbitration agreement as an order.

> The arbitration agreement provided, in relevant part:
>
> The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

Slip op. at 2.

After the arbitrator issued an award in favor of the tenant, the landlord filed a motion asking the district court to review the award, contending that the arbitrator committed legal error. Reviewing the award under the expanded review clause, the district court concluded that the arbitrator made an error of law. Accordingly, the district court granted the motion to vacate and remanded the dispute to the arbitrator.

On remand, the arbitrator reached a different conclusion, this time issuing an award in favor of the landlord. The district court subsequently confirmed the award. The tenant appealed.Relying on its decision in *Kyocera*, which held that the parties cannot contract for expanded judicial review, the Ninth Circuit in *Hall Street Associates* reversed. Remanding to the district court, the Ninth Circuit instructed the district court to confirm the arbitrator's initial award "unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9

U.S.C. § 11." Joint Appendix, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, No. 06-989, at 142.

On remand, the district court did not confirm the initial award, but instead concluded that vacatur under § 10 was the appropriate remedy because the arbitrator's initial award was "implausible." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 196 Fed. Appx. 476, 477 (9th Cir. 2006). On appeal a second time, the Ninth Circuit again reversed and remanded "with instructions to enforce the original arbitration award and declare [the tenant] the prevailing party." 196 Fed. App. at 478. The landlord sought review in the Supreme Court.

In support of its position that the FAA does not preclude expanded review clauses, the landlord advanced arguments similar to the arguments and decisions in the circuit decisions upholding expanded review clauses: the principal policy reason underlying passage of the FAA was to promote freedom of contract by placing agreements to arbitrate on the same footing as all other contracts; the FAA does not prescribe the exclusive grounds for vacating or modifying arbitral awards as evidenced by *Wilko's* manifest disregard standard; and enforcing expanded review clauses promotes efficiency in arbitration, a significant policy consideration. Brief of Petitioner, *Hall St. Assocs.*, No. 06-989, at 13, 16-38.

In response, the tenant argued that §§ 10 and 11 of the FAA are "the exclusive grounds on which a court may deny an application to confirm an arbitration award and vacate, modify, or correct the award." Brief of Respondent, *Hall St. Assocs.*, No. 06-989, at 15. The tenant also argued that permitting parties to contract for expanded judicial review would impermissibly "empower them to dictate the workings of a court in a manner that no party to any other type of contract is entitled." *Id.* at 36. (Respondent's Br. at p. 15). Furthermore, the tenant argued that upholding an expanded review clause would obligate federal courts to "rely on methods of dispute resolution that are foreign to American judicial proceedings (such as the inquisitorial as opposed to the adversarial method of fact finding) or that are premised on decision making standards that are not accepted by the judiciary (such as a coin toss or reference to astrological signs)." *Id.* at 38.

The Supreme Court vacated the Ninth Circuit's decision based on two grounds. First, the Court rejected the argument that the Supreme Court's prior decision in *Wilko*, in which the Court stated that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation," 346 U.S. at 436-437, established the rule that "expandable judicial review authority has been accepted as the law." Slip op. at 7. The Court in *Hall Street Associates* stated that even "if judges can add grounds to vacate (or modify)" arbitral awards, this logic cannot be extended to allowing "contracting parties" to likewise provide for expanded judicial review of arbitral awards. *Id.* at 8. The Court stated:

> Then there is the vagueness of *Wilko's* phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207"); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 431 (CA2 1974). Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." *See, e.g., Kyocera, supra,* at 997. We, when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment, *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Slip. op. at 8.

Second, by relying on the rule of statutory interpretation known as *ejusdem generis* and by reading §§ 10 and 11 in conjunction with § 9 of the FAA, the Court determined

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In its decision, the Supreme Court resolved the split in authority by holding that parties to an arbitration agreement may not contractually provide for expanded judicial review of arbitral awards.

The Court's decision makes clear that expanded review clauses in arbitration agreements are unenforceable. When asked to vacate or modify arbitral awards under the FAA, federal courts are limited to the grounds enumerated in §§ 10 and 11 of the FAA.

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"that the text compels a reading of the §§ 10 and 11 categories as exclusive." According to the court, the *ejusdem generis* rule provides that "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." Slip. op. at 9. Because the FAA emphasizes "extreme arbitral conduct" as grounds for vacatur or modification of arbitration awards, and because the FAA contains "no textual hook for expansion" of grounds for vacatur or modification, the *ejusdem generis* rule yields the conclusion that contracting parties cannot "supplement review for specific instances of outrageous conduct with review for just any legal error." *Id*.

In addition, the Court relied on the text of the FAA itself to reach its decision. Reading §§ 10 and 11 together with the § 9 language that district courts "must grant" an order confirming an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title," 9 U.S.C. § 9, the Court concluded that this language "unequivocally tells courts to grant confirmation in all cases," except when the specific grounds of §§ 10 and 11 apply. Slip op. at 10. The Court ultimately held that "[i]nstead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id*. at 11.

IV. Conclusion

The Supreme Court's decision in *Hall Street Associates* resolved a split in the federal courts regarding the enforceability of expanded judicial review clauses. The Court's decision makes clear that expanded review clauses in arbitration agreements are unenforceable. When asked to vacate or modify arbitral awards under the FAA, federal courts are limited to the grounds enumerated in §§ 10 and 11 of the FAA.▼

1 The First Circuit has jurisdiction over federal courts in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. 28 U.S.C. § 41. The Third Circuit has jurisdiction over federal courts in Delaware, New Jersey, Pennsylvania, and the Virgin Islands. *Id*. The Fourth Circuit has jurisdiction over federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. *Id*. The Fifth Circuit has jurisdiction over federal courts in the District of the Canal Zone, Louisiana, Mississippi, and Texas. *Id*. The Sixth Circuit has jurisdiction over federal courts in Kentucky, Michigan, Ohio, and Tennessee. *Id*.

2 The Second Circuit has jurisdiction over federal courts in Connecticut, New York, and Vermont. 28 U.S.C. § 41. The Seventh Circuit has jurisdiction over federal courts in Illinois, Indiana, and Wisconsin. *Id*. The Eighth Circuit has jurisdiction over federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. *Id*. The Ninth Circuit has jurisdiction over federal courts in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Hawaii. *Id*. The Tenth Circuit has jurisdiction over federal courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. *Id*.

3 The dispute arose under the Labor-Management Relations Act, 29 U.S.C. § 185, not under the FAA, but the Seventh Circuit looked at FAA cases.

news and notices

Board of Directors Approves New Certification Requirements

After extensive consideration of proposals from the Long Range Planning Committee, the ARIAS Board of Directors, in April, approved a final draft of new certification procedures for arbitrators and umpires.

The new requirements, which take effect on January 1, 2009, are now posted on the ARIAS•U.S. website in the New Certification Requirements section and are shown on Page 32 of this issue of the Quarterly.

Since members may have questions about specific details of the requirements, the Board has asked that they direct such questions to the Certification Committee at **CertificationCommittee@arias-us.org**. Member questions will be answered by the committee, and frequently asked questions will be posted on the website once a critical mass of questions has been received.

Intensive Arbitrator Training Workshops Expanded

In view of the fact that the new certification requirements make attendance at an intensive workshop a requirement for candidates who have not participated as a panelist in two or more qualifying arbitrations, the demand for attendance is expected by increase significantly. Therefore, the capacities of the next two workshops have been doubled. The September 3, 2008 and March 10, 2009 workshops, both at Tarrytown House, will each have a capacity of 54 arbitrator student participants. The September 2009 location has not yet been determined, but it also will be planned for 54.

Current certified arbitrators must meet the new requirements by December 31, 2009. Therefore, any who do not have at least two qualifying arbitrations and have never attended a workshop will also be required to attend to be recertified.

New Certification, Education, and International Committees Forming

As announced at the Spring Conference, new Certification, Education, and International Committees have been forming during the weeks since the conference.

The **Certification Committee** is charged with implementing the new requirements for arbitrator and umpire certification, proposing modifications or clarifications of those requirements to the Board of Directors, and making recommendations to the Board with respect to applications for certification. The Committee with be chaired by Board member Daniel FitzMaurice.

The **Education Committee** is charged with expanding ARIAS's education offerings including development of the ethics training component required by the new arbitrator certification requirements. The Education Committee with be chaired by Board member Mary Kay Vyskocil. Board members George Cavell and David Robb will also serve on this committee.

The **International Committee** is charged with developing ARIAS's role in international arbitrations and with coordinating the Society's relationships and contacts with other international arbitration associations. Mary Kay Vyskocil will also chair the International Committee.

The Board was planning to make member appointments to these committees at its June 12 meeting. It may be too late when you read this notice, but if you are interested in serving on any of these committees please contact the committee chair (**mvyskocil@stblaw.com** or **dlfitzmaurice@daypitney.com**) or Bill Yankus at **director@arias-us.org**.

Board Certifies 13 New Arbitrators; Douglass, Jordan Named to Umpire List

At its meeting in New York on March 26, the Board of Directors approved certification of seven new arbitrators, bringing the total to 334 The following members were certified; their respective sponsors are indicated in parentheses.

- **Peter Brown** (James F. Dowd, Thomas Tobin, Paul Hawksworth, Jay Wilker, William Hauserman)
- **Michael J. FitzGibbons** (Joseph DeVito, Michael Cass, John Binning)
- **Bernard Goebel** (Robert Mangino, Cecil

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Bykerk, Michael Pado)

- **Elaine Lehnert** (Jennifer Mangino, David Raim, Harold Horwich)
- **Barbara Murray** (Jonathan Rosen, Colin Gray, Clive Becker-Jones)
- **Andreas Stahl** (Barry Weissman, Theodor Dielmann, Klaus Kunze)
- **Thomas M. Zurek** (Barbara Niehus, Steven Radcliffe, Robert Comeau)

Then, at its meeting in Florida on May 7, the Board added **Andrew Ian Douglass** and **Leo J. Jordan** to the Umpire List, bringing the total to 92.

At the same meeting, it approved certification of six more arbitrators, bringing the total to 340. The following members were certified; their respective sponsors are indicated in parentheses.

- **Andrew D. Brands** (Robert Mangino, Caleb Fowler, Paul Hawksworth)
- **John H. Haley** (James Shanman, Mary Ellen Burns, Barry Weissman)
- **Gary F. Ibello** (Thomas Allen, Clifford Hendler, John Dattner)
- **James I. Keller** (Ronald Wobbeking, Eugene Wilkinson, Bruce Carlson)
- **Michelle A. Levitt** (Michael Davis, Harold Horwich, Eric Kobrick)
- **Harold J. Sofield** (Paul C. Thomson, John Dattner, Lawrence Zelle)

Board Approves Three New Mediators

Also at the meeting on March 26, the Board of Directors approved three applicants as ARIAS•U.S. Qualified Mediators. They were **Katherine Lee Billingham**, **Andre Hassid**, and **David A. Thirkill**.

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 ARIAS website includes a full explanation of how recognition may be obtained, along with links to the contact information of those who have been approved.

ARIAS•U.S. Web log Is Online

From an initiative of the Publications Committee, an ARIAS•U.S. blog has been developed and is available to members who care to post comments. It is located at **http://arias-us.blogspot.com**. Just click on "Comments" under the original entry to read other comments and post your own.

The possibility of an ARIAS Forum is also being discussed, where various topic threads will be available for comment.

ARIAS•U.S. Events Listed in International Reinsurance Planner

ARIAS•U.S. has begun listing its conferences in the new International Insurance and Reinsurance Planner that was launched recently on the Internet. Developed by Lovells, this new service to the international reinsurance community provides basic information about events and courses around the world. It can be found at **www.reinsuranceevents.com**.

feature

The Appointment And Use Of "Special Audit Masters" In Reinsurance Arbitrations

Gregory H. Horowitz
Carmela Cannistraci

As early as 1791, American courts recognized the many advantages of appointing Special Masters[1] -- neutrals charged with handling a designated part of a case on the court's behalf. Using a Special Master often streamlines what would otherwise be unwieldy, time-consuming and expensive phases of litigation, for which courts may not have the time and/or the specialized expertise. It, therefore, is quite common in large, complex litigation for Special Masters to oversee discovery, with such "masters" responsible for establishing schedules, resolving disputes and generally managing the entire discovery process. Courts, moreover, sometimes utilize Special Masters with unique expertise to facilitate and/or implement settlements and to advise on various specialized subjects, including technology and accounting. In long-tail liability insurance coverage disputes, Special Masters also may play a key role in the allocation phase of a trial.[2]

In the federal court system, the authority to appoint Special Masters is found in Federal Rule of Civil Procedure 53, which allows such appointments: (1) if the parties consent; (2) to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury" if such appointment is warranted by an "exceptional condition" or by the need to perform an accounting or resolve a difficult computation of damages; or (3) to handle pre- and post-trial matters that cannot be addressed effectively and timely by an available judge or magistrate.[3]

Many state court rules also expressly allow judges to delegate certain responsibilities to a Special Master. In New Jersey, for example, the rules allow the appointment of a master for the hearing of a case when all parties consent or under "extraordinary circumstances."[4] Although New Jersey courts determine a master's powers, within the permissible scope, "the master has and shall exercise the power to regulate all proceedings in every hearing, to pass upon the admissibility of the evidence and do all acts necessary or proper for the efficient performance of the duties directed by the [appointment]order."[5] In New York state courts, the role of master is similarly fulfilled by "referees," who may oversee discovery[6] or even try a case, either with consent of the parties or without such consent if "the trial will require the examination of a long account" or "to determine an issue of damages separately triable and not requiring a trial by jury."[7]

Given the widespread use of arbitration to resolve complex commercial cases, it is not surprising that the value and use of Special Masters has also been recognized in that context. The American Arbitration Association ("AAA") rules note that in some cases a judicial authority may direct the AAA to nominate a Special Master.[8] The JAMS arbitration rules go further and expressly provide that "[w]ith the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute."[9]

The ARIAS procedures also acknowledge that a Special Master can be a helpful tool. The Comment to the ARIAS discovery rule suggests that "discovery disputes may require the Panel to use innovative procedural approaches," including the appointment of a Special Master to resolve privilege and confidentiality issues.[10] Thus, the appointment of Special Masters in reinsurance arbitrations is well accepted. Commentators have even proposed that arbitration associations "train and encourage the use of 'special masters.'"[11] Indeed, while retaining a Special Master in a reinsurance arbitration likely requires the parties' consent, in many cases the advantages of such an appointment -- including benefits of economy, efficiency and expertise -- are often so clear that it may be easy to achieve the necessary consensus.

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Gregory H. Horowitz

Carmela Cannistraci

Using a Special Master often streamlines what would otherwise be unwieldy, time-consuming and expensive phases of litigation,...

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Thus, while an audit may be required or otherwise provide valuable information for reinsurance dispute resolution, if it is not actively managed, it can also become an easily manipulated arbitration weapon with great potential for contentiousness, additional expense and delay.

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One of the specific situations in which a Special Master can add particular value to an arbitrated reinsurance dispute is when a complex audit is conducted within the context of the arbitration. Thus, this article discusses a Special Audit Master's ("SAM") role and procedures, details how a Special Master may enhance the reinsurance audit arbitration process, and identifies the unique issues the Panel and the parties should consider before appointing or using a SAM.

Special Audit Masters Audits are increasingly taking place after the commencement of an arbitration pursuant to standard "access to records" clauses. Such contract provisions, which generally permit an assuming company access to the records of its cedent, can often be interpreted either broadly or narrowly -- and when a dispute is ongoing, there is a significant chance that the parties will not share the same perspective. Thus, while an audit may be required or otherwise provide valuable information for reinsurance dispute resolution, if it is not actively managed, it can also become an easily manipulated arbitration weapon with great potential for contentiousness, additional expense and delay.

That being said, it may be difficult at the outset of an arbitration for the parties and the Panel to agree on the need for a SAM -- particularly before the audit gets underway and the parties begin to join audit issues for resolution by the Panel. Even if the party seeking to conduct the audit is truly not trying to seek any tactical advantage or delay through the audit, they may still have a negative response to the proposed use of a SAM. They may believe in good faith that the use of a SAM would cause more problems that it solves and that the SAM may not be worth the added expense. On balance and when the parties consider the various factors set forth in detail below, however, there are a number of potential procedural, substantive and cost benefits for both sides in utilizing a SAM at the outset of a reinsurance arbitration with an embedded audit -- both in the preparation phase of the case and the hearing itself.

Indeed, even when the parties are in relative agreement about the contours of an audit, a SAM can play an invaluable role in keeping a complex reinsurance arbitration on track. First, when an audit is injected into the arbitration process, the entire schedule may be delayed by audit-related disagreements, which are more likely to arise when the parties are already in dispute mode. Second, as with any aspect of a case that requires heavy arbitrator involvement, it may be both difficult and costly to convene three Panel members to address the plethora of procedural and substantive audit issues as they come up -- particularly where the audit involves whole account excess of loss contracts covering multiple lines. Third, unless such audit issues are within the special expertise of the Panel members, it may take extra time and be quite burdensome and/or costly for them to get up to speed on certain specialized subjects, such as accounting and audit standards procedures and alternatives. A SAM's specialized knowledge of the audit focus areas -- whether accounting, claims, premiums and/or underwriting -- will almost certainly result in a smoother, more effective audit. This is especially true when an audit presents complex reinsurance accounting issues, is proposed to be broad in scope, is expected to be of especially long duration and/or involves whole account treaty coverage. With such complex audits taking place under the Panel's authority (with issues potentially arising daily), the parties are likely to need the guidance of a decision-making neutral often and on short notice. Thus, it may be efficient and economical for the parties and the Panel to plan in advance for a SAM to oversee the process and help ensure that both sides have the audit materials and safeguards they need for a productive and timely final arbitration hearing on the merits.

Defining the SAM Role The initial decision to be made is what role a SAM will play. A threshold issue is whether the SAM will make decisions regarding both the audit process (e.g. duration, scheduling) and substance (e.g. scope of the audit, permissible inquiries). If the audit extends to various functions within the audited company (e.g., an audit with both claims and premium issues), another consideration is whether the SAM's duties encompass every area of inquiry, every "sub-audit." Indeed, the parties and the Panel must have a clear understanding at the outset as to whether the SAM will monitor every step of the audit or just get involved when a dispute arises.

Another key issue to consider is whether the parties think it is appropriate -- and a worthwhile expense -- for a SAM to play any post-audit/discovery role. For example, given

the complexity of the matter, the parties and Panel should determine if the SAM also will be expected to review, summarize and/or otherwise provide feedback on an auditor's final report (and any subsequent rebuttal by the audited company) for the Panel. Extending the SAM role to these functions may effectively translate into providing the Panel with its own audit expert, which the parties may or may not be inclined to do.

Naturally, these preliminary determinations will inform other decisions regarding the desired qualifications of a SAM. The parties will likely have to agree on at least the basic credentials required, such as the candidate's specific area of expertise and amount of experience. Another consideration is whether the SAM is expected to perform alone or whether a multi-member support team is acceptable. For example, in a wide-scale audit, it may be necessary to utilize a SAM with accounting experience and who has an actuary available to him/her to assist in performing the SAM function. Additionally, the parties should determine what the expected time commitment will be and whether the SAM will be needed on site or will be able to work exclusively with the parties via telephone.

Selecting a SAM The parties will also have to consider how to choose the SAM. Subject to the specific language in the governing contract, it is likely that the parties will have to consent to the concept of the Panel's delegating any authority to oversee the audit and adjudicate audit disputes.[12] Once such consent is provided, however, either the Panel and/or the parties may select the SAM. If the parties make the SAM choice themselves, the process may be similar to umpire selection, with parties exchanging lists of candidates and attempting to agree upon a choice. If they cannot reach agreement, they may rely on either the Panel or a random selection method to break the stalemate. In any event, if in the initial phase of the SAM selection process the parties are each screening candidates themselves, they may want to agree upon a vetting script to avoid any later suggestion that either side prematurely discussed any expected or actual disputed issue or otherwise "gilded the lily" when speaking with potential nominees.

Once potential SAM candidates who meet the pre-determined qualifications are identified and their availability is confirmed, the next step will be to determine if any conflicts preclude their retention. SAM candidates will need to make full disclosure in a manner similar to that required of Panel candidates. However, in searching for SAM candidates, it may be particularly difficult to avoid conflicts because of the prevalence of large accounting/ consulting firms in annual financial audits conducted by many publicly traded carriers. In fact, it may be virtually impossible to find SAM candidates in the "Big 4" accounting firms who have not at some point performed audit or accounting work for one of the parties. For this reason, parties may want to cast an especially broad net in selecting SAM candidates and also consider qualified professionals from smaller accounting, audit or consulting firms. With larger firms, if a SAM candidate reveals that a colleague would be ethically barred from working on the arbitration, it will be necessary to ensure that the firm is capable of and willing to establish an "ethical" wall between that person and the SAM (assuming all parties and the Panel find this option acceptable).

There are various other preliminary issues to be addressed in the initial phase of choosing a SAM. One is how the SAM will be compensated. In addition to agreeing on a rate, the parties will have to decide how the SAM's fees and expenses will be split among them, especially if there are more than two parties in the arbitration and/or involved in the audit phase of the case. Undoubtedly, even if those costs are split among multiple parties, some may be weary of incurring the additional cost associated with a SAM. Those parties would be well-served to also consider the potential benefits -- specifically the possible savings -- that may flow from the cost of a SAM. Indeed, particularly in a large complex arbitration involving whole account reinsurance treaties and hundreds of audited contracts, it will almost always be cheaper for the parties to pay one SAM to manage the audit rather than three arbitrators. Given the SAM's added experience and ability to cut to the heart of what is needed to conduct a reasonable audit that will allow the parties to properly prepare for the hearing, it will often be cheaper for the parties in the long-run to pay a SAM to manage, focus and, if necessary, shorten the audit on an on-going basis. Indeed, the alternative may be to wait, and pay, for the three member panel to

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Once the initial SAM process decisions are made, it is often best, for the sake of clarity in the arbitration proceeding, to document such audit and SAM procedures carefully (and this may become part of the initial appointment order discussed above or a separate, subsequent document).

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educate themselves on the complex audit issues and then attempt to resolve such issues in a more traditional manner (e.g., motion practice) while any disputed portion of the proposed audit comes to a halt.

Another threshold -- and very important -- inquiry is how communications with the SAM will take place once the audit is underway in the context of the arbitration. The parties and the Panel should identify whether, when and how any such *ex parte* communications with the SAM may occur. For example, the parties and Panel should consider whether the SAM will be permitted to communicate with the Panel without notice to the parties either in the form of status reports and/or consultation in connection with disputes that may arise. Likewise, they should discuss if the SAM will be permitted to communicate with one party without notice to, and/or outside the presence of, the other party in order to streamline the resolution of any audit disputes. In addition, they should address whether the Panel will routinely review all written communications with the Special Master and the parties -- or just review any issues that are raised on appeal (see below).

When all of the appointment issues have been resolved, a written appointment order will help to memorialize the Panel's and the parties' expectations. It should expressly address the general scope of the appointment, the SAM's tenure, and any or all of the other points mentioned above. Of course, the SAM, and any SAM support staff, will also then have to sign confidentiality agreements consistent with those utilized by the parties and Panel in the arbitration.

The Audit and SAM Process Once the SAM is appointed, the Panel, the parties and/or the SAM must make initial decisions as to how the audit will be conducted and how the SAM will oversee that function and address any audit disputes. One approach is to hash out such points at a preliminary SAM conference with input from the parties and/or the Panel. Alternatively, the parties may prefer to leave certain basic procedural decisions to the Panel (e.g., the form of SAM Orders, appeal procedures) and more specialized substantive audit issues to the SAM (e.g., the number and types of audit inquiries, the need for and scope of access to electronic data).

Once the initial SAM process decisions are made, it is often best, for the sake of clarity in the arbitration proceeding, to document such audit and SAM procedures carefully (and this may become part of the initial appointment order discussed above or a separate, subsequent document). Compared to non-audit discovery (even in a large arbitration), a reinsurance audit will often involve a greater number of issues with a higher level of complexity, especially where finite risk or whole account excess of loss products are the subject of the audit. The initial written procedures provide a head start on handling such audit issues by establishing both the parties' basic expectations and a foundational framework to which the SAM can refer as the audit unfolds -- and on which the Panel can rely in any appeal of the SAM rulings or other subsequent proceedings before the Panel.

Some of the other issues that may need to be addressed when crafting the initial audit procedures, and/or as the audit develops, include the following:

Audit Location -- Will the audit take place on-site at the ceding entity's offices or will it be accomplished exclusively through paper discovery? To the likely dismay of the audited party's counsel, audits -- unlike regular discovery -- may involve allowing the adversary's auditor to spend substantial time actually working within the client's offices. If, in fact, the auditor will work on-site, it should be determined how many such visits are permissible, the duration of each visit and the type of access that will be permitted given the ongoing arbitration dispute -- but it may be difficult to predict this in advance. The SAM's input on these points can have a major impact on the pace of both the audit and the rest of the arbitration.

Audit Inquiry Documentation -- In the context of a reinsurance arbitration, it may be preferable to avoid the more informal dialogue that often occurs in a non-arbitration audit, and instead formally document *all* audit communications, information requests and exchanges. If so, the best practice may be to have the auditor submit (to the ceding company's counsel and possibly the SAM) written information requests to which the audited party also responds in writing, using agreed-upon forms. If such precautions are taken, it is imperative that *every* response is documented -- whether it is just a list of hard copy files or electronic data produced or a full

narrative answer. This will preserve potentially critical evidence for the final hearing on the merits and for any potential SAM (and, if needed, Panel) review if an audit dispute arises. The audit plan also should include a procedure by which: (a) the audited party can assert any initial objections to audit requests; and (b) the parties can then attempt to resolve in good faith any disagreement prior to seeking the SAM's intervention. However, to avoid any delay regarding such disputes (and any resulting adverse impact on the arbitration schedule), a mechanism also may be put in place so that the SAM is advised of any objections on a "real-time" basis and a time limit is established for joining disputes with the SAM.

Number of Inquiries -- As is the case with non-audit discovery, the parties and/or the SAM may want to decide how many initial audit inquiries will be permitted. After the initial round of requests and responses, however, unmonitored audits often become far more complicated and time-consuming than regular discovery -- in large part because audit participants often expect an informal follow-up dialogue that may be inadvisable in an ongoing arbitration that will rely in part on the audit record. Thus, the potential exists for the audit follow-up process in an arbitration to become a major hindrance to keeping the arbitration schedule on track. The SAM, therefore, may provide invaluable assistance by monitoring this process and providing guidance as to the bounds of reasonable audit inquiry -- i.e., when "enough is enough" and the parties have what they need to arbitrate their dispute. The SAM, for example, may limit the number of second-round requests or suggest alternative inquiries that will achieve the auditor's goals. In short, the SAM's expertise and monitoring efforts can keep an audit from becoming a runaway discovery train, while still ensuring that the parties obtain all necessary audit information for the arbitration.

Copy Requests -- Unless the audit is handled strictly on an off-site basis (with all documents/data provided in copy form as with "normal" written discovery), the auditor may want to request copies of certain original documents and/or electronic data viewed on-site. In such cases, it is advisable -- both for SAM and general arbitration purposes -- to utilize a copy request form, to bates-stamp or otherwise identify all copies produced, and to track the original data and documents that are provided on-site. The parties or the SAM may also want to limit the number of audit copy or original document requests permitted.

Electronic Data -- Given the possibility that audit inquiries (in today's technologically advanced business world) will require accessing electronic data, it is likely that an auditor will seek direct access to the ceding company's systems. Alternatively, the auditor may receive specifically requested electronic data via disk or other electronic transmission. If the SAM determines the auditor will have broader access to the ceding company's systems, however, it must be decided whether the auditor will be allowed unfettered "browsing" or only limited, narrowly defined electronic access. There are numerous possibilities. For example, the auditor may be granted access only to certain applications. Auditors given system access also may be required to "piggy-back" by sitting with an employee of the audited company who will navigate to the requested information and monitor the auditor's viewing (though, as discussed below, the employee may be instructed not to provide any substantive information in conversation due to the pending arbitration proceedings and limitations on deposition witnesses, etc.).

Another issue to consider is whether and how the auditor will receive system training from the ceding company. If the auditor is trained, it may be advisable to document the exact instruction provided for future use in the deposition of the auditor and/or at the final arbitration hearing (and, in part, to level the playing field in the event an audit rebuttal expert later needs such training). Finally, if an auditor wishes to rely upon any data discovered during electronic exploration, it is critical that such information is documented as evidence for inclusion in the audit report or any rebuttal report. Thus, the auditor should issue a copy request form requesting an electronic download or hard copy screen shots (with specific directions to the requested screens).

Oral Audit Exchanges/"Employee Contact" -- Although it may be preferable to limit all audit communications to written exchanges, under certain circumstances the parties may believe it is appropriate to step outside these bounds -- a scenario unlikely to occur in non-audit discovery. For example, it ultimately may be difficult to avoid some type of employee/auditor conversation if an audit inquiry or response is especially complex, if explanation is needed regarding the availability of data, or if it is necessary to explore possible alternative responses. If the audited party's employees are directed to participate in any such discussions, it will be important to avoid turning them into unofficial depositions -- especially if the Panel has already imposed restrictions on such oral discovery. Thus, the SAM should set parameters on any such discussions.

Indeed, the parties and Panel should consider whether the auditors will be permitted *direct* access to the audited party's staff or whether such communications will take place only through the SAM in some type of *ex parte* process. Of course, even if the auditors do have direct contact with employees outside of Panel-sanctioned depositions, the SAM and counsel may also want to be present to avoid any subsequent controversy about the substantive content of such communications.

On-Site Logs -- As noted above, if all or part of the audit takes place on-site at the audited party's offices, it may be helpful to memorialize all information provided on site each day, as well as the number and identity of the audit staff, the amount of time spent on-site each day, any training provided by the ceding company on-site, etc. The auditor should sign off on such logs daily to create a confirmed summary of all data/documents provided, which will enable both the parties and the SAM to keep track of

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To expedite audit dispute resolution, there should be an advance agreement or order as to the method by which such disputes will be submitted to the SAM.

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the audit progress and minimize the potential for any disputes about the materials made available to the auditor. Such logs should be in addition to, not substitutes for, any written audit response forms.

Information provided to the SAM -- At the outset, it should be decided whether the SAM will receive copies of all audit exchanges (requests, objections, responses, follow-ups, etc.) or only those audit communications relating to disputed points. Under certain circumstances -- particularly if any of the parties become concerned about the scope, length or direction of the audit -- it may be advantageous for the SAM to have received all audit communications on a real time basis. This way, the SAM will have a full context for deciding any disputes about the scope of the audit and/or be in a position to proactively monitor and control the audit process in advance of those disputes. Similarly, if a SAM is appointed in the middle of the audit process, it may be more efficient in the long run to provide all material audit exchanges and data to get the SAM up to speed and give him context for any future rulings. Additionally, if the SAM is expected to opine on or otherwise advise the Panel on the final audit results, receiving and digesting the information on a rolling basis may expedite the final review. Thus, the parties also should consider whether the SAM, upon receiving specific audit disputes, will want to (or should be allowed to) make his or her own inquiries about other audit requests or responses.

Audit Disputes -- During an audit, the parties may find themselves in disagreement about a myriad of points, including, by way of example, the permissible areas and depth of inquiry, the number of information and copy requests, electronic system access, and requests requiring specially generated data or extensive employee work time. To expedite audit dispute resolution, there should be an advance agreement or order as to the method by which such disputes will be submitted to the SAM. Among other things, the parties and SAM should decide whether all disputes be submitted in writing -- and, if so, whether a concise email with PDF attachments will suffice or if the parties will prepare formal motion papers with exhibits. Likewise, the parties and SAM should consider whether disputes will be submitted on a rolling basis or aggregated for periodic review and response by the SAM. Other relevant questions include: Are the parties entitled to present oral argument (and, if so, will there be a transcript of all proceedings)? Or will some/all decisions be made "on the papers"? Will the SAM consider additional written evidence (other than the audit inquiries/responses) or oral testimony? Given the complexity and value of reinsurance audit information and the potential for time-consuming follow-up inquiries, the most expeditious approach in many cases may be to submit audit disputes on a rolling basis in an informal writing that identifies the issue -- and then let the SAM decide the extent to which (if any) more detailed supporting materials and/or briefs are required. Indeed, the SAM may be in the best position to determine the most efficient and fair means of resolving each dispute on a case-by-case basis as the audit progresses.

SAM Decisions -- Other important considerations are how the SAM will communicate rulings about audit disputes and whether the SAM will issue reasoned decisions. Indeed, assuming that the Panel would want to maintain some oversight over the SAM and the parties would like to maintain their right to challenge the SAM's rulings with the Panel, the manner in which SAM decides these issues may impact how audit disputes are ultimately reviewed and resolved.

In most cases, it will be important to the parties -- and the Panel -- for the SAM to provide a written rationale for his/her audit-related decision. Such a reasoned basis will allow the parties to join with specificity the basis for any challenge to the SAM's rulings if there are any appeals to the Panel (see below). Moreover, it would assist the Panel in monitoring audit developments and disputes -- and facilitate Panel intervention, if needed. For example, if the Panel felt that the SAM had exceeded its authority and/or was otherwise deciding the audit disputes in a procedural manner inconsistent with the Panel's (implied or expressed) intent, a reasoned decision by the SAM would provide an opportunity for the Panel to "jump in" and provide additional guidance or clarification as to how they wanted the audit proceedings to be conducted.

Appeals -- The parties also should determine what (if any) mechanism should be established if they wish to object to any of the SAM's decisions. They should establish

timing requirements and procedures for any appeals to the SAM (for reconsideration) and to the Panel. One significant issue -- in which the parties probably will want to have a say -- will be the standard of review the Panel will use for any appeals of the SAM's decisions. The review of SAM decisions may be limited to an abuse of discretion standard if the reason to engage a SAM in the first place was to be able to rely on his or her expertise and delegate specialized matters that would otherwise involve costly and possibly extended Panel review. However, some Panels may not feel comfortable delegating such authority and may insist on a *de novo* review to preserve their discretion in any appeal. Indeed, as noted above, another issue to consider is whether the Panel may intervene at any time along the way if it determines that the SAM is acting in a manner inconsistent with the Panel's expectations and/or its own rulings in the case.

Audit Reports -- If the SAM is charged with reviewing and/or defining the scope of any audit reports and any rebuttals,[13] one consideration is whether the SAM will provide feedback to the Panel and/or to the parties with regard to any such reports and whether the SAM's feedback will be in writing (or will be communicated verbally). Indeed, assuming the parties have access to the SAM's ultimate recommendations, reflections or conclusions, they may want the opportunity to respond formally before the audit process is considered complete.▼

Conclusion

Appointment of a Special Audit Master can streamline a reinsurance arbitration and ensure that the parties stay on track, particularly where the audit issues to be addressed are numerous and/or complex. For this reason, the use of SAMs to coordinate and oversee arbitration reinsurance audits may be particularly helpful. Reinsurance audits take place all the time in the normal course of business, but when they happen instead in the heat of an arbitrated dispute, there are many potential pitfalls and complications. Unless the Panel has expertise in the areas on which the audit is focused and the time to monitor and facilitate the audit carefully, it can easily take on a life of its own and prolong the reinsurance arbitration process unnecessarily and expensively. Additionally, without careful oversight by the SAM, the protections usually afforded by formal arbitration discovery may be side-stepped in favor of the more common, informal and somewhat risky audit process. In short, the appointment of a SAM -- and the crafting and implementation of thoughtful audit procedures -- will help safeguard and balance the right to an audit in a reinsurance arbitration with the need to keep the entire arbitration process efficient and on schedule.

* The authors thank Daniel Schmidt, III of Dispute Resolution Services International and Richard Hershman of FTI Consulting for their insightful comments and input. They also want to gratefully acknowledge the research and other assistance their former colleague Dana Parker provided in the preparation of this article.

1 *See* Carstens, Anne-Marie C., *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*; 86 Minn. L. Rev. 625, 641-643 (2002) (citing Vanstophorst v Maryland, 2 U.S. (2 Dall.) 401 (1791)).

2 *See* Owens-Illinois v United Ins. Co. 138 N.J. 437, 475-77 (1994).

3 F.R.Civ.P. 53.

4 N.J. R. 4:41-1.

5 N.J. R. 4:41-3.

6 C.P.L.R. § 3104.

7 C.P.L.R. § 4317. In New York, the term "Special Master" generally refers to appellate division mediators who serve on a pro bono basis. N.Y.C.R.R. 202.14.

8 Optional Rules for Emergency Measures of Protections, O-7. "Special Master."

9 JAMS Comprehensive Arbitration Rules and Procedures, Rule 17(d). *See also Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 939 (10th Cir. 2001) (arbitration panel in a large property damage case appointed a Special Master to administer an escrow fund).

10 ARIAS Practical Guide to Reinsurance Arbitration Procedure, Chapter IV, Section 4.1, "Discovery Schedule," Comment G.

11 Anne Quinn & Jack Whittle, *The Current State of Reinsurance Arbitration: Addressing the Common Areas of Complaint*, ARIAS•U.S. QUARTERLY (2003).

12 If the Panel is reluctant to exercise its jurisdiction over a proposed reinsurance audit in the context of the arbitration and/or is considering whether the proposed audit is even appropriate given its proposed scope or relationship to the issues in dispute in the arbitration, it may want to consider conditioning the audit on the agreement of the parties to utilize a SAM.

13 Unless expressly authorized in a stipulated appointment order, the Panel should consider seeking the parties' consent before seeking the SAM's input on any ultimate issues of fact as this could be deemed outside of the scope of the duties delegated to the SAM in the administration of the audit.

In short, the appointment of a SAM -- and the crafting and implementation of thoughtful audit procedures -- will help safeguard and balance the right to an audit in a reinsurance arbitration with the need to keep the entire arbitration process efficient and on schedule.

members on the move

In each issue of the Quarterly, this column lists employment changes, re-locations, and address changes, both postal and email, which have come in during the last quarter, so that members can adjust their address directories and PDAs. Most of these changes are not reflected in the 2008 Directory, so please update where necessary.

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

Sandy Hauserman has left Guy Carpenter and relocated to Vermont, where he will be involved in Stones River Consulting, LLC and Digital Risk Underwriters. His new contact information is Stones River Consulting, LLC, 459 Portland Street - Suite 202, St. Johnsbury, VT 05819, phone 802-748-1333, cell 802-535-2905, email sandy@stonesriverconsulting.com .

Thomas J. Perry can now be found at Golub & Isabel, P.C., 160 Littleton Road, Suite 300, Parsippany, NJ 07054, phone 973-968-3377, fax 973-968-3044, email tperry@golub-isabel.com .

Joseph Donley has not actually moved an inch, but Kittredge, Donley, Elson, Fullem & Embick is now **Thorp Reed & Armstrong LLP**, so his email address has changed to jdonley@thorpreed.com , and he has brought his new firm into ARIAS•U.S. as a corporate member.

Bazil McNulty, an Exton, PA based boutique law firm, has relocated to New York City at 1285 Avenue of the Americas, 35th Floor, New York, NY 10019, phone/fax 212-537-4791. Emails are unchanged.

Philip J. Walsh has joined Hinshaw & Culbertson LLP as a partner in the firm's New York City office. His contact information is 780 Third Avenue, 4th Floor, New York, NY 10017, phone 212-471-6238, fax 212-935-1161, email pwalsh@hinshawlaw.com. Please correct his email address in the directory.

Richard S. March's direct phone at UnitedAmerica Insurance Group is 610-660-6816, email is rmarch@uai-group.com .

Since the ARIAS•U.S. Directory closed, **Nelson Levine de Luca & Horst LLP** has a new address in Blue Bell, PA and all the phones changed, too. The new address is 518 Township Line Rd. Suite 300, with the same 19422 zip code. The new phones are **Timothy Stalker** 215-358-5125, **Michael Kurtis** 215-358-5139, **Michael Nelson** 215-358-5160. The fax is 215-358-5101. Email addresses are unchanged.

James W. Schacht's new address is 12271 Wiseman Street, Petersburg, IL 62675, phone 217-632-7052, fax 217-632-7015, cell 312-259-4161.

Two Directory corrections are necessary for XL Capital. **Frank DeMento**'s email address was wrong; it should be frank.demento@xlgroup. Also, Matthew 's correct phone number is 203-964-5283.

Allan M. Zarcone's corporate address information has changed since the Directory. It is now Global Reinsurance Corporation of America, Times Square Tower, 7 Times Square, 37th Floor, New York, NY 10036. His email address contained an error; the correct address is allan_zarcone@ggrca.com. Phone numbers have not changed.

Harry Cohen has moved uptown to become a partner at Crowell & Moring, LLP. He is located at 153 East 53rd Street, New York, New York 10022, phone 212-803-4044, fax 212-895-4201, cell 914-450-3700, email hcohen@crowell.com.

Three Chicago members have joined Proskauer Rose LLP to form its Chicago office. As a result, everyone's postal address is new at 222 South Riverside Plaza, 29th Floor, Chicago, IL 60606-5808. Individual changes are as follows:

- **Marc E. Rosenthal**, phone 312-962-3530, fax 312-962-3551, email mrosenthal@proskauer.com.
- **Steven R. Gilford**, phone 312-962-3510, fax 312-962-3551, email sgilford@proskauer.com.
- **Paul L. Langer**, phone 312-962-3520, fax 312-962-3551, planger@proskauer.com.

Thomas M. Daly is now Managing Partner of the U.S. operation of Horseshoe Insurance Group of Bermuda. He can be contacted at Horseshoe Insurance Advisors US LLC, P.O. Box 8831, New Fairfield, CT 06812, phone 203-312-9620, fax 203-312-9681, cell 203-704-7430, email tom@horseshoeadvisors.com.

Patricia Drago's new business number is 732-259-3619.

Bryan D. Bolton has relocated from Philadelphia to join the rest of the ARIAS•U.S. representative team at Funk & Bolton, P.A., Twelfth Floor, 36 South Charles Street, Baltimore, Maryland 21201-3111, phone 410-659-7754, fax 410-659-7773. Email remains the same.

While they have not actually moved to a new location, **Richard Porter**, **John Jacobus**, and **Leah Quadrino** are no longer individual members. They are now designated reps for the new corporate membership of **Steptoe & Johnson LLP**, with all the same contact information. Also, **Paul Janaskie** has joined them. His new contact information is 1330 Connecticut Avenue, NW, Washington, DC 20036-1795, phone 202-429-3052, cell 301-801-5440, email pjanaskie@steptoe.com.

There is a new team at Mayer Brown LLP. They are located at 71 S. Wacker Drive, Chicago IL 60606. The new members are **Michael J. Gill**, phone 312-701-7128, fax 312-706-8633, email mgill@mayerbrown.com and **Lawrence R. Hamilton**, phone 312-701-7055, fax 312-706 8333, email Lhamilton@mayerbrown.com .

Email/Website Changes

Soren Laursen's correct email address is sorenlaursen@verizon.net. Please mark your Directory, which shows an old, retired one.

Hugh W. Greene, Jr.'s new email address is hgreenejr@embarqmail.com.

Back to the Breakers

After two years of experiencing other locations, ARIAS•U.S. will return to its members' favorite resort… The Breakers in Palm Beach… for the 2009 Spring Conference.

Mark your calendars now! The dates are May 6-8. The sessions will run from Wednesday noon until Friday noon.

If you missed the conference in 2006, you have not seen the new beachfront area that opened that year. It brought a whole new level of style to the Breakers beach experience.

Complete information will be on the website along with online registration in late February of 2009.

Final Delegate Count at Convention Was 414

When the late registrants and cancellations were tallied, the final attendance at this year's ARIAS Spring Conference in Amelia Island came in at 414. In addition, 57 spouses and guests attended, along with 16 children, ranging from 13 weeks to 12 years, for a grand total of 487.

The conference theme was "Decision 2008: Reclaiming the Purpose and Integrity of the Arbitration Process." That theme was carried out with red, white and blue bunting, balloons, and political convention-related sign graphics. Breakouts were designated "Caucuses" and the conference, itself, was relabeled a "Convention." Content of the sessions focused on a return to the traditional values and spirit of arbitration in a changing and sophisticated reinsurance environment.

By far, the highlight of the event was the opening day keynote address by The Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court. Justice Alito was introduced by ARIAS member David Grais, who recalled his days in college with his friend, Sam, and reminisced about their experiences at Princeton. Justice Alito, after correcting some of David's recollections and adding some new ones, went on to talk about his recent experiences as the junior member of the Court. He also described and gave his perspective on several arbitration cases upon which the Court had ruled.

This unique Convention featured four plenary tutorial sessions. Before the keynote address, the "Ethics in Arbitration" session featured Professor Catherine Rogers, a noted expert in the field, who led the discussion with an historical and comparative overview of ethical

standards governing arbitrator conduct. In conjunction with the other members of the panel, Professor Rogers addressed the proliferation of sources purporting to address or govern such conduct and examined practices and developments in other arbitration organizations and forums.

Following the keynote, the "Insurance Linked Securities" panel described various capital markets products and addressed the potential reinsurance arbitration issues that could arise from these contracts. Led by Kenneth Wylie, the panel members, industry leaders who are actively involved with these products, explained the mechanics of catastrophe bonds, sidecars, and collateralized industry loss warranty arrangements.

Justice Samuel A. Alito, Jr. with ARIAS•U.S. Chairman Thomas L. Forsyth

At the same time, David Geronemus, a renowned mediator with JAMS, led a panel entitled "Use of Mediation as a Tool to Resolve Reinsurance Arbitration Disputes." He described his experiences in mediating complex, multi-party, high stakes insurance coverage disputes. He and the panel, then, addressed best practices in the use of mediation in resolving reinsurance disputes in England and the U.S.

The Breakouts were designated "Caucuses" and the conference, itself, was relabeled a "Convention."

On Friday morning, there were two plenary mock arbitration sessions arising from one master topical fact pattern. One session utilized a "baseball arbitration" resolution approach, while the other demonstrated through sequential mock sessions the differences between the handling of the same facts in UK and US reinsurance arbitrations. Both panels included blue-ribbon arbitrators; the UK team was made up of three QCs (Queen's Counsel).

David Grais introducing Justice Alito

On Thursday morning, ARIAS•U.S. Chairman Tom Forsyth led an explanation of the new certification requirements that the Board has now approved and which will take effect on January 1, 2009 (see Page 32). He concluded by indicating that the new requirements were available in a separate section of the ARIAS•U.S. website and that any questions about them should be directed to the Certification Committee at **certificationcommittee@arias-us.org**.

CONTINUED ON PAGE 22

Justice Alito describing recent arbitration cases

Attendees during Alito keynote

After that session, five simultaneous workshops took place and were repeated after the morning break, so that each attendee was able to attend two. All "caucuses" were well attended, with New Contract Clauses garnering somewhat more than the others. The featured topics were as follows:

- Technology in Managing a Reinsurance Dispute
- Life and Health Reinsurance Workshop
- Commutation Disputes and Actuarial Panels
- Newer Arbitrator Program Mock Streamlined Proceeding
- New Contract Clauses and Arbitration Procedures: the Future of Reinsurance Arbitration

Chairman Forsyth with Ethics panelists Elizabeth Thompson, Catherine Rogers, Richard Porter, and Dale Crawford

Some members felt that it was even better than The Breakers. . .

Anyone wishing to receive slides of a presentation or a PDF of the conference program booklet, with the complete schedule and biographies of leaders, speakers, panelists, and presenters, should send a request to arias@cinn.com.

Of course, an ARIAS Spring Conference would not be complete without the golf and tennis tournaments during the Thursday afternoon break. Chaired by Jim Stinson and Eric Kobrick, respectively, the tournaments attracted 120 golfers and 26 tennis players, setting new records for both. Prizes were awarded at the reception that evening.

Instead of a banquet dinner on Thursday evening, this year a new approach was implemented whereby the reception was extended to two hours and heavy hors d'oeuvres were served. Attendees had the flexibility of having dinner at the reception or going to dinner elsewhere afterwards. Comments were mixed about the new concept, though most were positive.

As Frank Lattal closed the conference and reminded members about the Fall Conference on November 6-7 in New York City, 1300 balloons cascaded from a bag attached to the ceiling. In retrospect, the balloon drop should have been delayed until the Fall Conference, where the ceiling of the Hilton is significantly higher. This was more

of a balloon plop, since the bottom of the bag was only ten feet above the heads of the few people who were brave enough to sit under it.

Comments about the Ritz-Carlton were very positive. Some members felt that it was even better than The Breakers, the perennial favorite. The 2009 Spring Conference will take place back at The Breakers, in Palm Beach. **Mark the date...May 6-8, 2009!** Details will be on the website calendar as they develop.

Members are reminded that presentations at the 2008 Spring "Convention" were intended for educational purposes and may not reflect the views or positions of the presenters, the presenters' employers or clients, or the views of ARIAS•U.S. or any specific members of ARIAS.

Attendees during Ethics panel

CAUCUSES ONE AND TWO

Mediation panelists Matthew Allen, Peter Gentile, Jane Andrewartha, Vince Vitkowsky with David Geronemus (at podium)

Insurance Linked Securities panelists John Schwolsky, Danyal Ozizmir, Eric Brosius, Robert Bredahl, and Kenneth Wylie

NEW CERTIFICATION REQUIREMENTS

Board members Forsyth, Susan Stone, Daniel FitzMaurice with Long Range Planning Committee Chairman Mark Gurevitz

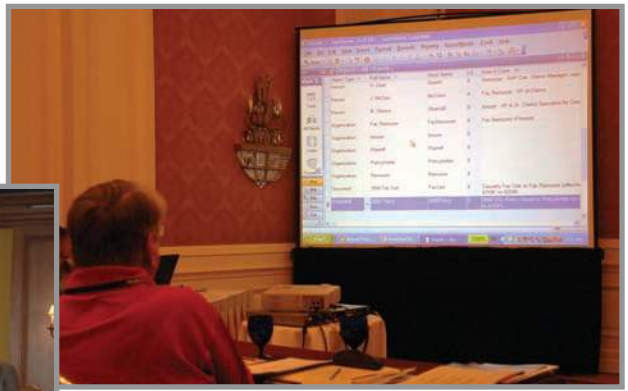
Above: Chairman Forsyth explained the new requirements that the Board has approved.

Left: Board member and LRPC member FitzMaurice emphasizes a point.

CAUCUS WORKSHOPS

Caucus B - Managing arbitrations with technology

Above: Caucus A - Focusing on life and health reinsurance issues



Above: Caucus B - Demonstrating technology

Left: Caucus C - Newer Arbitrator Program Mock Streamlined Arbitration

Caucus E - New Contract Clauses and Arbitration Procedures

Caucus D - Commutation Disputes and Actuarial Panels (James MacGinnitie at left)

MOCK SESSIONS

Team UK: David Webster, Michael Collins, Peter Rogan, Huw Davies, and Ian Hunter.

The US panel deliberates (Susan Claflin at left)

President Frank Lattal concludes the Conference...

Co-Chairs wrap up (Michael Knoerzer at right)

AROUND THE RECEPTION

So this is called a reception, Mommy?

Below: Klaus Kunze and friends

Right: Breakfast on the Oceanfront Lawn

John Nonna and friends

AROUND THE CONFERENCE

Rick Shaw

Left: John Schwolsky

Ron Klein

Deirdre Johnson

feature

Late Named Witnesses: What's a Panel to Do?

Robert M. Hall

Robert M. Hall

One issue that may concern the panel in such a situation is the possibility of having the panel's ultimate ruling on the merits vacated because of its decision on the late named witness.

Mr. Hall is a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant and expert witness as well as an arbitrator and mediator of insurance and reinsurance disputes

I. Introduction

Sooner or later, most reinsurance arbitrators will be faced with the situation of one side to the controversy attempting to name a new witness to their case in chief long after discovery is concluded and shortly before the hearing. This, naturally, generates complaints of prejudice and intense debate over what was required or implied in the schedule for discovery. The result is a difficult decision for the panel which may have significant impact on the outcome of the hearing.

One issue that may concern the panel in such a situation is the possibility of having the panel's ultimate ruling on the merits vacated because of its decision on the late named witness. The purpose of this article is to examine some recent case law on this possibility and to suggest factors to be considered by a panel in considering whether to allow testimony by a late named witness.

II. Recent Case Law

Commercial Risk Reins. Co. Ltd. v. Security Insurance Co. of Hartford, 526 F. Supp.2d 424 (S.D.N.Y. 2007) was a dispute in which a cedent sought reinsurance recoverables under a contract with an arbitration clause which granted the panel "the power to determine all procedural rules for the holding of the arbitration including but not limited to inspection of documents, examination of witnesses and any other matter relating to the conduct of the arbitration."[1] The contract also included "honorable engagement" language relieving the panel of judicial formalities and allowing it to abstain from following strict rules of law.[2]

The reinsurer proffered its chief financial officer as a witness after the close of discovery and provided to the cedent documents about which he was proposed to testify two days before the hearing. The cedent argued that it was prejudiced by the inability to depose the late named witness and the reinsurer argued that witness lists exchanged previously were merely preliminary in nature. After hearing the arguments of counsel on point, the panel ruled that the CFO's testimony would be excluded stating that the CFO "was not on the witness list." As to the issue of whether the witness lists exchanged by counsel were final or preliminary, the panel commented "Me [sic] take it for what it is . . . ."[3]

While the panel's articulation of the reasons for its decision was fairly opaque, I have no doubt, and neither did the court, that the panel carefully considered the competing arguments. Moreover, the court articulated its very limited standard of review of the panel's decision:

> [T]he panel satisfied the minimal standard governing its authority. The arbitrators allowed the parties an opportunity to address the issue, heard their arguments and "explain[ed] their conclusions in terms that offer even a barely colorable justification for the outcome reached."[4]

This being the case, the court found no justification for going behind the decision of the panel to exclude the CFO's testimony and second-guess it:

> In this context, Commercial Risk's protestations about the status of the witness list and the timing of their proffer of [the CFO] as a witness runs counter to the expansive delegation of decisional authority with which the parties, through their explicit agreement, entrusted the arbitrators. Thus, Commercial Risk's argument reflects an instance of phenomenon noted by this Court In which parties agree to arbitrate

and confer upon arbitrators maximum decisional authority so as to liberate them from rigid judicial formalities and application of strict rules of law, and then fault them if they do exercise their latitude to stray from those presumably discarded procedural or substantive constraints.[5]

III. Factors to Be Considered With Late Named Witnesses

One important factor in considering whether or not to allow the testimony of late named witnesses is fundamental due process. Stated differently, a panel must allow each side an opportunity to place its case before the panel.[6] However, a panel may legitimately question why a witness so critical to that party's case appears so late in the day. A related issue is whether the evidence sought to be presented is duplicative of other testimony or evidence, even if important to that party's case.

The party opposing the late named witness has legitimate arguments that it is prejudiced by the inability to depose the witness and to develop a hearing strategy that blunts the strengths and exposes the weaknesses of that witness' testimony. However, a panel may: (a) legitimately question whether this is an automatic reaction of highly competitive trial counsel; and (b) do its own analysis of the benefits of the testimony vs. the prejudice to the other side. Several cases demonstrate the courts' reactions to panel rulings in this context.

The panel denied the petitioner's request to have the CFO of the respondent testify at the arbitration hearing in *Areca, Inc. v. Oppenheimer & Co., Inc.*, 960 F.Supp.2d (S.D.N.Y. 1997). When the court was asked to vacate the panel award in favor of the respondent, the court found that the panel provided a fundamentally fair hearing. The petitioner put on ten witnesses over seven hearing days and introduced 148 exhibits. The CFO did not seem to have significant involvement in the dispute. Nonetheless, the panel allowed the petitioner to make its arguments as why the testimony of the CFO was essential. The court found that the panel was well within its rights to decline to hear cumulative evidence. "Although arbitrators must have before them enough evidence to make an informed decision, they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present *every piece* of relevant evidence."[7] (emphasis in the original).

Another case on point is *Tempo Shain Corp. et al. v. Bertek, Inc.*, 120 F.3d 16 (2nd Cir. 1997). Wayne Pollock, the former president of Tempo Shain, was scheduled to testify in an arbitration but was unable to do so when his wife became seriously ill. He intended to testify concerning his own alleged oral misrepresentations and in support of a counterclaim for fraudulent inducement related to a transaction in which he was the sole negotiator on his side. The panel declined to postpone the hearing and Tempo Shain moved to vacate an adverse order on the basis of §10(a)(3) of the Federal Arbitration Act which allows the court to take such action when the panel improperly refuses to postpone a hearing. While recognizing the very limited role of the courts in such matters, the court reviewed the record and determined that the testimony Pollock intended to give was; (a) not cumulative; and (b) critical to defending the misrepresentation claim by Bertek as well as Tempo Shain's counterclaim. On this basis, the panel's order was vacated.

IV. Commentary

Late named witnesses can create a difficult problem in administering a fair and orderly hearing. However, the panel has a great deal of discretion in fashioning proper remedies including barring the proffered testimony. If, however, the testimony offered is critical to the party offering the testimony, and that party offers a credible explanation for the delay in naming the witness, the panel should consider a fair means of allowing the hearing to go forward (e.g. a last minute deposition), delaying the hearing or keeping the record open for later testimony.▼

The views expressed in this article are those of the author and do not reflect the view of his clients. Copyright 2008 by the author. Questions or comments may be addressed to the author at bob@robertmhall.com.

ENDNOTES

1 526 F.Supp.2d at 426.
2 *Id.* at 427.
3 *Id.* at 429.
4 *Id.* quoting *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co,. A.G.),* 579 F.2d 691, 704 (2nd Cir. 1978).
5 *Id.* at 430-1.
6 *See e.g. Hoteles Condado Beach v. Union De Tronquistas Local* 901, 763 F.2d 34 (1st Cir. 1985).
7 960 F.Supp.2d at 55, quoting *Brandt v. Brown & Co. Securities Corp.*, 1995 U.S.Dist.Lexis 5699 (S.D.N.Y.).

Late named witnesses can create a difficult problem in administering a fair and orderly hearing. However, the panel has a great deal of discretion in fashioning proper remedies including barring the proffered testimony.

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the humorous side of the business. We hope you will find these articles interesting and/or enjoyable.

Pet Peeves

Eugene Wollan

Eugene Wollan

Pet peeves – we all have them. Being a professional curmudgeon, I have quite a few, and this space provides me with an opportunity to vent some of my more cherished ones. In the world at large, my favorites are (in no particular order):

- The cab driver who sits comfortably behind the wheel in his shirt sleeves, with the heater going full blast, while you swelter in the back seat in your winter overcoat.
- The driver immediately behind you who leans on his or her horn just as the light is turning green.
- The person just ahead of you at the airport check-in counter who seems to be rerouting every leg of a complicated journey around the world.
- The theatergoer whose seat is right smack in the middle of the row but waits until the lights have gone down to return to his/her seat after intermission.
- The person engaged in a loud, lengthy, gossipy cell phone conversation before a captive audience on a bus or in a restaurant.

Moving a little closer to home, there are pet peeves to be found a-plenty in law practices as well (still in no particular order):

- The loose-cannon adversary who attempts to compensate for his ignorance or unpreparedness with bluster and irrelevancy.
- The judge who takes over the questioning of every witness and simply won't let you try your own case.
- The court clerk who is the prototypical petty bureaucrat drunk with power, and addresses you condescendingly as "counselor" with a distinct and deliberate sneer in his voice.
- The court reporter who interrupts your momentum to change paper just when you were on a roll in your cross-examination.
- The witness who tells you something on which you base your entire trial strategy, and then does a 180 degree reversal when actually testifying.
- The cleaning person who thought the research materials you had carefully stacked on the floor next to your desk were garbage.

And moving even closer to home, there are more than enough pet peeves to be encountered in the somewhat more parochial world of insurance and reinsurance coverage litigation (and especially here in no particular order):

- The juror who sleeps through most of the trial and then votes against you because "Those insurance companies are all alike."
- The drafter of policy wordings (nowadays the broker or intermediary just as often as the underwriter) who does an unthinking, mechanical, cut-and-paste job and ends up with some provisions that are superfluous, some that are contradictory, and some that are simply silly. All of which, of course, throws into the proverbial cocked hat any rational effort to apply the customary rules of contract construction.
- The broker (probably wearing a bowler and very likely carrying a brolly) who acts for the insured in placing the coverage, the insurer in placing the reinsurance, and the reinsurer in placing the retrocessional cover, and then is aghast if anyone dares to mention the phrase "conflict of interest."
- And finally, and possibly most important of all, certain judges (they know who they are) who are perfectly willing to ignore or distort age-old rules of construction and time-honored principles of law in order to hold in favor of coverage, no matter what the facts and regardless of the equities.

> The party arbitrator whose partisanship is so aggressive that he might as well be listed Of Counsel for the side that appointed him.

Eugene Wollan is a former senior partner, now counsel, of Mound Cotton Wollan & Greengrass. He is resident in the New York Office.

Examples are also plentiful in the even more parochial world of reinsurance arbitrations:

- The party arbitrator whose partisanship is so aggressive that he might as well be listed Of Counsel for the side that appointed him.
- The attorney, probably experienced in courtroom work but new to arbitration, who wades into every witness and every issue with a take-no-prisoners attitude that might or might not impress his or her client but certainly antagonizes everyone else in the room.
- The witness who, the reinsurance world being indeed as incestuous as it is, knows everyone in the room and treats the occasion of his testimony as more like a fraternity reunion than a serious quasi-judicial proceeding.
- The umpire who fits into any one of the following categories except number 7:

1. **Caspar Milquetoast**. This umpire feels totally out of his element and is diffident almost to the point of invisibility. He is so awed by Counsel (after all, they are professionals) that he permits them to get away with murder, which they do with regularity as soon as they realize he can be taken advantage of; that realization usually comes to them within the first ten minutes of the hearing. This species requires a massive injection of calcium to strengthen the spine.
2. **Torquemada**. The exact antithesis of No. 1, this umpire puts even the Grand Inquisitor to shame. He becomes drunk with power, rides roughshod over Counsel and Panel alike, brooks no argument, and tolerates no discussion. He treats every witness like a retard or perjurer or both. His rulings, made without consulting his colleagues on the Panel, are brusque and arbitrary. The prescription for this mental aberration is a large dose of the milk of human kindness with a dollop of humility.
3. **Henry Clay**. Unlike his prototype, the Great Compromiser, every ruling this umpire makes is a half-way measure that satisfies no one and solves nothing. His role model is King Solomon, but it escapes his notice that cutting the baby in half is seldom an appropriate solution. A liberal application of decisiveness is called for here.
4. **Judge Roy Bean**. This umpire goes through the motions of a full and fair hearing, except that he starts out with his mind made up and is unwilling to be confused by the facts. The only remedy for this form of arrested intellectual development is a daily objectivity pill.
5. **Goldfinger**. To this umpire, "follow the fortunes" refers to his own bank account, perhaps in Switzerland. His primary concern is how long the hearing can be made to last and what fee schedule he can get the parties to accept. There is no known cure for the disease of greed, but it can usually be controlled by tactful cooperation of the parties.
6. **Willy Loman**. This is the quintessential salesman. He wants to be everyone's friend because some day, somehow, somewhere he may have some business referred to him by one of the parties or witnesses, or perhaps even be asked again to serve on a panel. Isolation is the recommended course of treatment.
7. **Oliver Wendell Holmes**. And then there is the umpire who is even-handed, fair-minded, dedicated and conscientious, intelligent and perceptive in his analysis of the case, considerate and pleasant but also firm and decisive in dealing with Counsel and witnesses, objective and impartial but open to reason and persuasion -- in brief, the paragon of umpires. There are those who, having been through the mill, will protest that if this prototype of umpire really exists, so too do Santa Claus and the Tooth Fairy. The question lies far beyond the scope of this discussion.

Much of what I'm complaining about can obviously be attributed to "human nature," and simply represents in specific applications and contexts certain characteristics and behavior patterns that are pretty universal. Nonetheless, I suppose it is perfectly natural for those of us who have been in the business for a couple of hundred years to be particularly sensitive to the manifestations on our very own turf of those kinds of behavior that might be amusing elsewhere but hit us close to the bone.

Can this behavior ever be changed? I doubt it, no matter how many advances are made in decoding the human genome or genetic engineering or behavior modification psychology. I think it's just too basic. I also think that most of it is triggered, consciously or otherwise, by some forms of self-interest, and that's the last kind of behavior the human animal is ever likely to give up.▼

The broker (probably wearing a bowler and very likely carrying a brolly) who acts for the insured in placing the coverage, the insurer in placing the reinsurance, and the reinsurer in placing the retrocessional cover, and then is aghast if anyone dares to mention the phrase "conflict of interest."

New Arbitrator and Umpire Certification Requirements

After extensive consideration of proposals from the Long Range Planning Committee, the ARIAS Board of Directors approved a final draft of new certification requirements for arbitrators and umpires. Currently, umpires with three completed arbitrations can request to be added to the Umpire List; in the future, they will apply for certification.

Since members may have questions about specific details of the requirements, the Board has asked that members direct questions to the Certification Committee at CertificationCommittee@arias-us.org. These questions will be answered by the committee and frequently asked questions will be posted on the website, once sufficient questions have been received.

...the Board has asked that members direct questions to the Certification Committee at CertificationCommittee@arias-us.org

New ARIAS•U.S. Arbitrator Certification Requirements

To become an ARIAS•U.S. Certified Arbitrator, a candidate must satisfy each of the following five components:

(1) Conference Component

Attendance at one ARIAS•U.S. fall or spring conference in the preceding two (2) years;

(2) Industry Experience Component

Have at least ten (10) years of significant specialization in the insurance/reinsurance industry. This specialized experience can be obtained with insurance or reinsurance companies, brokers, accounting, actuarial, consulting, law, or loss adjusting firms or through government service, or any combination thereof;

(3) Arbitration Experience/Knowledge Component

Option (a)

Participate as an arbitrator or umpire in two (2) or more qualifying insurance or reinsurance arbitrations that, in the aggregate, include at least six (6) full days of evidentiary hearings on the substantive merits of the parties' dispute. In order to be a qualifying insurance or reinsurance arbitration for these purposes, the arbitration must include, at a minimum, an evidentiary hearing of at least one (1) full day on the substantive merits of the parties' dispute;

OR

Option (b)

Participate as an arbitrator or umpire in one (1) or more qualifying insurance or reinsurance arbitration(s) (as defined above) that, in the aggregate, include at least three (3) full days of evidentiary hearings on the substantive merits of the parties' dispute, AND

Participate in an ARIAS•U.S. intensive arbitrator training workshop;

OR

Option (c)

Participate in an ARIAS•U.S. intensive arbitrator training workshop, AND earn a combination of two (2) "credits" by:

1. Service as an employee of a party with principal responsibility for managing an insurance or reinsurance arbitration. This service must include, at a minimum, attendance during three (3) full days of evidentiary hearings on the substantive merits of the parties' dispute in one (1) or more qualifying arbitrations (as defined above) (one (1) credit per each three (3) full days of evidentiary

hearings, up to a maximum of two (2) credits for six (6) or more full days of evidentiary hearings in two (2) or more qualifying arbitrations);

2. Service as a company representative of a party at an insurance or reinsurance arbitration that includes, at a minimum, attendance during three (3) full days of evidentiary hearings on the substantive merits of the parties' dispute in one (1) or more qualifying arbitrations (as defined above) (one (1) credit per each three (3) full days of evidentiary hearings, up to a maximum of two (2) credits for six (6) or more full days of evidentiary hearings in two (2) or more qualifying arbitrations);
3. Service as lead trial counsel in an insurance or reinsurance arbitration, which service must include, at a minimum, attendance during three (3) full days of evidentiary hearings on the substantive merits of the parties' dispute in one (1) or more qualifying arbitrations (as defined above) (one (1) credit per each three (3) full days of evidentiary hearings, up to a maximum of two (2) credits for six (6) or more full days of evidentiary hearings in two (2) or more qualifying arbitrations);
4. Attendance at ARIAS•U.S. educational or training workshop other than the ARIAS•U.S. fall or spring conference or the ARIAS•U.S. intensive arbitrator training workshop (one (1) credit per session up to a maximum of two (2) credits for two (2) different sessions); or
5. Service as a faculty member at an ARIAS•U.S. Conference, workshop or educational program (only one (1) credit available, regardless of the number of programs as a faculty member);

(4) Ethics Component

Complete the Ethics Training Module; AND

(Note: The Ethics Training Module will be based on the Guidelines for Arbitrator Conduct in effect at the time of the application (or recertification). The format of the training will be determined by the Education Committee. The Ethics Training Module will be available before December 31, 2008.)

(5) Recommendation Component

Provide completed recommendation questionnaires from three (3) sponsors. To be a sponsor, the person must be certified as an arbitrator by ARIAS•U.S. or satisfy the criteria for certification. A recommendation from a non-certified sponsor must include the basis for meeting these criteria. The Certification Committee will devise the form of the questionnaire to be completed by the sponsors.

(Note: The ARIAS•U.S. Certification Committee will review each application to become a Certified Arbitrator, determine appropriate means, if any, to verify the information in the application, and provide recommendations to the ARIAS•U.S. Board of Directors. The ARIAS•U.S. Board of Directors will exercise its authority and discretion to determine whether to grant any application to become a Certified Arbitrator.)

New ARIAS•U.S. Umpire Certification Requirements

To become an ARIAS•U.S. Certified Umpire, a candidate must satisfy each of the following requirements:

1. Be an ARIAS•U.S. Certified Arbitrator and maintain Certified Arbitrator status;

The Ethics Training Module will be based on the Guidelines for Arbitrator Conduct in effect at the time of the application (or recertification). The format of the training will be determined by the Education Committee. The Ethics Training Module will be available before December 31, 2008.

CONTINUED ON PAGE 34

In order to maintain Certified Arbitrator status, arbitrators who were initially certified before December 31, 2008 will have until December 31, 2009 to satisfy all of the new requirements for arbitrator certification except for the Recommendation Component.

CONTINUED FROM PAGE 33

2. Participate as an arbitrator or umpire in five (5) or more insurance or reinsurance arbitrations, each through to final award after completion of an evidentiary hearing of at least three (3) full days on the substantive merits of the parties' dispute; AND
3. Have completed at least one (1) of the five (5) arbitrations described in the preceding sentence within five (5) years prior to applying for umpire certification.

(Note: The ARIAS•U.S. Certification Committee will review each application to become a Certified Umpire, determine appropriate means, if any, to verify the information in the application, and provide recommendations to the ARIAS•U.S. Board of Directors. The ARIAS•U.S. Board of Directors will exercise its authority and discretion to determine whether to grant any application to become a Certified Umpire.)

Maintaining Certified Status

In order to maintain Certified Arbitrator status, arbitrators who were initially certified before December 31, 2008 will have until December 31, 2009 to satisfy all of the new requirements for arbitrator certification except for the Recommendation Component. In addition, regardless of the date that one was certified, to maintain Certified Arbitrator status, one must be a current member of ARIAS•U.S. and, every two years after initial certification, satisfy the following additional requirements:

1. Attendance at one ARIAS•U.S. conference;
2. Completion of on-line Ethics refresher; AND
3. Completion of an ARIAS•U.S. educational session or service as faculty member at ARIAS•U.S. conference, workshop, or training session.

To maintain Certified Umpire status, one must maintain Certified Arbitrator status.

Effective Dates

- The new ARIAS•U.S. certification requirements for arbitrators become effective for all applications to become a Certified Arbitrator received after December 31, 2008.
- The above requirements for Maintaining Certified Arbitrator and Umpire Status will become effective after December 31, 2009.
- As explained above, in order to maintain Certified Arbitrator status, arbitrators who were initially certified before December 31, 2008 will have until December 31, 2009 to satisfy all of the new requirements for arbitrator certification except for the Recommendation Component.

ARIAS•U.S. will continue to certify arbitrators and make additions to the umpire list under the pre-existing standards until December 31, 2008. All arbitrator certificates issued before January 1, 2009 will expire on December 31, 2009. As of January 1, 2010, ARIAS•U.S. will no longer publish the Umpire List. As of January 1, 2010, ARIAS•U.S. will publish a Certified Umpire list consisting of those currently certified arbitrators whom the Board has also certified as meeting the Umpire Certification Requirements above.

"Grandfathering"

There is no permanent or indefinite grandfathering.

As explained above, in order to maintain Certified Arbitrator status, arbitrators who were initially certified before December 31, 2008 will have until December 31, 2009 to satisfy all of the new requirements for arbitrator certification except for the Recommendation

Arbitrator Information on the Website

To afford Certified Arbitrators a better opportunity to display and emphasize their qualifications and experience to arbitration consumers, the ARIAS•U.S. arbitrator biography page will be redesigned to provide much more detailed information about Certified Arbitrators. When the new page is implemented, Certified Arbitrators will be required to update the website within a reasonable time as directed by ARIAS•U.S. The initial template for the enhanced website profile can be seen through a link at this point of the website version of this document.

- Training and workshop experience will be updated by ARIAS•U.S. staff as completed.
- More explicit detail regarding work experience will be entered by the arbitrator.
- Arbitration experience as an arbitrator, umpire, lead trial counsel, company representative or manager will be made explicit for U.S., U.K., Bermuda and other non-U.S. arbitrations.
- The extent of an individual's service in an arbitration will be classified as appointed, through organizational hearing, or through the arbitration hearing.
- Estimates or ranges of arbitrations will suffice when the exact number is not known.

Feedback

Since members may have questions about specific details of these requirements, the Board has asked that members direct such questions to the Certification Committee at **CertificationCommittee@arias-us.org**. Member questions will be answered by the committee and frequently asked questions will be posted on the website once a critical mass of these questions has been received.

ARIAS•U.S. Umpire List

The ARIAS•U.S. Umpire List is comprised of ARIAS•U.S. Certified Arbitrators who have provided the Board of Directors with satisfactory evidence of having served on at least three completed (i.e., a final award was issued) insurance or reinsurance arbitrations. The ARIAS Umpire Selection Procedure selects at random from this list. Complete information about that procedure is available on the website at www.arias-us.org.

Therese A. Adams
Hugh Alexander
John T. Andrews
David Appel
Richard S. Bakka
Nasri H. Barakat
Linda Martin Barber
Frank J. Barrett
Clive A. R. Becker-Jones
Peter H. Bickford
John H. Binning
Janet J. Burak
Mary Ellen Burns
Bruce A. Carlson
R. Michael Cass
Peter C. Clemente
John D. Cole
Robert L. Comeau
Dale C. Crawford
Thomas M. Daly
Paul Edward Dassenko
Donald T. DeCarlo
John B. Deiner
A.L. (Tony) DiPardo
John A. Dore
Andrew Ian Douglass
James F. Dowd
Michael W. Elgee
Charles S. Ernst
Robert J. Federman
Charles M. Foss
Caleb L. Fowler
James (Jay) H. Frank
Peter Frey
Ronald S. Gass
Peter A. Gentile
Robert B. Green
Thomas A. Greene
Martin D. Haber
Franklin D. Haftl
Robert M. Hall
Charles W. Havens III
Paul D. Hawksworth
Ian A. Hunter
Wendell Oliver Ingraham
Leo J. Jordan
Jens Juul
Sylvia Kaminsky
T. Richard Kennedy
Floyd H. Knowlton
Klaus H. Kunze
Denis W. Loring
Peter F. Malloy
Andrew Maneval
Robert M. Mangino
Richard E. Marrs
Roger M. Moak
Lawrence O. Monin
Rodney D. Moore
Diane M. Nergaard
Herbert Palmberger
James J. Phair
James J. Powers
George C. Pratt
Robert C. Reinarz
Debra J. Roberts
Edmond F. Rondepierre
Jonathan Rosen
Peter A. Scarpato
Daniel E. Schmidt IV
Richard D. Smith
David A. Thirkill
Elizabeth M. Thompson
N. David Thompson
Paul C. Thomson III
John J. Tickner
Kevin J. Tierney
Thomas M. Tobin
William J. Trutt
Richard L. Voelbel
Jeremy R. Wallis
Andrew S. Walsh
Paul Walther
Richard G. Waterman
Emory L. White Jr.
Richard L. White
W. Mark Wigmore
Michael S. Wilder
Eugene T. Wilkinson
Ronald L. Wobbeking
Eugene Wollan

in focus

Recently Certified Arbitrators

Michael J. FitzGibbons

Bernard Goebel

Michael J. FitzGibbons

Michael FitzGibbons is a seasoned insurance executive with both public and private sector experience. Currently, Mr. FitzGibbons is the principal shareholder of FitzGibbons and Company, Inc., an insurance consulting firm specializing in forensic and expert engagements and fiduciary services as appointed special deputy receiver on behalf of State Insurance Commissioners.

Prior to becoming a full time consultant, Mr. FitzGibbons was Assistant Vice President of Great American Insurance Company where he performed due diligence for the acquisition of a reinsurer. Prior to his tenure with Great American he was Vice President of Operations and Commutations at Universal Reinsurance Corporation, a subsidiary of the Armco Financial Services Group. He joined Armco following the principal operating subsidiaries entering runoff and was responsible for domestic commutations and coordination of international commutation efforts in addition to regulatory and bank compliance. Prior to joining Armco, Mr. FitzGibbons was Deputy Commissioner and Chief Examiner at the Indiana Insurance Department with direct oversight of domestic examinations, admissions, and the receivership division.

Since becoming a consultant, Mr. FitzGibbons's most significant private sector engagement was with Imperial Casualty and Indemnity Company where he, in conjunction with management, deployed an effective runoff plan which ultimately resulted in a successful sale to a third party. His most significant engagements in the public sector are American Bonding Company and Amwest Surety Insurance Company.

Mr. FitzGibbons developed and implemented a successful run off plan for American Bonding Company under the guise of rehabilitation. All creditors will be paid in full with a nominal dividend to its parent company. Amwest Surety Insurance Company is a liquidation proceeding and is expected to close in 2009. All Mr. FitzGibbons's engagements have included oversight for reinsurance disputes. He is well versed in treaty interpretations and accountings.

Mr. FitzGibbons received his BS in Finance and his MBA from Indiana University; he is a Certified Public Accountant and Certified Insurance Receiver ML.▼

Bernard Goebel

Bernard Goebel has been an executive in the life and health reinsurance business for over 30 years and is knowledgeable about reinsurance issues from both ceding company and reinsurer viewpoints. Prior to his retirement from full-time business, he had been with Swiss Re Life & Health America for 25 years and subsequently for six years with Tillinghast - Towers Perrin focusing on reinsurance issues. Currently, he is involved in various reinsurance projects including having provided expert witness testimony.

At Swiss Re, Mr. Goebel held various positions, including as Executive Vice President with overall responsibility for the individual life, group, and health profit centers. He also headed the marketing actuarial department responsible for pricing reinsurance transactions. He was generally involved in all aspects of the business including marketing, treaties, auditing, directing financial reinsurance and merger and acquisition related activities, and identifying issues and arguments in potential arbitrations. He also served as President of Atlantic International Re (Barbados).

At Tillinghast, as a Senior Consultant, Mr. Goebel's reinsurance practice included reviews of direct companies' reinsurance programs and treaties, appraisals of reinsurance companies, analysis of reinsurers' operations and book of business, placement of reinsurance to domestic and offshore markets, development of joint ventures, and consulting in arbitrations.

Mr. Goebel's background also includes experience at a mutual life company, in variable product development, and at a foreign company seeking U.S. life acquisitions. He received his B.A. from Queens College and is an Associate of the Society of Actuaries and a Member of the American Academy of Actuaries. He has served as Editor of the Reinsurance Section

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

Newsletter of the Society of Actuaries and on life industry committees at LIMRA. ▼

Gary F. Ibello

Mr. Ibello began his career with Fireman's Fund handling multi-line claims and joined its San Francisco home office unit handling APH claims in 1982. He became Vice President of the department in 1987 and managed the unit's growth to over 85 employees. During this time, Mr. Ibello also served as an insurer board member of the Asbestos Claims Facility and later as an ex-officio board member of the Center for Claims Resolution. He moved into his current role in 2001 when Fireman's Fund centralized their run-off operations.

In Mr. Ibello's 25 years of APH claims experience, he has supervised or handled virtually all aspects of these evolving areas including coverage issues and trials, multi-party negotiations and interim agreements, high exposure individual and multi-party settlements, and development and implementation of strategic settlement initiatives. He has also testified in a number of coverage trials and Wellington arbitrations both as a corporate and industry representative.

Mr. Ibello also supports Fireman's Fund's ceded reinsurance operations as its claims technical consultant. In this role, he has made high exposure claim presentations to both domestic and London reinsurers, has negotiated individual claim cessions, and has testified on claim issues in a number of reinsurance arbitrations. Mr. Ibello also participates on Fireman's Fund's ceded reinsurance commutation team and was instrumental in developing tools to quantify future APH liabilities.

Mr. Ibello is a graduate of the University of Nevada, Reno with a Bachelor's degree in Business Management. He is currently active in the Excess & Surplus Lines Claims Association and is Fireman's Fund's representative to the Coalition for Litigation Justice.▼

Elaine Lehnert

Elaine Lehnert is a Managing Director at Veris Consulting, LLC (Veris), a consulting firm which provides highly specialized accounting and financial services with a focus on the insurance and reinsurance industry. Her career has been devoted almost entirely to insurance and reinsurance matters.

Ms. Lehnert began her career at KPMG, one of the largest professional accounting firms worldwide. Her experience included providing audit and due diligence services to a wide range of insurers and reinsurers. After leaving KPMG in 1995, she continued her career in the insurance and reinsurance industry at the American Institute of Certified Public Accountants (AICPA). While at the AICPA (1995-1999), she managed activities of the Insurance Companies Committee and issued authoritative guidance dealing with the accounting by property and casualty, reinsurance and life insurance companies. She co-authored the AICPA Audit Risk Alert "Insurance Industry Developments" from 1995 through 2001 and the AICPA Audit and Accounting Guide, "Life and Health Insurance Entities."

Ms. Lehnert's current role of Managing Director at Veris Consulting, LLC includes directing all phases of services including forensic accounting and litigation support. She has provided expert assistance and testimony in circumstances involving insurance and reinsurance disputes. That assistance has included examining the underlying support for claims reported by ceding companies. She has also provided consulting services regarding financial representation and reporting made by parties to a reinsurance arrangement in proceedings that sought to rescind those reinsurance arrangements. Some of Ms. Lehnert's other experiences at Veris include proving analysis of a variety of financial reporting and accounting matters, such as the appropriateness of accounting for loss reserves, related party transactions, business combinations, generally accepted accounting principles and statutory accounting practices.

Ms. Lehnert received her Bachelor of Science in Accounting from Rider University and is a Certified Public Accountant.▼

Gary F. Ibello

Elaine Lehnert

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Barbara Murray

Brian Williams

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Barbara Murray

Barbara Murray has over 24 years experience in the insurance and reinsurance industry with significant concentration in Run-Off operations. She currently serves as Vice President of Reinsurance of Kemper Insurance Companies, overseeing the accounting and claim management functions with respect to ceded and assumed reinsurance claims, including financial reporting, dispute management, billing and collections. Prior to joining Kemper, Ms. Murray was a Director in the Insurance Services Division of PriceWaterhouse Coopers, where she provided expert witness, consulting and auditing services to insurance, reinsurance and related organizations with respect to reserving, claims and litigation management, reinsurance collections, systems, controls and processes. Ms. Murray was the Executive Vice President of Insurance Run-Off Consultants, a Division of Argonaut Ins. Co., where she was ultimately responsible for the day to day operations of the discontinued claims operations, resolving liabilities arising from direct and reinsurance policies issued in the US and UK. Prior to joining Argonaut, Ms. Murray was with Professional Managers Inc., where she managed professional liability claims on behalf of Freemont Insurance.

Ms. Murray has instructed courses in Reinsurance Accounting and Management at the University of Wisconsin, Madison. She has also participated in numerous speaking engagements including the Casualty Property Actuarial Society, Environmental Claims Managers Association, Mealey's Asbestos and Reinsurance seminars, Bermuda Hawksmere Reinsurance Roundtable events, Illinois CPA Society, Chicago Insurance Symposium at DePaul University, and the NYSSA. She was the meeting coordinator for the Environmental Claims Managers Association for ten years.

Ms. Murray received her Masters of Arts in Organizational Management from the University of Phoenix and her Bachelors of Science degree from the University of Illinois at Chicago. She has attained the designation of Casualty Claims Law Associate and has also completed numerous insurance and reinsurance programs including Environmental Law, Bad Faith, and Reinsurance Accounting and Management. ▼

Brian E. Williams

Brian Williams has more than 30 years experience in the life and health insurance industry as an in-house legal counsel at Sun Life Financial, one of Canada's largest and most respected insurance companies. In September 2006, he joined DRS Dispute Resolution Services LP in Toronto, Canada, as a full-time arbitrator and mediator of insurance and reinsurance disputes.

Mr. Williams is an experienced insurance lawyer. He began his legal career in private practice as a commercial litigation lawyer and then joined the Law Department of Sun Life Assurance Company of Canada in January 1977. He went on to serve in progressively senior legal positions over the next 30 years until September 2006, when he stepped down to establish a mediation and arbitration practice.

Mr. Williams has extensive knowledge of life, accident & sickness, disability and liability insurance, as well as life and health reinsurance, both assumed and ceded. He has extensive engagement in the disputes surrounding workers compensation carveout reinsurance pools and other MGU managed pools, involving litigation and arbitrations in the US, Bermuda and the UK.

During his legal career, Mr. Williams was a member of several insurance industry organizations, such as the Canadian Life and Health Association. At the International Claim Association, he served on the Executive Committee and the Law Committee, and most recently was the Chair of the Education Committee, which oversees the ICA Claim Education Program. He earned several insurance industry designations: FLMI, ALHC and AIRC.

Mr. Williams has also been trained in negotiation, mediation and arbitration at the University of Toronto and the Harvard Program on Negotiation. and the Ombudsman Association (2003).

He received his Bachelor of Arts (Economics) from the University of New Brunswick in 1972, his Bachelor of Laws from the UNB Law School in 1975. He is licensed to practice law in Ontario.▼


SAVE THE DATE
ARIAS•U.S.
Fall Conference
and
Annual Meeting
November 6-7, 2008
The 2008 Fall
Conference will
return to the
Hilton New York
on November 6.
Details will be
on the website
as they develop.

Law Committee Case Summaries

Since March of 2006, in a section of the ARIAS•U.S. website entitled "Law Committee Reports," the Law Committee has been publishing summaries of recent U.S. cases addressing arbitration and reinsurance-related issues. Individual members are also invited to submit summaries of cases, legislation, statutes or regulations for potential publication by the committee.

As of the middle of June 2008, there were 40 published case summaries and one regulation summary on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions

Provided below are four case summaries taken from the Law Committee Reports.

Commercial Risk Reinsurance Co. Ltd v. Security Ins. Co. of Hartford, 525 F. Supp. 2d 424, 2007 WL 4292045 (S.D.N.Y. 2007)

Court: United States District Court for the Southern District of New York

Date Decided: November 30, 2007; reconsideration denied December 12, 2007

Issues Addressed:

1. Whether a Court may reexamine an arbitration panel's decision to exclude, on untimeliness grounds, testimony and documents.
2. Whether an arbitration award that does not break down the total amount due as between two unsuccessful entities, even though the two entities' liabilities were undisputedly several and not joint, is sufficiently definite to merit confirmation.
3. Whether an arbitration panel exceeds its authority when it rules on issues that are arguably outside the scope of the underlying contract being arbitrated.

Submitted by: Michele L. Jacobson, Esq. and Christian Fletcher, Esq.*

The United States District Court for the Southern District of New York, in *Commercial Risk Reinsurance Co. v. Security Ins. Co. of Hartford*, denied a petition to vacate a reinsurance arbitration award, and granted a cross-petition to confirm it, holding that, despite contrary assertions in the vacatur motion, (1) the arbitrators were not guilty of misconduct, pursuant to 9 U.S.C. § 10(a)(3), when they excluded as untimely testimony and exhibits proffered by the losing parties on the issue of damages; (2) the award was definite enough to survive a challenge under 9 U.S.C. § 10(a)(4) even though it failed to allocate the total damage amount severally between the two separate losing entities, because the Court could simply condition confirmation on a stipulated allocation, and then modify the award pursuant to 9 U.S.C. § 11; and (3) the arbitrators did not exceed their authority by making rulings involving the scope of that authority, such as awarding damages based on policies that were arguably not covered by the underlying reinsurance agreements, awarding damages that arguably exceeded the reinsurance agreements' limit of liability, and awarding interest that runs after the arbitration is over. 525 F. Supp. 2d 424, 433 (S.D.N.Y. 2007).

Commercial Risk Reinsurance Company Limited and Commercial Risk Re-Insurance Company (together, "Commercial Risk") brought an action to vacate an arbitration award in favor of Security Insurance Company of Hartford ("Security"). *Id*. at 426. In the underlying arbitration, Security sought to recover losses arising from worker's compensation programs, that Commercial Risk had agreed to reinsure pursuant to two reinsurance agreements (the "Treaties") entered into by the parties in 1999 and 2000. *Id*. Under the Treaties, each of the two Commercial Risk entities agreed to accept a specific share of Security's interests and liabilities associated with the worker's compensation program written on Security's paper. *Id*. When Commercial Risk refused to pay amounts billed by Security, contending that a portion of the losses were not covered under the Treaties, Security initiated the arbitration. *Id*.

The Treaties contained an arbitration clause that granted the arbitrators "the power to determine all procedural rules for the holding of the arbitration including but not limited to inspection of documents, examination of witnesses and any other matter relating to the conduct of the arbitration," and included an "Honorable Engagement" provision directing that the arbitrators were to "interpret [the Treaties] as an honorable engagement and not merely as a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law." *Id*. at 426-27.

Pursuant to its authority under the Treaties, the arbitration panel set a discovery schedule, after the close of which Commercial Risk proffered a witness to testify on the issue of damages, and, two days before the hearing began, documents they intended the witness to refer to. *Id*. at 428. Security objected to the introduction of both the witness and certain of the documents, alleging that it would be prejudiced by the lack of sufficient notice and effective opportunity to depose the witness. *Id*. The three-member panel unanimously agreed. Id. at 428-29. The record before the District Court revealed that the panel heard oral argument from both sides on the issue before issuing a ruling that, since the witness

"was not on the witness list," he would be precluded from testifying. *Id*.

Observing that an arbitration panel's broad discretion, which parties confer when they agree to abandon the rigors of a judicial proceeding, was even further liberalized by the Treaties' "Honorable Engagement" clause, the Court found "no justification for going behind the arbitrators' interpretation and application of their procedural mandate[.]" *Id*. at 429. In so holding, the Court distinguished a Second Circuit case, *Tempo Shain Corp. v. Bertek, Inc*., 120 F.3d 16 (2d Cir. 1997), which held that an award must be vacated where the arbitration panel excludes, as cumulative, testimony on a topic that no other competent witness could address. *Id*. The Court found that the exclusion of evidence in *Tempo Shain* "amounted to a substantive ruling regarding the extent of the evidence" while the exclusion in the instant case was "a factual finding in respect of an evidentiary ruling." *Id*. The Court concluded that, "if the arbitrators make a factual and procedural determination that under their governing rules proffered evidence is untimely or not included in approved discovery schedules, absent evidence of misconduct that determination is beyond judicial review." *Id*. at 430.

Commercial Risk's claim, as grounds for vacatur, that the award was insufficiently definite because it failed to preserve the several liability of the two Commercial Risk entities, directing both to pay a single amount of $20,754,990 plus interest, was also rejected by the District Court. *Id*. at 431. Without disagreeing that the awarded amount should be broken down, the Court refused to vacate it and instead relied on its authority pursuant to 9 U.S.C. § 11 to correct an award "so as to effect the intent thereof and promote justice between the parties." *Id*. Noting that the quota share percentages delineated in the Treaties offered a point of reference, it conditioned confirmation on a stipulated allocation of the award amount between the two Commercial Risk entities. *Id*.

Finally, the Court was not persuaded by Commercial Risk's various arguments that the arbitration panel exceeded its authority. *Id*. at 432. Whether the panel was correct to award damages that were based on policies Commercial Risk contended were not covered by the Treaties, and that exceeded what Commercial Risk contended was the limit of liability set by the Treaties was, the Court held, a matter of contractual interpretation not subject to judicial challenge. *Id*. Neither did the panel exceed its authority in granting post-award interest at ten percent, when the Treaties permitted it to award interest, without qualifying the type or fixing a cap at any particular rate. *Id*.

Commercial Risk subsequently moved for reconsideration of the Court's ruling on the witness exclusion issue, arguing that the arbitration panel had improperly excluded their witness and evidence. *Id*. at 433. The Court denied the motion, emphasizing that the panel had considered the potential prejudice to Security arising from the lack of sufficient notice and opportunity to depose the witness, and that the panel's decision was well within the broad authority delegated to it by the Treaties and the Honorable Engagement clause. *Id*. at 434.

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Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A. S.,

Case: 05 Civ. 10540 (RPP)

Court: United State District Court, Southern District of New York

Date Decided: June 28, 2006

Issues Addressed: Arbitrator's continuous duty to disclose conflicts; evident partiality of an arbitrator

Submitted by: John R. Cashin*

In *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi*, A. S., District Court Judge Robert P. Patterson, Jr. held that an arbitrator has a continuous duty of full disclosure regarding his relationship to the parties and nondisclosure of facts that might create even the appearance of partiality requires that the arbitral award be vacated.

Applied Industrial Materials Corp. ("Aimcor") and Ovalar Makine ("Ovalar") commenced arbitration in 1997 to resolve a dispute over their respective rights in the profits from a joint venture for the sale of petroleum coke in Turkey. The Joint Venture Agreement contained an arbitration provision requiring that disputes be resolved by arbitration in New York. The arbitration was to be decided by a Tripartite Arbitration Panel consisting of two party appointed arbitrators who collectively selected the final arbitrator to serve as chairman. The arbitration provision included the following disclosure requirements:

"... all arbitrators are required to disclose any circumstance which could impair their ability to render an unbiased award based solely upon an objective and impartial consideration of the evidence presented to the Panel.

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Such disclosure shall include relations with anyone of:

a) the parties to the arbitration;

b) other affiliates or associated companies of the parties."

At the initial preliminary hearing on September 3, 2003, the Panel was advised that Aimcor was being sold and the principal suitor was Oxbow Industries.

On April 16, 2005 the Chairman of the Panel disclosed that an affiliate of his employer was soliciting business from Oxbow Industries. The Chairman made no further disclosures to the parties regarding his possible conflicts of interest.

On September 22, 2005 the Panel issued a majority opinion in favour of Aimcor with Ovalar's appointed arbitrator dissenting. In November Ovalar discovered that the affiliate of the Chairman's employer had been doing business with Oxbow for over a year and had earned $ 275,000 in revenue from the arrangement.

Ovalar wrote to the Chairman asking for his withdrawal from the Panel due to the commercial relationship between his employer and Oxbow, one of the parties to this arbitration. The Chairman refused to withdraw stating that the amount of business conducted with the affiliate was less than one-third of 1% of the affiliates revenue and amounted to an imperceptible fraction of his employer's revenue. Aimcor subsequently filed a motion to confirm the award and Ovalar motioned to vacate it.

In its opinion vacating the award, the District Court made reference to the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes and the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. It concluded that the Chairman's failure to investigate the nature of his employer's relationship with Oxbow and his subsequent failure to make an additional disclosure did not measure up to those ethical standards of disclosure. Such non-disclosure required that the arbitral award be vacated.

The District Court's reasoning in the case was supported by the need for an appearance of impartiality in international arbitrations conducted in the United States. Judge Petterson stated, "It is important that courts enforce rules of ethics for arbitrators in order to encourage businesses, to have confidence in the integrity of the arbitration process, secure in the knowledge that arbitrators will adhere to these standards.... Confidence in the arbitral panel to render fair and impartial decisions is important to this country's international trade, and full disclosure is integral to the integrity of the Panel's decision."

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Argonaut Insurance Co. v. Century Indemnity Co., Civil Action No. 05-5355, 2007 WL 2668889 (E.D. Pa. Sept. 6, 2007)

Court: United States District Court, Eastern District of Pennsylvania

Date Decided: September 6, 2007

Issues Decided: Withdrawal of arbitration demand; consolidation of arbitrations; question of arbitrability versus question of arbitral procedure

Submitted by: Paul Janaskie*

A federal district court has ruled that it lacks authority to resolve "a rather tangled web of arbitration demands" that has led "to multiple incomplete arbitration panels." The court concluded that it could not "unravel this thicket" because the issue of whether a party may withdraw an arbitration demand is an issue of arbitral procedure for an arbitrator to resolve. *Argonaut Ins. Co. v. Century Indem. Co.*, Civil Action No. 05-5355, 2007 WL 2668889 (E.D. Pa. Sept. 6, 2007).

The case involved a reinsurance treaty calling for binding arbitration. Pursuant to the arbitration clause, each party appointed one arbitrator, and the two arbitrators then selected the third arbitrator. The clause further provided that, if a party refused or neglected to appoint its arbitrator within the time limit given in the treaty, then the other party selected the second arbitrator.

The cedent issued three separate arbitration demands to a reinsurer. Each arbitration demand concerned losses arising from a different insured. Several weeks later, the cedent issued a fourth arbitration demand to the reinsurer. This fourth demand was a consolidated arbitration demand involving multiple claims, including the three claims that were the subject of the three prior arbitration demands.

The reinsurer appointed its arbitrators for the first three arbitration demands. When the cedent did not appoint its arbitrators for the first three arbitration demands, the reinsurer appointed a second arbitrator for each of those three arbitrations. The cedent responded that its fourth arbitration demand "superceded" the prior three arbitration demands and "to avoid any confusion going forward," those three prior arbitration demands were withdrawn.

Before the court, the cedent and reinsurer agreed that under current judicial precedent the issue of consolidation of arbitrations is an issue for arbitrators, not a court. The parties asked the court to decide a narrower issue: which of the four

panels should decide whether or not to consolidate the arbitrations?

The cedent took the position that the consolidation issue should be decided in the fourth arbitration because it had withdrawn the prior three arbitration demands. The reinsurer took the position that the court should order the first three arbitrations to proceed. The reinsurer contended that it had appointed its arbitrators for the first three arbitrations and therefore the cedent's withdrawal was ineffective.

The court ordered all four arbitrations to proceed, and it refused to dismiss any of the arbitrations. The court held that the issue of the withdrawal of an arbitration demand is a matter of arbitral procedure to be decided by an arbitrator, not a court. The court reasoned that it was limited to resolving "gateway questions of arbitrability," such as whether the parties are bound by a given arbitration clause or whether a particular dispute between the parties falls within their arbitration clause.

According to the court, the issue of withdrawal of an arbitration demand is not a gateway question of arbitrability. "The question of whether withdrawal is permitted, at what point, and in what manner, is a question of procedure arising out of the process of arbitration and not a question of arbitrability."

The court stated that it had reached "a distinctly inefficient conclusion," because all four arbitration panels must proceed. "This means that unless these two sophisticated business litigants can sensibly jointly design a procedural roadmap, the panels will have to agree upon a reasonable solution as to which panels must decide the issues."

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Certain Underwriters at Lloyd's London v. Argonaut Insurance Company, No. 06-3395, 2007 WL 2433139 (7th Cir. Aug. 29, 2007)

Court: United States Court of Appeals for the Seventh Circuit (Illinois)

Date Decided: August 29, 2007

Issues Decided: Contractual deadline to appoint arbitrator in reinsurance arbitration; choice-of-law; New York Convention

Submitted by: Paul Janaskie*

The United States Court of Appeals for the Seventh Circuit has ruled that a party's appointment of an arbitrator was invalid because the party failed to make the appointment within 30-days as required by the reinsurance treaties. Because the New York Convention applied to the arbitration agreement, the court held that the party could not resort to state law that would extend the appointment period due to a holiday. Certain Underwriters at *Lloyd's London v. Argonaut Insurance Company*, No. 06-3395, 2007 WL 2433139 (7th Cir. Aug. 29, 2007).

In this case, the reinsurer requested that the cedent designate its arbitrator within 30 days as required by the reinsurance treaties. When the cedent failed to designate its arbitrator by the 30-day deadline, the reinsurer selected the second arbitrator in accordance with the terms of the treaties.

The cedent argued that it was not bound by the strict 30-day deadline because the 30th day was a Sunday and the 31st day was a U.S. federal holiday. The cedent appointed its arbitrator on the 32nd day. In response, the reinsurer petitioned a federal court for an order confirming its appointments of two arbitrators.

According to the Seventh Circuit, "the most significant issue presented by this case" is what substantive law should apply since the reinsurance treaties lack a choice-of-law provision. The cedent argued that the court should apply California law (which arguably extended the time for appointment of the arbitrator due to the federal holiday). The reinsurer argued that dispute should be resolved by a federal common law rule of decision.

The Seventh Circuit agreed with the reinsurer, particularly because the parties' arbitration agreement fell within the New York Convention. The court explained that "a critical objective" of the Convention is the uniform treatment of arbitration agreements to facilitate efficient international arbitration. Given this goal of uniform treatment of arbitration agreements, the court concluded that the parties' dispute over the appointment of the second arbitrator should be resolved by a federal common law rule rather than by a state law rule of decision. Otherwise, if state law governed, the court would permit necessarily "*non*-uniform results."

As a matter of federal common law, the court held that, in the absence of a choice-of-law provision calling for application of a particular state's law, the parties "are to be bound to the explicit language of arbitration clauses" and cannot resort to "state-specific exceptions that would otherwise extend clear contractual deadlines." "[D]eadlines included in arbitration agreements under the Convention will admit of no exceptions. Thirty days must *mean* thirty days."

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