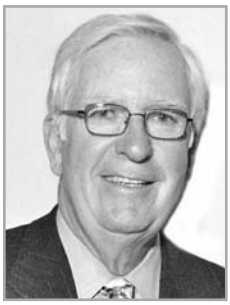
VOLUME 15 NUMBER 3

ARIAS QUARTERLY U.S.

THIRD QUARTER 2008

ARIAS Europe *Gains Speed*

editor's comments



With this issue, we welcome formation of ARIAS Europe as successor to ARIAS Germany. We are privileged to feature a report on the new organization by its Chairman, Herbert Palmberger. ARIAS Europe will seek to publish a set of arbitration rules and procedures, as well as adopt standards for qualification and certification of arbitrators and umpires. As Dr. Palmberger points out, the law and procedures in continental European jurisdictions are quite different from the U.S.

The development of a list of qualified arbitrators and umpires experienced and trained in European jurisdictions will be a positive step forward in international insurance and reinsurance arbitrations. It also will increase opportunities for ARIAS chapters to educate and train persons who will be dealing with the different rules and practices of various countries. Hopefully, efforts will be made to bring about greater uniformity and less conflict in those rules and practices.

I am pleased to report that Herbert Palmberger has agreed to join the Board of Editors of the ARIAS•U.S. Quarterly. He has been a frequent attendee of our ARIAS•U.S. meetings, and his service as an international editor will serve to keep our members advised of happenings in the new ARIAS Europe.

Arbitration being a creature of contract, it is not surprising that persons drafting those contracts will from time to time seek to vary traditional terms governing arbitrations. James Foster, in *Reinsurance Arbitration Clauses through the Looking Glass; Practical Questions Raised by Newer Contract Terms*, carefully analyses some of the motivations for recent increased attempts at new wordings of arbitration clauses, some of the key changes in those wordings, and likely unintended consequences of those changes. The article should be required reading for anyone involved in drafting or interpreting arbitration provisions.

In *Cross-Examination without a Comfort Blanket*, Richard Mason discusses some of the instances in which counsel in arbitration hearings may face the invigorating challenge of witness cross-examination without benefit of full pre-hearing discovery. The author offers some helpful suggestions for counsel confronting such a challenge and for arbitrators in allowing an appropriate degree of latitude to counsel in the hearing process.

Your editors are pleased to offer readers a new feature that will appear periodically in the Quarterly. In this issue's "Tech Tips," Larry Schiffer outlines different forms of electronic briefs that may be used for hearings. The author suggests that the question of whether electronic briefs will be utilized, as well as the degree of sophistication of any such briefs, should be addressed as early as the organization meeting.

Case Notes Corner, by Ron Gass, reports on an interesting federal court decision involving withdrawal of a party-appointed arbitrator at the appointing party's request after the full panel has been constituted.

Returning to this issue is our friendly curmudgeon, Gene Wollan. In this edition of Off the Cuff, the author documents everyday examples of abuses of the English language. As always, the piece is both instructive and amusing.

I look forward to seeing each of you at the New York Annual Meeting.

T. Richard Kennedy

contents

VOLUME 15 NUMBER 2

Editorial Policy

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

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

Manuscripts should be submitted as email attachments to trk@trichardkennedy.com .

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

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feature

ARIAS Europe Gains Speed

Herbert Palmberger

Herbert Palmberger

On July 10th and 11th, 2008, newly created ARIAS Europe held its first large event in Düsseldorf / Germany.

Besides the annual General Meeting, the formation of the new association was celebrated at a festive dinner with an ensuing debate between experts from the insurance and reinsurance industry as well as the press. On the following day experts speeches and a mock arbitration took place.

ARIAS Europe - as it is called now - was formed in Germany in 2006 as ARIAS Germany. The interest in the German insurance and reinsurance market grew over the time, and beyond that, applications for information and membership arrived from other continental European countries, e.g. Austria, Switzerland, France, Scandinavia and several Central and Eastern European jurisdictions. In 2007 the association, therefore, was renamed ARIAS Europe, its present name.

ARIAS Europe was formed by its founding members **Herbert Palmberger** (Attorney at law for insurance and reinsurance in Düsseldorf), **Michael Pickel** (Executive Board Member of Hannover Re) and **Hans Werner Rhein** (Executive Board Member of AON Re in Hamburg). Honorary founding member is **Dick Kennedy** in recognition of his tremendous support and most valuable advice in the formation of ARIAS Europe which still continues now far beyond the original formation process. In addition, the board of ARIAS Europe now consists of **Jürgen Rehmann** (Executive Board Member of Deutsche Rück in Düsseldorf) and **Andreas Schwepcke** (Director of Claims at Swiss Re Germany in Munich). It is noteworthy in this context that Andreas Schwepcke also is the managing member of the board of ARIAS Europe, and he deserves much of the merits for what ARIAS Europe is today.

ARIAS Europe in fact now has about 40 members, and it is a great pleasure to note that by now three of them are from the United States. At the same time numerous members of ARIAS Europe are - in some cases for many years already - members, certified arbitrators and / or umpires of ARIAS•U.S. We therefore encourage all members of ARIAS•U.S. to consider and effectuate a membership in ARIAS Europe by emailing h.palmberger@heuking.de.

ARIAS Europe has been formed with the purpose to build a solid base of arbitrators for insurance and reinsurance matters in the continental European jurisdictions. As we all know, the law and the procedures on the European continent follow the principle of statutory law, thus quite distinct from the case law of the Common Law systems of those countries in which our sister organisations ARIAS UK and ARIAS•U.S. work successfully.

Due to the smaller number of disputes in the continental European insurance and reinsurance environment, it did not appear worthwhile to continue (as our sister organisation CEFAREA in France does) the country-by-country approach; this led to the idea to combine membership from the European continent under the roof of ARIAS Europe.

ARIAS Europe will at the given point in the near future publish its rules of arbitration with a set of requirements and procedures. This major activity is under discussion now.

Furthermore, standards for qualification and certification of arbitrators and umpires are under discussion and will be issued in due course.

As ARIAS Europe is a very democratic organisation, these processes take their time, which however is accepted and appreciated as all members have the possibility to express and contribute their ideas which are gratefully taken.

In the end, ARIAS Europe will be able to

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Herbert Palmberger is a partner in the German law firm of Heuking Kühn Lüer Wojtek in Düsseldorf. He advises on insurance and reinsurance matters, and he acts frequently in international arbitrations as counsel and arbitrator.

provide insurance and reinsurance companies from all over the world with a list and possibly recommendations of arbitrators and umpires experienced and trained in continental European insurance and reinsurance arbitration.

For the latter purpose, training courses and events will take place, and the first one was already a good success this July. While a discussion round consisting of members of insurance, reinsurance and broking companies discussed general terms and trends of reinsurance arbitration on the first day, this already led to sound expert contributions from the auditorium, and it was close to midnight, when this session ended.

Nevertheless, on the following morning everybody appeared in full freshness and eager again to hear of and contribute to subjects like "Impartiality of Arbitrators", where there is a big difference in opinion and philosophy between Europe and the US. The subject was covered by experts from Germany and Switzerland, while in the auditorium a representative closely connected with the US claimed that the Americans are simply much more honest and realistic on this subject - which did not go uncontested. This definitely will give more rise to discussion, also with our friends from the US, in the future.

The afternoon was devoted to a mock arbitration with parties, witnesses and arbitrators from the UK, Germany, Switzerland and the US. The different approach to the same subject - which in the end led to mostly similar results was enhanced by discussions in smaller working groups into which all participants could split.

Besides, the networking effect was a very pleasant addition to the serious subjects, and some of the witnesses and party representatives in the mock arbitration did a great job in a professional and entertaining manner at the same time.

We in ARIAS Europe all very much look forward to a good cooperation and friendship with our sister organisations in the US, the UK and France, and we will report on our progress in more or less regular intervals, depending on the amount of hopefully good news.

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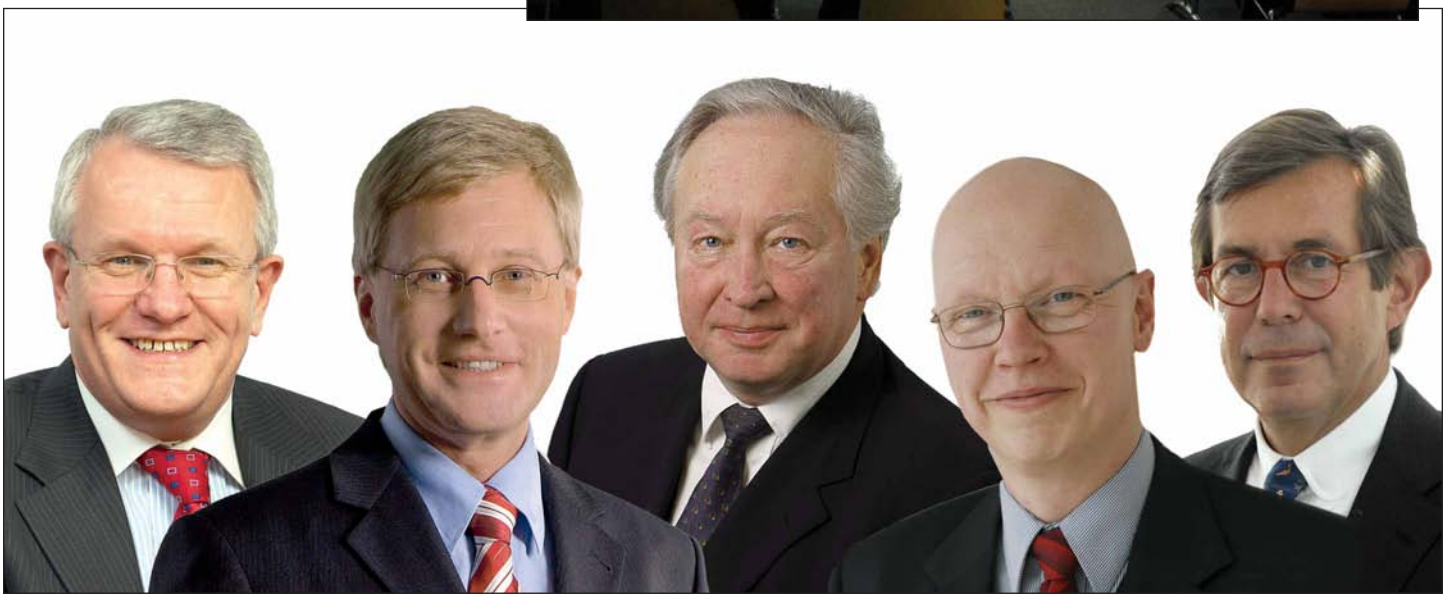

ARIAS Europe Board of Directors, left to right: Jürgen Rehmann, Michael Pickel, Herbert Palmberger, Andreas Schwepcke and Hans Werner Rhein.

news and notices

Liberty Mutual Group CEO to Give Keynote at Fall Conference

Edmund F. "Ted" Kelly, Chairman, President and CEO of Liberty Mutual Group, will be the keynote speaker at the 2008 ARIAS•U.S. Fall Conference, taking place on November 6-7 at the Hilton New York Hotel.

Mr. Kelly, who was elected CEO in 1998, has presided over a significant expansion in the scope and size of the company, both through acquisition and organic growth. As a result, Boston-based Liberty Mutual Group is today a diversified global insurer and the sixth largest property and casualty insurer in the U.S., based on 2007 direct written premium. The Liberty Mutual Group ranks 94th on the Fortune 500 list of largest corporations in the U.S., based on 2007 revenue. It employs over 41,000 people in more than 900 offices throughout the world.

Mr. Kelly will speak at the opening of the conference on Thursday morning, November 6.

Detailed conference information has been sent to all members and is available on the website, along with online registration.

September Workshop Mock Sessions Combined 45 Arbitrator Students with 22 Attorneys

The Intensive Arbitrator Training Workshop on September 3 in Tarrytown, New York was highlighted by spirited presentations by attorneys from five law firms and strong performances by arbitrator students filling the roles as panelists.

The firms clearly had prepared for these sessions. The five teams were made up of three to six attorneys each. They aggressively presented their cases in the three separate stages of the proceedings. Firms that volunteered for these sessions were as follows:

- **Barger & Wolen LLP**
- **Lovells LLP**
- **Saul Ewing LLP**
- **Stroock & Stroock & Lavan LLP**
- **Wollmuth Maher & Deutsch LLP**

As usual for these events, experienced arbitrators provided instruction in general sessions before and after the mock arbitrations. This time, the teachers were **Mary Ellen Burns**, **Sylvia Kaminsky**, and **Peter Scarpato**, all of whom provided vital guidance on dealing with the many facets of being an arbitrator.

Attendance by 45 student arbitrators was higher than in recent years, due to the fact that these events are now specifically required for certain applicants under the new certification requirements. The two workshops in 2009 are set to handle as many as 54. March will take place in Tarrytown again, while September is slated for Eaglewood Resort, just outside of Chicago.

Board Certifies Lamar and Muhl as Arbitrators

At its meeting in New York on June 12, the Board of Directors approved certification of two new arbitrators, bringing the total to 333. The following members were certified; their respective sponsors are indicated in parentheses.

Cynthia J. Lamar (Robert Hall, Debra Hall, Stephen Schwab)

Edward J. Muhl (Robert Hall, Martin Haber, Debra Hall)

New Arbitrator Data Entry System in Test

In late July and early August, a group of 30 ARIAS Certified Arbitrators, chosen at random, were asked to test the new data entry system. The new approach to handling online profiles came out of the initial work of the Long Range Planning Committee. Aimed at giving users of the online profiles more detailed information about arbitrators, the system allows arbitrators to enter information into their profiles at any time, rather than sending update emails to ARIAS•U.S. Information is entered through a series of editing screens for different sections of the profile, available only to the arbitrator.

This fall, after the new system has been fine-tuned in response to feedback from the testers, it will be made available to all certified arbitrators and added to the website. The current profiles will continue to appear, as well, for six months, after which they will be removed. Search systems will also operate side-by-side during the transition.

The new information system will offer users

added details to help them pinpoint the specific backgrounds that they might be looking for in an arbitrator who would fully understand the issues in a dispute.

First Educational Session set for November 5

One of the requirements for maintaining arbitrator certification in the future is attendance every two years at an educational session. The Education Committee has completed plans for the first session of the ARIAS?Educational Series; it will take place on November 5, the afternoon before the 2008 Fall Conference.

Although the Hilton was not able to accommodate the session, a meeting room has been reserved down the street at the Sheraton Hotel & Towers at Seventh Avenue and 53rd Street. The event will begin with lunch at 12:00 in the Avenue restaurant on the lobby level, followed at 1:30 by a full afternoon of training, ending at 5:00. There will be a short mid-afternoon break.

The topic of this session will be "**Powers of Arbitrators - DISCOVERY**." Content will include discussion of subpoenas, depositions and document discovery, as well as, sanctions, costs and interest, and privilege issues. Panelists will cover the extent to which arbitrators are able to direct and control the processes and the controversies that can occur in these areas. A mock arbitration will demonstrate dealing with relevant topics and issues.

Faculty for these sessions will consist of some of the top ARIAS•U.S. trainers. Explaining the legal standards will be **Mary Lopatto** (moderator), **Chuck Ehrlich**, **Peter Scarpato**, **Larry Schiffer**, and **Barry Weissman**. Arguing sides in the mock arbitration will be **Larry Greengrass** and **Michelle Jacobson**. The panel will consist of **Marty Haber**, **Jeff Morris**, and **Connie O'Mara**.

Registration will take place on the ARIAS•U.S. website beginning at 11:00 a.m. Eastern Time on October 1. The cost for the lunch and afternoon of training is $120. Attendance will be limited to the first 100 ARIAS•U.S. members to register.

Three and a half hours of CLE credit are available for this course.

September 2009 Intensive Workshop Planned for Eaglewood Resort

As a way to offer members in the middle and western parts of the country a more convenient location for attending an Intensive Arbitrator Training Workshop, the Chicago area had been targeted for the September 2009 event.

The exact location has now been determined. On September 9, 2009, the day-long workshop will be held at the Eaglewood Resort in Itasca, a suburb of Chicago. The resort is just 10 miles from O'Hare airport and offers excellent conference facilities at a reasonable rate. More information will be available on the website calendar as plans continue to develop.

Two-Year Run at The Breakers for 2012 and 2013

After traveling around the country for two years in 2010 and 2011, the ARIAS•U.S. Spring Conference will return to Palm Beach for a two-year stay. In 2010, the event will be on the West Coast at the del Coronado, then in 2011, we swing back east to Miami Beach for three days at the totally rebuilt and refurbished Fontainebleau (below). After all that excitement, it seems only right to come home to the member favorite for an extended stay. With a two-year contract, The Breakers has helped to keep the rates for guest rooms at reasonable levels. Details will be on the website calendar as the years go by.

Rebuilt Fontainebleau Hotel, Miami Beach

Conference Gifts Offered for Sale

Gifts left over from recent ARIAS•U.S. conferences are now available for purchase at cost plus shipping. The website has a yellow button on the home page that links to the gift page with ordering instructions and a photo and description of each one. The items offered are windbreakers, padfolios, blankets, sports bags, coasters, pens (good ones), and flash drives. Two non-gift items are there, as well...bunting from this year's spring "convention" and the lottery drum from last year's spring conference. Ordering is on a "first come, first gets it" basis. Every order includes a free ARIAS•U.S. baseball, while they last.

feature

Reinsurance Arbitration Clauses through the Looking Glass; Practical Questions Raised by Newer Contract Terms[1]

James H. Foster

James H. Foster

After having been a fairly stable, standard-form element of most reinsurance treaties for many years, arbitration clauses have recently become the focus of a great deal of drafting creativity, negotiating energy and speculation. This paper will not attempt to review the background of the clause, but will instead examine some of the key changes and the issues raised by the new language.

Although there is no new "standard" clause and arbitrations could conceivably be affected by a variety of new terms, for discussion purposes the issues can be grouped into changes that affect the form the arbitration may take or that change the conduct or resolution of an arbitration compared to more traditional language.

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Changes that Affect the Form of Arbitrations

1. Short-Form Arbitrations

Responding to occasional frustration over the time and expense incurred when arbitration starts to look and behave like litigation, it is becoming more common (though by no means standard) to provide for some form of short-form arbitration for smaller matters.

In an effort to avoid long, drawn out arbitrations on smaller matters (where the costs of arbitration can exceed the amount in dispute), a number of new clauses provide for quick, short-form resolution of small disputes ("small" sometimes being defined as $1,000,000, sometimes less). The thrust of this new language (either directly or indirectly through incorporation of other industry procedures as a benchmark[3]) generally is to call for a decision by a single arbitrator without a hearing, based on briefs submitted after limited documentary discovery and with no deposition discovery.

Although this approach can generate quicker results, introduction of the various approaches to short-form proceedings in smaller matters may carry some unintended consequences. Although on the surface these clauses appear to be straightforward attempts to return the arbitration process to its historical roots of simplicity and efficiency, that may not be the actual impact of this wording. First, although these clauses can appear innocuous on the surface, when the clauses (and the various materials incorporated by reference) are read in detail, it becomes clear that these clauses tend to be "tilted" heavily in favor of the ceding company[4]. That being the case, introduction of this language could lead to extended debates with reinsurers during the drafting process. During those discussions, if it appears that the principal motive of the ceding company is to provide for a speedy process, reinsurers may push back or at least demand a process which can be quick and efficient but is more balanced.

These short-form provisions may carry a somewhat more insidious impact. Because these clauses are designed to make it easier for the ceding company to recover small amounts, the parties, especially the ceding company, may lose their incentive to negotiate diligently to resolve a legitimately disputed matter. In other words, if a "small" disputed matter will be subject to a short-form procedure that tilts in favor of the ceding company, will the ceding company have as much of an incentive to try to reach a negotiated resolution of the matter as it would if it faced a traditional arbitration?[5] If not, then one consequence of this language may be to lead to a greater number of arbitrations; although each arbitration may be a relatively quick one, a drafting approach that may increase the number of matters taken to arbitration might be questioned because that is no way to maintain a reinsurance relationship.

Mr. Foster is currently the head of Everest Reinsurance Company's Claim Department, which manages all domestic and international claim matters for Everest Re in all lines of property/casualty reinsurance. He is also President of Mt. McKinley Insurance Company, a run-off insurer within the Everest Re Group.[2]

An alternate motive for these short-form approaches is to protect the ceding company from the risk of foot-dragging by rogue reinsurers which wantonly deny claims or have gone into run-off and delay claim payments to preserve cash. If that is the motive for a short-form approach, then a preferable drafting approach is to concentrate such terms in a clause specifically directed to the run-off situation, rather than to cause friction in ongoing reinsurance relationships by nominally making such terms applicable to all.

2. Timing and Procedural Rules

The "traditional" clause sets out only broadly worded requirements with respect to the actual procedures to be followed during the arbitration and in the arbitration hearing. The courts have consistently declined to meddle with procedural decisions by the panel.[6] Concerned that arbitrations handled under general guidelines were subject to abuse, delay and runaway expense, some ceding companies have suggested supplementing the traditional language with wording that exerts far tighter control of the process. One such wording sets specific time guidelines with respect to the date for the hearing ("*no sooner than 90 days and no later than 150 days from the date that the notice requesting arbitration is mailed*"[7]), initial statements of position (*30 days from the date of the appointment of the umpire*), reply briefs (*10 days after the initial briefs and no later than 10 days prior to the hearing*), post-hearing briefs (*within 20 days of the close of the hearing*) and the final decision (*within 30 days following the close of the hearing or post-hearing briefs*). The contract may also exhort the panel to make procedural decisions with efficiencies of time and cost in mind. A panel operating under these rules would have noticeably less flexibility than would be the case under the traditional language.

Unfortunately, by introducing a new set of specific rules governing the arbitration, this newer language provides more target points for the losing party in alleging misconduct by the panel. Even short of post-hearing challenges, some of this new language holds the prospect of making the arbitration proceeding itself more complex, rather than more simple. That is because by introducing a variety of new rules, but not a comprehensive system of rules and developed jurisprudence as applied in court, the contract could introduce confusion on the part of the parties or the panel as to how much flexibility the panel will have in managing the process. In this instance, a moderate level of specificity may be a bad thing.

Another ancillary impact of the tighter time guidelines could also be to effectively disqualify some of the most respected "top tier" arbitrators and umpires, whose busy schedules may not fit these tighter schedules.

A more prosaic, but perhaps ultimately more effective way to avoid the run-away time and cost problems stimulating this new language is for the parties themselves to exert greater control. Of course litigation counsel will always want to ask for more documents, take more depositions, write longer position statements and the like. Strong control by the clients, including support of panels imposing reasonable restrictions, should curb many of the perceived abuses.

3. Consolidation

Although not uniform, it has been common for treaties to contain a simple provision for consolidated arbitration in certain circumstances, such as "*[i]f more than one reinsurer is involved in the same dispute, all such reinsurers shall constitute and act as one party for purposes of [the arbitration].*" Even this relatively simple wording on consolidation can lead to procedural complexities and ambiguities in lining up and coordinating the activities of the multiple reinsurers. The parties and the panel need to decide how the reinsurer defendants can collectively name an arbitrator, how they will collectively manage the presentation of the reinsurer side of the dispute, and whether separate counsel, separate briefing and separate awards are necessary. At its heart, however, this approach makes sense because it is designed to eliminate multiple (and perhaps inconsistent) rulings on the same issue under the same contract. In practice, though, even under this relatively simple approach consolidated arbitrations are still the exception rather than the rule.

In an attempt to streamline dispute resolution, as well as perhaps to lessen mischief by rogue reinsurers, some new

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Although this approach can generate quicker results, introduction of the various approaches to short-form proceedings in smaller matters may carry some unintended consequences.

These clauses variously allow consolidation of (1) multiple disputes under one contract with one reinsurer, (2) multiple disputes under multiple contracts with one reinsurer, or (3) multiple disputes under one contract with multiple reinsurers.

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clauses also provide for dramatically expanded consolidation. These clauses variously allow consolidation of (1) multiple disputes under one contract with one reinsurer, (2) multiple disputes under multiple contracts with one reinsurer, or (3) multiple disputes under one contract with multiple reinsurers. Unfortunately these clauses tend to lack much additional clarification as to how the panel is to handle the complexities posed by such aggressive consolidation. Even if the supposed gain in efficiency is not illusory, the impact of that approach could be arbitration proceedings which are themselves extraordinarily complicated to manage and which, because of those extra complexities, present more grounds for potential challenges than is now typically the case.

Even under the fairly traditional "one contract, one dispute, multiple reinsurers" consolidation language, it can be very cumbersome to actually consolidate. The more complex consolidations anticipated by some of the new language could get dramatically more difficult to manage. To take one relatively simple example, namely consolidation with one reinsurer under multiple contracts, the ceding company could find that it had a dispute under a recent property contract - perhaps over the calculation of a profit commission - and an unrelated dispute under a casualty contract - perhaps the proper allocation of a latent disease loss. Under some of the new language these disputes could be consolidated, even though they involve radically different issues, implicate radically different documentary evidence and witnesses and call for expertise on the part of the panel which is very different from one issue to the next[8]. In that example, by consolidating multiple issues the ceding company may be making a single arbitration more complex and expensive than would two more focused arbitrations. The difficulties of the more elaborate consolidations anticipated under newer wordings could grow exponentially from this simple example. Panels will get little help from the courts; because the courts are extremely deferential to panels on questions of what and how to consolidate they push many of the most complicated management issues back onto the panel.[9]

Changes Affecting the Way Arbitration Panels Make Decisions

1. Concerns about the Continued Efficacy of "Honorable Engagement"

The traditional clause specified that the arbitration proceeding could be informal, using such formulations as: "*[t]he arbitrators shall interpret this Contract 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,*" and stating that the arbitrators " *shall make this award with a view to effecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language,*" or "*[t]he board shall make its decision with regard to the custom and usage of the insurance and reinsurance business.*"

This level of discretion, flexibility and informality makes sense in light of the historical purpose of the Arbitration clause, namely to have a confidential resolution of the dispute by industry experts who could appreciate the business issues involved. In that context, it simply would not make sense to impose strict rules on the arbitration panel. However, as reinsurance contracts have gotten more detailed in describing the business deal and as reinsurance relationships have gotten less cordial, there has been some pressure on the honorable engagement language and some concern that perhaps honorable engagement-type language gives the panel too much discretion. As will be seen below, some of this pressure has arisen through other clauses. However, there should be no need to substantively alter the honorable engagement wording - there are no formulations of this wording that allow the panel to ignore the contract. The panel is still charged with interpreting and applying the contract; a more detailed contract may mean that there is a smaller area of uncertainty in the interpretation of the contact than may have been true in the past but there will still be interpretive and application issues on which the panel's expertise can be critical.

2. Intrusion of the Entire Agreement Clause into the Arbitration Process

Entire Agreement clauses are a fairly recent phenomenon in reinsurance contracts, typically including language such as: "*This contract constitutes the entire agreement between the parties with respect to the matters set forth in this contract and there are no other oral or written understandings or agreements between the parties. No amendment, alteration or modification of this contract shall be valid unless expressed in a written instrument duly executed by each of the parties hereto.*" There are reasons not related to arbitrations why Entire Agreement clauses are becoming more common. However, one consequence of the introduction of this clause - perhaps intended, perhaps not - is that Entire Agreement clauses may now affect the conduct of arbitration.

To the extent that a party saw an advantage in a narrowly-focused arbitration hearing, the Entire Agreement clause might be referred to in support of the notion that neither discovery nor evidence at the arbitration hearing should go beyond the "four corners" of the reinsurance contract itself. In fact some companies have even attempted to lay the foundation for such an argument by presenting underwriting submissions with the caveat that the ceding company will not vouch for the accuracy of the information presented.[10]

As Entire Agreement language has been negotiated and drafted, both ceding companies and reinsurers have realized that restricting a panel to a literal "four corners" approach is neither practical nor desirable. In one form or another, it is common for additional language to be inserted into Entire Agreement clauses to try to make it clear that the clause is not intended to restrict the arbitration panel's discretion. For example, "*This [Entire Agreement] Article shall not in any way, form, or manner prevent the introduction and/or admission into evidence of any correspondence between the parties regarding the intent of the parties to this contract, including, but not limited to, placement correspondence between the parties and/or underwriting representations made to the reinsurer.*"[11] Along similar lines, "... the majority of the arbitration panel under the Arbitration article hereof, at its discretion, may consider supplemental written evidence related to but not in conflict with the terms of this contract and that are relevant to the issue or issues before the arbitration panel." In some instances this clarifying language is placed into the Arbitration Article itself.

Although these clarifications are useful, the very need for this to be debated in the drafting process reflects threat of a "four corners" approach. In the author's view, to best fulfill the purposes of the reinsurance contract, Entire Agreement language should not trump the honorable engagement principal.

Reinsurance treaties are by their nature highly sophisticated, customized products. These contracts are designed to respond to the specific needs of the ceding company and to fit the ceding company's desired risk profile and accounting treatment; they are therefore tailored specifically for each situation. At the same time, however, treaties are intended to cover a fairly broad scope; by design they typically cover all or most of a particular book of business written by ceding company, and sometimes several separate lines of business. Because of this broad scope, many of the contract clauses are necessarily stated in fairly general terms. The general manner in which some terms are necessarily stated can be readily seen upon a sampling of the business covered language in a variety of treaties: examples include coverage of business "underwritten by [a specified regional office]," classified as "program business," "wholesale," "property," "core business," "blended excess," "third party liability" and business "written by" a specified division or business "deemed by the company to be 'marine'."

When disputes arise on treaties with general terms such as these, it may often be critical for the panel to examine evidence outside the "four corners" of the contract. In most circumstances, such an evidentiary examination is not to determine whether there is an agreement different than that expressed in the treaty, but rather to determine the intent of the parties and in doing so interpret and apply the language used. For example, where a treaty covers business "underwritten by" a particular office of the ceding company, it may not be clear on the face of the treaty what the parties meant by the phrase "underwritten by;" that could

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However, as reinsurance contracts have gotten more detailed in describing the business deal and as reinsurance relationships have gotten less cordial, there has been some pressure on the honorable engagement language and some concern that perhaps honorable engagement-type language gives the panel too much discretion.

Therefore, it appears that the current "generation" of Entire Agreement clauses may have little practical impact on the conduct of arbitrations. Going forward, ceding companies, their brokers and reinsurers should keep in mind the importance of being quite explicit if they intend to use entire agreement concepts to restrict the discretion of arbitration panels.

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mean "produced by" even if the technical underwriting was done elsewhere, "underwritten" in the sense of the actual technical rating of the business or it could mean "authorized by" even if the technical rating was done elsewhere.

This example is precisely the kind of situation which calls for the kind of discretion and flexibility expressly given to the panel. In order to make sure what the parties meant by the phrase "underwritten by," the panel might need to consider, for example, information in the submission which describes the underwriting practices of the ceding company, correspondence which might contain the same type of information, or information relating to the course of dealing between the parties, which might itself demonstrate a mutual understanding of the term's meaning. It is also critical to note that in searching for the proper interpretation of such language, the panel might also need to consider evidence of oral discussions which formed a part of the underwriting process but which were not necessarily reduced to a written representation.[12] That exercise, guided by the experience of the panel, is precisely the kind of informal, educated process anticipated by the Arbitration clause. Such a process is not re-writing the contract, but is seeking the right interpretation of the parties' intent so that the contract can be properly applied by the panel.

So far, the intrusion of Entire Agreement concepts to tie the hands of arbitration panels is implicit at most. In light of the still-consistent use of honorable engagement or similar language, panel members may conclude that limitations which are at most implicit have no impact on how they conduct the arbitration, a conclusion buttressed by the tendency of the courts to be extremely deferential to a panel's management of the arbitration.[13]

Therefore, it appears that the current "generation" of Entire Agreement clauses may have little practical impact on the conduct of arbitrations. Going forward, ceding companies, their brokers and reinsurers should keep in mind the importance of being quite explicit if they intend to use entire agreement concepts to restrict the discretion of arbitration panels.

3. The Impact of Governing Law Considerations

As an historical artifact, in addition to providing a choice of law for those disputes addressing questions on the validity or formation of the contract (where the panel did not have such authority), the Governing Law clause was also seen as providing guidance in specifying the jurisdiction whose law would govern actions to confirm or challenge an arbitration award. With the expansion of the panel's authority in most contracts to cover disputes as to formation and validity, the Arbitration clause has now removed one of the principal purposes originally served by the Governing Law clause. With this broader arbitration language, the remaining purpose to be served by the Governing Law clause would be to identify what jurisdiction's law would govern actions to confirm or vacate the panel's award.

As a starting point, it should be noted that even most current reinsurance contracts typically have a relatively "traditional" stand-alone Governing Law clause. It appears that within the contracting process, the presence and wording of this clause has become more or less a boilerplate element of the contract. Although still the exception rather than the rule, some contracts have begun to introduce choice of law principles into the Arbitration clause itself, even while the contract retains a traditional Governing Law article. These references have typically taken one of two forms. In the first, the parties use choice of law language to make it clear that procedural issues related to the arbitration are to be governed by a specific jurisdiction's law. For example, "*the procedures and rules applicable to arbitration under the laws of the State of Illinois... will govern the procedures of the arbitration*," or "*the arbitrators shall not be obliged to follow judicial formalities or the rules of evidence except the extent required by [the law of the state set out in the Governing Law clause]*."

An argument can be made that this type of language serves a useful purpose, namely to clarify the parties' intention that procedural issues surrounding the arbitration are to be governed by state law rather than by the Federal Arbitration Act ("FAA")[14]. The cases decided under the FAA make it clear that while the parties can by contract make state law rather than federal law govern, that intention must be clearly expressed. Presumably language of the type quoted above reflects an attempt to express the intent to be governed by state law.

The second respect in which some contracts have introduced choice of law concepts into the arbitration clause is by inserting language containing a permissive but not mandatory reference to state law. For example, such a clause might include language as: "*[I]nsofar as the panel looks the substantive law, it will consider of the law of the Commonwealth of Pennsylvania*." This type of language, perhaps reflective of the recognition that virtually all briefs submitted to arbitration panels will quote case law even where the panel is not bound to follow legal rules, might be referred to as a "soft" choice of law.

None of the modifications of the Arbitration clause noted above can be considered without also considering that most Arbitration clauses still have explicit honorable engagement or similar language giving the panel great flexibility and discretion in how to manage the arbitration process and also explicitly allow the panel to make its decision on grounds other than legal precedent. In the context of this broad discretion granted to the panel, the purpose and impact of choice of law references introduced into some of the clauses are far from clear. Is the use of such language in the Arbitration clause designed to specify state law as governing the specifics of the arbitration procedure? Is it intended to govern the procedure on post-award issues such as confirmation or vacatur? Is it in fact intended to govern the substantive bases for the panel's decision? In many of the examples visible in the market, these questions are not answered.

On the face of the contract, the combination of a Governing Law clause (or choice of law language in an Arbitration clause) and an Arbitration clause granting substantial discretion to the panel can be confusing. It appears that thus far, Governing Law language has not been designed explicitly to dictate the substantive bases for the panel's decision; most references appear at most to address arbitration procedure, even if inartfully. Except in those contracts where the language clearly indicates an intent that the procedural aspects of the arbitration be governed by specified law, a panel could and likely would feel free to conduct the arbitration pursuant to the flexibility granted by the honorable engagement language.

Going forward, to avoid confusion to the extent possible, the parties should be very clear if they intend for governing law language to tie the hands of a panel.

4. Baseball Clauses

In what might be seen as a fairly extreme approach to exerting control over the process, some new clauses have actually taken the decision out of the arbitration panel's hands. In this approach, the arbitration clause provides that the panel, after hearing evidence and considering the parties' positions, must adopt the position of one party or the other. For example: "*[T]he arbitration board must wholly adopt either the Company's Final Position or the Reinsurers' Final Position..... It is further understood that the board will have no discretion to award anything other than the relief requested by either the Company's Final Position or the Reinsurers' Final Position*." This type of approach is generically referred to as "baseball" arbitration because it follows the format of salary arbitrations in professional baseball; several variations have surfaced, but all embody the core concept of removing the ultimate decision from the discretion of the panel.

Baseball-type clauses are typically justified by parties frustrated by "compromise" awards. They certainly accomplish the purpose of preventing a "split the baby" result. One could question, though, whether it makes sense to invest in the time and expense of retaining industry experts for the panel and trying the arbitration case, only to then take the decision from their hands.

Conclusion

For arbitration practitioners, both counsel and panelists, the newer language starting to appear in contracts will likely have little immediate impact, both because few if any arbitrations will have been instituted under this language and because the language is not yet clear enough in its intent to force panels to behave differently than the past. These developments warrant careful attention, however, because eventually this new language, and continued evolution of the contracts along these lines, could significantly alter the framework within which reinsurance arbitrations are conducted.▼

1 This paper was prepared to supplement the panel discussion on contract wording at the Spring 2008 Conference of ARIAS - US and is adapted in part from

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Except in those contracts where the language clearly indicates an intent that the procedural aspects of the arbitration be governed by specified law, a panel could and likely would feel free to conduct the arbitration pursuant to the flexibility granted by the honorable engagement language.

These developments warrant careful attention, however, because eventually this new language, and continued evolution of the contracts along these lines, could significantly alter the framework within which reinsurance arbitrations are conducted

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articles by the author published in Mealey's Litigation Report: Reinsurance in 2007. They can be found at Mealey's Litigation Report: Reinsurance, Vol. 18, #7 (8/3/07) (addressing access to records issues), Vol. 18, #10 (9/21/07) (on arbitration issues) and Vol. 18, #14 (11/16/07) (addressing issues on entire agreement and governing law clauses).

2 The views expressed herein are solely those of the author and not of Everest Re, its affiliates or any industry group to which Everest Re may belong.

3 Examples of such references include Section 16 the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes (2004 ed.) by the Insurance and Reinsurance Dispute Resolution Task Force (see www.arbitrationtaskforce.org) and the Newer Arbitrator Program of ARIAS - US (see www.arias-us.org).

4 These new clauses, either on their surface or through incorporation by reference of other procedural rules, typically provide for very limited discovery (such as an exchange of relevant, non-privileged documents with no additional documentary discovery and no depositions), and also provide for a hearing on the papers. Because in most situations ceding company will have substantially more information concerning the particular claim in dispute, this process almost always will favor the ceding company.

5 This question becomes all the more pertinent when this arbitration language is joined with access to records language that denies a reinsurer access to records if it is not current in paying all ceded claims. If a ceding company can deny a reinsurer access to records and then trigger a short-form arbitration it may have little incentive to do otherwise.

6 See, e.g., Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F. 3d 255 (2nd Cir. 2003) (Panel did not act improperly in requiring pre-hearing security); Nationwide Mutual Ins. Co. v. Home Ins. Co., 330 F. 3d 843 (6th Cir. 2003) (District Court did not have the power to make panel reconsider treatment of offset issue); North River Ins. Co. v. Allstate Ins. Co., 866 F. Supp. 123 (S.D.N.Y. 1994) (Panel could determine preclusive effect of earlier arbitration); Hesfibel Fiber Optik v. Four S Group, Inc., 315 F. Supp. 2d 1365 (S.D. Fla. 2004) (Court would not disturb arbitrator decision not to hear an expert witness where the adverse party would not have had a chance to retain a rebuttal expert); Roche v. Local 32B-32J Service Employees Int'l Union, 755 F. Supp 622 (S.D.N.Y. 1991) (Arbitrator's refusal to grant fourth adjournment of hearing was not misconduct); Hoteles Condado Beach v. Union de Tronquistas Local 901, 763 F. 2d 34 (1st Cir. 1985) (Arbitrator's decision to sequester witness would not be disturbed). There are of course limits to this deference in cases of real abuse of discretion: See Hoteles, supra (Arbitrator's refusal to consider evidence that was clearly material would mandate vacatur of award); Western Employers Ins. Co. v Jeffries & Co., 958 F. 2d 258 (9th Cir. 1992) (Vacatur required where arbitrators failed to make findings of fact and conclusions of law as was required under the contract).

7 Contract wordings cited here are intended to be generic examples of wordings seen in the market and not specific to any particular company or industry group.

8 Even this simple example points out potential problems in the new, broadly worded consolidation language, which on its face is not limited to prospective contracts or to contracts with arbitration clauses. Taken at face value, this language suggests the possibility of this new consolidation wording superseding more limited language in an earlier treaty, and also raises the specter of a ceding company attempting to consolidate a treaty issue with an issue under a facultative contract that does not have an arbitration clause. Either of those eventualities presents a panel with a serious dilemma and provides additional grounds for a reinsurer to challenge the results of a consolidated arbitration.

9 For example, in the recent case of Lloyds v. Westchester Fire Ins. Co., No. 06-1457 (Slip Op. 3rd Cir., 6/12/07), the court held that the question of whether to consolidate arbitration issues under multiple contracts was for the arbitration panels to decide, not the courts (even though there were two "competing" panels, presumably both of which might consider consolidation - leading to a potential nightmare for the different panels to manage). Accord, Dorinco Reinsurance Co. v ACE American Ins. Co., 2008 US Dist LEXIS 4593 (ED Mich. 2008), where the court decided that the potential consolidation of disputes over payment of hurricane losses (where the ceding company wanted two arbitration panels, the reinsurers eight) should be decided by the panels of the two arbitrations initiated by the ceding company.

10 While the attempt to disavow a submission's accuracy is still rare, it is troubling as it seems the polar opposite of the utmost good faith that is supposed to underlie the relationship.

11 This form of language has been approved as a portion of BRMA Clause 74C. See Broker and Reinsurance Markets Association clauses at www.brma.org.

12 It is perfectly appropriate for panels to consider evidence of discussions in addition to written evidence. For that reason, the examples quoted in the text of the current drafting responses to the evidentiary dilemma posed by the Entire Agreement clause are not adequate, because they do not make it clear that evidence of oral discussions should be within the purview of the panel's discretion. Of course, the fact that a matter relevant to a dispute may have been raised only in an oral manner and not in any writing can certainly be taken into account by the panel when considering the weight it should give such evidence.

13 For example, "It is well settled that arbitrators are afforded broad discretion to determine whether to hear evidence," Areca, Inc. v. Oppenheimer & Co., Inc., 960 F. Supp. 52, 55 (S.D.N.Y. 1997), citing Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc., 738 F. Supp. 789 (S.D.N.Y. 1990), aff'd 931 F. 2d 191 (2nd Cir 1991). Accord, Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F. 2d 34 (1st Cir. 1985); Fine v. Bear Stearns & Co., Inc., 765 F. Supp. 824 (S.D.N.Y. 1991); Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002). Of course, since it is well settled that an arbitration award may only be set aside based on one of the grounds set forth in the FAA, see Nationwide Mutual Ins. Co. v. First State Ins. Co., 213 F. Supp. 2d 10 (D. Mass. 2002), and since FAA Section 10(a)(3) refers to misconduct by a panel refusing to hear material evidence and makes no mention of a panel committing misconduct by admitting too much evidence, the likelihood of a court vacating an award on the basis of a panel considering evidence outside the four corners of a contract seems extremely remote. This is especially true in light of the fact that in almost all cases, the arbitration panel will not be required to give a reasoned award, so a reviewing court will most likely not know why the panel admitted evidence, whether or how it considered that information in making its decision. The court would therefore have no basis to conclude that any evidence had been improperly admitted or relied upon.

14 The FAA is at 9 U.S.C § 1 et seq. Although the subject is beyond the scope of this panel discussion and this paper, for a brief review of the battle between the FAA and state law, see Mealey's Litigation Report: Reinsurance, Vol. 18, #14.

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.

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

Recent Moves and Announcements

P. Jay Wilker has become Counsel to New York State Court of Claims Judge Melvin L. Schweitzer. His new address is NYS Court of Claims, 26 Broadway New York, NY 10004, phone 212 361 8172, email pwilker@courts.state.ny.us .

Andrew Klivan's new address is 205 E 95 Street, Apt 30J, New York, NY 10128.

William Popalisky is now with DLA Piper US LLP. His contact information is 1251 Avenue of the Americas, New York, NY 10020-1104, phone 212-335-4665, fax 212-884-8665, cell 917-754-1306, email william.popalisky@dlapiper.com.

John Heath's address and numbers have changed to John Heath & Company Inc., 950 S. Tamiami Trail, Suite 102, Sarasota, FL 34236, phone 941-955-5005, fax 941-955-5252.

Herbert Palmberger is now with a new firm, Heuking Kühn Lüer Wojtek. He is located at Cecilienallee 5, 40474 Düsseldorf, Germany, phone +49-211-600 55 585, fax +49-211- 600 55 580, email H.Palmberger@heuking.de .

David V. Axene can now be found at Axene Health Partners, LLC, 35067 Mahogany Glen Drive, Winchester, CA 92596, phone 951-294-0841, fax 619-839-3980, email david.axene@axenehp.com, website www.axenehp.com

Doug Maag can now be contacted at phone 610-993-0865, cell 610-246-6622, email doug.maag@comcast.net .

Savannah Sellman has joined Clyde and Co, opening its first office in San Francisco. The following address is temporary since they are moving to permanent quarters in September or October, but it may still be active at publication time: Clyde & Co US LLP, 505 Montgomery Street, 10th Floor, San Francisco, CA 94111, phone 415-874-3894, fax 415-365-9801.

Email/Website Changes

John Andrews
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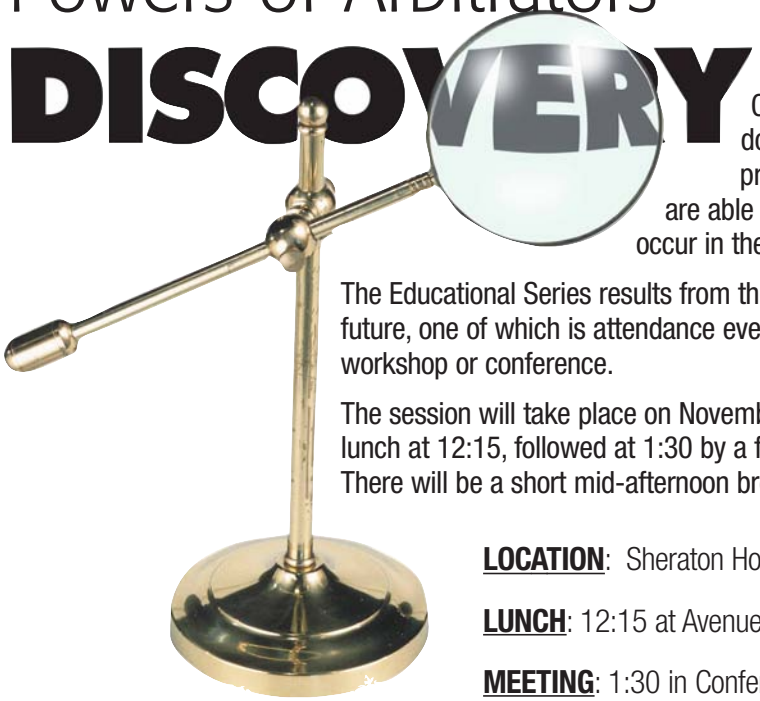
Powers of Arbitrators



The First Session of the New ARIAS•U.S. Educational Series will focus on the many facets of the discovery process in an arbitration.

Content will include discussion of subpoenas, depositions and document discovery, as well as sanctions, costs and interest, and privilege issues. Panelists will cover the extent to which arbitrators are able to direct and control the processes and the controversies that can occur in these areas.

The Educational Series results from the new requirements for maintaining arbitrator certification in the future, one of which is attendance every two years at an educational session other than an intensive workshop or conference.

The session will take place on November 5, the day before the 2008 Fall Conference. It will begin with lunch at 12:15, followed at 1:30 by a full afternoon of training, with adjournment at 5:00. There will be a short mid-afternoon break.

LOCATION: Sheraton Hotel & Towers at Seventh Avenue and 53rd Street, NYC

LUNCH: 12:15 at Avenue Restaurant – Lobby Level

MEETING: 1:30 in Conference Room D, Executive Conference Center – LL Level

REGISTRATION: Beginning at 11:00 a.m. EDT on October 1 – **www.arias-us.org**

FEE: $120 for lunch and training session.

LIMITATION: 100 attendees…***ARIAS•U.S. members only***

CLE: 3 ½ credits

feature

Cross-Examination Without a Comfort Blanket

Richard C. Mason

Richard C. Mason

Richard C. Mason is a member of the national law firm of Cozen O'Connor, and represents clients in reinsurance arbitrations and litigation.[1]

"We may have three principal objects in the study of truth: one to discover it when it is sought; another to demonstrate it when it is possessed; and a third, to discriminate it from the false when it is examined."[2]

The adage "never ask a question on cross-examination to which you don't know the answer" sometimes reminds me of my old baseball coach's admonition: "Don't give him anything good to hit, but don't walk him." The ideal is, by definition, a worthy object. But one also needs to know how to handle circumstances when the ideal is unattainable.

In cross-examination, the "ideal" contemplates circumstances allowing examination of a witness solely based on questions previously asked and answered by a witness in deposition. In such cases, the witness either will testify as he or she did in deposition, or provide an inconsistent answer. Should a witness deviate from prior deposition testimony, counsel may clutch the comfort blanket afforded by the ability to read the contrary deposition testimony into the record.

But the comfort blanket is not always available. In this article, I discuss those (often invigorating) occasions when counsel may need to ask questions never posed in deposition. The skill is a critical one in reinsurance arbitration, where third parties often will testify but once, and where the economies of an arbitration, or strategic considerations, may weigh against deposing a party witness even when the witness has been listed to appear at the hearing. While this discussion includes circumstances in which counsel may *elect* to reserve a line of questioning for the hearing, this article offers no excuse for neglecting to acquire necessary information during the disclosure phase. For a pilot, "flying blind" signifies a skill, not a goal.

But the comfort blanket is not always available. In this article, I discuss those (often invigorating) occasions when counsel may need to ask questions never posed in deposition.

The skill of cross-examining a witness "blind" - *i.e.*, employing questions not previously answered in deposition - is an important one, particularly in arbitration. In arbitration, there are at least five instances, discussed below, in which this skill is valuable.

Instances When Prior Testimony May Be Unobtainable, or Unwanted Third-Party Subpoenas

The most common instance in which counsel may need to cross-examine without a comfort blanket involves third-party witnesses subpoenaed to appear in the proceeding. Recent decisions have held that under the Federal Arbitration Act, a third-party witness may not be compelled to give a deposition.[3] However, third-party witnesses may be subpoenaed to testify before the arbitration panel. Some decisions describe such an examination as part of the "hearing" itself, though the FAA simply refers to the arbitrators' power to call a witness "... to attend before them or any of them ..."[4] But regardless of whether such a proceeding occurs during the main hearing, or in deposition-style examination before a single arbitrator, it is probable that the examination will not be repeated. Counsel often has but one chance to question a third-party witness who is appearing pursuant to a subpoena. Accordingly, unless there has been an opportunity to interview the witness in advance, counsel necessarily will be asking questions to which the witness's answers are unknown.

Arbitral Economy or Rulings Limiting Depositions

Criticisms of increased discovery in latter day arbitration sometimes overlook a critical factor: the massive increase in the amounts in dispute. Few participants would complain about multiple depositions in an arbitration of a $50 million dispute. Many arbitrators

consider a sliding scale of efficiency and disclosure, in which the amount at stake may properly justify increased discovery.[5]

In the small case, excessive discovery more easily can destroy the value of the process. Neither side wins in a proceeding in which $250,000 is awarded while the victor expends $450,000 in fees and expenses. Thus, in the small case, the panel may limit the number of depositions, though not necessarily in lock-step with the number of hearing witnesses.

Likewise, a party may decide to arbitrate "on the cheap." This approach may even be disconcerting to an opponent who comes to realize the other party is in an advantageous financial position from minimizing, on a relative scale, its financial investment in the proceeding. A dramatically unbalanced expense burden can increase the relative settlement pressure for the party who is paying more to arbitrate if it concludes there is no linear correlation between expenditures and odds of success.

Thus, whether at the direction of the panel or a party, the interest of economy may limit depositions.

The "Surprise" Hearing Witness

Although it is common practice for parties to exchange preliminary lists of hearing witnesses, surprises of one sort or another do occur. For example, parties occasionally submit heavily populated lists from which opposing counsel must distinguish the witnesses likely to actually appear from those witnesses a party has listed merely "in an abundance of caution." In the small or even mid-sized arbitration, a party might forego deposition of a seemingly peripheral witness, who nevertheless may appear at the hearing armed with direct or (more often) rebuttal testimony. Or, an opponent's position or evidence during the hearing might open the door to their own employee being called to testify even though not listed (and not deposed). The party seeking such an appearance might be granted this right without (necessarily) an accompanying opportunity to depose that witness. The fluid nature of some arbitrations, therefore, can create a risk of "surprise" different than encountered in litigation.

Horse trading may also limit depositions. Years ago a lawyer complained to me that the CEO of his client had informed him: "If I am deposed, you have seen your last case from us." The CEO was not deposed. Neither, however, were one or more executives of the opponent who previously had been slated for deposition.

Late Emerging Issues

A corollary to the "surprise witness" is a more common occurrence: the "surprise *issue*." Particularly in the complex case, it may be only after the last document has been produced and the last deposition taken, that all the issues come to light. I recall an arbitration many years ago in which only late in the disclosure process did it emerge that the cedent had sought to place a prior iteration of the risk in the London Market a year before it placed it with this reinsurer.

At the hearing, the cedent's witnesses admitted that essentially the same risk, though styled slightly differently, had been submitted to, and declined by, a Lloyd's syndicate. The reinsurer's underwriter then testified he had, per his regular practice, inquired regarding prior declinations and had been informed there had been none. He stood up to cross-examination, and thus the materiality of the nondisclosure was established. Thus, in that proceeding, testimony adduced for the first time at the hearing proved critical.

Forbearance in Aid of Securing Candor

The first four instances discussed above may be categorized as exigencies. They concern situations primarily arising from situations beyond counsel's control, though - as in the case of the "surprise witness" - the party's election, perhaps for reasons of economy, to limit depositions can play a role.

The last situation in which "blind questioning" may arise is purely discretionary. There are situations in which counsel believes that an opponent's representative is sufficiently calculating that the element of surprise is the best means of obtaining a candid and straightforward answer. "Forewarned is forearmed" (and rehearsed), and a well-prepared witness who has had a rehearsal, by way of deposition, can be all the more difficult at the Hearing.[6]

Accordingly, counsel may prefer to develop a line of questioning that not only was not deployed during deposition, but likely will not have been envisioned by opposing counsel. In a complex case, in particular, there may be documents that, when looked at collectively, establish a point that neither opposing counsel nor the witness likely appreciates. If so, the witness may not have been prepared for the line of questioning asked at the hearing.

For example, various documents from different sources might, when presented seriatim, demonstrate the witness had a pattern of paying little mind to loss notices for amounts less than $1,000,000. If the witness is led through these documents in deposition, he may concede (let us assume, correctly) that he did not seem to pay attention to small loss notices. However, by the time of the hearing, having been schooled in advance by the deposition experience, he may "clarify" that for each of these notices there was some distinction - say, for example, seemingly remote liability, or retrocessional protection, or (the all-purpose) his being away on holiday - that explains why he ignored those notices when he absolutely would have not have ignored a loss advice had he received it for *this claim*. If counsel does not trust this witness to be frank, the better strategy for eliciting the truth may be to reserve the line of questioning for the hearing.

Regrettably, some witnesses lie or dissemble under oath. As opposing counsel, there is nothing wrong with employing surprise in aid of obtaining the truth. And bringing the truth out live in front of the Panel makes a stronger impression than reading deposition testimony to the witness and asking the witness whether the deposition testimony was correctly recorded.

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Concomitantly, the arbitrators should allow appropriate latitude to conduct some of the "discovery" during the hearing. Allowing this leeway during hearings can mitigate against a perceived need to depose every possible witness prior to the hearing.

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Techniques for "Blind" Cross-Examination

When the comfort blanket of deposition testimony is absent, increased preparation in connection with the hearing is essential. Asking a new line of questioning at the hearing requires a very different approach than "ideal" cross-examination. A number of practice points exist that may increase the likelihood of success.

Inform the Panel

First, if blind questioning is the result of exigencies, such as documents produced by a third-party after a party witness was deposed, inform the panel of this. In a neutral tone, simply comment: "I didn't have these documents when I took Ms. Jones' deposition, so I am going to ask some new questions today." In arbitration, no lay jury being present, counsel should be permitted reasonable latitude during examination to informally address the panel concerning the direction of the proceedings. Thus, if a deposition was foregone for reasons of economy, counsel might observe: "It seems that in a case of this magnitude five depositions were enough, so we did not take Mr. Smith's deposition. But here he is, so you and I will be hearing his answers to my questions for the first time."

Concomitantly, the arbitrators should allow appropriate latitude to conduct some of the "discovery" during the hearing. Allowing this leeway during hearings can mitigate against a perceived need to depose every possible witness prior to the hearing. The potential benefit: streamlined discovery, albeit in exchange for a somewhat lengthier hearing. After all, there was a time when the hearing itself often was *the* process for adducing key facts.

The arbitral environment differs from a jury trial. There, each hour in the jury box may be regarded by a juror as an imposition, as the juror has been compelled to serve for fifteen dollars a day. For this reason, trial cross-examination must be short, precisely targeted, and conservative. Professional arbitrators, by contrast, are not as susceptible as lay jurors to mere impressions. At the conclusion of the hearing, they usually will have ample time to read the transcript. Thus, it will do little good to have left the reinsurer's underwriter trembling after a ten minute examination confined to "picking the low hanging fruit" if, for example, the record fails to show the underwriter knew of facts your cedent client is accused of having concealed.

Questions from the Panel

Questioning from the panel is welcome, valuable, and a well-established prerogative of an arbitrator. The examination during the hearing of a witness who has not been deposed, however, may warrant careful discretion on the part of arbitrators when interposing their own questions. There is a risk that the question interjected may be one the attorney intended to deploy later, only after the witness had been ringed in and committed to the desired answer, or that the question could cause the witness (correctly or incorrectly) to assume that a particular answer or fact might be material.

To illustrate, where the issue was whether "underwriting guidelines" were regarded as mandatory:

Q. Are there risks in excess of $10 million you believe could be written profitably assuming adequate premium is charged?

A. Yes.

Q. Did you believe such risks generally would be profitable?

A. Yes.

Q. All other things being equal, they would generate more profit than a $1 million risks?

A. Assuming the risk of loss is not proportionately higher, yes.

Q. Were there one or more occasions on which you had the opportunity to write a risk larger than $10 million but did not do so?

A. Yes.

Q. Do the Underwriting Guidelines contain a provision setting a limit on writing risks in excess of $10 million?

A. Yes.

Q. In ten years of using these and the predecessor Guidelines, did you ever write a risk in excess of $10 million?

A. No.

Q. So ...

[Interjection]: What did you feel was the purpose of these Guidelines?

A. Oh, they were simply there for guidance.

"Stepping on" a line of cross-examination has the potential to impede a party's ability to elicit important facts, or, to develop facts in an intelligible sequence. In court, in extreme circumstances, it has been deemed prejudicial or unfair to a party.[7] Thus, when cross-examinations are not unduly lengthy, many arbitrators reserve their questioning until the attorney has completed the examination.

However, as discussed above, examination of a witness who has not previously been examined may be relatively prolonged. Panel members may worry that having to ask a question in the fourth hour concerning testimony given in the first thirty minutes may - aside from the risk of simply forgetting why one wanted to ask the question - raise the problem of having to bring the witness's mindset back to the context concerning which he had been testifying hours ago. In addition, counsel's questioning may simply neglect to elicit a critical foundational fact - such as the witnesses' relevant experience or authority - without which the witnesses' substantive testimony may be of no evident value. Indeed, there are many instances in which arbitrators may need to interpose questioning.

In those circumstances, there are a few precautions that can insulate against any undue risk of treading on a valuable line of cross-examination that may be on the verge of administering the *coup de grace*. Counsel may be asked if he or she is near to honing in on a point. A few questions later might be an ideal time for interjections by the panel, while the iron is still hot. And for particularly critical lines of questioning, counsel might take the initiative to apprise the Panel in advance that a particularly important line of questioning may seem at first somewhat mystifying, but that counsel intends to tie things up before finishing, bringing out the relevant foundational facts before concluding, if not necessarily in the order one might develop them when employing a purely narrative approach.

Counsel Should Employ Documents Intelligently to Elicit the Truth

While, as I have observed, the maxim "never ask a question to which you do not know the answer" is over-used, counsel should, at a minimum, have an answer in mind. And that answer should be directly or inferentially supported by other evidence.

The other evidence may include testimony of others, but will principally consist of the documents. Employing documents effectively in cross-examination serves multiple purposes, including: (1) securing testimony consistent with the documentary evidence, (2) keeping the witness honest, and (3) assuring the panel that the questioning is based upon evidence, and not designed simply to "fish" or harass.

Ineffective use of documents is a common occurrence. Directing an adverse witness to read a document - particularly one written by another - is seldom the most effective use of a document. It is a tactic sometimes justified in front of a lay jury, in which counsel perceives the need, through repetition, to hammer home a key point throughout the trial. By contrast, an arbitration panel, having been furnished with pre-hearing briefs, will have a far better grasp than a jury of a party's themes entering the hearing. Critical documents can be emphasized in summation. And the arbitrator appointed by a party fulfills a proper role in ensuring that during deliberations the other panel members do not overlook important evidence. Accordingly, except for occasions when witnesses make statements that contradict a writing, so that having it read during cross-examination demonstrates the witness's lack of credibility, there is seldom cause for having documents merely read by an adverse witness.

The effective use of documents should be based on the same analytical approach one employs in developing cross-examination generally. While others' practices may differ, mine typically begins with two questions. First, if X were actually true, as I expect the witness will claim, what would the witness have done that would have been consistent with X? Second, if X is untrue, as I believe it is, what might the witness have done that would have been inconsistent with X?

To illustrate, suppose I am concerned an adverse witness will testify, incorrectly, that the cedent classified pregnancy as a "disability" risk. In that case, I would focus on documents concerning how the cedent treated pregnancy claims by policyholders. Were they covered as disability, or classified as "medical" risks? If my hypothesis is that pregnancy had customarily been treated as medical business, I would seek documents indicating such

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claims had been ceded under a medical stop loss treaty. Cross-examination built upon such a documentary record is on solid footing, even if the ultimate question - How did the company classify pregnancy risks? - had never before been answered by this particular witness.

When documents establishing an evidentiary point are lacking, documents can still be used to further end of candor. A witness might be questioned on a preliminary topic on which she may be inclined to dissemble. "Ms. Jones, at these round-table meetings, management recognized that the seventeen percent ceding allowance afforded a profit even when the reinsurer would experience a loss. Correct?" Assume the witness denies this, but then is confronted with documents showing she was present at two meetings where this was acknowledged. When the questioning then moves to the central topic, the witness may worry that her inclination to make a blanket denial will similarly be contradicted by the record. She does not want to lose all credibility, and may therefore work harder to give an accurate, rather than an argumentative, answer.

Is it proper for counsel to bluff; that is, to physically pretend to hold an impeachment document when there is no such record? Opinions are mixed. In my view, the guidepost must be a search for the truth.[8] Thus, it is shabby practice to buffalo a nervous witness by waving a document that is really only the hotel bill. On the other hand, counsel always should demonstrate total command of the record early in an examination, so the witness knows he will be exposed if he deviates from reality. I remember one such examination where, after the documents "corrected" a witness twice, he answered a later question with: "Do you have a document there that says so?" I gave him the only appropriate response: "I think you should answer as if I had a document proving the truth."

Finish Strong

Breaking one rule - the rule against asking questions to which you do not know the answer - can be sound practice. However, breaking multiple rules at the same time is simply foolish. Thus, if one is going to ask new questions at the hearing, do not make these your concluding questions. Asking new questions does carry risk. Unfavorable testimony at the conclusion of an examination tends to resonate more than bad testimony sandwiched between line of questioning that undercuts the witness' credibility. Reserve to the end at least a few questions for which you do know the answer.

If the witness provides a bad answer that, while incorrect, cannot easily be disproved by the evidence, you may need to resist the temptation to swiftly change the subject. Doing so will only temporarily avoid highlighting the answer. Opposing counsel likely will bring it out again on redirect and, of course, during summation.

Rather than skip forward rapidly to some new topic, experienced counsel hold in reserve a line of questioning going to the reliability of the assertion. Why wasn't the action described by the witness documented? Does the witness remember other similar instances and, if not, why is the witness's recollection so strong with regard to this instance? I once asked a witness why she remembered her underwriting intent from twelve years ago so clearly when she had difficulty recalling more recent decisions. This was somewhat risky, as a possible answer could have been along the lines of "I remember it because I had a big argument with my colleague and it all happened on my birthday;" i.e., the kind of self-corroborating details that validate a recollection. Instead, however, she answered: "I remember this issue, because it is important." "Important for what?" Again a somewhat risky follow-up. The answer might have been: "Important, because back in 1992 I'd had a similar problem on the XYZ Program." Instead, the answer was: "Important for this case." That was the signal to conclude on that subject. The witness had now suggested that not only was her recollection the result of straining to remember (probably during preparation with counsel), but also that the recollection may have been colored by her interest in seeing her employer prevail.

The risk of a harmful (corroborative) answer certainly exists, but it is a tolerable one. After all, the witness had begun by giving an unqualified answer which the panel might have presumed was based on a well-founded recollection. Further testimony corroborating her memory may be undesired, but does not inflict a fresh wound. This is often a risk worth taking when weighed against the

potential that the witness's declaration is merely a rehearsed response, and not a firmly held memory.

Conclusion

Arbitration presents more opportunities for cross-examination without a comfort blanket than litigation. Third-party testimony "before the panel," numerical and time limitations on depositions, and greater latitude before experienced panels, each may put counsel on the spot. Either ask a question for which one does not know the answer; or play it safe.

For attorneys who litigate as well as arbitrate, the opportunity to examine a witness fresh (and live) can be an invigorating exercise of truly thinking on one's feet. The experience is a throwback to nineteenth century practice, in which intuiting human nature often substituted for use of prior recorded testimony as a basis for impeachment.

The ability of counsel to cross-examine without a prior deposition does not justify a proceeding that visits surprise, unfairly, upon either party. The positions of the parties, and their evidence, are appropriately made known in pre-hearing briefing. If a party witness gives seemingly dispositive testimony that has not been alluded to in pre-hearing briefing, the panel may wonder about possible gamesmanship and may have a few questions of its own for the witness, counsel, or both. The object always must be to distill out the truth in the most efficient manner. This requires counsel who are able to cross-examine based on varying degrees of discovery, and arbitrators who acknowledge the additional latitude during the hearing that is appropriate in such cases.▼

1 The views expressed herein do not necessarily reflect those of the author's clients.

2 Blaise Pascal, Minor Works p. 1 (Harv. Classics 1909).

3 *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408-10 (3d Cir. 2004).

4 9 U.S.C. §7 (West 2007).

5 The ARIAS•US Practical Guide to Reinsurance Arbitration Procedure, Chapter IV, Comment E provides: "The Panel has considerable discretion to limit the amount and type of discovery available to the parties in the arbitration. The Panel's objective should be to give each party a fair and reasonable opportunity to develop and present its case without imposing undue burden, expense or delay on the other party(ies). No particular pattern suits all reinsurance arbitrations. In resolving disputes, the Panel should exercise its discretion and strike the appropriate balance for the given case between enabling the parties to obtain relevant discovery necessary to their respective cases, and protecting the streamlined, cost-effective intent of the arbitration process."

6 As Justice Jackson famously observed: "I think every lawyer knows that one of the great questions in this case is credibility, and that if we have, in cross-examination, to submit every document before we can refer to it in cross-examination after we hear their testimony, the possibilities of useful cross-examination are destroyed. [W]e have had the experience of calling document after document to their attention, always to be met with some explanation, carefully arranged ..." Excerpt No. 2 at the Testimony of Hermann Goering (Mar. 19, 1946), posted at www.law.umkc.edu/faculty/projects/ftrials/nuremberg. (The author does not equate any of his opponents with Justice Jackson's adversary).

7 *See, e.g., Harding v. Noble Taxi Corp.*, 182 A.D. 2d 365, 370 (1ST Dept. 1991) ("[T]he trial court's persistent interjection into the questioning and testimony of the plaintiff's expert hampered her ability to establish her case.").

8 *See* Phillip H. Corboy, Cross-Examination: walking the Line Between Proper Prejudice and Unethical Conduct, 10 Am.J. Trial Advoc. 15, 13 (1986)("Truth, as an absolute, is an incidental function of the adversary process. ....[A] lawyer may effectively employ trial skills and tactics that make a witness appear unreliable, although that countenance stems more from the artifice of counsel's skillful questions than any discomfiting revelations by the witness. ... Out of the process of destruction on cross-examination, the truth, as spoken, is whittled. ... From this dialectic, a terrible beauty is born; it is called justice.").

For attorneys who litigate as well as arbitrate, the opportunity to examine a witness fresh (and live) can be an invigorating exercise of truly thinking on one's feet. The experience is a throwback to nineteenth century practice, in which intuiting human nature often substituted for use of prior recorded testimony as a basis for impeachment.

tech tips

You Too Can File an Electronic Brief

Tech Tips is a new feature of the ARIAS•U.S. Quarterly that will appear periodically to offer information about technical subjects that are especially relevant to arbitration proceedings.

Larry P. Schiffer

Larry P. Schiffer

Savvy umpires now include on their organizational meeting agenda an item on whether electronic briefs should be submitted. What's an electronic brief you ask? If you missed our Technology Workshops at the last two meetings we will try to catch you up.

An electronic brief is a copy of your hearing brief stored on a CD or DVD in a format usable by the arbitration panel. Electronic briefs may be simple or complex. In some cases, a simple CD or DVD with an electronic version of the brief and electronic images of the exhibits may be sufficient. In other cases, a more sophisticated electronic brief, where the exhibits, case law, and the deposition testimony all appear as hypertext links to the actual transcripts, cases, and documents in electronic format, may be requested. The more sophisticated the brief, the more likely counsel will use a technology consultant to create the brief and provide the software necessary to read and manipulate the information on the CD or DVD. Arbitrators need to advise counsel of their technology requirements so that counsel is aware of what needs to be provided to the panel well in advance of the submission date.

A simple electronic brief in a word processing format with Adobe Portable Document Format (PDF) copies of the exhibits is relatively easy to accomplish in a short amount of time. A true electronic brief with integrated hypertext links to cases, testimony, and documents takes some time for a technology consultant to put together. Often, the parties will submit a simple electronic copy of the brief on the exchange date and then agree to provide the panel with the full-blown integrated electronic brief a week or so before the hearing. This gives the panel a chance to read the parties' arguments in advance if the arbitrators choose to do so, but then have the fully functional electronic brief before the hearing when the panel is more likely in a position to study the materials.

Not all arbitrators need or want a fully functional hypertext electronic brief and there is a cost associated with producing such a document. If electronic briefs with hyperlinks are not going to be used, but the panel wants exhibits electronically, it will be necessary to determine in what manner the exhibits are to be produced. If the panel wishes to annotate the exhibits in digital format, then the exhibits must be saved to the CD or DVD in the proper format to allow for annotation. This may be PDF format if the arbitrators have the appropriate software version that allows for annotations or in some other format as long as the annotation capability is imbedded in the disk sent to the panel. If the panel only wants to have the electronic version of the exhibits as a resource and does not plan annotating the documents on disk, then a simple PDF or TIFF file for each exhibit should suffice.

Electronic briefs of varying degrees of sophistication are becoming commonplace. The key is to determine what is necessary and required early on in the case to avoid last minute disasters.▼

If electronic briefs with hyperlinks are not going to be used, but the panel wants exhibits electronically, it will be necessary to determine in what manner the exhibits are to be produced.

Larry Schiffer is chair of the ARIAS·U.S. Technology Committee. He is a partner in the New York office of Dewey & LeBoeuf LLP.

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.

off the cuff

More on Words

Eugene Wollan

Eugene Wollan

In my admittedly obsessive pursuit of perfection in the everyday use of the language of Shakespeare and Dickens, and my equally obsessive over-reaction to grammatical solecisms, I have taken lately to jotting down insults to the English language that I encounter in television commercials. Unfortunately, these are not a rarity, and - to put it bluntly - they drive me nuts.

[I am referring only to actual grammatical errors, not the more universal category of generally offensive commercials, like the one in which that stocky guy with a heavy black beard yells at the camera and tells you that if you act now he'll double your order AT NO EXTRA COST.]

I think the first flagrant mistake that caught my ear and made me wince was that of the fast food chain that advertised a meat sandwich of some kind "served with au jus." This is clearly a candidate for William Safire's Department of Redundancy Department. According to Wikipedia, "au jus" is French for "with [its own] juice," so this claim is apparently serving the meat "with with juice." I wonder if the same chain offers a "cheeseburger with cheese."

Another candidate for the same Safire category is the ubiquitous phrase, on television and in print ads, "free gift." Tell me, pray, is there any other kind of gift?

Here are several others that make me recoil in horror:

- "An inventory of cars and homes are available now." The subject of the verb here is "inventory" which, the last time I looked, was singular. The verb should agree in number with the subject, which is not necessarily the noun closest to the verb.
- "After taking [this medication], it not only stopped the pain ..." This is a classic dangling participle. "It" did not take the medication, and the copywriter of this one ought to take his or her medicine.
- "Women who are nursing, pregnant, or may become pregnant ..." In order for the first "pregnant" to make sense, the word "are" must be implied before it, but the way the sentence is structured it would also have to be implied before the next phrase, which would give us: "Women who are nursing, [are] pregnant, or [are] may become pregnant," which is just silly. It's easy enough to fix: "Women who are nursing or pregnant, or who may become pregnant."
- "You'll get healthy, in shape, and lose weight all at the same time." This is essentially the same mistake as the one about pregnant women. If we specify the words that are omitted because they're understood, we get, "You'll get healthy, [get] in shape, and [get] lose weight all at the same time." It would be easy enough to say, "You'll get healthy and in shape, and lose weight all at the same time."

[By the way, as far as I know, the gym responsible for this commercial does not particularly cater to women who are nursing, pregnant, or may become pregnant.]

- "Everyone gets what they want." "They?" "Everyone" means "every one" and "one" is singular. This is, sad to say, a very common mistake, and I think many people make it knowingly in order to avoid the political incorrectness of "everyone gets what he wants" or the perceived awkwardness of "everyone gets what he or she wants." If the latter really is a concern, why not recast the sentence to something like "They all get what they want"?
- "___ a savings of $50 ___." It may be multiple dollars, but it's only one saving.
- "One of two women will suffer from . . . in their lifetime." Since when is "one" (which is the subject of the verb) plural?
- "You don't see those kind of guarantees ___." Since the subject matter is a single

Many wordings seem to be in love with the word "which" to the exclusion of "that," as in "... costs of defense which are reasonably incurred ..." It's a fair guess that the drafters of such language are blissfully unaware of the distinction between a restrictive and a non-restrictive clause.

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Many authors of these wordings seem to suffer from a sort of "Moses On Mount Sinai" syndrome; they think they are enunciating the Ten Commandments instead of just writing a private contract. The verb "will" is frequently replaced willy-nilly by "shall," presumably because it has a more authoritative (or Biblical) sound.

CONTINUED FROM PAGE 21

guarantee, confusion is rampant. "That kind of guarantee"? "Those kinds of guarantees"? Or maybe, to simplify, "a guarantee like this _ _ _"?

- "We never forget who we're working for." Would the writer say "we're working for he." ?
- "If you owe the IRS more than $10,000, our legal team has negotiated _____." I wonder what their legal team has negotiated if I owe less than $10,000.

* * * *

It should go without saying that my single-minded, Ahab-like campaign to track down grammatical imprecision (my personal Moby-Dick) is triggered every time I have occasion to review or analyze an insurance policy or a reinsurance contract, and I am delighted to report that outright grammatical mistakes like those I have encountered on television are quite rare. Style is, however, a very different matter, and it is in that area that I have a serious bone to pick with the authors of many wordings. Much of my criticism relates to the same kind of mindset I find in so many other kinds of writing: in an effort to make the content sound elegant, the writer succeeds only in making it sound pretentious. For example:

- Many wordings seem to be in love with the word "which" to the exclusion of "that," as in "... costs of defense which are reasonably incurred ..." It's a fair guess that the drafters of such language are blissfully unaware of the distinction between a restrictive and a non-restrictive clause. I would respectfully refer them to my personal bible, The Elements of Style, by William Strunk Jr. and E. B. White, which is particularly enlightening on this subject (note: that's a non-restrictive clause introduced by "which").
- Many authors of these wordings seem to suffer from a sort of "Moses On Mount Sinai" syndrome; they think they are enunciating the Ten Commandments instead of just writing a private contract. The verb "will" is frequently replaced willy-nilly by "shall," presumably because it has a more authoritative (or Biblical) sound. Technically, in formal writing the first person uses "shall" to anticipate the future and "will" to express what Strunk and White call "determination or consent." (By that standard, "We shall overcome" was a prediction of inevitable victory rather than an expression of determination to see it through.) For the second and third person, the reverse applies. Thus, in order to be correct, the policy wording should talk about what (the insurer) "shall" do and what you (the insured) "will" do. Far too often, this distinction is ignored. Moreover, it's not even done consistently. Thus, in the same policy, I find, "... we shall reimburse you ..." and "... the most we will pay ..." A little consistency would go a long way.
- Another manifestation of this syndrome is a favorite drafter's device that shows up in the Definition section of a contract:

  "....., as used herein, shall mean ....."

  When "shall" it mean whatever it means? Next Tuesday? It means whatever it means <u>now</u>, not some time in the future, and the "shall" is both superfluous and pompous. [I could go on at length about the superfluity and meaninglessness of "as used herein," but that's another story.]
- The phrase "the following" is used time and time again to introduce any kind of listing, be it of perils, exclusions, or whatever. It's not wrong, and heaven knows it's very common, but it's (or at least it seems to me to be) an unnecessary effort to sound elevated, when a simple "these" would do the same job. Exactly the same can be said for any number of other words that are apparently used for their "elegant" (read "legalistic") sound despite the availability of at least one simple, down-to-earth alternative. For example:

"the above"	=	"these"
"the said"	=	"that"
"foregoing"	=	"these"
"hereinafter:	=	"later"
"thereof"	=	"of it"
"hereto"	=	"to this"
"notwithstanding the foregoing"	=	"nevertheless"
"hereby"	=	usually superfluous (as in "It is hereby agreed")

The list could go on.

- In one policy or contract after another, I find

some provisions, apparently on a random basis, introduced by language like this: "It is hereby understood and agreed . . ." Well, of course it is. The entire document is understood and agreed, or it wouldn't be the contract between the parties. Moreover, the use of that phrase in some provisions but not in others gives rise to the question "Why here and not there?" and can easily be seen as creating an ambiguity that could come back to haunt the drafter later on.

- The phrase "condition precedent" is frequently strewn about, also apparently on a random basis, without careful regard for what is and is not appropriately subject to that restriction. It's one thing, for example, to say that the submission of a detailed Proof of Loss is a condition precedent to recovery on a claim, but is it really necessary or appropriate to say the same thing about an arbitration Award?
- Many insurance contracts nowadays include a section containing helpful "Definitions" of their key terms. Some of them, however, fall into the trap of using the term itself to define the term. I have one before me, for example, that defines "co-owner" as "any co-owner with the insured [of the property insured]." Clear?
- There also seems to be a view among the drafters of some wordings that the use of redundant clichés in some way adds heft to the substantive content. I'm looking at a single paragraph right now that contains these cases in point:

  - "cost and expense"
  - "due and reasonable"
  - "prompt and immediate"

[This brings to mind one of my very favorite legalistic clichés: "clear and unambiguous." Can a word or phrase be one and not the other?]

One of Strunk and White's rules is Omit Needless Words. Some of these draftsmen seem to be heedless of needless.

I know from decades of personal experience that a lot of thought goes into the formulation of policy and treaty wordings. What often happens, however, is that the focus on substantive content is so intense that the drafter loses sight of some of the finer points like those I have highlighted. No one would contend that the distinction between "that" and "which" is as important as a precise definition of the basic coverage, but that doesn't mean it should be ignored completely.

There's one other point I'd like to make, not strictly a matter of wording, but more generally an example of drafting policy language without thinking through all the ramifications. I bring it up here because it's a particular bugaboo of mine, and also because it happens all too often, including in the very policy I have been working with in a current case. There's an Arbitration Clause that says, in effect, that any dispute will be arbitrated. There's also a Service of Suit Clause by which the insurer or reinsurer agrees to be subject to suit in any federal or state court ... etc., etc. What is missing is any attempt to reconcile them, to tell the reader which has priority over the other. The courts are called on from time to time to perform this function, but that simply should not be necessary.

* * * *

From TV commercials to Arbitration Clauses may seem like quite a stretch, but what they have in common is the language. I believe the English language is a wonderful tool, and I tend to take it personally when I find that tool being used sloppily or mishandled. Call me Ahab.▼

In one policy or contract after another, I find some provisions, apparently on a random basis, introduced by language like this: "It is hereby understood and agreed..." Well, of course it is. The entire document is understood and agreed, or it wouldn't be the contract between the parties.

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Thomas A. Player
James J. Powers
George C. Pratt
Michael D. Price
Raymond L. Prosser
Robert C. Quigley
Joseph W. Rachinsky
R. Stephen Radcliffe
Robert Redpath
George M. Reider Jr.
Robert C. Reinarz
Allan E. Reznick
Steven J. Richardson
Kevin T. Riley
Timothy C. Rivers
David R. Robb
Eileen T. Robb
Debra J. Roberts
Robert L. Robinson
Edmond F. Rondepierre
Jonathan Rosen
Angus H. Ross
Brenda L. Ross-Mathes
Andrew N. Rothseid
Don A. Salyer
Molly P. Sanders
Peter A. Scarpato
Daniel E. Schmidt IV
Savannah Sellman
James A. Shanman
Richard M. Shaw
Radley D. Sheldrick
Gerald M. Sherman
Richard M. Shusterman
L. Ian Sleave
David W. Smith
Richard D. Smith
Richard E. Smith
Harold J. Sofield
David Spiegler
Walter C. Squire
Andreas Stahl
Timothy W. Stalker
J. Gilbert Stallings
Paul N. Steinlage
Richard E. Stewart
Thomas P. Stillman
Michael H. Studley
John D. Sullivan
Peter Suranyi
James E. Tait
David A. Thirkill
Elizabeth M. Thompson
N. David Thompson
Paul C. Thomson III
John J. Tickner
Kevin J. Tierney
Harry Tipper III
Thomas M. Tobin
Michael J. Toman
Daniel T. Torpey
David W. Tritton
William J. Trutt
Jacobus J. Van de Graaf
James D. Veach
Richard L. Voelbel
Robert C. Walker
William J. Wall
Jeremy R. Wallis
Andrew S. Walsh
Michael T. Walsh
Paul Walther
Richard G. Waterman
Richard L. Watson
Barry Leigh Weissman
Alfred O. Weller
Emory L. White Jr.
Richard L. White
William Wigmanich
W. Mark Wigmore
Michael S. Wilder
P. Jay Wilker
Eugene T. Wilkinson
Brian E. Williams
William A. Wilson
W. Rodney Windham
Ronald L. Wobbeking
Eugene Wollan
Allan M. Zarcone
Lawrence Zelle
Michael C. Zeller
George G. Zimmerman
Thomas M Zurek

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

New Arbitrator and Umpire Certification Requirements *(Effective January 1, 2009)*

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.

Members are asked to direct any questions to the Certification Committee at **CertificationCommittee@arias-us.org**. These questions will be answered directly by the committee and frequently asked questions will be posted on the website.

...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;

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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.

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.

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 (which does not have to be repeated). 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 new system is expected to be online in the fall.

- 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

The Board has asked that members direct any questions to the Certification Committee at **CertificationCommittee@arias-us.org**. Questions will be answered directly by the committee and frequently asked questions will be posted on the website.▼

in focus

Recently Certified Arbitrators

Andrew D. Brands

Peter C. Brown, Jr.

James I. Keller

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

Andrew D. Brands

Andrew Brands is Senior Vice-President and General Counsel responsible for the Europe and Reinsurance Division of Great-West Life, London Life and Canada Life, and non-public capital transactions for Great-West. In his role as General Counsel he manages the legal affairs in all the jurisdictions in which the companies conduct business, including Canada, United States, Ireland, Germany, United Kingdom, and Barbados. In addition, he manages the legal aspects of capital transactions. Mr. Brands also has carriage of all legal affairs regarding the Reinsurance Division in the Great-West group of companies. His responsibilities include legal oversight of corporate governance, treaty negotiations and arbitrations. Prior to joining Canada Life, he was a senior partner at Smith Lyons. Mr. Brands is on the Board of Big Brothers and Big Sisters of Toronto and is the Past Chair.

Peter C. Brown, Jr.

Peter Brown began his career in reinsurance as a broker in the Casualty Treaty Department of Guy Carpenter in 1977. Previously, he had been employed as a corporate attorney and manager of the legal department of National Bulk Carriers, the managing entity of an international conglomerate wholly owned by Daniel K. Ludwig. Declining an opportunity to manage a major initiative of Mr. Ludwig's in Brazil, Mr. Brown discovered, through a propitious series of events, the world of risk transfer and, particularly, syndication of financial capacity in support of large risk transfer through reinsurance. He opted to change his career path.

Immediately thrust into analyses of contract wordings and summarizing third party claims, along with arranging casualty treaty placements, Mr. Brown was also assigned a position in a small internal working group (which included input from CT Bowring in London) focused on creation of a contract wording to address reinsurance treatment of Extra Contractual Obligations and judgments for amounts in Excess of Original Policy Limits. This working group developed contract wordings that gained acceptance and adoption by the insurance and reinsurance industries and remains today in every Reinsurance Agreement essentially as it was drafted in 1978. To accompany distribution of these wordings to Guy Carpenter's clients and their reinsurers, as an illustration of their meaning and practical application, he prepared several examples of hypothetical casualty claim scenarios.

Mr. Brown's experience at Guy Carpenter included placement of Directors and Officers Liability, Surety, Fidelity, Medical Professional Liability, Auto, and General Liability lines of business. After several years, he joined Sellon Associates where, for the next eighteen years, he interrelated with clients directly, eliciting underwriting information, overseeing claims and contracts, accompanying reinsurers on underwriting and/or claims audits, verifying accounting of premium and losses and of calculation of profit commissions, strategizing on reinsurance structures and providing marketing advice. At Sellon Associates, Mr. Brown enhanced his Carpenter experience and developed additional in depth working knowledge of specialty casualty business, financial guarantee business, crop insurance (hail and multi-peril), lawyers professional liability, international trade credit, residual value, automobile contingent (vicarious) liability, and the design and use of structured reinsurance. In 1999, he joined Towers Perrin where he continues to provide intermediary services in his developed areas of expertise.

Peter Brown graduated with a Bachelor of Arts degree in English from the University of Notre Dame and earned a Juris Doctorate from Fordham Law School. He is licensed to practice law in New York and has been a member of the Advisory Committee of Fordham Law for fifteen years. Between college and completion of law studies, he served in the U.S. Marine Corps, which service included a tour of duty in Vietnam.

James I. Keller

James Keller is currently Vice President of Operations for Cairnstone Re, a medical stop-loss managing general underwriter (MGU). His main reponsibilities include medical stop-loss claims and medical management. He has been in the medical insurance/reinsurance industry for more then 35 years. He has

expertise in all company operations with focus on claims, both fully insured as well as self-funded.

Prior to joining Cairnstone Re in 2000, Mr. Keller was Vice President of Administration and one of three founding senior members of Alden Risk Management Services (ARMS), John Alden's self-funded division. In addition, Mr. Keller also served as Vice President of Administration for Alden's fully insured business, as well as their Florida based HMO, Neighborhood Health Partners.

Mr. Keller was Vice President of Claims for several companies since joining the insurance industry with CNA Insurance in Kansas City, MO in 1969.

Mr. Keller is a member of the Self Funded Insurance Institute (SIIA) as well as the Society of Professional Benefit Administrators (SPBA) and attends regular functions and organizational meetings to keep abreast of the latest trends and marketplace happenings. In addition, he is a member of the National Health Care Fraud Association and is a licensed agent in the state of Florida.

Cynthia J. Lamar

Cynthia Lamar has approximately 20 years experience in insurance and reinsurance law and regulation and is the Property and Casualty Legal Officer for Horace Mann Insurance Companies as Assistant Vice President and Assistant General Counsel. Ms. Lamar advises on all aspects of personal lines auto and homeowner business including underwriting, claims, contracts, regulatory compliance, reinsurance, and corporate matters.

Prior to her current position, Ms. Lamar was Vice President and Assistant General Counsel for the Reinsurance Association of America (RAA). She worked with RAA members to develop public policy positions, legislation, and regulatory proposals to address the interests of the U.S. reinsurance industry in matters affected by state, federal, and international law. Specific assignments included development and communication of the RAA's policy on continuation of federal terrorism risk insurance and participating with the U.S. State Department to promote the industry's position on enforcement of judgments in foreign jurisdictions through the Hague Convention on Choice of Court Agreements.

Ms. Lamar spent much of her career as a regulator with the Illinois Department of Insurance, where she served as Special Counsel to the Director. She was typically assigned special projects and emerging regulatory and legislative issues that were high profile and politically challenging, requiring careful handling with a high degree of diplomacy and technical legal skill. Ms. Lamar was responsible for such matters as U.S.-based insurance securitizations; mutual holding company conversion; adoption of NAIC financial solvency accreditation standards; regulatory modernization; and state, federal and international insurance regulatory cooperation efforts. She was very active in the National Association of Insurance Commissioners where she chaired several working groups.

Ms. Lamar received her Juris Doctor Degree (cum laude) from Saint Louis University School of Law. She earned her Master's Degree in Public Administration and her Bachelor's Degree in Management, both from the University of Illinois at Springfield.

Cynthia J. Lamar

Edward J. Muhl

Edward J. Muhl

Edward Muhl is the owner and Chief Executive of an insurance, reinsurance and legislative consulting firm. He has 42 years insurance experience in both the public and private sectors, having served in a regulatory capacity in two states as Commissioner of Insurance in Maryland and Superintendent of Insurance in New York. He also served as Vice President and President of the National Association of Insurance Commissioners.

Mr. Muhl's private industry experience includes Partner and National Leader of PricewaterhouseCoopers Insurance Regulatory Practice, Vice President Royal Insurance, Vice Chairman Global Insurance services, in which he established the London office and worked with the London market companies and Equitas on handling, reconciling and data capture and processing of their APH claims. He was a member of the board and head of Peterson Consulting Insurance and Reinsurance Practice domestic and foreign, Senior Vice President Reliance Insurance Group, Director of Claims Maryland Automobile Insurance Fund, claims supervisor Nationwide Insurance and General Adjuster for GAB Inc. He serves on the boards of several insurance companies, as well as on a Congressional Insurance Advisory Committee and is a member of the International Insurance Society.

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Harold J. Sofield

Thomas M. Zurek

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Mr. Muhl's experience also includes participation as member or chairman of Governor's Task Forces on General Liability, Tort Reform, Workers Compensation, Health Insurance Pooling Mechanisms and Medical Malpractice (Maryland). He was appointed to head individual liquidation matters in Maryland and headed the New York Liquidation Bureau. He has had considerable exposure to both the formal and informal hearing processes in which he served as a paneled member or chief hearing officer on a variety of issues involving insurers, reinsurers, brokers, MGA's, agents, liquidations, rate determinations and issues involving fraud.

Mr. Muhl holds a Bachelor of Arts degree in Social Science and served in the United States Navy Submarine Squadron VI.

Harold J. Sofield

Harold (Bud) Sofield retired in 2006 after 25 years of service with General Reinsurance Corporation, Stamford, Connecticut. He was Vice President and manager of General Re's property claims unit.

Prior to joining General Re in 1981, Mr. Sofield spent eleven years with the Factory Mutual Insurance Companies, predecessor to F.M. Global (FMG). He was a senior claims adjuster in the New York offices of FMG, conducting fire loss investigations and adjusting claims at FMG's Commercial and Industrial risks. He also has extensive experience in boiler & machinery, inland marine, difference in conditions, and all-risk claims.

At General Re, Mr. Sofield was a member of the claims department senior staff. He planned and directed property unit staff on client audits and due diligence on new business. He had overall responsibility for claims department procedures for detecting, reserving and payment of the companies Treaty and Facultative property claims. One of his major responsibilities was catastrophe tracking and providing the company with accurate estimates of their exposure on major events such as hurricanes and earthquakes. He has extensive experience on issues of: number of occurrences, allocation of loss, definition of risk, and reinsurance terms and conditions.

While at General Re, Mr. Sofield worked closely with primary insurance companies senior claim staff and experts, providing direction on primary insurance issues, as well as giving guidance on reinsurance issues. He worked closely with Gen Re treaty and facultative underwriting staffs on forms, wordings, and terms of conditions in reinsurance contracts.

Mr. Sofield is past president of the Loss Executive Association (LEA), a 600 member organization whose membership includes adjusters, attorneys, engineers, accountants, and other experts. The LEA's primary goal is education, and advancing knowledge of property claims issues.

Thomas M. Zurek

Thomas Zurek has been in the insurance/reinsurance industry for more than 35 years. He serves as the General Counsel and Secretary of OneAmerica Financial Partners Inc., and is a member of the enterprise's executive council and an ex-officio member of the board of directors and secretary for all board and corporate functions. Mr. Zurek joined OneAmerica in 2002 to focus on merger and acquisition activity; corporate governance; class action defense; significant ERISA litigation; general commercial conflict resolution, including all human resource issues; extensive domestic and international reinsurance arbitration matters; regulatory compliance (state and federal); and general corporate legal management. In addition to his role as General Counsel of the OneAmerica companies, he was appointed President of American United Life Reinsurance Management Services (AULRMS) in 2004. AULRMS is an MGU owned by OneAmerica and located in New Jersey.

Prior to joining the OneAmerica companies, Mr. Zurek was executive vice president and general counsel for the American General Life companies. In this role, he was a member of the Life companies' management committee. From 1974 through 1997, Mr. Zurek was in private practice in Des Moines, Iowa with emphasis on litigation and representation of Life and Property Casualty companies. From 1977 to 1990, he was an adjunct professor of law at Drake University, teaching trial advocacy and various commercial law disciplines.

Mr. Zurek is a member of the bar associations of Illinois, Indiana, Iowa and Texas. He holds Bachelor of Science and Juris Doctor degrees from Drake University.

Pre-Hearing Voluntary Withdrawal of Party-Arbitrator at Appointing Party's Request and Substitute Appointment Upheld by Federal Court

Ronald S. Gass

Albeit a rare event, there are occasions when a party-arbitrator resigns from a panel and must be replaced, for example, when an illness or other disability strikes. Rarer still are those times when an appointing party requests its own party-arbitrator to withdraw voluntarily from an arbitration prior to the hearing. This scenario and the validity of the parties' and panel's efforts to appoint a substitute party-arbitrator were at the heart of a noteworthy Illinois federal district court decision reported earlier this year.

In 1996, WellPoint Health Networks, Inc. ("WellPoint") agreed to purchase various group business operations from John Hancock Life Insurance Company ("John Hancock"). In a trio of interrelated contracts, the parties agreed to resolve any disputes through binding arbitration. After a disagreement arose regarding WellPoint's obligation to make certain payments to John Hancock, the parties filed cross-demands for arbitration in 2002. The arbitration clause included the typical provision that each party was to appoint one of the arbitrators and the two party-arbitrators were to select the third. In the event that either party failed to appoint its arbitrator within 20 business days following receipt of the notice demanding arbitration, the party demanding arbitration would appoint the second arbitrator before entering upon arbitration.

The parties timely appointed their respective party-arbitrators, and because they could not agree on the third, the umpire was ultimately appointed in 2003 by the American Arbitration Association ("AAA") in accordance with the arbitration clause. Following extensive discovery over the next two years and a nearly eleven-fold increase in John Hancock's damages demand in 2005, WellPoint retained new co-counsel. Shortly thereafter, WellPoint's party-arbitrator communicated to the umpire that WellPoint had requested that he "stand down" as its appointed arbitrator.

WellPoint's counsel informed the panel that they had asked its party-arbitrator to withdraw voluntarily, stressing to him that WellPoint acknowledged that it could not unilaterally terminate his appointment. Responding to its party-arbitrator's concern about whether this request would impact the previously agreed arbitration schedule, WellPoint agreed that it would abide by the hearing schedule and that this substitution would not require a change in that schedule. John Hancock subsequently objected to WellPoint's attempt to remove its party-arbitrator from the panel, noting that there was no basis for it and that it would "unfairly prejudice" it and "inject serious legal error" into the proceeding if permitted. Although the reason WellPoint had asked its party-arbitrator to withdraw was not revealed, its counsel denied that it was seeking some tactical advantage. During the ensuing weeks, the parties and panel struggled with how to resolve the withdrawal issue until WellPoint's party-arbitrator finally determined that he could not continue to serve in the face of WellPoint's demands that he step down, and the panel accepted his withdrawal.

WellPoint subsequently appointed its replacement party-arbitrator; however, John Hancock (1) continued to object to the withdrawal of WellPoint's original party-arbitrator; (2) objected to the appointment of the replacement party-arbitrator; (3) contended that it should be permitted to select the replacement party-arbitrator because the withdrawal of the initial one should be construed as a default by WellPoint for failing to timely appoint an arbitrator under the arbitration agreement; and (4) alternatively, the remaining panel members should select a replacement or, absent their agreement, the matter should be submitted to the AAA.

WellPoint's proposed replacement party-arbi-

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case notes

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

Ronald S. Gass

In the absence of an express provision in the agreement governing the resignation contingency, the court looked to the general intent of the parties as evidenced by their agreement.

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

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trator was rejected by the remaining panel members as was a second appointee, who was also opposed by John Hancock. In an effort to break the deadlock, one of the two remaining panel members suggested that he and the umpire propose three substitute arbitrators and let WellPoint choose one of them. Although WellPoint initially rejected this idea, it ultimately agreed to withdraw its second replacement party-arbitrator and to appoint one of the arbitrators suggested by the remaining panel members. John Hancock renewed its objection to the original party-arbitrator's resignation but agreed that the panel's latest candidate met the prerequisites for service as WellPoint's party-arbitrator. The panel subsequently confirmed to the parties that the proposed substitute arbitrator had been "instated" as a panel member and that the panel was now "duly constituted."

As the 2006 hearing approached, there were discussions between the parties and panel about whether the proceedings should be bifurcated into separate liability and damages phases. Ultimately, it was agreed that the hearing would not be strictly bifurcated along these lines. Instead, the panel would consider both liability and damages issues during Phase I, and subject to any disagreements over the exact accounting of damages, those matters would be addressed during a Phase II hearing. After the 2006 Phase I hearing, the panel issued an order making certain liability and other findings. The Phase II hearing followed in 2007, during which the panel considered the proper measure of damages. It ultimately ruled that WellPoint was to pay John Hancock a small fraction of the damages it had sought.

WellPoint subsequently filed a petition to confirm the panel's favorable Phase I and II rulings in Illinois federal district court, and John Hancock filed a cross-petition seeking to vacate the those rulings on the ground that one of the panel members was not selected in accordance with parties' arbitration agreement. WellPoint countered that the panel's awards should nevertheless be confirmed because the arbitration agreement did not expressly address the party-arbitrator withdrawal issue and the replacement party-arbitrator was selected "only after a comprehensive and fair deliberative process . . . in which Hancock fully participated."

As a preliminary matter, the court rejected WellPoint's two threshold arguments: (1) that John Hancock's cross-petition to vacate should be dismissed because it was not timely filed after the Phase I ruling (it had waited to file until after the Phase II award was rendered), and (2) that John Hancock had waived any objection to the constitution of the panel because it failed to seek a court-ordered designation of WellPoint's party-arbitrator replacement pursuant to the Federal Arbitration Act before the panel issued an award.

The court then turned to the issue at the heart of this case, i.e., whether the panel lacked authority to render an award because the arbitrators were not duly selected in accordance with the parties' arbitration clause. Based on its review of the wording, the court concluded that the arbitration clause did not contain any specific provisions addressing the contingency of what should occur if a duly appointed arbitrator resigned. Noting a "dearth" of case law on the subject but considering two Northern District of Illinois arbitration decisions involving similar default appointment clauses, it found that the selection of the replacement arbitrator to fill the vacancy created by the resignation of WellPoint's party-arbitrator did not violate the arbitration agreement. The default appointment provision in the parties' arbitration agreement (providing that a party forfeits its right to choose an arbitrator if it fails to appoint one within the initial 20-business-day period following the arbitration demand) was inapplicable because there was no such inaction by WellPoint.

In the absence of an express provision in the agreement governing the resignation contingency, the court looked to the general intent of the parties as evidenced by their agreement. Noting that the clause reflected the parties intent that the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire, it focused on the fairness of the substitution procedure followed in this particular case. Key factors tilting the balance in favor of fairness were that John Hancock (1) had significant input into the selection of the replacement arbitrator; (2) had agreed that the substitute arbitrator met the prerequisites for service as WellPoint's party-arbitrator; and (3) at no time had argued that the entire panel should be disbanded and reconstituted.

John Hancock also argued that WellPoint should not have been permitted to appoint its own replacement party-arbitrator because it had played a role in his resignation. Noting that WellPoint's role in that regard "is indeed a complicating circumstance," the court could not discern any specific wrongdoing by WellPoint. Among the factors cited by the court in support of its conclusion were: (1) WellPoint had made it clear to the panel that it was fully aware that it had no right to remove its party-arbitrator and that his decision about whether to remain on the panel was entirely his own, and (2) WellPoint had fully cooperated in the panel's effort to fill the vacancy created by its party-arbitrator's resignation in a fair manner. The court acknowledged that it is always an arbitrator's prerogative to resign if the arbitrator determines that it is in the best interests of the parties to do so. It was also important that WellPoint's party-arbitrator decided to withdraw and the panel accepted his resignation following discussions with the parties in which it was determined that his withdrawal would not affect the arbitration schedule. In short, the court concluded that the resignation of WellPoint's party-arbitrator and the appointment of a substitute arbitrator proposed by the panel did not deprive the panel of authority to render an award. Thus, it denied John Hancock's cross-petition to vacate the arbitral award and granted WellPoint's petition to confirm the Phase I and II awards.

This interesting arbitration decision highlights many of the thorny issues confronting arbitrators and the parties when one party requests that its party-arbitrator voluntarily resign after the panel has been duly constituted. Clearly, procedural fairness is a critical factor in judicial review of such scenarios, particularly when arbitration clauses so rarely address the resignation contingency specifically.▼

WellPoint Health Networks, Inc. v. John Hancock Life Insurance Co., 547 F. Supp. 2d 899 (N.D. Ill. 2008).

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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.

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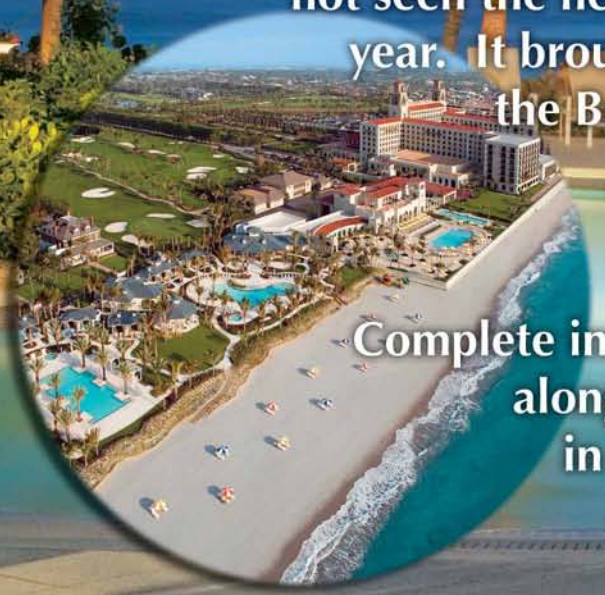

Complete information will be on the website along with online registration in late February of 2009.

ARIAS U.S.

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The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of August 2008, ARIAS•U.S. was comprised of 471 individual members and 121 corporate memberships, totaling 1138 individual members and designated corporate representatives, of which 333 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure*, based on a unique software program created specifically for ARIAS•U.S., that randomly generates the names of umpire candidates from the list of ARIAS arbitrators who have served on at least three completed arbitrations. The procedure is free to members and non-members. It is described in detail in the Umpire Selection Procedure section of the website.

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

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If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill Yankus, Executive Director, at director@arias-us.org or 914-966-3180, ext. 116.

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

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