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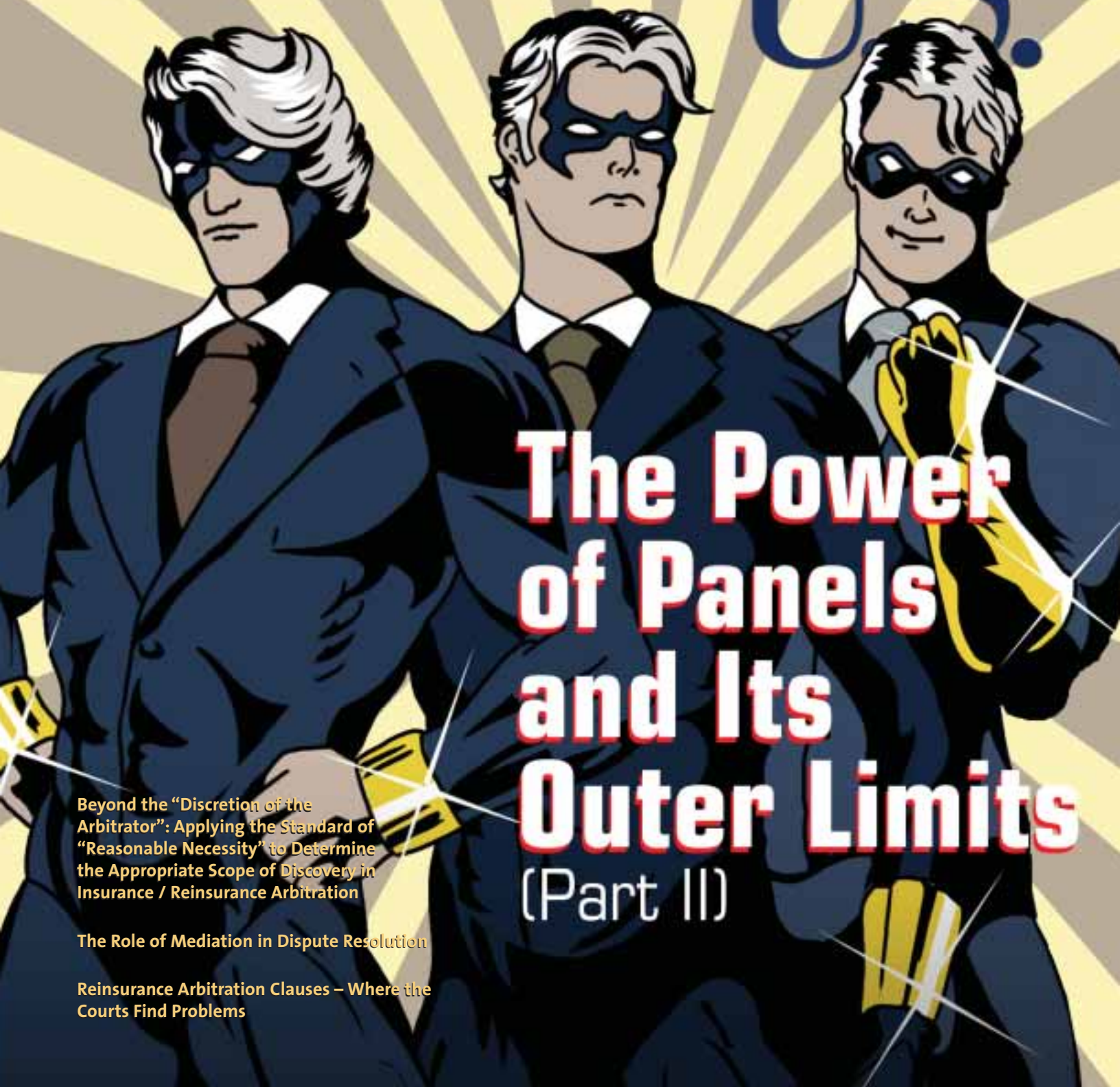

The Power of Panels and Its Outer Limits (Part II)

Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance / Reinsurance Arbitration

The Role of Mediation in Dispute Resolution

Reinsurance Arbitration Clauses – Where the Courts Find Problems

editor's comments

After many years of service, Charlie Foss and Jay Wilker are retiring from the Quarterly's Board of Editors due to other commitments. Charlie has been a significant contributor to the success of our publication from the time ARIAS-US was founded in 1994. Jay through diligent effort established our key-word index which is of great value to persons researching the many subjects covered by the Quarterly. We are truly grateful to them both for all their good work.

Joining our Board with this issue are Mark Gurevitz and Gene Wollan. Both Mark and Gene have contributed immensely to ARIAS•US as an organization and to the Quarterly publication. We look forward to working with them as Editors in our ongoing efforts to provide members with a first-rate publication.

Attorneys David Attisani and Jennifer Brennan in this issue present the second part of their article, *The Power of Panels and Its Outer Limits*. As amounts and issues in reinsurance disputes grow in size and complexity, it is essential for arbitrators to understand the sources of their authority and limits of their quasi-judicial powers that they may be called upon to exercise. The article provides an excellent discussion of the practical and legal limits of a panel's authority, as well as suggested action to establish rules or guidelines that would address recurring issues relating to such authority.

A case for expanded utilization of arbitrator powers in formulating and overseeing discovery is made by Charles Moxley in his article, *Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration*. The author outlines the authorities for a panel's powers, and suggests that active exercise of the power to regulate discovery is essential to avoid "unbridled court style discovery" and to contribute to the realization of arbitration's goals of fairness, speed and economy.

Reinsurance Arbitration Clauses – Where the Courts Find Problems, by Larry Schiffer, analyzes recent court decisions involving disputes over the interpretation of various reinsurance arbitration clauses. Pointing to areas of ambiguity that lead to such court challenges, the author suggests that parties to reinsurance contracts should exercise more care in drafting dispute resolution clauses to minimize the ambiguities.

We include in this issue the important remarks of Dean John Feerick delivered at the Annual Meeting of ARIAS•US. Entitled *The Role of Mediation in Dispute Resolution*, Dean Feerick notes a statement in a recent report that our U. S. litigation system has "become disabled by disproportionate cost and delay, and this dysfunction is impacting justice." Observing that costs and delays associated with arbitration similarly are raising concerns about its viability as a dispute resolution system, the paper suggests that mediation may become the preferable alternative.

In these days of budget cutbacks and reduced funds for travel, I hope you have preserved on your calendar the ARIAS•US Spring Meeting as an essential opportunity to consider important and emerging issues in the field of insurance and reinsurance dispute resolution and to network with key players in that field. I look forward to seeing you at the Breakers.

T. Richard Kennedy

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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

An Elephant in the (Arbitration) Room — The Power of Panels and Its Outer Limits (Part II)

David A. Attisani
Jennifer A. Brennan

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Jennifer A. Brennan

This installment ...analyzes the practical challenges faced by arbitrators who exercise those powers.

David Attisani is Chairman of the Insurance & Reinsurance Practice Group at Choate Hall & Stewart LLP, where he has practiced for the past sixteen years. Jennifer Brennan is a senior associate in the same Group. The authors also wish to acknowledge the contributions of Anita Christy, a 2008 summer associate.

In Part I of this article, published in the last edition of *ARIAS Quarterly*, we endeavored to examine the outer limits of arbitrators' authority to perform certain traditionally judicial acts in the context of an industry arbitration. The first installment described the principal sources of arbitral authority in the United States and abroad — the Federal Arbitration Act ("FAA"), state law (the Uniform Arbitration Act ("UAA") or Revised UAA ("RUAA")), international law (the "UNCITRAL rules"), and various commercial rules, including those promulgated by the American Arbitration Association ("AAA Rules") and ARIAS (the "ARIAS Practical Guide") — and whether these principles confer on arbitrators the power to award multiple damages. This installment advances the analysis by examining the extent of an arbitrator's power to order injunctive relief, exercise subpoena powers, and issue confidentiality orders, and it analyzes the practical challenges faced by arbitrators who exercise those powers.

I. FIVE (QUASI-) JUDICIAL FUNCTIONS

A. Interim Relief/Pre-Hearing Security

An arbitrator's authority to grant injunctive relief remains an unsettled issue, which the courts continue to address on a case-by-case basis. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (if permitted under the terms of the parties' arbitration agreement, an arbitrator may order injunctive relief).[1] In the reinsurance context, when the financial condition of one party is precarious or unknown, relief is generally requested in the form of a motion seeking pre-hearing security. In these financially troubled times, such requests have begun to proliferate based — not only on the respondent's condition, but also — on perceptions of vulnerability associated with their business partners and the market(s) in which they operate. The scope of a panel's authority to issue security awards must be defined, so that parties know whether a court will likely enforce them. This is particularly true when a party seeks to attach its adversary's assets. This section generally describes the sources of an arbitrator's authority to award interim relief — with emphasis on requests for pre-hearing security.

1. Sources of Authority

If a contract expressly authorizes arbitrators to award interim relief, the courts will generally enforce the award. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). If the relevant contract is silent with respect to interim relief, however, the panel may look elsewhere for guidance.

Although the FAA and UAA are silent on the issue, the RUAA expressly states that an "arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary ... to promote the fair and expeditious resolution of the controversy, to the same extent and under the same condition as if the controversy were the subject of a civil action." *See* Section 8(b). There is, however, no express reference to "security motions."

Article 26 of the UNCITRAL rules also provides for broad interim relief, which expressly includes security orders. It says, in pertinent part:

> INTERIM MEASURES OF PROTECTION
>
> (1) At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the

conservation of the goods forming the subject-matter in dispute, such as *ordering their deposit* with a third person or the sale of perishable goods.

(2) Such interim measures may be established in the form of an *interim award*. The arbitral tribunal shall be entitled to require security for the costs of such measures.

(3) A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Id. (Emphasis supplied).

Interim relief is also expressly authorized by a few of the private commercial codes. For example, the ARIAS Practical Guide states, in Chapter 4.4, that "[t]he Panel has the authority to enter interim awards in appropriate cases." The ARIAS Guidelines also contain a sample form Pre-Hearing Security Order, and they note that security orders are commonly utilized in appropriate cases. The AAA Commercial Arbitration Rules arm panel members with even broader authority:

(a) The arbitrator may take *whatever interim measures* he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.

Id. at R-34 (emphasis supplied). The broad language of the AAA Rules articulates the role of interim measures in maintaining the status quo, and it also provides specific examples of authorized forms of relief. The AAA Rules add that an "arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." R-43(a).

Finally, procedural guidelines recommended by industry professionals expressly authorize panel members to award interim relief, concluding that the decision to do so is "almost

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To the Editor...

Reinsurance arbitrators are generally interested in the location of an arbitration proceeding only in the context of making travel plans or deciding which jurisdiction's law will apply. For the lawyers involved, however, the issues are a little more complex, including the issue of whether or not he or she is engaging in the unlicensed practice of law. While most jurisdictions do not consider the participation in an arbitration proceeding in a state where the lawyer is not admitted to be the unlicensed practice of law, there are some exceptions.

The Committee on Arbitration of the Association of the Bar of the City of New York prepared an excellent paper recently that has been published in the Bar Association's publication, The Record, entitled "Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York." Although focused on New York, it includes an excellent state-by-state summary of the law in each jurisdiction, which might be of significant interest to the lawyer members of ARIAS. The article can be accessed from the Bar Association's web site (2008 Issue 3, at p. 700) at: http://www.nycbar.org/Publications/THERECORD.htm.

Sincerely,
Peter H. Bickford
New York

Letters to the Editor may be sent to T. Richard Kennedy at trk@trichardkennedy.com

As a general matter, and within reason, an arbitration panel may establish the scope of discovery in a reinsurance arbitration, subject to any agreement between the parties. In the absence of statutory authority, however, neither the parties nor the arbitrators control the flow of information from third parties.

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exclusively within the discretion of the panel of arbitrators." *See* RAA Procedures at §8.1 ("A Panel may issue orders for interim relief, including pre-award security.").

2. Pre-Judgment Security and The Courts

Given the silence of the FAA and UAA — and the failure of many jurisdictions to adopt the RUAA — the question whether a panel has authority to grant injunctive relief in arbitrations not governed by commercial rules (absent express authorization from the parties' arbitration agreement) remains one for the courts. The current weight of judicial authority — and industry practice — supports an arbitrator's discretion to award equitable relief, including pre-hearing security orders.

In general, this broad discretion to preserve the status quo is rooted in a pragmatic recognition of the parties' limited ability to enumerate every possible problem (and the related undertakings) a panel may need to address in the future. *E.g., Yasuda Fire & Marine Ins. Co. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994). The arbitration clauses found in older reinsurance contracts often specify without elaboration, for example, that the arbitrators are "free from all judicial formalities." Faced with this kind of omnibus honorable engagement provision, a number of courts have construed it as a talisman meaning "inherent authority." As one court said:

> Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to [honorable engagement clauses] have the authority to order interim relief in order to prevent their final award from becoming meaningless.

British Ins. Co. of Cayman v. Water Street Ins. Co., 93 F. Supp.2d 506, 516 (S.D.N.Y. 2000) (citations omitted); *see also Forum Ins. Co. v. First Horizon Ins. Co.*, 1989 WL 65041, at *3 (N.D. Ill. June 8, 1989) (panel had "inherent power, aside from any treaty, to order ... security"). More broadly, the Seventh Circuit Court of Appeals has explained the need for flexible interpretation of a panel's inherent powers:

> [W]e would be remiss if we did not emphasize how important a wide range of remedies is to successful arbitration. Although parties to arbitration agreements may not always articulate specific remedies, that does not mean remedies are not available. If an enumeration of remedies were necessary, in many "cases the arbitrator would be powerless to impose any remedy, and that would not be correct. Since the arbitrator 'derives all his powers from the agreement, the agreement must implicitly grant him remedial powers when there is no grant.'"

Yasuda, 37 F.3d at 351 (citations omitted).[2] In other words, if arbitrators are to be charged with stewardship over this form of adjudicative process, then the courts will not deprive them of the tools needed to run it and to deliver meaningful remedies, even if those powers need to be implied in the parties' agreement.

3. The Unauthorized Insurers' Process Act

Although the import of state Unauthorized Insurers Process Acts (the "UIPA") on the arbitration process is debatable, parties in arbitration have argued from time to time that the UIPA bears, in certain circumstances, on a panel's authority to issue security. The UIPA is a model statute adopted, in varying forms, by all fifty states.[3] It provides, among other things, that pre-appearance security is required from unauthorized insurers before they may file a pleading in court. A common iteration of that restriction provides:

> Before any unauthorized foreign or alien insurer *files* any pleading in any proceeding against it, it shall either: (A) deposit with the *clerk of the court* in which the proceeding is pending, cash or securities ... sufficient to secure payment of any final *judgment* which may be rendered in the proceeding....

N.Y. Ins. Law at §1213(c) (emphasis supplied); *see also*, e.g., Del. Code Ann. tit. 18 at §2107(a); Me. Rev. Stat. Ann tit. 24-A at §2107(1); Mass. Gen. Laws Ch. 175B at §3(a). In some states, reinsurers are exempted from the security requirement, if they "designat[e] the commissioner of insurance or his successor in office [as the reinsurer's] true and lawful attorney upon whom may be served all lawful process in any action, suit or proceeding instituted." *See, e.g.*, Del. Code Ann. tit. 18 at §2107; Me.

Rev. Stat. Ann tit. 24 at §2106; Mass. Gen. Laws Ch. 175B at §3A.

There is an ongoing debate over the applicability of these statutes, if any, to industry arbitration. On one hand, the statutes specifically point to judicial proceedings — as opposed to arbitrations — in their reference to a "filing" with the "clerk of the court" and by noting that "the court" may dispense with security orders in certain circumstances. Others argue, however, that the statutes may be applied, if only by analogy, to the arbitration context, because state legislatures clearly recognized — when they adopted the UIPA — that pre-hearing security was essential to protect their citizens in disputes involving foreign insurers. *See* N.Y. Ins. Law at §1213(a) ("The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state ....").[4]

At least one court faced with this issue has held that the New York UIPA did not undermine or otherwise affect an arbitration panel's authority to order pre-award security. *See British Ins. Co. of Cayman v. Water Street Ins. Co.,* 93 F. Supp.2d 506 (S.D.N.Y. 2000); *see also General Reinsurance Corp. v. Underwriting Members of Lloyd's*, No. 103047/02, at 6, 10 (N.Y. Sup. Ct. Oct. 8, 2002) (when an arbitrating party petitioned the court to obtain pre-hearing security under the New York UIPA, the court denied the petition because the UIPA does not necessarily apply to arbitrations, and "the question of whether petitioner is entitled to security should rest with the arbitration panel"). Still, because the language of each state statute varies, each one must be examined individually in order to determine whether it arguably addresses an arbitrator's ability to manage the subject proceeding and to award pre-hearing security.

In short, arbitrators are generally authorized to order injunctive relief. If, however, the proceedings are not governed by a source of authority expressly arrogating this authority to the panel, and the parties' arbitration agreement is silent on the subject of injunctive relief, a panel's authority to award injunctive relief may be (and, it sometimes is) subject to dispute.

B. Subpoena Power

As a general matter, and within reason, an arbitration panel may establish the scope of discovery in a reinsurance arbitration, subject to any agreement between the parties. In the absence of statutory authority, however, neither the parties nor the arbitrators control the flow of information from third parties. *See Matter of the Arbitration between Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995) (non-parties "never bargained for or voluntarily agreed to participate in an arbitration"). Because relevant information is often in the possession of non-parties to a reinsurance arbitration — including brokers, MGA's, and other participants in the disputed reinsurance program — the ability of a panel to issue deposition or document subpoenas may be critical to its final disposition.

Arbitral authority to subpoena non-parties must be found in sources extrinsic to the contract that launched the arbitration and enabled the arbitrators. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) ("[a]n arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act"); *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) ("If discovery were to be obtained from ... Third Parties ... the authority to compel their participation would have to be found in a source other than the parties' arbitration agreement").[5] Because reinsurance contracts often involve risks and cedents located in different states, most reinsurance contracts are interpreted according to the FAA, absent the parties' selection of a specified state's law. Under the FAA, "arbitrators ... may summon in writing any person *to attend before them* or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." *Id.* at §7 (emphasis supplied). The UAA,[6] RUAA,[7] the UNCITRAL rules,[8] and the AAA Rules[9] each authorize some form of arbitral subpoena power.

The FAA, UAA and RUAA allow panels to compel attendance of non-parties at a hearing, but they do not directly address the scope of a panel's power to order pre-hearing discovery from third parties. Similarly, although AAA Rule 31(d) may be interpreted to authorize pre-hearing discovery from non-parties, if a non-party refuses to comply with the subpoena, the party seeking discovery must enforce the subpoena in court. The federal circuits called upon to consider the issue are split — some permit discovery subpoenas to be issued; some require a showing of "special need"; and, a third group has ruled out arbitral discovery subpoenas altogether. Moreover, there is no consensus as to whether these subpoenas may be used to compel the appearance of deponents or, in the alternative, whether they may be used only to obtain documents.

A recent decision by the Court of Appeals for the Second Circuit, however, may signal "an 'emerging rule' that [an] arbitrator's subpoena authority under FAA § 7 does not include the authority to subpoena nonparties or third parties for pre-hearing discovery." *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, No. 07-1197, 2008 WL 4978550 (2d Cir. Nov. 25, 2008) (citation omitted).

1. Pre-Hearing Discovery Not Allowed

In adopting reasoning previously applied by the Court of Appeals for the Third Circuit, the Life Receivables court took a strict constructionist view of the FAA and staked the outer bounds of permissible, non-party discovery in arbitrations governed by the FAA. *See id.; see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). In *Hay Group*, the Third Circuit held that Section 7 of the FAA ("Section 7") did not authorize a panel to order pre-hearing document production from non-parties. *See Hay Group*, 360 F.3d at 407. In reversing the federal trial court's ruling below, the Court in Hay Group held that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the

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For these reasons, confidentiality provisions are viewed by some as an essential component to the formula that has made arbitration the principal means of resolving formal reinsurance disputes. In fact, some practitioners argue that confidentiality should be considered an implied term of reinsurance agreements (especially older contracts), even if it is not expressly set forth in the parties' contract.

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documents at that time." *Id*. at 407; *see also Integrity Ins. Co., v. Am. Centennial Ins. Co*., 885 F. Supp. 69, 72-73 (S.D.N.Y. 1995) (arbitrators were free to order pre-hearing document discovery, but had no power to issue deposition subpoenas, because the burden was too high for non-parties who "never bargained for or voluntarily agreed to participate in the arbitration").

Applying the same reasoning, the *Life Receivables* court strictly construed the language of the FAA, noting that "[w]hen a statute's language is clear, our only role is to enforce that language according to its terms." *Life Receivables*, 2008 WL 4978550, at *5 (citations omitted). Because Section 7 only permits document discovery from non-parties if they appear before members of the panel, the court concluded that the FAA does not authorize arbitrators to compel pre-hearing document discovery from non-parties. As a result, if an arbitrator were to issue a third-party subpoena, the subpoena likely would not be enforced by a court in the Second Circuit.

Although arbitrators may be limited in their ability to compel discovery from non-parties, they are not powerless. In fact, the *Life Receivables* court expressly noted that Section 7 of the FAA is not restricted to merits hearings — a panel could order a witness to appear at a preliminary hearing with the requested documents in hand. *See id*. at *6.[10] Of course, such orders sometimes induce non-party witnesses to produce their documents, in order to avoid the inconvenience of appearing in person. *Id*. At a minimum, the limitations of Section 7 should cause both parties and arbitrators to consider more closely the scope of discovery requests and their relevance to the issues in dispute. *See id*. In this respect, the FAA provides some measure of control on the elephantine expansion of arbitration proceedings.

2. Pre-Hearing Discovery Permitted

In contrast to these more recent decisions, the Sixth Circuit Court of Appeals ruled, in 1999, that a panel could compel not only a third party's attendance at an evidentiary hearing, but also pre-hearing production of documents from non-parties. *Am. Fed'n of Television and Radio Artists v. TJBK TV*, 164 F.3d 1004, 1009 (6th Cir. 1999). The court determined that the FAA's authorization of document subpoenas for production at an evidentiary hearing "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing." A similar rationale has been employed by courts with respect to an arbitrator's authority to issue deposition subpoenas. *See Amgen Inc. v. Kidney Ctr. of Delaware County, Ltd*., 879 F. Supp. 878 (N.D. Ill. 1995). Like the court in *American Federation*, the *Amgen* court held that the FAA-granted authority to compel testimony at a hearing also included the power to compel testimony prior to an evidentiary hearing.

In 2000, the Eighth Circuit offered a more nuanced approach to the problem of arbitral subpoenas to produce documents. *Security Life Ins. Co. of Am. v. Duncanson & Holt Inc*., 228 F.3d 865, 870-71 (8th Cir. 2000). In *Security Life*, the Court paid special attention to the non-party's involvement in the issues under review. It held that an arbitrator could compel pre-hearing discovery of a non-party who was "not a mere bystander pulled into [a] matter arbitrarily, but is a party to the contract that is the root of the dispute, and is therefore integrally related to the underlying arbitration, [even] if [it is] not an actual party." *Id*. at 871; *see also Meadows Indemnity Co. v. Nutmeg Ins. Co*., 157 F.R.D. 42, 45 (M.D. Tenn. 1994) (pre-hearing discovery of non-parties allowed, because the subpoenaed recipients were "intricately related to the parties involved in the arbitration and [were] not mere third-parties who [had] been pulled into this matter arbitrarily"); *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc*., 432 F. Supp.2d 1375, 1379 (N.D. Ga. 2006) (the FAA impliedly permits arbitrators to order pre-hearing discovery from non-parties). Most of these rulings predate the *Hay Group* and *Life Receivables* decisions. As a result, it is an open question whether these courts would rule the same way if the question were presented today.

3. Pre-Hearing Discovery Permitted Based on a Showing of "Special Need"

A middle ground approach forged by the Fourth Circuit, but rejected by the Second Circuit in *Life Receivables*, applies a balancing test — arbitral orders for pre-hearing discovery of a non-party are enforceable, if the requesting party can demonstrate a "special need or hardship." *COMSAT Corp. v. Nat'l Sci. Found*., 190 F.3d 269, 275 (4th Cir. 1999). Although the court declined to define its standard in the

abstract, it did require that, "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable." *Id*. at 276.

The circuit split highlights the judiciary's schizophrenic efforts to mark the outer limits of arbitral powers, or (more specifically) to balance the need to arm arbitrators facing litigation problems with judicial tools, on the one hand, against the bench's pervasive suspicion that these devices are best left in the charge of judges, on the other. Some of the key benefits to arbitration, including efficiency and economy, would ultimately be jeopardized if arbitrators were permitted to arrogate to themselves complete authority to order any subpoena, deposition, or other discovery without selective but meaningful judicial oversight. Furthermore, limitless subpoena power would permit a panel to reach non-parties who never agreed to participate in the relevant arbitration, and who otherwise have the right to place their objections before judges — instead of being subjected to industry "judges" selected by private entities with interests potentially inimical to their own.

More broadly, and for the same reason, arbitral power to order pre-hearing discovery of third parties may both exceed and stand at odds with the source of a panel's authority — a private contract that binds only consenting parties. In light of the mixed messages propagated by the courts, arbitrators must consider and manage the tension between their role in "safeguard[ing] the rights of third parties while insuring that there is sufficient disclosure of information to provide for a full and fair hearing." RUAA at §17, Comment 8 (2000).

C. Imposing Confidentiality

Confidentiality and the technical expertise of industry arbitrators were once considered the hallmarks of "private" arbitration. The benefits of confidentiality are palpable. Sealing the arbitration record may encourage parties to communicate candidly and promote compromise. In addition, confidentiality allows parties to avoid disclosure of their claim handling and payment practices which, in some cases, could invite third parties to seek discovery in an effort to advance their own interests. The veil of confidentiality also arguably prevents honorable arbitration positions — which may, in fact, be driven by the circumstances of a specific case, or by an ongoing business relationship — from being mis-characterized as "corporate positions." And, absent confidentiality requirements, a third party's general knowledge of arbitration proceedings and the positions taken therein could unfairly refract public perception of a company, which could (in turn) inhibit its sale of new business. For these reasons, confidentiality provisions are viewed by some as an essential component to the formula that has made arbitration the principal means of resolving formal reinsurance disputes. In fact, some practitioners argue that confidentiality should be considered an implied term of reinsurance agreements (especially older contracts), even if it is not expressly set forth in the parties' contract.

Most U.S. arbitrations still do remain confidential. In the past half decade, however, some parties and their counsel have selectively withheld their agreement to confidentiality provisions, in an effort to use disclosure as settlement leverage against adversaries who may wish to avoid public scrutiny, including disclosure to business partners (or the reinsurance community, writ large) of the relevant facts or the fact of a dispute itself. Other reasons for eschewing confidentiality may include a party's wish to rely on a favorable result for its precedential effect in later arbitrations against the same party, or as a means to encourage future opponents to resolve the same issue in their favor. Regardless of their motivation, a small but growing number of disputes turn on the parties' incompatible wishes with respect to the confidentiality of a reinsurance arbitration, which is typically governed by an arbitration clause that fails to address the issue.

1. Authority To Issue Confidentiality Orders

If only one party wishes to maintain confidentiality, does a panel have the authority to order it? If so, what is the source of that mandate? Although there is little authority available to answer these questions definitively, industry practice, state statutory regimes, and the parties' express agreement may be (and often are) marshaled in an effort to do so.[11]

The "customary" U.S. practice is, of course, to maintain the confidentiality of a reinsurance arbitration and the information and testimony created during its pendency. Unless parties can show that prior arbitrations under the relevant contracts were not confidential, "confidentiality" is often viewed as an implied contract term, which is implemented through the issuance of a confidentiality order. The historical industry expectation of confidentiality suggests that, if a party wanted its dispute to be public, it would (and, should) have articulated that predilection in its contract. Absent express terms or a course of dealing to the contrary, most panels will likely continue to interpret reinsurance contracts to include confidentiality provisions. Given the factual nature of a custom and practice inquiry, arbitrators may feel empowered to order confidentiality with little risk that their order will be found to "manifestly disregard" existing law, or that they will have exceeded their powers.[12]

If, however, one party successfully challenges a custom and practice finding, confidentiality mores may not survive judicial review, absent some form of statutory authorization. *See, e.g., Nationwide Mut. Ins. Co. v. Randall & Quilter Reins. Co.*, 2007 WL 2326878, at *2 (S.D. Ohio Aug. 10, 2007). In *Randall*, the court declined to enforce a panel's confidentiality order on its own merits. Instead, the order was "simply one factor in the Court's calculus and not outcome-determinative" with respect to its decision whether to maintain, during a confirmation proceeding, the confidentiality of documents originally produced in arbitration. *Id*. at *2

The FAA, the UAA and the UNCITRAL Rules are all silent on the subject of confidentiality. The RUAA authorizes arbitrators to preserve confidentiality, but their discretion is not unfettered: "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected

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from disclosure *to the extent a court could* if the controversy were the subject of a civil action in this State." *Id*. at §17(e) (emphasis supplied). On its face, the RUAA does not confer omnibus authority to seal an entire proceeding, but it does permit an arbitrator to protect specified information. Of course, the focus on specific items invites argument that any unspecified item was not intended to (and cannot) be protected from disclosure. Because most states have not yet adopted the RUAA, formal authorization to order confidentiality in arbitration is not available, unless the relevant arbitration agreement is governed by a state statute that expressly provides for it.[13]

Commercial arbitration codes, to the extent that they may apply, often include only a placeholder for a confidentiality agreement — a state of affairs which may reflect the uncertainty created by challenges to the industry presumption of confidentiality. The ARIAS Practical Guide advises, for example, that confidentiality "should be memorialized in either an agreement by the parties and the Panel, or an order entered by the Panel, setting forth the terms and scope of the confidentiality." *Id*. at Ch. 3.8 (2004). Although the Practical Guide intimates that confidentiality orders are appropriate, it refrains from expressly authorizing an arbitrator to impose confidentiality without the parties' bilateral consent, and it does not identify the source of any such authority.[14] Similarly, while expressly providing that meetings and hearings of the panel are private, the RAA Procedures state only that parties shall use their "*best efforts* to maintain the confidential nature of the arbitration proceedings and the Award." RAA Procedures at §7.2 (emphasis supplied). The failure of these commercial codes to address squarely a panel's authority to issue confidentiality orders may simply reflect the view of the drafters that confidentiality is an implied term of reinsurance agreements.

2. What Is A Party To Do?

Despite the view of some industry players that reinsurance arbitrations should remain confidential, a party may successfully demonstrate that this putative industry practice does not apply to its modern contracts — a plausible scenario given the number of recent entrants into the reinsurance market. Absent agreement of the parties or a statutory mandate, a panel is arguably not inherently authorized to order confidentiality. As one court said: "There is no confidentiality privilege precluding disclosure of the [arbitration] material requested." *Galleon Syndicate Corp. v. Pan Atl. Group, Inc*. 223 A.D.2d 510, 511 (1996). A party that wishes to keep its disputes out of the public domain should take care to insert confidentiality provisions in its contracts. If arbitration is brought under a contract that is silent on the issue, the party desiring confidentiality should raise the issue with its opponent in an effort to reach a compromise.

To date, few courts have been called upon to review confidentiality orders issued over one party's objection — those courts which have addressed the issue have focused on protection of a specific cache of documents, as opposed to the confidentiality of the entire proceeding. *E.g*., *Galleon*, 223 A.D.2d at 511. In view of the FAA's celebrated deference to arbitration, and the widely-held understanding that confidentiality is one of the chief benefits traditionally associated with industry arbitration, most courts will be loath to expose the parties' dispute to the public without appropriate safeguards.

3. Post-Award Practice

Even if both parties agree that their arbitration is confidential, disclosures often occur at the close of a case when one party moves to confirm or vacate an arbitration award in court. In these instances, despite the existence of a confidentiality order, some facts concerning the arbitration are likely to become a matter of public record. *See, e.g., Global Reinsurance Corporation-US Branch v. Argonaut Insurance Company*, 2008 WL 1805459 (S.D.N.Y 2008).

In *Global*, the court was called upon to seal a petition to confirm an arbitration award. By necessity, such petitions often contain confidential facts disclosed during the arbitration. After balancing the competing considerations and acknowledging that it was a "close question," the Court concluded that the petition should be sealed. It reasoned:

> Arbitration remains a species of contract and, in the absence of some governing principle of law . . . parties are permitted to keep their private undertakings from the prying eyes of others. The circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e. the arbitration award.... [D]isclosure of the decretal portions of the awards does present the risk that it will impair [a party's] negotiating position with other reinsurers and that such interest outweighs the public's right of access.

Global, 2008 WL 1805459, at *1. *But see Nationwide Mut. Ins. Co. v. Randall & Quilter Reins. Co*., 2007 WL 2326878, at *2 (S.D. Ohio Aug. 10, 2007) (declining to keep arbitration materials under seal where one party voiced no concern regarding injury to its reputation if they became public).

Upon a request for reconsideration by the party seeking disclosure, however, the Court in *Global* found no evidence that disclosure would cause immediate harm to either party. A party's reliance "upon its assessment of the danger of a slippery slope that might impair the exchange of information between parties to a reinsurance agreement" was insufficient to overcome the presumption favoring public access. Despite acknowledging that the federal policy supporting arbitration is promoted by imposing confidentiality, the court in *Global* observed that, "in the ordinary course," a petition to confirm or vacate an award will not publicize all testimony and documentary evidence that was placed before a panel. *Global*, 2008 WL 1805459, at *1.

Confirmation and vacation proceedings, however, often deviate from the "ordinary course" adumbrated by the court. The extended arbitration proceedings, and subsequent litigation, between

Commercial Union and EMLICO offers a glaring example of the limited protections offered by confidentiality agreements, when one party petitions a court for relief and publicizes the facts of its arbitration in the process. *See Commercial Union Ins. Co. v. Lines*, 239 F. Supp.2d 351 (S.D.N.Y. 2002), *vacated*, *Commercial Union Ins. Co. v. Lines*, 378 F.3d 204 (2d Cir. 2004).[15] In that case, the confidentiality agreement specified that no party was permitted to disclose confidential information to third parties. The panel also issued an order admonishing that "the parties are not to make any further public statements as respects this arbitration other than its existence." *Id*. at 357, n.7. The parties could, however, use the documents they exchanged, briefs, memoranda, depositions and transcripts of legal proceedings involving the confirmation, modification or vacation of any award or ruling. *Id*. at 354, n.4. As in many other cases, the petition and subsequent court decisions described in detail many of the underlying disputed facts, the impetus for the arbitration itself, and the award. *See e.g. id*. at 354-55.

In sum, even when an arbitration panel issues a confidentiality order, a motion to confirm or vacate its award may also vacate the panel's confidentiality ruling. In general, the judicial trend is to refuse to seal publicly filed documents. We are now at the confluence of this judicial proclivity and the increased appetite of parties to bring their arbitration proceedings into the courtroom for tactical and other purposes — a crossroads that may irrevocably erode one of the benefits traditionally associated with industry arbitration.

II. CONCLUSION

Industry arbitration has historically provided — and, in the view of many experienced practitioners, continues to provide — an attractive alternative to litigation in many cases. Among the principal benefits participants have enjoyed are the (relatively) free exchange of information; in a confidential forum; under the stewardship of industry professionals, who are empowered to conform suitable relief to the contours of unique and evolving problems. As arbitrations grow in number and the disputed stakes continue to rise, however, these benefits are often mitigated by the quasi-judicial process required to produce an award or other definitive result.

Arbitrators have been invited more frequently to undertake acts of a judicial character, in order to preserve and adapt the benefits of arbitration to this more challenging climate of high-stakes disputes. At the same time, they have been called upon to confront the elephant (or, perhaps, the herd of elephants) in the room — the question whether, in each case, the urged or contemplated, quasi-judicial action is not only warranted but also authorized by the parties' agreement or by law. In the past, arbitrators were (believed to be) entrusted with broad authority to decide all of the issues before them. The current trend reflecting more frequent resort to judicial review, however, enhances the risk that arbitration rulings issued without express authority will be vacated.

Some traditionally "judicial" acts, including awards of multiple and punitive damages, imposition of interest, and certain kinds of subpoenas are legally authorized undertakings, as long as they are not expressly barred by the applicable arbitration agreement or by state law. Other familiar forms of relief, such as awards of attorney's fees, are not tools commonly available to arbitration panels, despite their mandate to tailor awards to the circumstances they face. An arbitrator's power to provide injunctive relief and to impose confidentiality strictures on arbitration proceedings remain unsettled issues, lurking at the margins of authorized action, despite the profound need for clarity.

An unfortunate, but perhaps essential, outgrowth of the search for authorization is the risk that panels may (if only temporarily) be divested of certain powers. Arbitration clauses, of course, often contain disengagement provisions that free reinsurance arbitrators from following strict rules of law. In those circumstances, arbitrators enjoy wider (albeit, not absolute) latitude but, when the parties' contract specifies only that the law of a particular jurisdiction will govern, arbitrators must exercise caution with respect to their growing responsibilities. They must, for example, be circumspect when it comes to requested or seemingly required extensions of their powers beyond the grant of authority inherent in a private agreement to arbitrate. Some courts and commentators have, as noted above, previously agreed that a panel's authority to act is limited when the rights of non-parties are implicated by an arbitrator's order. Parties must, for their part, also be aware of the practical and legal limits of a

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Among the principal benefits participants have enjoyed are the (relatively) free exchange of information; in a confidential forum; under the stewardship of industry professionals, who are empowered to conform suitable relief to the contours of unique and evolving problems.

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panel's authority, and it behooves the industry — including trade groups such as ARIAS — to address by rule recurring issues of authority which require significant time and expense to decide time and again.

More broadly, with expanded arbitrator power comes further overlap between arbitration and litigation. As the two processes seemingly grow together, and arbitrations become laden with judicial procedures, arbitration is bound to lose some of its efficiency and, therefore, more than a little of its luster, unless practitioners and trade groups succeed in restoring traditional benefits of arbitration by appropriately calibrating the powers of arbitrators to the goals of parties to industry arbitration.▼

1 Black's Law Dictionary defines "equitable remedy" as: "A remedy, usu. a nonmonetary one, such as an injunction or specific performance, obtained when legal remedies, usu. monetary damages, cannot adequately redress the injury." *Id.* at 609 (3d pocket ed. 2006). For purposes of this article, the authors consider injunctive relief, including pre-award security orders, to be a species of equitable relief.

2 Few cases reject an arbitrator's power to grant pre-hearing security. *But see Recyclers Ins. Group, Ltd. v. Ins. Co. of North America*, No. 91-503, 1992 WL 150662 (E.D. Pa. June 15, 1992). In *Recyclers*, a federal trial court vacated an arbitration panel's order requiring a reinsurer to place $1 million in escrow as security for a possible award against it, finding that the panel had exceeded its authority. The Recyclers court observed that: "arbitrators cannot require a party to post collateral to secure potential liabilities where the parties do not provide the arbitrators with that authority in the agreement to arbitrate." *Id.* at *4.
Apparently recognizing flaws in this reasoning, the same court confirmed a security order just four years later. *See Meadows Indem. Co. v. Arkwright Mut. Ins. Co.*, No. 88-0600, 1996 WL 557513, at *2 (E.D. Pa. Sept. 30, 1996). In *Meadows*, the panel ordered a party to post pre-hearing security in the form of a $1.5 million letter of credit. *Id.* at *1. Although the parties had not expressly authorized the arbitrators to impose pre-hearing security, the agreement authorized letters of credit in other contexts. *Id.* The court examined the arbitral award deferentially, expressly rejected the Recyclers holding, and concluded that the parties had "empowered the arbitrators to award relief in any reasonable form at any stage in the proceeding." *Id.* at *4. Ultimately, the court concluded: "the more appropriate rule is that an arbitration award ordering a party to post security before the panel will consider the merits may rationally derive such an award from a contract that does not expressly provide that it may impose such an award." *Id.* at *7. This is the rule followed by most U.S. courts.

3 The UIPA was promulgated by the National Association of Insurance Commissioners in 1949.

4 At least one state, Illinois, has explicitly included arbitrations in its process statute. *See* 215 Ill. Comp. Stat. 5/123(5) ("Before any unauthorized foreign or alien company shall file or cause to be filed any pleading in any action or proceeding, including any arbitration ..."). Omission of this clause from other state statutes may suggest that they did not intend to extend the statute to arbitrations. Of course, as the balance of this article makes clear, the same omission could simply represent another example of state legislatures failing to account for the complexities of modern arbitration.

5 When a non-party resists an arbitrator's subpoena, the ability to enforce it resides with the courts. As a result, venue and jurisdiction may become significant considerations in the context of establishing the parameters of discovery.

6 "The arbitrators may issue (or cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths." UAA at §7(a) (1955).

7 "An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths." RUAA at §17(a) (2000).

8 "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine." UNCITRAL Arbitration Rules Art. at 24 (1976).

9 "An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently." AAA at R-31(d) (2007).

10 This tactic was previously approved by the Second Circuit, who ruled that it was permissible to subpoena deponents to "appear and testify in an arbitration proceeding," which was scheduled to take place ten months before the merits hearing. *See Stolt-Nielsen SA v. Celanese AG,* 430 F.3d 567 (2d Cir. 2005). The Second Circuit allowed the subpoenas to stand, concluding that the Act was intended to ensure only that arbitrators be present when a non-party is called to provide information.

11 Some commonwealth countries have advanced national standards either authorizing or prohibiting confidentiality orders in arbitration. For example, Section 10 of the Bermuda International Conciliation and Arbitration Act of 1993 expressly states that arbitration proceedings are available as evidence in any other arbitration or litigation. Section 46 further provides that a court may not make public any part of an arbitration proceeding that a party "reasonably wishes to remain confidential." *Id.* at §46(b). English courts have held that there is a legal right and duty of confidentiality in arbitration proceedings, although there is a limited exception for awards and the reasoning behind an award, which are sometimes "subject to a qualified right of disclosure." *See* Graydon S. Staring, *Law of Reinsurance* §22:6[2] (2008). Australian courts, on the other hand, have found that arbitrators lack the authority to issue orders imposing confidentiality. See, e.g., Charles S. Baldwin, IV, Protecting Confidential And Proprietary Commercial Information In International Arbitration, 31 Tex. Int'l L.J. 451, 482 (1996) (citing Esso Austl. Resources Ltd. v. Plowman (1995) 128 A.L.R. 391, 402, 404 (Austl.)).

12 In practice, it would likely be difficult for a party to establish that a panel of experienced industry professionals "exceeded its powers" by finding that a custom and practice of confidentiality existed in this industry. See FAA, 9 U.S.C. §10(a)(4).

13 A few states have adopted a detailed approach to orders of confidentiality in arbitration. Texas, for example, extends broad confidentiality protection to arbitrations. See Tex. Civ. P. & Rem. Code at §154.073(a)-(b) (West 2008). The Texas statute expressly protects communications made by participants to an arbitration, provides that they may not be used as evidence against the issuer, and states that any record made at an arbitration is confidential. Id. Under Missouri law, all information related to arbitration proceedings is considered confidential, including communications by any participant, arbitrator, or other person present at an arbitration. See Mo. Rev. Stat. at §435.014 (West 2008); Group Health Plan, Inc. v. BJC Health Sys., Inc., 30 S.W.3d 198, 203 (Mo. Ct. App. 2000). In Missouri, protective orders signed by arbitrators (for example) receive the same confidentiality protections as arbitral awards. Id. at 204.

14 The AAA Rules do not directly address the question whether arbitrators have the power to impose confidentiality. Instead they state only that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." AAA Commercial Rule 23.

15 The details of the relevant arbitration proceeding were again set forth in a later decision of the same court. See Commercial Union Ins. Co. v. Lines, 2008 WL 2234634 (S.D.N.Y. May 30, 2008).

news and notices

April 10 Is Early Registration Deadline for 2009 Spring Conference; April 30 Is Last Day for Cancellations.

The deadline for registering at the early conference fee is April 10. The final deadline is April 24, after which a $100 administrative charge is required.

Please note that the registration **cancellation policy has changed**. A refund can only be provided if a cancellation is received the day before the final catering numbers are due to the hotel. Therefore, there will be no refunds after April 30.

The deadline for hotel reservations is another date altogether this year. It is April 21, later than it has been in the past. A link to the "Welcome ARIAS•U.S." page of The Breakers online reservation system is on the home page of the website at **www.arias-us.org**. Also, there is online registration and the announcement brochure with complete conference details.▼

Prominent Speakers at Spring Conference

We are honored to have among those joining our faculty at the Spring Conference a distinguished jurist, the Chief Judge of the United States Court of Appeals for the Second Circuit. On Friday morning, **The Honorable Dennis G. Jacobs** will preside over a mock appellate oral argument on a post award challenge. Judge Jacobs will hear arguments and later render his decision on the matter.

In addition, the conference will feature a number of industry leaders on a panel of legislative and regulatory topics. On the first afternoon, **Leigh Ann Pusey**, the President of the American Insurance Association, **Frank Nutter**, the President of the Reinsurance Association of America, **Al Iuppa**, a former President of the National Association of Insurance Commissioners and former Chair of the International Association of Insurance Supervisors, and **Joel Wood**, the top Washington lobbyist for the Council of Insurance Agents & Brokers, will provide an update on the most recent regulatory and legislative reform proposals and developments.

Complete conference information is on the website with online registration.▼

Board Approves Mew and Salyer as Mediators

On February 20, the Board of Directors approved **Graeme Mew** and **Don A. Salyer** as ARIAS•U.S. Qualified Mediators.

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

Peter Gentile Appointed ARIAS•U.S. Treasurer

On February 3, **Peter A. Gentile**, a long-time member and Certified Arbitrator, was appointed by the Board of Directors to the position of ARIAS•U.S. Treasurer, succeeding Robert Quigley, who had retired from the position. Mr. Gentile is an independent umpire, arbitrator, mediator, expert witness and consultant to the insurance industry. Previously, he had been National Director of Property and Casualty Business Development for the Tillinghast business of Towers Perrin, following tours in management at Gerling Global, Swiss Re, and KPMG / Peat Marwick.▼

Search System for New Profiles Opens on Website

Nearly half of all ARIAS Certified Arbitrators have entered data into the new profile format. As of February 20, there is a way for parties to search those profiles based on the expanded experience data contained in them.

Labeled "Advanced Arbitrator Search," the new system is accessed through the website's left-side navigation. With so much more data contained in the new profiles, the new system allows refining arbitrator search specifications to a much greater degree than in the past.

In June, when most arbitrators will have completed their new profiles, the old search system will be discontinued. Old profiles will still be accessible, but they will not be included in searches.▼

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news and notices

Online Ethics Training Course Is Open

To qualify for certification under the new requirements, a candidate must complete the ARIAS•U.S. Ethics Training Course. Since all certified arbitrators are required to meet the new qualifications before the end of this year, all must complete this course before submitting their new applications.

After several months of development by the Education Committee, the course is now available on the ARIAS•U.S. website. For ready access to the course, there is a yellow button on the home page. The cost of developing and operating the course is being paid by means of a fee of $150 upon entry, using a credit card. Anyone who does not finish in a single visit can return to complete the course at another time (without paying again). Instructions will guide users through the steps. Completing the entire course requires 45 minutes to an hour.

For complete information about applying for certification, please go to **Arbitrator and Umpire Certification Procedures** on the website.▼

New Feature in Law Committee Reports Provides Connections to State Statutes

You might not notice it unless you look for it, but there is a new part of the Law Committee Reports section of the website that could prove to be very helpful to arbitrators and attorneys dealing with insurance and arbitration. It provides links to state statutes involving arbitration, insurance and reinsurance **for every state that has this information online** (the vast majority). It was a big project for the Law Committee to round them all up and another big project for ARIAS to create all the links, but the lists are now on the website and can be accessed through the Law Committee Reports section.▼

ARIAS Online Membership Directory Officially Launched

For the first time, contact information for all ARIAS•U.S. members is available on the website.

Constructed by Mountain Media in a very user-friendly format, the new directory replaces the printed directory of the past few years. Not only will this system save the cost of printing and distributing the paper version, but also it will provide far more accurate information about members, since it will be updated frequently.

The directory is password protected; it is only available to members whose email addresses are in the ARIAS member database. After a member enters his/her address and clicks on "I need a new password," a password is sent to that email address. It can be used for future access or replaced, as necessary.

Access to the Directory is through the left-side navigation of the website. Instructions for entering and using the directory are provided on the opening page, along with a request to protect the information from anyone who might try to harvest email addresses.▼

Board Certifies Four New Arbitrators

At its meeting in New York on January 14, the Board of Directors approved certification of four new arbitrators, bringing the total to 345. The following members were certified; their respective sponsors are indicated in parentheses.

- **James S. Gkonos** (Joseph DeVito, Joseph Donley, James Stinson, Paul Hummer)
- **Nancy Braddock Laughlin** (Paul Thomson, David Spector, Anthony Burt)
- **David C. McLauchlan** (John Heath, Robert Bates, Ryan Opria, Susan Mack)
- **Graeme Mew** (Angus Ross, Paul Bates, James Cameron)▼

Members Asked to Send Email Addresses

Any members who have not received messages from ARIAS recently can assume that they are not in the ARIAS database with a current email address. There have been many messages.

As increasingly more communications with members become electronic, it is more important than ever to have your current address in the ARIAS database. If you believe you are not effectively there now, please send your address to **ARIAS@cinn.com**. Also, to ensure that you receive our communications, please add **cinn131@jangomail.com** to your safe sender list. Otherwise, they could go to your junk mail folder.▼

New Certification Requirements Take Effect

With the start of the new year, the new ARIAS Certification Requirements became effective. The coming year will be a transition year as all currently certified arbitrators apply under the new requirements and umpires apply for certification for the first time. The changeover has resulted in many questions about how the timing of requirements and renewals will be handled. In an attempt to provide comprehensive instructions, a new section of the website has been opened entitled "**Arbitrator and Umpire Certification Procedures**." In addition to giving easy access to all forms and information, it includes **Frequently Asked Questions (FAQs) about Certification**.▼

2009 Dues Are Overdue

In December and January, invoices were sent by email and postal mail to all members for 2009 dues. If you are not sure whether you have paid, send an email message to **ARIAS@cinn.com** to find out.

The easiest method of payment is, of course, through the secure payment system that is accessed from the home page.▼

feature

Beyond the "Discretion of the Arbitrator": Applying the Standard of "Reasonable Necessity" to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration

Charles J. Moxley, Jr.

Charles J. Moxley, Jr.

The concern of stakeholders in insurance and reinsurance arbitration about the morphing of arbitration into full-blown litigation with unbridled discovery seems to be growing. The fact that it is largely self-inflicted (we certainly have the ability to influence if not control the process) is cold comfort. Insurers and reinsurers alike feel trapped between the Scylla of open-ended expense and delay and the Charybdis of losing a case because of evidence not unearthed.

Is arbitration capable of providing parties with adequate discovery to investigate and prepare their case without opening the floodgates of unbridled court style discovery?

The answer is emphatically "Yes!" Arbitration provides both a process for achieving this and a standard whereby it may be achieved.

In-house counsel expect ingenuity and flexibility from arbitrators in administering cases in such a way as to achieve the arbitration goals of expedition and economy while providing a fair process. Unless arbitrators are able to satisfy this need, arbitration will become the same dinosaur that litigation has become.

ARBITRATION'S PROCESS FOR ACHIEVING EXPEDITIOUS DISCOVERY

Arbitrators in insurance and reinsurance arbitrations are generally expert in the subject matter of the case and are expected to familiarize themselves with the facts of the case early on. By the time of the Organizational Meeting and later follow-up conferences on discovery issues, the arbitrators can put themselves in a position to understand what discovery is reasonably necessary in light of the factual and legal issues in the case. Based on their expertise and experience, arbitrators are able to see beyond counsels' statements of position to what truly needs to be disclosed in light of such issues and how it may be discovered most efficiently.

This requires the panel's getting heavily involved with counsel in framing the issues, specifically with reference to understanding each side's lines of argument as to the matters in contention. It also involves the panel's exploring with counsel what types of evidence will be needed at the hearing and hence may be the subject of discovery—so that discovery can be streamlined, avoiding the litigation-style fishing expedition.[2] This active engagement by the panel in streamlining discovery should continue throughout the case, with regular status conferences.

The panel's proactive role in framing the issues and formulating and overseeing discovery makes all the difference. In not one case in a hundred do judges engage in such a process.[3] Because of caseloads and judicial standards as to discovery, as well as the overall judicial attitude to discovery matters, judges generally determine discovery disputes from on-high, based on the issues broadly construed, as presented by counsel, without getting down and dirty. A court decision in a heavily-contested discovery dispute is typically rooted far more in case law than in a penetrating analysis of the discovery needs of the particular case.

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Is arbitration capable of providing parties with adequate discovery to investigate and prepare their case without opening the floodgates of unbridled court style discovery?

Charles J. Moxley, Jr. is a litigator, arbitrator, and mediator, specializing in complex insurance industry and other disputes. (See biography on page 39.)

...there is a well-established and broadly understood standard for discovery in arbitration, a standard that a party in an arbitration may confidently present to arbitrators as being the governing standard by which they should be guided.

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But the process is a demanding one, requiring a radical mindshift. Lawyers serving as advocates and arbitrators today grew up in the world of unbridled federal court discovery, as did many of our client representatives. One's instinct, absent a client or judge reining the process in, is to go for the discovery. The no-stone-unturned mindset feels correct and appropriate; it feels like the standard of care. No one — neither outside counsel nor party-appointed arbitrators nor in-house attorneys nor claims, underwriting or other party representatives — wants to be in the position, after losing a case, of being on the receiving end of the question, "Why didn't you get access to document X or depose witness Y?"

The key insight is that we can achieve this revolution in approach through the arbitration process we already have. The very nature of insurance and reinsurance arbitration means that one needs less evidence to present or defend one's case than would be necessary were the matter being litigated. The arbitrators' familiarity with insurance and reinsurance matters narrows the need for fact and expert testimony. The inapplicability of the rules of evidence broadens the scope of admissible evidence. The self-authenticating nature of most documents in arbitration curtails the need for discovery as to foundations for their admission into evidence. Arbitrators can greatly expedite some cases by bifurcating or hearing certain issues early on that will, if they are decided one way, avoid some or all the rest of the case or narrow its scope. Examples might be deciding early on whether parole evidence will be permitted as to an agreement or whether a case is time barred or whether consequential damages may be recovered (where other damages are relatively small). Cumulatively, these arbitration advantages can substantially curtail the scope of necessary discovery in a case.[4]

So, while parties should, by design, end up getting less discovery in arbitration than in court, that does not mean that, in arbitration, they get less of what they need to be able to prepare and try their case.

ARBITRATION'S STANDARD FOR ACHIEVING EXPEDITIOUS DISCOVERY

Is there a standard that determines the appropriate scope of discovery in insurance, reinsurance and other commercial arbitrations, a principled basis for the arbitrators' determination as to what discovery should or should not be permitted?

Over and again, in discussions of the topic, we hear and read that "Discovery is in the discretion of the arbitrator," as if that were an answer. Virtually never does the discussion go to the next level: On what basis are arbitrators supposed to — do they — exercise this discretion?

The answer, in my view, is that there is such a standard. Based on my experience as an arbitrator in many cases over a 30 year period and review of applicable law and of the guidelines and rules of organizations such as ARIAS•U.S., the Reinsurance Association of America (RAA), the Task Force on Insurance and Reinsurance Disputes, the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention and Resolution (CPR), and others, there is a well-established and broadly understood standard for discovery in arbitration, a standard that a party in an arbitration may confidently present to arbitrators as being the governing standard by which they should be guided.

It is as follows: Absent their having established some other standard, parties in domestic arbitrations are entitled *to whatever discovery, including document production, depositions, and interrogatories, they reasonably need to prepare and present their claims or defenses, but no more*. Parties have a threshold right to reasonable particularization of the claims or defenses asserted against them and to the basic documents, but, beyond that, there is *no presumption of discovery*. Parties must show *actual need*. Discovery, beyond a certain minimum, should be reasonably proportional to the scope of the case. If, as is often the case, information as to a particular issue is available in various ways, parties should develop it in the most economical way practicable. Redundancy should be avoided, as should discovery on matters not in dispute or subject to stipulation or the like. I refer to this as the "reasonably necessary" standard or the standard of "reasonable necessity."

Limiting parties to discovery that they rea-

sonably need requires, as suggested above, that the arbitrators and counsel start focusing on the real issues in the case at the Organizational Meeting.

This standard for discovery is far narrower than that applicable in court cases. Parties in arbitration are generally *not* entitled to discovery of all evidence "reasonably calculated to lead to the discovery of admissible evidence" or even of all evidence relevant to the dispute.[5]

The different standard for discovery in arbitration derives from the nature and objectives of arbitration. Arbitration by definition is intended to be less *expensive* and *more* expeditious than litigation. These characteristics are more than descriptive; they are determinative of the arbitration process. The central reason for the explosive growth in arbitration in recent decades is the huge cost of discovery in litigation and resultant delays.

Arbitration is intended to avoid the unbridled discovery of litigation. *Yet the requirements of expedition and economy in arbitration are subject to the overriding right of a party to have a fair opportunity to prepare and present its claims or defenses*. Arbitrations need to be done expeditiously, but they also need to be done right. The objectives of expedition and economy are to be pursued *in light of* the reasonable discovery needs of the case.

The fact that the "reasonably necessary" standard is judgmental does not detract from its value. The standard supplies the basis for the dialogue between the parties and the arbitrators and for the arbitrators' exercise of their discretion. Arbitrators' deciding what discovery is reasonably necessary in a case based on a standard to that effect is a far cry from their deciding the scope of discovery based solely on personal predilection.

There are corollaries to the "reasonably necessary" standard. As a general proposition, witnesses should not have to testify twice, first at a deposition and then at the hearing.[6] Absent agreement by the parties to the contrary or the need in a particular case to do it differently, each witness should testify only once, preferably live at the hearing. Absent special circumstances, a witness who is controlled by a party and can be brought to the hearing or is within subpoena range of the locale of the hearing should generally not be deposed.[7]

Where, however, few or no depositions are taken and parties will be going into the hearing with a limited sense of the evidence that may emerge, it will often make sense to permit the parties to submit their primary briefing of the case on a post-hearing basis after the facts are in, limiting the pre-hearing briefs to issues that are already more developed.

When necessary, depositions, including videotaped depositions, may be taken and presented at the hearing, but arbitrators' preference for live testimony is generally so strong that teleconferenced real-time testimony is preferred if the witness is not available to appear in person. Indeed, in many instances testimony by telephone will be preferred over even videotaped depositions, where the parties are comfortable with it.

It should not be of concern that arbitrators' decisions on discovery matters will rarely be overturned. Even in litigation, that is generally the case.[8] In addition, finality is one of the prized objectives of arbitration. One selects skilled and trusted arbitrators and they resolve the matter.

In my experience experienced arbitrators generally have an intuitive understanding of the need to resolve discovery disputes based on according parties the discovery they reasonably need, but no more, thereby balancing the goals of fairness, expedition, and economy[9] Yet it is interesting to note that this standard is implicit — and, at times, explicit — in the guidelines and rules of leading arbitration organizations.

I will first review how, as a matter of practice, arbitrators, in my experience, generally handle discovery questions at the various phases of a case and then will analyze the matter in light of applicable guidelines and rules of arbitration organizations, and then in light of applicable law and commentary.

The Parties' Formal Agreement as to the Scope of Discovery

Arbitration is obviously a creature of contract. Parties go into arbitration because they choose to, whether by pre-dispute or post-dispute agreement. They certainly may, by their arbitration agreement, specify what discovery shall be permitted in any arbitration arising under the agreement.

Occasionally I have seen arbitration clauses specifying that a particular body of discovery

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When the parties' agreement does not specify the scope of discovery and counsel are in disagreement on the matter, arbitrators generally require counsel to justify the need for whatever discovery they seek. Counsel need to be prepared to do so with specificity in terms of the applicable contractual or legal standards or custom and usage or the like giving rise to the need for the information in question.

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rules shall apply, such as those set forth in the Federal Rules of Civil Procedure or in a state's procedural rules. This, of course, has the advantage of providing specific rules, reinforced by a robust body of case law, but the disadvantage of importing the costs and delays of litigation discovery into arbitration. Nonetheless, there are cases in which, for various reasons, the parties are primarily interested not in the expedition and economy goals of arbitration but rather in the opportunity to choose their own finders of fact.

Where this is what they want, they should get it. Certainly one of the main and most important benefits arbitration can provide is the determination of disputes by decision-makers familiar with the underlying subject matter and related custom, practices, and law. In many complex high stakes insurance/reinsurance disputes this benefit of arbitration may be more important to the parties than expedition and economy.

In the vast majority of cases, in my experience, discovery is not specifically addressed in the parties' arbitration clause. Quite often, however, arbitration clauses designate rules of some arbitration organization, such as the American Arbitration Association, to be applicable to any arbitration arising under the contract. Such designations obviously have the effect of rendering the discovery portions of such rules applicable to ensuing arbitrations.

Where parties do specify the scope of discovery, arbitrators generally understand that such agreements are enforceable and binding. If the scope of discovery specified by the parties' agreement seems overly broad to the arbitrators, they may try to talk the parties into narrowing it to foster the arbitration goals of expedition and economy. But, if the parties are adamant, arbitrators will generally honor the parties' agreement. Indeed, they are presumptively required to do so since the parties' agreement is the basis of arbitrators' jurisdiction.

Agreements as to Discovery Following Commencement of the Arbitration

Much more typically, counsel reach at least preliminary agreement as to discovery once the arbitration has been started, generally in preparation for the Organizational Meeting.

This process does not have much, if anything, to do with any body of rules as to the permissible scope of discovery in arbitration. It is simply counsel working the matter out among themselves on a pragmatic basis, assuring they get discovery they want by giving the other side discovery it wants.

The scope of what counsel will agree to varies greatly from case to case. If counsel are litigators who only occasionally do arbitrations, they typically agree on a broad scope of discovery, including numerous depositions—not only of non-party witnesses outside the jurisdiction, but also of party and other witnesses whose presence can be compelled at the hearing.

On the other hand, if counsel are frequent arbitration practitioners, they are more likely to bring a proposed schedule to the Organizational Meeting that reflects a more limited scope of discovery, although even then it is likely to be fairly broad given litigators' propensity to turn over every rock and to avoid putting themselves in the position of having to seek leave to increase the amount of discovery later.

In my experience, arbitrators generally tend to accept whatever agreement counsel reach as to document production. However, in large cases, document production, particularly e-discovery,[10] has become a huge problem over which panels may increasingly need to exercise oversight. Large corporate entities in many cases now consider unbridled document demands as perhaps more of a problem even than depositions.[11] In-house counsel at large companies have told me they expect arbitrators to impose reasonable restrains in this area.

When counsel agree to a number or duration of depositions that seems excessive, most arbitrators tend to push back, at least initially, in an effort to get the parties to curtail the depositions in the interests of expedition and economy, particularly depositions of witnesses who can be available to testify live at the hearing or whose testimony may be redundant or otherwise unnecessary.

In insurance and reinsurance arbitration often the umpire will initiate this process, first with the party appointed arbitrators and then with counsel. The process does not need to be heavy-handed or overtly judgmental. Rather, it's along the lines of, "Let's review whether we really need all these depositions, etc.", or whether we can devise a more limited program that still gets everybody the discovery they need on the matters really in contention. Again, it has been my experience that, when

arbitrators push back like this, counsel often back off from pressing for the full discovery program initially proposed in favor of a more tailored approach. They know the discovery needs to be limited, but feel compelled to take a run at unbridled discovery.

Arbitrators, as noted, will also typically try to get counsel to consider alternatives to discovery where available, such as live testimony at the trial via video-conferencing or, where counsel are comfortable with it, by telephone.[12] Often even non-party witnesses outside subpoena range of the locale of the arbitration will agree to appear in such informal ways to suit their personal convenience and avoid the expense of motion practice as to a subpoena.

Arbitrators will also often urge the parties to proceed with their depositions in phases, only going forward to the next layer of depositions when such depositions seem necessary and non-redundant.

Where there is perhaps an underlying redundancy or inevitability as to the testimony of witnesses sought to be made the subject of depositions, counsel will sometimes agree to stipulate, for hearing purposes, as to what the witness would have said if she had testified.

If, notwithstanding the arbitrators' entreaties, counsel persist in their agreement as to numerous and extended depositions, arbitrators are generally prone to respect that agreement and let the depositions go forward. After all, it is the parties' process and counsel presumably know their case better than the arbitrators at the discovery phase.

When Counsel Disagree as to Discovery

When the parties' agreement does not specify the scope of discovery and counsel are in disagreement on the matter, arbitrators generally require counsel to justify the need for whatever discovery they seek. Counsel need to be prepared to do so with specificity in terms of the applicable contractual or legal standards or custom and usage or the like giving rise to the need for the information in question.

There remain some arbitrators at both ends of the spectrum: those who believe there is not supposed to be much, if any, discovery in arbitration and those still imbued with the broad discovery of our litigation system.

In my experience as an arbitrator in over 125 cases, most arbitrators determine discovery disputes by applying the above-described balancing test, weighing the interests of 1) expedition, 2) economy, and 3) fair opportunity of a party to prepare and present its case. It is, however, my sense that, in insurance/reinsurance and other arbitrations where each side selects one of the arbitrators, the issue as to the scope of discovery at times becomes somewhat "politicized," with each party-appointed arbitrator, at that early phase of the case, tending to push for however broad a scope of discovery his or her party wants.

Robert M. Hall and Debra J. Hall have noted this issue in writing about the Task Force Procedures:[13]

> Perhaps the threshold issue is whether the party arbitrator system is a contributing element to problems identified with the arbitration process e.g. arbitrations which are too long and expensive with too much discovery and contentiousness. Does some degree of identification with a party by party arbitrators prevent a panel from acting decisively to avoid these problems? A growing number of experienced practitioners advocate all neutral panels as a better alternative.

Access to Records Clauses

The presence of an access to records clause in an insurance/reinsurance agreement is relevant, but not necessarily dispositive, to the arbitrators' consideration of discovery issues in a case arising under the agreement.

The existence of the clause means that the party whose records are the subject of the clause understood that its records would be open to review.[14] Nonetheless, once the arbitration proceeding is commenced and the panel constituted, the panel becomes responsible to resolve discovery issues. While the access to records clause will typically cover broad areas of the parties' relationship, not all such areas will necessarily be in dispute in the case. It remains to be worked out in each case what documentary production is appropriate on the facts of the case.

Source of the Arbitrator's Power to Determine Discovery Matters

Obviously where the arbitration clause or arbitration rules the parties have adopted address the scope of discovery, the source of the arbitrator's power in the area is evident. What is the source of this power where the parties have not addressed the matter?

The overriding answer is that the parties' selection of the arbitrators to conduct the proceeding accords them the power to take the procedural and other steps necessary to do so, including as to discovery.[15]

RULES AND GUIDELINES AS TO DISCOVERY IN ARBITRATION

The guidelines and rules of arbitration organizations are generally consistent with the "reasonably necessary" standard postulated above.

The ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure 2004

Chapter 4.1 of the Practical Guide addressing discovery specifically contemplates depositions. Comment D states, "ARIAS•U.S. Sample Form 4.1 [the "Comprehensive Arbitration Scheduling Order"] anticipates that the parties will want, and the Panel will permit, depositions of persons whom the parties identify as their fact witnesses at the hearing."[16]

The Comprehensive Arbitration Scheduling Order contains the following provisions:[17]

> Date VI Each party will identify individuals it wants to depose. A party may depose anywitness on the other party's(ies') witness list(s) and only such other persons as the parties may agree or the

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However, the ARIAS•U.S. Practical Guide goes on to note that the scope of discovery is *subject to the arbitration interests of avoiding undue burden, expense and delay.* Comment D in Chapter 4.1 also cautions that "the parties and the Panel should not presume that depositions are necessary or appropriate in all instances or that each side needs the same number of depositions as the other side to fairly present its case."

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> Panel may order upon a showing of good cause...
>
> * * *
>
> Date IX Expert witness depositions will be completed.

Comment B in Chapter 4.1 also contemplates that, in some instances, it may be appropriate for the Panel, in the absence of dispute as to the matter, to leave discovery to the parties, only getting involved on the issue if the parties reach impasse.[18]

The ARIAS•U.S. Agenda for the Organizational Meeting similarly contemplates depositions and other discovery, including interrogatories, bills of particular, and audits.[19]

All of this appears quite broadly to contemplate depositions and other discovery. Standing alone, these provisions would support a threshold expectation of parties in insurance/reinsurance arbitrations being conducted pursuant to the Practical Guide that they would have access to a broad range of discovery.

However, the ARIAS•U.S. Practical Guide goes on to note that the scope of discovery is *subject to the arbitration interests of avoiding undue burden, expense and delay*. Comment D in Chapter 4.1 also cautions that "the parties and the Panel should not presume that depositions are necessary or appropriate in all instances or that each side needs the same number of depositions as the other side to fairly present its case."[20]

Comment E goes on to make it clear that the Panel has "considerable discretion" in discovery matters and should exercise that discretion "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)."[21]

Comment E specifically states the matter in terms of the "appropriate balance" between according each party the discovery it needs while protecting the arbitration interests of expedition and economy:[22]

> 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*.

In describing how the Panel should go about resolving discovery disputes, Comment G restates this same balancing test, pointing, again, to the contemplated nature of the arbitration process as "streamlined" and "cost-effective:"[23]

> The Panel should adopt a procedure to resolve discovery disputes that takes into account the parties' interests in *fairly resolving the disputes and their interest in maintaining the streamlined, cost-effective nature of the arbitration process*.

The Reinsurance Association of America's Manual for the Resolution of Insurance/Reinsurance Disputes

The RAA Manual first characterizes discovery as "the area in which arbitrators tend to deviate enormously from any particular pattern, and in which the panel's exercise of its discretion is at its greatest latitude."[24]

The RAA Manual, however, then goes on to suggest the need for a balance, stating, "A given panel quickly develops its own sense of what constitutes relevance, and each panel decides what constitutes the proper balance between legitimate document production and disruption and time-stalling tactics."[25]

While stating that "[t]here are no set rules to guide or restrain a panel,"[26] the RAA Manual then goes on quite pointedly to recommend that arbitrators balance the interests of fairness, expedition, and economy:[27]

> Recommendation: The panel should determine the scope of discovery based on the complexity of the claims and defenses presented. *The goal should be to strike a proper balance between the need to allow the parties to present sufficient evidence to ensure a just resolution of the dispute, and the need to avoid the delay (and costs) associated with the parties and their attorneys producing and/or reviewing the materials (as well as the cost of paying the arbitrators to consider the supporting documents.)*

As to the preference for live testimony and the disadvantages of depositions in this regard, the RAA Manual states, "Panels must bear in mind that testimony is best when it is live — when the arbitrators can judge witness credibility and probe the witness."[28]

The RAA Manual specifically notes that panels may appropriately require that parties show the "need" for depositions.[29]

Task Force Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes

The RAA Manual, in its discussion of the scope of discovery in insurance/reinsurance arbitration, references the Insurance and Reinsurance Dispute Resolution Task Force's "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" (Regular and Neutral Panel Versions April 2004) (the "Task Force Procedures"). The Task Force Procedures provide that arbitration panels may permit such depositions as they find "*reasonably necessary*" and such document production, beyond the parties' voluntary exchanges, as they consider "*necessary for the proper resolution of the dispute.*"[30]

An analysis of the Task Force's approach as to discovery states:[31]

> The Task Force chose not to limit and regularize the discovery process by adopting one or more of the specific rules that have been proposed in recent years (e.g., to confine discovery to the contract at issue or to limit the number and length of depositions). Perhaps this is as it should be, in that the scope and duration of discovery must be tailored to the circumstances of each case. But the Procedures' broad guidelines may do little to stem the discovery disputes that occur all too often.

American Arbitration Association, Supplementary Procedures for the Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes

The American Arbitration Association's Supplementary Procedures for the Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes [the "AAA Insurance/Reinsurance Rules"] provide in R-21 that "consistent with the expedited nature of arbitration" an arbitrator may direct "(i) the production of documents and other information."[32]

AAA Insurance/Reinsurance Rule L-4(a) establishes what looks very much like the above-postulated "reasonably necessary" standard:

> Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.[33]

Reinforcing the standard as to the balance between justice, speed and economy, AAA Insurance/Reinsurance Rule L-4(b) provides,

> Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

Interestingly, the AAA Insurance/Reinsurance rules recognize the arbitrator's power to limit discovery even in the face of agreement by the parties. Rule L-4(c) provides,

> The parties may conduct such discovery as may be agreed to by all the parties provided, however, that *the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate*. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.[34]

Reinforcing the point that the rules applicable to insurance/reinsurance arbitrations are generally the same in principle as those applicable generally to commercial arbitration, it is noteworthy that the AAA's above Insurance/Reinsurance rules are *identical* with its corresponding commercial rules.[35]

American Arbitration Association Employment Rules

The AAA's Employment Rules similarly provide that the arbitrator may permit such discovery, by way of deposition, interrogatory, document production, or otherwise, "as the arbitrator considers *necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration*." [36]

JAMS

The JAMS Rules introduce the subject of discovery in their discussion of the preliminary hearing, stating that among the matters to be addressed at the hearing are the exchange of information and the schedule for discovery "as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law."[37]

Defining relevance as the standard for discovery, JAMS Rule 17(a) provides for the parties' voluntary exchange of "all non-privileged documents and other information relevant to the dispute or claim immediately after commencement of the Arbitration."[38]

JAMS Rule 17(b) provides that each party may take a deposition of an opposing party or of one individual under the control of the opposing party, and specifies a reasonable need standard for the Arbitrator's determination as to whether additional depositions may be permitted. The Rule provides,

> The necessity of additional depositions shall be determined by the Arbitrator based upon the *reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness*.[39]

CPR

CPR in its Rules recognizes the same standard of balancing the "needs" of the parties and the interests of expedition and economy in arbitration, stating that, "The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties

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and the desirability of making discovery expeditious and cost-effective."[40]

INTERNATIONAL ARBITRATION—THE WORLD OF MORE LIMITED DISCOVERY

While the focus of this article is on domestic arbitration, it is interesting to note that international arbitration is thriving, notwithstanding the substantial limitations on discovery in such cases.

Such limitations are notably reflected in the discovery Guidelines (the "ICDR Guidelines") recently promulgated by the International Centre for Dispute Resolution (the "ICDR"), the international branch of the American Arbitration Association. The ICDR Guidelines start by noting that arbitrators

> have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.[41]

While allowing for discovery of documents upon which parties intend to rely at trial and, further, of documents "that are reasonably believed to exist and to be relevant and material to the outcome of the case,"[42] the ICDR Guidelines set forth a strikingly stringent limitation as to depositions and other discovery,

> Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.[43]

While the question may be raised as to whether an approach quite so stringent makes sense as to international insurance/reinsurance arbitrations, given the extent to which important factual information in such cases is often held exclusively by one side or the other on key issues, nonetheless, the fact of this authoritative promulgation of such a restrictive standard is sobering as to the need for the extensive discovery parties routinely seek and get in insurance/reinsurance cases.

DISPUTE RESOLUTION OUTCOMES WHEN DISCOVERY IS LIMITED

Given the narrower scope of discovery in international arbitrations, the question arises whether parties perceive themselves as getting less justice in such cases. While this would be an interesting matter to survey on a broader basis, my sense, anecdotally, is that U.S. parties and their counsel generally feel they fare roughly as well in international as in domestic arbitrations, with no significant loss from the lessened discovery.

Disputes where both sides essentially start out with most of the facts obviously require less discovery than disputes involving issues as to subjective knowledge, parole evidence, fraud, and the like, but international arbitration, the civil law systems, and the roots of arbitration itself suggest that our innate sense as to the need for broad discovery to obtain fair results may be overblown.

APPLICABLE LAW

The Revised Uniform Arbitration Act (RUAA) and Case Law

The RUAA's provisions as to discovery are similar to the above guidelines and rules of ARIAS•U.S., the RAA, the Task Force, the AAA, JAMS, and CPR, focusing, as did such rules, upon the balance of the "needs" of the parties and the interests of expedition and economy. RUAA §17(c) provides: [44]

> An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

The Comments to §17 note that discovery is not a presumptive right in arbitration and is not supposed to be as broad as in litigation. They emphasize that the arbitrator's standard in deciding discovery disputes is the balance of "fairness, efficiency, and cost."[45] They further note that courts typically view extensive discovery as inconsistent with the supposed benefits of arbitration and leave such matters to the discretion of arbitrators.[46]

RUAA Section 17(b) also permits depositions intended for trial, as opposed to for discovery, subjecting such depositions to the same test of making the proceedings fair, expeditious, and cost effective. [47]

Discovery from Non-Parties/the FAA

The Federal Arbitration Act ("FAA"), which is generally applicable to insurance/reinsurance disputes since they involve interstate and foreign commerce, does not cover the subject of the scope of discovery in arbitration, but rather, in the discovery area, focuses on the subpoena power of arbitrators, including subpoena power to compel hearing testimony and, in the view of some courts, discovery from non-parties.[48]

COMMENTATORS

Thomas H. Oehmke, in his treatise on commercial arbitration, similarly concludes that the test for discovery in arbitration is "necessity" not "convenience."[49] Oehmke notes that, while liberal discovery is favored in court, in arbitration "the presumption is reversed and a convincing case must be made that the information sought is essential."[50] He states the overall rule that "[d]iscovery should be available to permit a party to obtain the information necessary to prosecute or defend against a claim."[51] He adds that, "lacking a discovery mandate in the parties' contract or adopted rules, a court will not enforce discovery except where the lack of discovery would result in a fundamentally unfair hearing."[52]

Domke in his treatise on commercial arbitration similarly describes the reluctance of courts to get involved in overseeing discovery in arbitrations.[53]

Weinstein, Korn & Miller note that New York State case law strongly discourages applications to the court for disclosure in

arbitrations because "such devices would tend to frustrate the major advantages of arbitration, speed and simplicity."[54] The authors point out that, "because of the different place occupied by discovery in arbitration ... courts will not order disclosure 'except under extraordinary circumstances.'"[55]

CONCLUSION[56]

Arbitration is expected to provide parties with a fair process, speed and economy. Absent their having established some other standard, the parties to an insurance/reinsurance arbitration are generally entitled to whatever discovery they reasonably need to enable them to prepare and present their claims and defenses—but that should be the limit of it, lest speed and economy be compromised.

This standard is a broad and judgmental one, but one that experienced arbitrators knowledgeable about insurance and reinsurance can readily and reliably apply. It provides guidance to, parties, counsel, and arbitrators as to the appropriate boundaries and should accord in-house counsel reasonable predictability as to scope and expense.

The "reasonably necessary" standard is evident from the practice of experienced arbitrators and supported by the guidelines and rules of ARIAS•U.S., the RAA, the Task Force for Insurance and Reinsurance Disputes, the AAA, JAMS, and CPR, and by the RUAA.

By actively engaging themselves in the refining of the issues and the tailoring and oversight of discovery, arbitrators can contribute to the realization of arbitration's promise of fairness, speed, and economy.▼

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2 See the interesting discussion by Robert M. Hall of steps the panel can take at the Organizational Meeting "in shaping and prioritizing the issues in the dispute" and requiring counsel to reveal the "substantive reasons for non-performance of either side," resulting in a discovery plan tied to the specific issues in the case. Robert M. Hall, "*How Reinsurance Arbitrations Can Be Faster, Cheaper and Better*," ARIAS•U.S. Quarterly, pp. 33, 34 (Third Quarter 2004).

3 An interesting analysis of this advantage of arbitration is set forth in an article by an attorney who had two similar construction cases at the same time, one of which was being arbitrated and the other litigated, resulting in what he described as an "unintended experiment." Reporting that the case in arbitration ended up being handled more efficiently and expeditiously, the author attributed the difference to the arbitrators' involving themselves heavily in managing discovery in the case and tailoring it to the needs of the case. *See* Jeffrey R. Cruz, "*Arbitration vs. Litigation: An Unintentional Experiment*," American Arbitration Association, Disp. Res. J. (Nov. 2005), *available at* http://www.adr.org/sp.asp?id=29193.

4 In-house counsel in large companies have complained to me that the reluctance of many arbitrators to seriously consider summary judgment or other pre-hearing motions or to limit testimony at hearings (instead taking virtually everything "for what it is worth") frustrate the purposes of arbitration, inclining them to return to litigation.

5 *See, e.g.*, USCS Fed. Rules Civ. Proc. R 26(b)(1); N.Y. CPLR 3101(a) for representative standards as to the breadth of discovery in court cases.

6 The examination at the hearing of an adverse witness who has not been deposed presents the challenge of pure cross-examination. *See generally*, Richard C. Mason, "*Cross-Examination Without a Comfort Blanket*," ARIAS•U.S. Quarterly, p. 14 (Third Quarter 2008). In my experience, this is a challenge to which counsel regularly rise.

7 Obviously, there are circumstances where more extensive discovery is necessary to enable a party to prepare or to streamline the hearing.

8 While many efforts to appeal arbitral decisions are made, they are rarely successful. It is also noteworthy that the lack of appeal, as a general matter, from discovery decisions in arbitration is not that different from the situation in litigation, although the court standard for appeal is generally broader. It is rare that a court decision as to discovery is overturned on appeal or is a basis for reversal of a decision on the merits. At the same time, as discussed hereinafter, there is at least the theoretical possibility that even an arbitral decision could be overturned if the denial of discovery rendered the arbitration proceeding "fundamentally unfair." *See* Thomas H. Oehmke, 3 Commercial Arbitration §§ 89:6; 90:1.

9 Achieving the proper balance between these considerations is obviously important with respect to the arbitration objective of finality, since an arbitral decision unreasonably limiting discovery to a party would likely result in a challenge by the party if it received an adverse decision, leading to expense and delay, notwithstanding the low likelihood of success of the challenge.

10 Electronic discovery raises extensive issues of increasing concern in arbitration. Parties in arbitrations are often willing to limit electronic discovery in the interests of expedition and economy. *See, e.g.*, Rick H. Rosenblum and McLean Jordan, "*Electronic Discovery and Reinsurance Arbitration: An Update*," ARIAS•U.S. Quarterly, p. 11 (First Quarter 2008); Peter R. Chaffetz and Andreas A. Frischknecht, "*Electronic Discovery in Arbitration*," ARIAS•U.S. Quarterly, p. 2 (Fourth Quarter 2006); Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, Disp. Res. J., Nov. 2006/Jan. 2007 *available at* http://www.mediate.com/warshauer/docs/ediscovery%20article%20final%20printed%20AAA%20dispute.pdf.

11 Issues as to privilege and sanctions are also of concern to in-house counsel. For a discussion of issues as to attorney/client privilege and work product with respect to documents, *see, e.g.*, Robert M. Hall, "*Discovery from Intermediaries: Winning the Peace*," ARIAS•U.S. Quarterly, p. 22 (Fourth Quarter 2006); P. J. Wilker, "*The Production of Documents in Reinsurance Arbitration Proceeding*," ARIAS•U.S. Quarterly, p. 18 (Fourth Quarter 2002).
For a discussion of sanctions against parties for discovery abuses, *see* Nick DiGiovanni and Teresa Duckett, "*Sanctions and Punitive Damages in Arbitration*," ARIAS•U.S. Quarterly, p. 5 (First Quarter 2004); Daniel L. FitzMaurice and Daniel J. Foster, "*Discovery in Reinsurance Arbitration*," ARIAS•U.S. Quarterly, pp. 2, 5 (Fourth Quarter 2004). For a discussion of the appointment of special audit masters to oversee discovery, *see* Gregory H. Horowitz and Carmela Cannistraci, "*The Appointment and Use "Special Audit Masters" in Reinsurance Arbitrations*," ARIAS•U.S. Quarterly, p. 11 (Second Quarter 2008).

12 Section 14.6 of the Task Force Procedures, for example, provide, subject to certain conditions, that arbitrators may permit testimony by telephone, affidavit, transcript, videotape, or other means. *See* Insurance and Reinsurance Dispute Resolution Task Force's "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes" (Regular and Neutral Panel Versions April 2004) (the "Task Force Procedures"), at Reinsurance Association of America, Manual for the Resolution of Reinsurance Disputes, at Procedural Guidelines, pp. PG1-PG43, *available at* www.ArbitrationTaskForce.org.

13 *See* Robert M. Hall and Debra J. Hall, "Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes," p. 3, http://www.arbitrationtaskforce.org/images/HallandHallArticle.pdf. *See* discussion of the Task Force Procedures *infra* at text accompanying n. 30.

14 For a discussion of the extent to which Access to Records clauses constitute a waiver by cedents of attorney/client privilege, *see* Michele L. Jacobson, Robert Lewin, and Royce F. Cohen, "*The Access to Records and Claims Cooperation Clauses: Their Impact on Discovery in Arbitration Proceedings*," ARIAS•U.S. Quarterly, p. 2 (Third Quarter 2006).

15 See the interesting discussion of this matter in Robert A. Knuti and T. Monique Jones, "*The Legal Power of Arbitrators to Grant and Limit Discovery*," ARIAS•U.S. Quarterly, pp. 6, 7 (Fourth Quarter 2002).

16 ARIAS•US, PRACTICAL GUIDE, Ch. 4.1, cmt. d, available at http://www.arias-us.org/index.cfm?a=41.

17 http://www.arias-us.org/index.cfm?a=41

18 ARIAS•US, PRACTICAL GUIDE, Ch. 4.1, cmt. b, *available at* http://www.arias-us.org/index.cfm?a=41.

19 http://www.arias-us.org/index.cfm?a=40.

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Arbitration is expected to provide parties with a fair process, speed and economy. Absent their having established some other standard, the parties to an insurance/reinsurance arbitration are generally entitled to whatever discovery they reasonably need to enable them to prepare and present their claims and defenses—but that should be the limit of it, lest speed and economy be compromised.

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20 *Id*. at cmt. D.
21 *Id*. at cmt. E (Emphasis supplied).
22 *Id*. (Emphasis supplied).
23 *Id*. at cmt. G (Emphasis supplied).
24 MANUAL FOR THE RESOLUTION OF REINSURANCE DISPUTES § IV (R.A.A. 2007).
25 *Id*.
26 *Id*.
27 *Id*. (Emphasis supplied).
28 *Id*.
29 *Id*.
30 Task Force Procedures at §11 ("DISCOVERY"), §§ 11.2; 11.3.
31 Alan J. Sorkowitz and Navneet K. Dhaliwal, "An Analysis of the 2004 Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes," Sidley Austin Brown &Wood LLP, Reinsurance Law Report 14, *available at* http://www.arbitrationtaskforce.org/images/SorkowitzArticle.pdf.
32 Insurance/Reinsurance Rules, Rule R-21, AAA (amended and effective September 15, 2005) *available at* http://www.adr.org/sp.asp?id=22126.
33 *Id*. at Rule L-4(a).
34 *Id*. at Rule L-4(c) (Emphasis supplied).
35 *Compare* Commercial Arbitration Rules, Rules R-21 and L-4, AAA (amended and effective September 1, 2007) *available at* http://www.adr.org/sp.asp?id=22440 with Insurance/Reinsurance Rules, Rules R-21 and L-4, AAA (amended and effective September 15, 2005) *available* at http://www.adr.org/sp.asp?id=22126.
36 Employment Arbitration Rules, Rule 9, AAA (effective July 1, 2006) *available at* http://www.adr.org/sp.asp?id=32904#9 (Emphasis supplied).
37 Comprehensive Arbitration Rules and Procedures, Rule 16, JAMS (revised March 26, 2007) *available at* http://www.jamsadr.com/rules/comprehensive.asp#Rule%2016.
38 *Id*. at Rule 17.
39 *Id*. (Emphasis supplied).
40 Rules for Non-Administered Arbitration, Rule 11, CPR (effective November 1, 2007) *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx. (Emphasis supplied). *See also, id*., at General Commentary—Salient Features of the Rules. The CPR Rules note that they are suitable for insurance as well as other disputes. *See id*., at General Commentary – Types of Disputes.
41 International Centre for Dispute Resolution, ICDR Guidelines for Arbitrators Concerning Exchanges of Information, *available* at http://www.adr.org/si.asp?id=5288, at "Introduction," p. 1.
42 *Id*. at Section 3(a).
43 *Id*. at Section 6(b).
44 [Revised] Unif. Arb. Act (2000) at § 17(c). The RUAA has been enacted by 12 states, Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington, along with the District of Columbia. See generally, The National Conference of Commissioners on Uniform State Laws, *A Few Facts About the Uniform Arbitration Act* [2000], http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-aa.asp. The RUAA has been approved by the American Bar Association and endorsed by the American Arbitration Association, the National Academy of Arbitrators and the National Arbitration Forum. *Id*.
The RUAA's predecessor, the Uniform Arbitration Act ("UAA"), was adopted by 35 states, with an additional 14 states adopting substantially similar legislation. [Revised] Unif. Arb. Act (2000) at "Prefatory Note", *available at* http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.pdf.
45 *Id*. at §17, cmt. 3.
46 *Id*. at §17, cmts. 2 and 3. Courts have treated attacks on discovery limitations in arbitration as "an attack on the character of arbitration itself." *Guyden v. Aetna*, Inc., 2008 U.S. App. Lexis 20783, *24 (2nd Cir. 2008) *citing Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004). "Courts generally treat arguments relating to discovery provisions as 'procedural in nature, and therefore left for an arbitrator to resolve.'" *Id. citing Kristian v. Comcast Corp*., 446 F.3d 25, 43 (1st Cir. 2006); *CIGNA HealthCare of St. Louis, Inc. v. Kaiser,* 294 F.3d 849, 855 (7th Cir. 2002).
47 *Id*. at §17(b).
48 For a discussion of the legal bases for compelling document production and testimony from such non-party witnesses as reinsurance intermediaries, *see* generally Robert M. Hall, "*Discovery from Intermediaries: Interim Report on Developments in Regulation and Case Law*," ARIAS•U.S. Quarterly, p. 2 (Second Quarter 2006), and Michele L. Jacobson, Robert Lewin, Royce F. Cohen and Andrew S. Lewner, "*Obtaining Discovery from Reinsurance Intermediaries and Other Non-Parties – Updated Case Law and Commentary*," ARIAS•U.S. Quarterly, p. 2 (Third Quarter 2005); *see also*, Leslie Trager, *The Use of Subpoenas in Arbitration*, Disp. Res. J., Nov. 2007/Jan. 2008 available at http://www.aaauonline.org/upload/The%20Use%20of%20Subpoenas%20in%20Arbitration.pdf.
49 Thomas H. Oehmke, 2 Commercial Arbitration, § 89:3 (Footnotes omitted).
50 *Id*.
51 Thomas H. Oehmke, 4 Commercial Arbitration, § 152.11 (Footnotes omitted).
52 Thomas H. Oehmke, 2 Commercial Arbitration, § 89:3 (Footnotes omitted).
53 1 Domke on Commercial Arbitration, § 32:1 (Footnotes omitted).
54 13-75 New York Civil Practice: CPLR ¶ 7505.06.
55 *Id., citing International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S. 2d 253 (1st Dep't 1976); *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 406, 362 N.Y.S.2d 843, 847 (1974).
56 The within analysis of guidelines, rules and considerations applicable to the scope of discovery in insurance/reinsurance arbitration is not intended to prejudge the facts or the appropriate scope of discovery of any particular case. Discovery issues are case-specific and cannot be evaluated in advance or in the abstract.

members on the move

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

Although we will continue to highlight changes and moves, remember that **the new ARIAS•U.S. Membership directory on the website is now updated frequently**; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us.

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

Mitchell L. Lathrop is operating out of two offices at his new firm, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. He can be contacted at 3580 Carmel Mountain Road, Suite 300, San Diego, CA 92130, phone 858-314-1566, fax 858-320-3001, cell 619-985-8262 or at Chrysler Center, 666 Third Avenue, New York, NY 10017, phone: 212-935-3000, same cell.

Paul Steinlage has moved his office to 1619 Woodland Ridge Road, Wausau, WI 54403. His phone is unchanged.

After several years with Morgan Stanley, involved in other fields, **Ken Pierce** has returned to reinsurance arbitration and ARIAS•U.S., joining Mayer Brown LLP's New York office at 1675 Broadway, New York, NY 10019-5820. He has been joined there by **Cliff Schoenberg**. Their new contact information is as follows: Kenneth R. Pierce, phone 212-506-2510, fax 212-262-1910, email kpierce@mayerbrown.com; Clifford H. Schoenberg, phone 212-506-2460, fax 212-262-1910, cschoenberg@mayerbrown.com.

Gail P. Norstrom has moved to the role of Chief Executive Officer, Gulf Reinsurance Limited, Regulated by the DFSA, Dubai International Financial Center, Level 2, Gate Village 10, P.O. Box 506766, Dubai, UAE, phone +971 4 323 0830, fax +971 4 362 2573, cell+ 971 (0) 50 708 5609, email gail.norstrom@gulfre.com, website www.gulfre.com.

Crowell & Moring LLP has moved its office in New York. As a result, **Harry P. Cohen** can now be reached at 590 Madison Avenue, New York, New York 10022, phone 212-803-4044, fax 212-895-4201, cell 914-450-3700, email hcohen@crowell.com.

The Schacht Group, having formed a strategic affiliation with Smart Business Advisory and Consulting, LLC, has a new addresses and numbers. **James W. Schacht** is now at 30 North LaSalle Street, Suite 4300, Chicago, IL 60602, phone 312-849-6045, fax 312-849-6051, cell 312-259-4161, email jim@theschachtgroup.com.

Henry C. Lucas, III and associates have relocated to Lucas and Cavalier, LLC, 1500 Walnut Street, Suite 1500, Philadelphia, PA 19102, phone 215-751-9192, fax 215-751-9277, cell 267-253-9052, email hlucas@lucascavalier.com.

Locke Reynolds LLP has merged with Frost Todd Brown; therefore, **Hugh E. Reynolds Jr**. should now be contacted at Frost Todd Brown LLP, 1900 Capital Center South, 201 N. Illinois Street, Indianapolis, IN 46204, phones are the same, email hreynolds@fbtlaw.com.

David C. McLauchlan, having retired from Locke Lord Bissell & Liddell, now has his office at One North Franklin Street, Suite 1680, Chicago, IL 60606-3423, phone 312-550-1010, email davidc.mclauchlan@gmail.com.

Linda Martin Barber may now be reached at Arbitration & Business Consulting, PO Box 208, 43 Miller Avenue, Chautauqua, NY 14722, phone 716-357-9292, cell 716-581-1817, email lbarber43@roadrunner.com.

Dennis Chookaszian is now at phone 847-778-2971, email dennis@chookaszian.com.

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feature

The Role of Mediation in Dispute Resolution

Address Delivered at the ARIAS•U.S. 2008 Fall Conference

John D. Feerick

John D. Feerick

Thank you for the introduction and for the opportunity to address you on the general theme of mediation in the dispute resolution process. In speaking of themes, I always love the story of Winston Churchill having once been in a restaurant and having sent back a pudding to the kitchen because he said "it had no theme." Well, you can't send me back to the kitchen, you're stuck with me at least for the next few minutes. I will try to be short so you can finish your meal and conversation.

I salute you for the attention you are giving to ADR topics in your program and for the mock training sessions. You are truly on to something important and your timing could not be better.

Your program is occurring at a time when major developments are taking place regarding how we resolve disputes. A recent interim report of a Task Force of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System at the University of Denver has raised alarms about the nation's civil justice system. The report suggests that the system has "become disabled by disproportionate cost and delay, and this dysfunction is impacting justice." 1500 members of the College responded to a Task Force survey, nearly half of whom expressed their belief that discovery is abused in *every* civil case. The survey also indicated that because of costs and delay, cases with merit are not being brought at all and that cases without merit are being settled out of court because "the cost of pursuing or defending those claims fails a rational cost-benefit test."[1]

The report suggests that the system has "become disabled by disproportionate cost and delay, and this dysfunction is impacting justice."

Similarly, I hear among arbitration practitioners, including in your industry, that the costs and delays associated with arbitration are raising concerns about its viability as an alternative to litigation. A paper being delivered elsewhere this afternoon by Thomas Stipanowich describes arbitration as becoming a new form of litigation. He concludes from his review that it is being subjected to "unprecedented stresses and strains and drawing wider criticism."

A litigation trends survey by Fulbright and Jaworski reveals that 75 percent of house counsel's perceptions of international arbitration are to the effect that it costs the same as litigation and takes the same time as litigation. According to the American Arbitration Association, on the other hand, a study of its cases under the Commercial Arbitration Rules a few years ago, revealed that less than 300 days was the average from filing to completion. My impression is that the promises associated with arbitration such as speed and lower costs are not being achieved in too many areas for comfort in terms of an alternative process to litigation.

As challenges to public and private justice systems grow in seriousness, positive developments are occurring to promote just outcomes in the dispute resolution landscape. A highly-acclaimed book by Julie Macfarlane, called the *New Lawyer*, notes that structural changes within both the justice system and the legal profession have rendered the adversarial 'client warrior' notion outdated and inadequate, with a shift toward conflict resolution rather than protracted litigation. She and others urge a new settlement-oriented, problem-solving approach to lawyering, with an emphasis on communication, relationship building and negotiation skills and greater use of negotiation, mediation and other settlement processes. The Fall 2008 newsletter of the New York State Bar Association contains a useful overview by Francis Carling of habits of ineffective advocacy in mediation.

In some areas of legal practice, new forms of lawyering are occurring which involve a greater partnership of the client with the lawyer throughout the progress of a case. Unfortunately, in vast areas of our society,

John Feerick is former Dean and now Professor of Law at Fordham University School of Law. He is the Sidney C. Norris Chair of Law in Public Service at Fordham Law and Founder and Director of the Feerick Center for Social Justice at Fordham Law School.

more and more clients are going without lawyers because of their inability to bear legal fees. Even where there is an ability to pay, clients are troubled by legal costs and its impact on finances and the financial statement.

Just to round out, contextually, developments taking place. The Arbitration Fairness Act pending in Congress would render unenforceable pre-dispute arbitration clauses in employment, consumer and franchise agreements and agreements to arbitrate disputes that arise under statutes to protect civil rights. The mandatory nature of these clauses involving parties of greatly disparate economic power is a serious issue of the present moment. I also call your attention to the new Kheel Center on the Resolution of Environmental Disputes at Pace Law School. Next Monday it will host at the City Bar an important program examining skills and techniques used by lawyers and others in environmental, land and resource conflicts where rights are less well developed, the conflicts are new and rapidly evolving, the stakeholders many, and the forums for conflict resolution less clear. The program is giving special attention to the skills and techniques of how to enter ADR processes and how to function within those processes.

The evidence suggests that more and more lawyers are taking a look at ADR and are under increased pressure to do so by clients upset by the cost, delay, and time attention required by litigation.

Not surprisingly, mediation has grown in popularity. Just what is this process we call mediation? In their book on Law and Practice of Insurance Coverage Litigation, David Leitner, Reagan Simpson, and John Bjorkman, describe it well as follows:

> *Unlike litigation and arbitration, where judges and other third parties render decisions and judgments, mediation remains in the control of the disputing parties. [It is] is premised on reaching a voluntary resolution of a controversy, focusing on creative solutions to a problem as opposed to demanding a victory at all costs. The parties typically choose the mediator, and play a significant role in determining the schedule, the location and the persons who will appear on their behalf. The parties also usually retain the ability to terminate the discussions or resume them at a later time. The disputing parties reach agreements via active participation and active decision-making.*
>
> *As a general rule, mediation involves less preparation and fewer exchanges of information and presentations than litigation. It is also private and confidential, informal, and protective of existing relationships. The parties tailor the process to their needs and control the outcome. The hallmark of (many) mediations is that the mediator meets with all parties, lawyers and principals, in joint or separate meetings known as caucuses, guiding them through exchanges of information and explorations of interests and positions, with the goal of enabling [them] to reach agreement themselves."*

One of your members told me the story of a successful mediation in which he was involved in which all the parties were pleased to have as their mediator a former distinguished judge and a much decorated person. When they met with him, they wanted to know more about his fascinating career. He immediately cut them off and said we don't have time for that. In this process unlike litigation, he said, you should not treat me as a judge or arbitrator. Instead, you are the focus here, not me! I am here to hear from you and receive your practical suggestions for how I can help you reach an agreement among yourselves. He added:

> I can understand you wanting to know more about me if I were your judge or arbitrator, having to decide this dispute. That should be your focus in those processes. But in mediation, I have no power to render a binding decision or impose a settlement. I am here to help you engage in a confidential settlement discussion.

As that mediator proceeded to what would be a successful outcome, I understand that a principal for one of the parties gave a rambling, somewhat convoluted 15 minute presentation of his position, following which the mediator said: "I don't understand a word you said. Give it to me again like Alice in Wonderland." The lawyer for that party immediately stepped in and clarified to the mediator's satisfaction what was said.

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Mediation, according to many users, is less costly, quicker, less stressful and more protective of reputational interests. So it should come as no surprise that mediation is the most frequently used ADR process in the federal courts.

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Mediators help parties "engage in conflict constructively and discuss difficult issues. They help parties identify key issues and gather relevant information...some mediators may offer suggestions for the parties." Ruth Raisfeld, one of many in a new generation of lawyer mediators, has said that

> the work of the mediator is to keep the parties engaged in negotiation even when the parties appear hopelessly far apart. The mediator will continue to question the parties about the facts, relevant law, and interests, and will attempt to get the parties thinking about the strengths and weaknesses of their case as well as their adversary's case.

Let me stress again that mediation sessions are typically informal, without the framework of evidentiary rules, and offer solutions, economic and non-economic that are not available in litigation. Sometimes parties bring up other, both related and non-related, matters between them and include that as part of their resolution.

Mediation, according to many users, is less costly, quicker, less stressful and more protective of reputational interests. So it should come as no surprise that mediation is the most frequently used ADR process in the federal courts. Not every matter, of course, is appropriate for mediation, as, for instance, where the parties need to establish a principle of law as a binding precedent. Interestingly, I and other mediators have had the experience of mediations not resulting in a settlement, but only to learn afterwards that the parties subsequently reached an agreement because of the communications that took place at the mediation.

As I lay out these perspectives on mediation, I am reminded of the story about the incomparable Tallulah Bankhead who, upon coming to New York and wowing Broadway, was invited by a fellow Alabamian, Alexander Woollcott, the author, to meet him one afternoon at the Algonquin Hotel on 44th street and sit in on the discussion of a famous literary group known as the Algonquin Roundtable. After listening to the literary group for a couple of hours, Woollcott turned to her and said: "Well, Miss Bankhead, what do you think of our little Roundtable?" To which Tallulah replied, "Ah, Mr. Woollcott – there is a great deal less here than meets the eye."

Mediation, arbitration, and other forms of dispute resolution have been with us from time immemorial.

Some of the greatest of all Americans have noted the advantages of ADR. George Washington mediated disputes in his native Virginia long before his fame was achieved, and in his last will and testament he called for efforts to amicably resolve any disputes arising under it before resorting to the arbitration method he set out in his will.

A half century after Washington, Abraham Lincoln declared in a law lecture: "Discourage Litigation. Persuade your neighbors to cooperate when they can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time." Was he perceptive? Indeed.

At the heart of the dispute resolution system is the neutral – the person the parties look to for the purpose of a fair process and a fair and just resolution. Those who serve as neutrals have a tremendous responsibility – not only to the parties involved but to the ADR system itself and the public at large. ADR neutrals need to be trained, experienced, committed and above all possessed of impeccable integrity. Your industry is certainly filled with complexity and your ADR neutrals need to be able to deal with that complexity. This may require industry experience and qualifications but not always. I remember 15 to 20 years ago receiving a visit from those associated with the Wellington facility, asking me what I knew about aggregate limits and other words of insurance art. I said "absolutely nothing" to which they responded "you will be perfect as a mediator. You will come at it without preconceptions and we will teach you what you need to know." And so they did – to a point.

My ideal of a mediator is former United States Senator George Mitchell who conducted the Irish peace talks that led to the historic Irish peace accords. He brought to the role superb listening qualities, patience, even-handedness, independence, perseverance, commitment, and judgment. Said Mitchell of the talks: "I listened and listened, and then I listened some more. At times it was interesting, at times entertaining; it was also repetitive, frustrating." He added: "I believe in letting people have their say. It was important." As a result, he helped inspired trust and confidence in him by the parties.

His book, *The Making of Peace*, reveals that Mitchell put to good use the tools and techniques of mediators. He drew the parties into

every aspect of the process ranging from helping the parties formulate the ground rules for the mediation, asking them for their suggestions and ideas and meeting with them jointly and separately. He used committees, subcommittees, caucuses, shuttle diplomacy and smaller group discussions to find areas of agreement. Only when all the issues were seen together could all the parties get a sense of where the necessary trade-offs and compromises might be made. He underscored in his book the wisdom of Yogi Berra that you can learn a lot from observing and listening and applying the principle that it ain't over until it's over.

You might ask how all of this translates to the world of dispute resolution in which you are engaged. I would suggest that exactly what you are doing today is right on the mark, namely looking at your existing processes, talking about issues that have developed, and exploring new and different ways of resolving disputes. I would suggest that mediation is worthy of your attention. Listen to Yogi again: When you come to a fork in the road, take it. Perhaps it is time to take a different fork in the road in terms of your dispute resolution approach.

The most complex of commercial and financial disputes can be resolved by mediation given the requisite attention and commitment by counsel and clients. I was reminded of this a few years ago when I was asked to serve as a mediator of an Enron-related dispute involving more than 50 entities and individuals, all of whom were represented by one or more counsel. The clients fell into 4 or 5 general groups in terms of their interests, with some differences within the groups. The lawyers and clients worked out the mediation process they wanted. First, it was to be a confidential process and to reinforce that they worked out the appropriate confidentiality agreement: They agreed to meet in advance with the mediator to discuss documents they would need from each other, the kinds of written submissions to be submitted to the mediator from each group, and the ground rules for the mediation in terms of opening statements at an initial joint session. Each written submission would have a part to be shared with other counsel and a part for the mediator only containing settlement ideas and suggestions from the group in question. A member of a group who had a difference with some aspect of the approach of the group was allowed to communicate in confidence that difference to the mediator.

The process called for a two-day session only for the mediation, to begin after the mediator had read the submissions and made any calls to submitting parties for clarification of what was said in their submission. This right of communication, as I recall, could be done ex parte.

At the mediation session, after the joint opening, caucuses, subcommittees, and shuttle diplomacy became the rule. At the end of the second day, around 5:00 p.m., when a resolution still seemed distant, some suggested an impasse had been reached and the process had failed. Others remembered the wisdom of Yogi Berra that it ain't over till its over, pointing out that the second day did not end until midnight. You can imagine my delight, therefore, when, at 11:25 p.m., the representatives of each of the groups signaled they had found common ground and all that remained was for a small subcommittee of lawyers to embody the agreement in writing, which they did before midnight. The impossible became possible only because of the work of the lawyers and the active engagement of their clients. I never had an experience like this before or since. I appreciate having now the memory.

To conclude, as Tom Stipanowich, formerly the head of CPR and now the director of the Straus Institute on Conflict Resolution at Pepperdine, said:

> In mediation, the flexibility, informality, privacy, and above all the ability of disputing parties to take control of their destiny by stepping back from legal claims to explore underlying issues and significant personal and institutional interests may all contribute to finding creative and mutually acceptable solutions to get a venture or a partnership back on track. Mediation can also be conducted at a tempo that reflects the needs and rhythm of the relationship.

Finally, to paraphrase the author of the Law of Nations, Emmerich de Vattel, there cannot be a more beneficent process than that of mediation and reconciling people at odds with each other.▼

1 Focus Column, American Judicature Journal, recent issue.

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feature

Reinsurance Arbitration Clauses - Where the Courts Find Problems


Larry P. Schiffer

Larry P. Schiffer

Introduction

One way to improve the alternative dispute resolution process is to examine the disputes about alternative dispute resolution clauses that find their way into court. Typically, a court proceeding over the interpretation of a provision in an alternative dispute resolution clause arises because of some ambiguity or lack of clarity in the clause that the parties now need the court to sort out. Those provisions that routinely result in court proceedings may be candidates for modification.

This article will focus on arbitration clauses in reinsurance agreements. It will examine some of the types of disputes over reinsurance arbitration clauses that find their way into court in an attempt to identify provisions that may be in need of amendment.

Reinsurance Arbitration Provisions With Ambiguous Scope

Because arbitration is a creature of contract[1], parties to a reinsurance agreement are free to contract for the scope of issues that they will submit to arbitration should there be a dispute in the future. Difficulties arise, however, when the parties' intentions regarding the scope arbitration are not clearly expressed in the reinsurance agreement. Lack of clarity over the scope of arbitration may lead to a dispute that has to be settled in court. Litigation over a poorly drafted arbitration clause may result in a judicial interpretation that is contrary to the parties' intentions.

One of the more significant examples of litigation over reinsurance arbitration provisions is where the arbitration clause does not clearly set out the scope of what conflicts are arbitrable. Many arbitration clauses provide that only matters dealing with the *interpretation* of a reinsurance agreement are to be arbitrated. When this language is used, disputes can arise over whether certain disputed issues deal with "interpretation" of the agreement as opposed to the formation of the agreement.

For example, in *Gerling Global Reinsurance Co. v. ACE Property & Cas. Ins. Co.*,[2] a dispute arose as to whether two facultative reinsurance certificates were void because the ceding insurer failed to disclose a material litigation to the reinsurer in violation of the cedent's implied duty of utmost good faith. The arbitration clause provided that "[s]hould an irreconcilable difference of opinion arise as to the interpretation of this Certificate...as a condition precedent of any right of action hereunder, such difference shall be submitted to arbitration." Because the validity of the reinsurance certificates was at issue, the court held that the reinsurer's claim raised doubt as to the very formation of the contract. According to the court, where a question arises as to a reinsurance contract's *formation*, the issue is not subject to a narrow arbitration provision that deals solely with the *interpretation* of the contract.

In another case construing a similar narrow arbitration clause, the reinsurer brought a claim for a refund of monies allegedly paid as a result of the cedent's problematic reinsurance billings. The claim alleged nothing more than an error in billing and payment. The court found that while the claim may have been "connected to the main agreement that contains the arbitration clause," it did not go to the interpretation of the certificate.[3] The court noted that the arbitration clause was drafted narrowly and therefore would be interpreted narrowly.

In *New Hampshire Ins. Co. v. Canali Reinsurance Co.*,[4] the court held that an arbitration clause requiring the submission to arbitration of "[a]ll disputes arising out of the interpretation of this Agreement" was a narrow clause that did not include a dispute over a party's alleged failure to deposit funds into an account as required by the parties' agreements. The court also noted that the inclusion of a sepa-

One of the more significant examples of litigation over reinsurance arbitration provisions is where the arbitration clause does not clearly set out the scope of what conflicts are arbitrable.

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rate service of suit clause providing that disputes regarding amounts due under the agreement must be litigated in court, served as evidence that the arbitration clause was meant to be read narrowly.

But not all courts give such a narrow reading to arbitration clauses that provide that only issues involving interpretation of a contract must be submitted to arbitration. In *Railroad Ins. Underwriters v. Certain Underwriters at Lloyd's London*,[5] the court held that the issue of determining which entity should be paid by the reinsurer was a question of interpretation for the arbitrators to decide, and was not merely a failure to pay that would fall under the contract's service-of-suit clause.

What these cases teach is that if the parties did not mean to limit the scope of arbitration to only those issues that concern the mere interpretation of the contract, as opposed to the failure to pay under the contract, they should have drafted the arbitration provision more clearly. Narrow arbitration clauses, however, may be appropriate where the parties want certain disputes to be litigated in court and not subject to arbitration (*e.g.*, fraud in the inducement). If that is the case, parties should make this clear in the drafting of their dispute resolution clause. If, however, parties want all disputes concerning the contract subject to arbitration, whether the dispute is about the formation, interpretation, or application of the contract, then the dispute resolution clause should be written broadly and clearly to ensure that there is no ambiguity about the broad scope of the clause.

Presence of Both an Arbitration Clause and a Service-of-Suit Clause

Another cause of litigation over arbitration clauses is the presence in a reinsurance agreement of both an arbitration clause and a service-of-suit clause. Most courts hold that an arbitration clause and a service-of-suit provision are to be read as being compatible with one another. Essentially, these courts hold that an arbitration clause takes precedence over a service-of-suit clause and that a service-of-suit clause provides an auxiliary role to the arbitration clause.

In *Boghos v. Certain Underwriters at Lloyd's of London*,[6] the arbitration clause stated: "Notwithstanding any other item set forth herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration." The reinsurance agreement also contained a service-of-suit clause providing that the Underwriters would submit to the jurisdiction of a United States court in the event of a failure of Underwriters to pay an amount due under the insurance. Even though the dispute involved the insurer's failure to pay a claim, the court still held that the dispute must be submitted to arbitration. According to the court, the phrase "notwithstanding any other item set forth herein" clearly indicated that the parties wished to submit *all* disputes to arbitration, even if another provision could arguably lead to a different result if read in isolation.

Similar facts were present in *Security Life Ins. Co. v. Hannover Life Reassurance Co. of America*.[7] The arbitration provision was extremely broad and provided that arbitration was the "sole remedy for disputes arising under" the agreement. The service-of-suit clause applied if there was a "failure of the Reinsurer...to pay any amount claimed" under the agreement. The court stated: "the fact that the service of suit clause specifies that it applies to a 'failure to pay any amount claimed' does not exempt these specific claims from broad arbitration agreements." The court reasoned that the purpose of service-of-suit clauses was to ensure that jurisdiction over the parties can be obtained. The court stated that the two provisions were to be read in harmony with one another. That is, the service-of-suit provision would come into play in order to compel arbitration or enforce an arbitration award.

In *Gaffer Ins. Co. v. Discover Reinsurance Co.*,[8] the court held that the service-of-suit provision did not prevail over the arbitration clause even though the service-of-suit clause provided that "[n]othing in the Article constitutes...a waiver of [Gaffer's] rights to commence an action in any court of competent jurisdiction in the United States..." The court reasoned that contracts should be interpreted so as to give effect to every provision. The claim that the service-of-suit clause replaced arbitration as the mandatory dispute resolution mechanism would render the arbitration provision superfluous. Instead, the court held that the arbitration clause and the service-of-suit clause can be read as being compatible with one another. That is, parties to a reinsurance contract can mandate arbitration to resolve disputes, while also relying on the courts in order to file actions to compel arbitration or

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What these cases teach is that if the parties did not mean to limit the scope of arbitration to only those issues that concern the mere interpretation of the contract, as opposed to the failure to pay under the contract, they should have drafted the arbitration provision more clearly.

Traditional arbitration provisions in reinsurance agreements provide that the arbitrators shall interpret the contract as an "honorable engagement" rather than as a strict legal obligation. This "honorable engagement clause" affords arbitrators more flexibility in resolving a dispute and allows them to forbear from applying the strict rules of evidence and law of a particular state.

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to enforce arbitration awards.

Other courts, however, have held that the inclusion of a service-of-suit clause in a reinsurance agreement may affect the scope of the arbitration clause. In *New Hampshire Ins. Co. v. Canali Reinsurance Co.,* [9] discussed above, the court found that the presence of a service-of-suit clause may serve as evidence that the parties intended the arbitration clause to be read narrowly. In New Hampshire, the service-of-suit clause provided that disputes over amounts due under the agreement would be litigated. The court held that the inclusion of the clause demonstrates that the parties contemplated issues that would not be arbitrated if a dispute arose. According to the court, this was evidence that the arbitration clause was not to be given an all-encompassing interpretation.

Contract wording experts have addressed the service-of-suit clause issue by amending the service-of-suit clause to clearly indicate that it is not meant to override the arbitration clause or narrow the scope of the arbitration. This additional sentence added to the service-of-suit clause avoids sideshows like the cases discussed above and gets the parties focused back on resolving the substantive dispute between them.

Presence of Both an Arbitration Clause and a Choice-of-Law Provision

Like the service-of-suit clause issue, the choice-of-law clause has also caused confusion when included in a contract with an arbitration clause. Many courts hold that an arbitration clause and a choice-of-law clause can be read in harmony with one another. In *Preston v. Ferrer*,[10] the United States Supreme Court cited its decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.* and stated that the "best way to harmonize" the two clauses is to read the choice-of-law clause to encompass the selected state's substantive principles, but to not give effect to special rules that would limit the authority of arbitrators.

Some courts have held that the inclusion of a choice-of-law provision in a reinsurance agreement may affect the application of the arbitration clause. In *Security Ins. Co. v. TIG Ins. Co.*,[11] the Second Circuit Court of Appeals applied California law under the choice-of-law clause in the arbitration agreement in order to stay a reinsurance arbitration pending the result of a related litigation. The court noted that California abides by the proposition that sophisticated commercial parties include a choice-of-law clause in order to control the entire agreement. The court held that by including a broad choice-of-law clause, the parties intended to incorporate California's procedural rules for arbitration, including any special rules that limit the availability of arbitration under California law. Because this was the case, the Second Circuit held that a special rule under the California Civil Procedure Code applied, which permits a court to stay arbitration pending the outcome of an ongoing litigation that arises under the same transaction.

A choice-of-law clause may affect the substantive law governing the arbitration unless the parties make it clear how they wish the arbitrators to interpret the contract. As seen below, reinsurance contracts often have a provision that deals with this issue, the honorable engagement clause, which affects the arbitration panel's role in interpreting the law.

The Honorable Engagement Clause

Traditional arbitration provisions in reinsurance agreements provide that the arbitrators shall interpret the contract as an "honorable engagement" rather than as a strict legal obligation. This "honorable engagement clause" affords arbitrators more flexibility in resolving a dispute and allows them to forbear from applying the strict rules of evidence and law of a particular state. Arbitrators are given broad discretion to base their decisions on fairness and on the custom and common practice in the reinsurance industry. Arbitrators are thus freed from the duty to follow a strict construction of the agreement's text. The inclusion of an honorable engagement clause, however, may lead to an interpretation of a reinsurance agreement that was not intended by the parties, and may also lead to litigation over the extent of the discretion given to the arbitrators to depart from express contractual terms.

In *Garamendi v. California Compensation Ins. Co.*,[12] the reinsurance agreement contained a clause providing that the arbitrators shall consider the contract as an "honorable engagement rather than merely as a legal obligation" and that they are "relieved of all

judicial formalities and may abstain from following the strict rules of law." In this case, the reinsurer sought rescission based on claims of material misrepresentation and concealment of material facts. Although an applicable section of the California Insurance Code created a right to return of premium upon the rescission of an insurance contract, the arbitration panel ordered that only a portion of the premium be returned to reinsurer.

On review, the court vacated the arbitration award stating that an arbitration panel cannot violate a party's statutory rights even if an honorable engagement clause is included in a reinsurance contract. The court also noted that the arbitration panel lacked the authority to award arbitration fees to the reinsurer where the insurance contract expressly provided that each party would bear the cost of its own arbitrator, and that the joint arbitration costs would be split evenly between the parties. The court explained that although the honorable engagement clause relieves the arbitrators from following strict rules of procedure or law, arbitrators "are not, because of such freedom, released from the obligation to be guided by the basic agreement of the litigants."

In *Nationwide Mut. Ins. Co. v. Home Ins. Co.*,[13] the cedent entered into a reinsurance contract with the reinsurer. The cedent then entered into an assumption agreement with a third party. The Sixth Circuit Court of Appeals held that the arbitration panel could not order the reinsurer to make payments directly to the third party despite the presence of an honorable engagement clause. The court found that an arbitration panel's jurisdiction is limited to the debts related to the reinsurance contract at issue and does not reach to include debts that are external to the particular contract before the arbitration panel. The Sixth Circuit stated that although an honorable engagement clause allows the arbitration panel to abstain from following strict rules of contract interpretation, "it does not give the panel the power to exceed its own jurisdiction."

These cases demonstrate that the courts will not allow an arbitration panel to exceed its jurisdiction or vitiate the parties' contract rights because the reinsurance contract contains an honorable engagement provision in its arbitration clause. Clarity in the honorable engagement provision goes a long way toward avoiding litigation over the scope of an arbitration panel's power under that clause.

Other Ambiguous Provisions in Arbitration Clauses That Create Disputes

A number of disputes have arisen over other ambiguous provisions or terms used in arbitration clauses of reinsurance agreements. For example, disputes have arisen over the ambiguity regarding the time period allocated for the selection of the arbitration panel. In *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*,[14] the arbitration agreement called for either party to appoint an arbitrator "within thirty days after receipt of written notice" from the other party requesting it to do so. Litigation arose regarding the interpretation of the term "thirty days." Argonaut contended that "thirty days" did not mean thirty days if the thirtieth day fell on a weekend or holiday. Lloyd's urged a strict interpretation of the reinsurance agreement, contending that thirty days means thirty days regardless of what day of the week the thirtieth day fell on. The court held that in the absence of an express provision in the agreement, "[t]hirty days must mean thirty days."

Not all courts interpret time limitation provisions so strictly. In *Ancon Ins. Co. (U.K.) Ltd. v. GE Reinsurance Corp.*,[15] the court declined to strictly enforce an adverse selection clause in a reinsurance agreement. This adverse selection clause provided that if a party failed to appoint its arbitrator within thirty days of receiving written notice requesting it to do so, then the other party would get to choose two arbitrators instead of just one. According to the court, strictly enforcing the provision would vitiate the intent of the Federal Arbitration Act. The court noted that the result may have been different if the agreement made it clear that time was of the essence. Otherwise, said the court, a party that acts in good faith should not be stripped of the right to appoint an arbitrator. The majority rule, however, is that the adverse selection clause will be strictly enforced.

Litigation also has resulted from ambiguity over whether arbitration agreements under separate contracts underlying larger reinsurance programs call for consolidated or class arbitration, or for separate arbitrations. The clear trend among courts is to defer to arbitrators the question of consolidation, finding that the question is procedural in nature.

In *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*,[16] a dispute arose as to whether separate contracts underlying a reinsurance program must have separate arbitrations or whether they must be consolidated for purposes of arbitration. The court cited extensive precedent for the proposition that where a reinsurance agreement is silent, the issue of whether parties are entitled to individualized arbitration or to consolidated arbitration is a procedural question for arbitrators to decide.

In *Dorinco Reinsurance Co. v. ACE Am. Ins. Co.*,[17] the cedent entered into a common reinsurance agreement (as well as individual slip agreements) with sixteen separate reinsurers. A dispute arose as to whether each one of the sixteen reinsurers was entitled to its own arbitration panel, or whether all of the reinsurers had to arbitrate as a group. The court concluded that the arbitration provision was ambiguous in addressing each reinsurer's right to separate arbitration proceedings. The court held that the arbitrators should determine the structure of the parties' arbitration absent an express provision in the arbitration agreement.

Some courts find that ambiguity can be present even if a reinsurance contract seems unambiguous on its face. Litigation has arisen because of such "latent" ambiguities in arbitration clauses. In *Medical Ins. Exchange of California v. Certain Underwriters at Lloyds, London*,[18] the arbitration provision contained an exception providing that if any matters in a dispute involve "allegations of misrepresentation, non-disclosure, concealment,

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Very often, parties to a reinsurance contract give short shrift in the negotiating process to the dispute resolution clause, often accepting boilerplate language from the reinsurance intermediary or from the cedent. And while marketing and underwriting personnel would rather assume that disputes will never happen, care in drafting the dispute resolution clause will inure to the benefit of both parties when disputes do arise.

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or fraud, then either party shall have the right to litigate and shall not be compelled to arbitrate those or any other matters in dispute." The court held that there was a latent ambiguity in the arbitration clause because extrinsic evidence revealed more than one possible meaning. Although fraud was being alleged by the claimant, the court held that the allegation did not fall within the exception because extrinsic evidence revealed that the parties intended the exception to apply only to disputes as to the validity of the contract.

Each of these cases demonstrates that ambiguous language will result in unnecessary collateral litigation.

Conclusion

This brief tour of recent court decisions arising from disputes over the interpretation of various provisions within arbitration clauses in reinsurance contracts leads to the conclusion that many arbitration clauses need clarity. Of course, no contract provision will be immune from a party's challenge to its meaning, but these cases help reveal areas of ambiguity that can be addressed by providing clear language reflecting the parties' intent.

Very often, parties to a reinsurance contract give short shrift in the negotiating process to the dispute resolution clause, often accepting boilerplate language from the reinsurance intermediary or from the cedent. And while marketing and underwriting personnel would rather assume that disputes will never happen, care in drafting the dispute resolution clause will inure to the benefit of both parties when disputes do arise.▼

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1 *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001), *cert denied sub nom Negoce v. Blystad Shipping & Trading, Inc.*, 534 U.S. 1020, 122 (2001).

2 *Gerling Global Reinsurance Co. v. ACE Prop. & Cas. Ins. Co.*, 42 Fed. Supp. 522 (2d Cir. 2002).

3 *Gerling Global Reinsurance Co. v. The Home Ins. Co.*, No. 2125N, 2002 N.Y. App. Div. LEXIS 12519 (N.Y. App. Div. Dec. 12, 2002) (*citing Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001)), *cert denied sub nom Negoce v. Blystad Shipping & Trading, Inc.*, 534 U.S. 1020, 122 (2001)).

4 *New Hampshire Ins. Co. v. Canali Reinsurance Co.*, No. 03 Civ. 8889LTSDCF, 2004 WL 769775 (S.D.N.Y. April 12, 2004).

5 *Railroad Ins. Underwriters v. Certain Underwriters at Lloyd's London*, No. 07-cv-3071(LLS), (S.D.N.Y. Jun. 4, 2007) (mem.).

6 *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495 (Cal. 2005).

7 *Sec. Life Ins. Co. v. Hannover Life Reassurance Co. of America*, 167 F. Supp. 2d 1086, 1089 (D. Minn. 2001).

8 *Gaffer Ins. Co. v. Discover Reinsurance Co.*, 936 A.2d 1109 (Pa. Super. 2007); *see also Credit Gen. Ins. Co. v. John Hancock Mut. Life Ins. Co.*, No. 1:99 VC 02690, 2000 U.S. Dist. LEXIS 9003 (N.D. Ohio May 30, 2000) (stating that arbitration clauses, even those without specific language stating that arbitration is a precedent to any right of action, are enforceable despite the presence of a service-of-suit clause).

9 *New Hampshire Ins. Co. v. Canali Reinsurance Co.*, No. 03 Civ. 8889LTSDCF, 2004 WL 769775 (S.D.N.Y. April 12, 2004).

10 *Preston v. Ferrer*, 128 S. Ct. 978, (2008), citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

11 *Security Ins. Co. v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004).

12 *Garamendi v. California Compensation Ins. Co.*, No. B177760, 2005 Cal. App. Unpub. LEXIS 11799 (Cal. Ct. App. Dec. 21, 2005) (citing *Firestone Tire & Rubber Co. v. United Rubber Workers,* 168 Cal. App. 2d 444 (Cal. Ct. App. 1959).

13 *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 849 (6th Cir. 2003).

14 *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 582 (7th Cir. 2007).

15 *Ancon Ins. Co. (U.K.) Ltd. v. GE Reins. Corp*, No. 06-2106-CM, 2007 U.S. Dist. LEXIS 24822 (D. Kan. Mar. 30, 2007).

16 *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 58 (3d Cir. 2007); see also Argonaut Ins. Co. v. Century Indem. Co., No. 05-5355, 2007 U.S. Dist. LEXIS 65863 (E.D. Pa. Sept. 6, 2007) (holding that the issue of which of multiple arbitration panel was the appropriate body to hear a case is a matter of arbitral procedure for the arbitrators to decide); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573 (7th Cir. 2006) (holding that where an arbitration agreement is silent on consolidation, the question of consolidation is a procedural question for the arbitrators to decide, and not a question of arbitrability for the courts).

17 *Dorinco Reinsurance Co. v. ACE Am. Ins. Co.*, No. 07-12622, 2008 WL 192270 (E.D.Mich. Jan. 23, 2008).

18 *Medical Ins. Exchange of Cal. v. Certain Underwriters at Lloyds, London,* No. C 05-2609, 2006 WL 463531 (N.D. Cal. 2006).

Law Committee Case Summaries

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

As of the middle of February 2009, there were 48 published case summaries and three regulation summaries on the website. The committee encourages members to review the existing summaries and to routinely peruse this section for new additions

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

KX Reinsurance Co. v. General Reinsurance Co., 2008 WL 4904882 (S.D.N.Y.)

Court: United States District Court For The Southern District Of New York

Date Decided: November 14, 2008

Issue Decided: Whether an Arbitration Panel May Retain Jurisdiction over the Parties after Issuing Its Final Award

Submitted by: Michele L. Jacobson, Esq. and Andrew S. Lewner, Esq*

In *KX Reinsurance Co. v. General Reinsurance Co.*, the United States District Court for the Southern District of New York held that an arbitration panel is not permitted to retain jurisdiction over a dispute once it has issued its final award. In so holding, the Court vacated a portion of an arbitration award that provided that the panel would remain constituted until both parties expressly requested that it desist. The Court confirmed the remainder of the award.

Background

Between 1975 and 1979, General Reinsurance Company ("Gen Re") and North Star Reinsurance Corporation ("North Star" and together with Gen Re, "Respondents") separately entered into several reinsurance treaties with KX Reinsurance Company ("KX"). Id. at *1. Pursuant to these treaties, KX agreed to provide excess of loss reinsurance to both Gen Re and North Star. Each of these reinsurance treaties contained an identical arbitration clause, which required arbitration for "any dispute arising between the parties with respect to the interpretation of this Agreement or the rights of the parties in connection with any transaction hereunder." *Id*. The arbitration clause further provided that the arbitrators "are relieved from all judicial formalities and may abstain from following the strict rules of law." *Id*.

On April 19, 2007, Gen Re and North Star separately initiated arbitration proceedings against KX seeking to collect money that KX allegedly owed under the various excess of loss reinsurance treaties, and seeking to force KX to comply with a "letter of credit" clause that required KX to collateralize outstanding balances and reserves.[1] In their arbitration demands, both Gen Re and North Star sought:

a) "An Interim Award requiring [KX] to post security for . . . the full amount of its outstanding balances and current outstanding reserves for the treaties;"

b) "A Final Award requiring [KX] to pay the outstanding balances . . . plus additional balances that may thereafter become due;"

c) "A Final Award requiring [KX] to post acceptable security for its share of the outstanding balance;"

d) "A Final Award requiring [KX] to post acceptable security for its share of [Gen Re and North Star]'s reserves on a going forward basis;" and

e) "An award of interest, attorney's fees, and other appropriate relief."

Id.

On November 7, 2007, the Panel issued an interim order granting Respondents' request for security. *Id*. at *2. In its interim order, the Panel stated that Respondents were permitted to "request additional security" after February 15, 2008. KX subsequently settled a portion of the claims involved in the arbitration, and applied to the panel to reduce the amount of its posted security. *Id*. The Panel granted this request, and in so doing stated that KX was also permitted "to request further deductions . . . based on future payments made" after February 15, 2008. *Id*.

On March 25, 2008, KX informed Respondents and the Panel that it would withdraw its defense with respect to the letter of credit clause. *Id*. Respondents, in turn, drafted a stipulation which provided that KX could withdraw its defense to the letter of credit clause, with prejudice, and that the security that KX had posted pursuant to the Panel's interim order would remain in force after the conclusion of the arbitration. KX never signed the proposed stipulation. *Id*.

The Panel issued its Award on June 5, 2008 (the "Award"), requiring KX to pay on all claims remaining at issue in the arbitration, and to further pay interest to Respondents, as well as Respondents' fees, costs and expenses. *Id*. The Panel denied Respondents' request for bad faith damages, as well as Respondents' request for a claims protocol governing all future claims. In recognition of KX's decision to withdraw its defense to the letter of credit provisions, the Award incorporated the Panel's prior November 7, 2007 interim order requiring KX to post security. Finally, while the Award stated that all "other requests put forward by the parties that have not already been addressed by this Award are denied," the Award further provided that "the Panel will remain duly constituted until such time

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as all parties request that we stepdown (sic)." *Id*.

Following KX's payment of all damages required by the Award, KX requested that the Panel confirm that it had been disbanded. Id. at *3. Respondents opposed disbandment of the Panel on two grounds: First, Respondents maintained that KX had yet to pay balances due on certain claims that were not addressed by the Panel's Award. Second, Respondents argued that KX should be forced to post additional collateral to avoid a future collateral shortfall. After the Panel rejected KX's request that it disband, KX sought confirmation of all parts of the Award, with the exception of the Panel's retention of jurisdiction, which it sought to vacate. *Id*.

Confirmation of Arbitral Awards

The Court initially discussed the policy in favor of confirming arbitration awards. *Id*. As the Court noted, "the confirmation of an arbitration award is a summary proceeding that converts a final arbitration award into a judgment of the Court." The Court also noted the strong federal policy of granting arbitral decisions "great deference." *Id*.

In addition, the Court explained that an arbitration award may only be confirmed if the award is determined to be "final." *Id*. The Court noted, "an arbitration award is final where it resolves all of the issues submitted to arbitration and resolved them definitively enough so that the rights and obligations of the two parties, with respect to the issued submitted, do not stand in need of further adjudication." *Id*.

While the Award was not designated by the Panel as a "final award," the Court found that the Award's "context and scope" demonstrated that the Award was, indeed, final. *Id*. at *4. The Court based this determination upon the following factors: (1) the arbitration clause in the treaties stated that "the decision of the majority shall be final and binding upon the contracting parties," (2) "Respondents specifically requested a final award in their demand for arbitration," (3) "the Panel introduced its ruling by noting that it had 'heard and fully considered' all evidence and arguments associated with the matters before them," and (4) "the Panel specifically stated that 'all other requests put forward by the parties that have not been addressed in this Award are hereby denied.'"

As such, the Court determined that the Award was a final award. Since the only dispute surrounding any portion of the Award involved the portion of the Award retaining jurisdiction, the Court considered whether that portion of the Award should be vacated.

Vacatur of Arbitral Awards

The Court began its analysis by noting that vacatur of an arbitration award is only proper upon a showing by the party seeking vacatur that one of the four grounds for vacatur set forth in the Federal Arbitration Act ("F.A.A.") exists. Those four grounds are:

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

Id. at *3. Focusing its analysis on Section 10(a)(4) of the FAA (which permits vacatur of an award if the arbitrators exceeded their power), the Court explained that in determining whether vacatur is proper, "the only question is whether the arbitrators had the power based on the parties' submission or the arbitration agreement, to reach certain issues, not whether the arbitrators correctly decided those issues." *Id*. at *3.

The Court explained that once an arbitration panel decides the submitted issues, "it becomes *functus officio* and lacks any further power to act. Arbitrators do not have the power to monitor the parties' compliance with the Award, unless the authority is specifically conferred on them through the parties' submissions." *Id*. In view of this standard, the Court held that the Panel exceeded its authority in retaining jurisdiction over the dispute.

In reaching this determination, the Court rejected Respondents' contention that the Panel was entitled to remain in place "because KX had yet to pay balances due on several claims *that were not addressed by the Panel in the Award*." *Id*. at *4 (emphasis in original). As the Court reasoned, the Panel's Award specifically provided that "any claims not addressed in the Award should be deemed as refused." *Id*. Thus, to the extent that claims remained unpaid, these claims were already addressed in the Panel's Award.

The Court also rejected Respondents' position that the Panel should remain constituted because Respondents anticipated that they would request that KX increase the amounts of security that KX had posted. As the Court explained, by Respondents' own admission, "Respondents had not submitted their claim for additional security in the arbitration demands," and, "as such, it was outside the parameters of the Panel's authority." *Id*. at *5.

In addition, the Court rejected Respondents' contention that the Panel's incorporation of its November 2007 interim order into the Award permitted the Panel to retain jurisdiction over the amount of security posted by KX. *Id*. Finally, the Court explained that where there were three narrow exceptions to the functus officio doctrine, none of those exceptions applied.[2] *Id*.

Accordingly, the Court confirmed all portions of the Award, with the exception of the Panel's retention of jurisdiction, which the Court vacated.▼

1 By agreement of the parties, the two separate arbitrations were consolidated.

2 The three recognized exceptions to the functus officio doctrine are: (1) if the award is ambiguous; (2) if the award has an error on its face; or (3) if the award does not adjudicate the submitted issues.

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The Tall Tree Insurance Company v. Munich Reinsurance America, Inc., No. C-08-1060 MMC, 2008 U.S. Dist LEXIS 60499 (N.D. Cal. Jul. 29, 2008)

Court: United States District Court for the Northern District of California

Date Decided: July 29, 2008

Issue Decided: Use of declaratory relief to determine reinsurance obligations

Submitted by: Dan Millea and Jennifer M. Geelan*

In *Tall Tree Ins. Co. v. Munich Re America Inc.*, the cedent sought a declaration that 1) it was obligated to reimburse its insured and 2) the reinsurer was obligated to reimburse the cedent. The Northern District of California held that the cedent failed to allege sufficient facts to demonstrate that an actual controversy existed between the cedent and its reinsurer. The court dismissed the cedent's complaint and granted the reinsurer's motion for judgment on the pleadings.

The cedent, The Tall Tree Insurance Company issued two excess liability insurance policies to Hewlett-Packard. HP "requested" that Tall Tree reimburse HP under HP's policies for defense costs incurred in a group of lawsuits entitled the "Starter Cartridge Suits." Munich Re American Inc. had issued two reinsurance policies to Tall Tree, promising to pay Tall Tree for amounts it was "legally obligated to pay" under HP's liability policies. Tall Tree believed there was coverage under HP's liability insurance policies and requested that Munich Re confirm that it would reimburse Tall Tree for payments made under the policies. Munich Re denied that it had an obligation to reimburse Tall Tree, claiming there was no coverage for the Starter Cartridge Suits under HP's policies. After Munich Re denied its obligations under the reinsurance agreement, Tall Tree sought a declaration from the court that 1) Tall Tree was obligated to reimburse HP for defense costs incurred in the Starter Cartridge Suit litigation; and 2) Munich Re was obligated to reimburse Tall Tree for any payments Tall Tree made in good faith to HP, including any interest Tall Tree paid HP for the outstanding amounts. Munich Re argued that Tall Tree failed to state a case or controversy over which the court had jurisdiction.

The court agreed with Munich Re and found that Tall Tree failed to allege sufficient facts to demonstrate that an actual controversy between Tall Tree and Munich Re existed. In determining whether such a controversy existed, the court, citing *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941), noted that the question was "whether the facts alleged, under all the circumstances, show that there is a substantive controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Under that standard, the court held that Tall Tree failed to allege sufficient facts to demonstrate that an actual controversy existed which warranted a declaration as to whether Tall Tree had an obligation to HP. The court explained that because Tall Tree sought a declaration that it had a duty to pay HP, there was no controversy between Tall Tree and HP. Additionally, Tall Tree was not claiming that Munich Re asserted any basis for precluding Tall Tree from paying HP. The court noted: "In short, [Tall Tree] can simply pay HP."

Additionally, the court held that Tall Tree failed to allege any facts to demonstrate that an actual controversy existed which warranted a declaration as to whether Munich Re would be obligated to reimburse Tall Tree for any payments Tall Tree paid in good faith to HP. While the court recognized that Munich Re had a duty to reimburse Tall Tree for payments it made to HP in good faith or to follow Tall Tree's fortunes, it held that Tall Tree's request for declaratory relief was premature. The court reasoned that until Tall Tree paid any claim that HP had submitted or would submit in the future or until a determination was made that Tall Tree was obligated to pay such a claim, there was no act for Munch Re to assess and "follow." The court dismissed Tall Tree's complaint, granting Munich Re's motion for judgment on the pleadings. The court also held that Tall Tree failed to identify any new factual allegations warranting amendment of the complaint.▼

* *Dan Millea is a partner at Zelle, Hofmann, Voelbel, Mason & Gette LLP. He has represented insurers and reinsurers in matters related to major property damage and business interruption claims.*
Jennifer Geelan is an associate at the firm.

Robert Lewis Rosen Associates Ltd. v. Webb, 2008 WL 2662015 (S.D.N.Y. 2008)

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

Date Decided: July 7, 2008

Issue Decided: Whether manifest disregard of the law remains a viable basis for vacatur of an arbitration award in the Second Circuit after the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, __ U.S. __, 128 S. Ct. 1396 (2008)?

Submitted by Michele L. Jacobson, Esq. and Regan A. Shulman, Esq.*

In *Robert Lewis Rosen Associates, Ltd. v. Webb*, 2008 WL 2662015 (S.D.N.Y. 2008), the United States District Court for the Southern District of New York held that, after the foundation of the Second Circuit's adoption of the manifest disregard standard of review for vacatur was eroded by the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, manifest disre-

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gard of the law was no longer a viable ground for vacatur in the Second Circuit. 2008 WL 2662015 at * 4.

Petitioner Robert Lewis Rosen Associates, Ltd. ("RLR") and Respondent William Webb ("Webb") had a seven year history of arbitration and litigation relating to RLR's contractual performance of career management services for Webb. 2008 WL 2662015 at * 1-2. This history culminated in RLR's filing a petition to vacate the arbitration award that dismissed its claim for attorneys' fees incurred in enforcing a judgment awarded in connection with an earlier arbitration between RLR and Webb. 2008 WL 2662015 at * 2. Rejecting RLR's contention that the award rendered was in manifest disregard of the law, the Court denied the petition for vacatur and granted Webb's cross-motion to confirm the award. 2008 WL 2662015 at * 4, 6.

The Court explained that the Second Circuit's adoption of the manifest disregard of the law standard of review for arbitration awards stemmed from its interpretation of Supreme Court dicta in *Wilko v. Swan*, 346 U.S. 427 (1953), which suggested that "'manifest disregard of the law' provide[d] an additional judicial basis for vacatur" that was not found in the federal arbitration law. 2008 WL 2662015 at * 3-4. The Court noted, however, that the Supreme Court's rejection of contractual expansion of judicial review of arbitration awards in Hall Street was based on two essential propositions that clashed with the Second Circuit's interpretation of *Wilko*: (1) that the FAA's statutory grounds for vacatur are exclusive; and (2) that "the Supreme Court ha[d] never endorsed manifest disregard as an independent basis for vacatur." 2008 WL 2662015 at * 4. Concluding that, after *Hall Street*, *Wilko* could no longer support application of the manifest disregard standard, and that the Second's Circuit adoption of that standard was based on *Wilko*, the Court held that "the manifest disregard of the law standard [was] no longer good law." 2008 WL 2662015 at * 4.

The Court also pointed out that application of the 'severely limited' manifest disregard standard as articulated by the Second Circuit would mandate denial of the petition for vacatur. 2008 WL 2662015 at * 4. The Court confirmed that even when the manifest disregard standard is applied, vacatur is only appropriate where "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law ignored by the arbitrator was well defined, explicit and clearly applicable to the case." Id. In rejecting RLR's claim that the arbitrator acted in manifest disregard of the law, the Court reasoned that that: (1) the arbitrator was not alerted to any applicable and governing legal principle which he ignored (2008 WL 2662015 at * 4-5); (2) the manifest disregard standard of review does not permit a court to substitute its own interpretation of an agreement for that of the arbitrator (2008 WL 2662015 at * 5); and (3) an arbitrator's refusal to have an evidentiary hearing before dismissing a claim as a matter of law does not satisfy the requirements for vacatur based on manifest disregard of the law (*Id.*). Finally, chiding both parties for their exploitation of the right to publicly air their grievances "to an excessive degree," the Court denied that portion of Webb's cross-motion that sought sanctions and attorneys' fees. 2008 WL 2662015 at * 6.▼

** Michele L. Jacobson is a partner, and Regan A. Shulman is special counsel, in the litigation department of Stroock & Stroock & Lavan LLP, concentrating on insurance and reinsurance litigation and arbitration.*

Recently Certified Arbitrators

Thomas E. Geissler

Thomas Geissler has been in the insurance industry for more than 25 years. He retired in 2006 after working 12 years for the Allianz Group, the financial services company based in Munich, Germany. Before moving to Allianz, Mr. Geissler worked 14 years for Hartford Steam Boiler Inspection & Insurance Company, the specialty lines insurer. Prior to joining HSB, he practiced law for four years in the Hartford area.

As President and CEO of Allianz Global Risks, Mr. Geissler led the large account insurance business in North America. In this role, he was a member of the global management team that was responsible for large Allianz multi-national clients. Previously, he was CEO of Allianz Discontinued Operations with specific responsibility for managing the orderly run-off of approximately $5 billion in reserves. Between 2001-2003, he lead the successful turnaround of the $2.2 billion Commercial Business at Fireman's Fund Insurance Company (wholly owned subsidiary of Allianz). Earlier, as President of Commercial Business, he was a member of Board of Directors. Mr. Geissler was Sr. VP of Ceded Reinsurance and was responsible for FFIC's reinsurance function that included placing programs as well as securing recoveries. At FFIC, his responsibilities included product development, property underwriting and medical malpractice. As Chairman of the Corporate Underwriting Committee, he focused heavily on CAT management.

At Hartford Steam Boiler, Mr. Geissler directed several insurance and reinsurance units. During his last three years at HSB he was responsible for the reinsurance assumed business that reinsured over 100 commercial insurers in the U.S. Prior to that assignment, he managed the Highly Protected Risk (HPR) underwriting unit. In his first eight years at HSB, he supervised the Law Department and managed all litigation nationwide, including claims.

Mr. Geissler has extensive experience in placing and resolving insurance/reinsurance claim disputes. During his time as Sr. VP of Ceded Reinsurance at FFIC, he placed coverage with London, Bermuda and the US markets both on a direct and broker basis. In pursuing recovery, he had significant transactional experience in London. Similarly, as CEO of Allianz Discontinued Operations, he dealt extensively with asbestos, environmental and surety matters on a direct and reinsurance level.

Mr. Geissler received a B.A. from Williams College and a J.D. from the University of Connecticut School of Law. He is a member of the State and Federal Bars of Connecticut▼

Thomas E. Geissler

Nancy Braddock Laughlin

Nancy Braddock Laughlin has over 20 years experience in the insurance industry. Ms. Laughlin manages her own consulting business focusing on insurance process improvement and litigation matters. Prior to having her own firm, she worked as a consultant at PricewaterhouseCoopers. Before joining PricewaterhouseCoopers, she was an in-house Risk Manager and Claims Manager for various domestic and global corporations. She has extensive experience in all commercial P&C lines in the following industries:

- Health Care
- High Tech
- Hospitality
- Manufacturing
- Oil and Gas
- Real Estate
- Transportation
- Warranty

She has provided significant project management, claims management and litigation support for her clients. Ms. Laughlin has worked for many years doing in depth forensic-type litigation support.

As a consulting expert, she has been a significant part of several multi-million dollar arbitrations and testified in several matters.

Ms. Laughlin is a graduate of Southern Methodist University with a Bachelor of Business Administration in Finance, Real Estate and Petroleum Land Management along with a minor in Geology. She also obtained her CPCU Professional Designation from the American Institute for Chartered Property and Casualty Underwriters.▼

Nancy Braddock Laughlin

David C. McLauchlan

David McLauchlan has over 36 years of experience in insurance and reinsurance coverage litigation, arbitration and mediation, complex

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David C. McLauchlan

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

Steven A. Mestman

Graeme Mew

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business litigation, professional liability, construction litigation, aviation law and client counseling. He has served as lead trial counsel in numerous cases involving asbestos and environmental insurance coverage. He has represented foreign and domestic carriers and businesses in a myriad of business disputes trying cases all over the United States before State and Federal Courts, tribunals and arbitration panels.

In January, Mr. McLauchlan became an ARIAS•U.S. Certified Arbitrator and completed the CPR Advanced Mediator Training Course. Mr. McLauchlan holds a law degree from the University of Illinois College of Law and BA degree from Bradley University. He is admitted to practice law before the Illinois Supreme Court, the United States District Court, a member of the Trial Bar of the Northern District of Illinois, and the United States Supreme Court.

He has been recognized by the Leading Lawyers Network, selected by Illinois Super Lawyers and is AV peer rated as published by Martindale Hubbell. Mr. McLauchlan has spent his entire legal career with the law firm of Lord Bissell & Brook, which became Locke Lord Bissell & Liddell LLP via merger in 2007. He became a partner in the firm in 1980 and retired from the firm in December 2008. During his tenure with the firm, he has served as a member of the firm's Executive Committee, Compensation, Hiring and Technology Committees and as Practice Group Leader and Chairman of the firm's London Insurance and Reinsurance Practice Group. In January 2009, he founded The McLauchlan Law Group LLC in order to focus on the arbitration and mediation of disputes. A resident of Chicago, Illinois, he is an avid golfer, skier, motorcyclist, and aviation enthusiast and active instrument-rated pilot for over twenty years.▼

Steven A. Mestman

Steven Mestman retired in 2008 after more than 31 years of combined service with Everest Reinsurance Company and its predecessor Company, Prudential Reinsurance Company. He was Executive Vice President in charge of the domestic Casualty Treaty and Casualty Facultative Reinsurance Underwriting Departments, the Surety Treaty Reinsurance Underwriting Department, and the Contract Wording Department, servicing all of the underwriting departments, domestic and internationally.

At Everest Re, Mr. Mestman was responsible for establishing underwriting policy, strategic planning, market forecasting, budgeting, staffing, and profit/loss results for each of the underwriting departments reporting to him. With respect to contract wording matters, he was responsible for determining Everest Re's preferred wordings on treaty contracts and facultative certificates. His duties also included regular interaction and coordination with other Everest Re senior officers in the Claims and Legal Departments on any issues of substance which could impact underwriting results and/or contract wording terms and conditions. Mr. Mestman has had extensive experience in underwriting virtually all classes of casualty and specialty insurance during his career.

Prior to joining Everest Re, Mr. Mestman spent eight years in the insurance industry serving initially for five years as a multi-line property and casualty claims adjuster, casualty underwriter, and casualty underwriting supervisor for the Hartford Insurance Group. Subsequently, he was a marketing manager for an insurance agency.

Mr. Mestman received a Bachelor of Science degree from the University Of Missouri School Of Business. He is a Chartered Property and Casualty Underwriter (CPCU), and is a member of the Professional Liability Underwriting Society (PLUS). He has served on various industry boards and associations including the Everest Reinsurance Company Board of Directors and the IRU. He has prepared and presented numerous educational seminars, both domestically and internationally, to insurance company executives focusing on coverage analysis and best practices applicable for underwriting of casualty and specialty insurance products.▼

Graeme Mew

Graeme Mew has a transatlantic practice as a lawyer, mediator and arbitrator with offices in Toronto and London. He is ranked by the *Canadian Legal Lexpert Directory* as a Leading Lawyer in Litigation – Commercial Insurance, International Commercial Arbitration and Professional Liability, and by Best Lawyers in Canada in Insurance Law (Litigation) and International Arbitration (Arbitrator and Counsel). His extensive insurance and reinsurance experience includes reinsurance (for cedants and reinsurers) professional indem-

nity, directors' and officers' liability, general liability, transportation, property, accident & health and special/surplus lines work.

Currently, Mr. Mew is a partner at Nicholl Paskell-Mede LLP's Toronto office (www.npm.ca) and a member of the Chambers of Jeremy Stuart-Smith QC at Four New Square in London (www.4newsquare.com). He has practised law since 1983 and is licensed in England & Wales (as a barrister) and Ontario and has been admitted *pro hac vice* by the United States District Court in the US Virgin Islands. He has advised in respect of matters in Bermuda, Barbados, Turks & Caicos Islands and Cayman Islands and regularly monitors and supervises insurance litigation in the United States, Bermuda and the Caribbean.

Mr. Mew has mediated over 350 cases as a neutral and has served as a sole arbitrator/adjudicator or panel member in over 50 cases that have proceeded to a final award. He is a panel arbitrator and mediator for the International Centre for Dispute Resolution (ICDR) based in New York and for ADR Chambers in Toronto. He is also an arbitrator for the Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland.

Mr. Mew is the author of *The Law of Limitations* (LexisNexis) and of numerous articles on insurance, civil litigation and related topics. He served as President of the Commonwealth Lawyers Association from 2005-2007. He was an Appeal Panel member at the 2003 and 2007 Rugby World Cup tournaments. He is a Canadian and British citizen.▼

Charles J. Moxley, Jr.

Charles Moxley has specialized in insurance industry cases as a litigator in New York for over 35 years, representing insurance and reinsurance companies and State Regulators in a wide range of coverage, fraud, and commercial tort cases. His practice has primarily consisted of large complex cases involving high stakes, multiple parties, scores of witnesses, and intricate factual and legal issues.

A substantial portion of Mr. Moxley professional life is spent serving as an arbitrator and mediator. He has been an arbitrator on American Arbitration Association commercial and large and complex case panels for over 30 years, presiding over more than 125 cases, including numerous coverage cases. He was umpire in many of these cases, and, in others, was a panelist or sole arbitrator. He has also served as court-appointed mediator in complex commercial cases, settling many of them.

Mr. Moxley is Adjunct Professor of Law at Fordham Law School and previously taught at St. John's and New York Law Schools, teaching primarily in the litigation/dispute resolution area. He has written on ADR, including recent articles on discovery in arbitration, in the American Arbitration Association's *Dispute Resolution Journal* and in the *New York Dispute Resolution Lawyer*, a publication of the Dispute Resolution Section (DR Section) of the New York State Bar Association (NYSBA).

Mr. Moxley is active in bar association activities relating to ADR. He is currently Co-Chair of the Legislation Committee of the NYSBA's DR Section and a member of the Arbitration Committee of the New York City Bar and of the Arbitration and Mediation Committees of the American Bar Association.

Mr. Moxley is Of Counsel to Kaplan Fox & Kilsheimer LLP in New York City. He is a graduate of Columbia Law School and Fordham University and received his legal training at Davis Polk & Wardwell following a federal court clerkship.▼

Charles J. Moxley, Jr.

Gail P. Norstrom

Gail P. Norstrom

Gail Norstrom is the President and CEO of Gulf Reinsurance Limited, Dubai, UAE. Gulf Re is a specialist reinsurer founded in May 2008 in the Dubai International Financial Centre and is regulated by the Dubai Financial Services Authority. The company writes all lines of non-life treaty reinsurance (except medical) and offers facultative reinsurance for energy, construction and other large property risks for insurance companies in the six Gulf Cooperation Council (GCC) states of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates(UAE). The shareholders of Gulf Re are (equally) Gulf Investment Corporation, the investment arm of the GCC, and Arch Capital.

Prior to joining Gulf Re in February of 2008, Mr. Norstrom spent six years as a Managing Director in Aon's National Property Broking Group in New York. This Group has the responsibility for property insurance products, risk management services as well as client property insurance program placement. In that role, Mr. Norstrom assisted Aon clients in developing property risk assessment, mitigation and risk retention / transfer strategies

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Hugh E. Reynolds, Jr.

Richard C. Wiggins

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and served as the lead broker for several global properties insurance placements. He was also a member of the team coordinating Aon's Terrorism Risk Management activities, acted as strategic advisor to Aon Property Risk Control organizations and oversaw Aon's Property Benchmarking activities.

Prior to joining Aon, Mr. Norstrom spent thirty plus years in the property insurance business, all with Industrial Risk Insurers, Hartford. He retired in June of 2001 after eight years as President and CEO. As CEO he had overall responsibility for a $600 million premium volume, 1000 person property insurance and risk management services organization and led the organization through its evolution from an Industry Association to becoming a key component in GE Capital's insurance business (now part of Swiss Re). During his career at IRI, he had responsibility for property insurance underwriting, loss control engineering, claims, marketing, as well as the design, negotiation and placement of IRI's reinsurance programs.▼

Hugh E. Reynolds, Jr.

Hugh Reynolds was admitted to practice in 1953. He served as a U.S. Army reserve officer (4 years active duty) retiring as Lt. Col. He has been with Locke Reynolds LLP for his entire professional career. Primarily, he has been a trial attorney specializing in insurance contract and coverage disputes, construction law, product liability law and general commercial disputes.

Chair - TIPS Section (1994-1995), ABA; ABA House of Delegates; Founding Fellow - American College of Construction Lawyers; Fellow - American College of Trial Lawyers; American Arbitration Association's panel for construction disputes and commercial disputes; member - American Law Institute (Drafting Committee Restatement of the Laws of Suretyship) and Sagamore Inn of Court; editor - Construction Lawyer (ABA Forum on the Construction Industry (1982-1984)); Federation of Defense and Insurance Counsel (President 1988-89); Defense Research Institute (Board of Directors).

Awards include:

- Potter Lifetime Professional Service Award, DRI, 2003
- Andrew Award for leadership and professionalism, Fidelity & Surety Committee, TIPS,1995
- Cornerstone Award for Lifetime Achievement, Forum on the Construction Industry, ABA, 1990
- Hecker Award for leadership, outreach, enthusiasm, and professionalism, TIPS, 1995

Mr. Reynolds has been involved in several hundred arbitrations as a lawyer (including two arbitrations between a ceding company and a reinsurer). He has served as an arbiter in approximately 25 arbitrations.

ADR Training; AAA Construction Mediation Conference, 2007; AAA Arbitration Awards: Safeguarding, (ACE001), 2006; AAA Chairing an Arbitration Panel (ACE005), 2005; AAA Arbitrator Ethics and Disclosure (ACE003), 2004; AAA Commercial Arbitrator II Training, 2002; AAA Arbitrator Update 2001; AAA Commercial Arbitrator Training, 1999; AAA Construction Arbitrator Training, 1997; AAA Advanced Mediator Training, 1995; ICLEF, Mediator Training Course; Faculty, CLE sessions on ADR.

Mr. Reynolds has been widely published and has given a considerable number of addresses regarding various legal matters.▼

Richard C. Wiggins

After majoring in Journalism at the University of Florida in Gainesville, Florida,

Richard Wiggins began his career as an independent insurance adjuster with GAB Business Services in 1961 and later became executive vice president of Cramer, Johnson and Wiggins, a regional adjusting firm. Since 2005, he has served as an umpire in over 200 cases involving arbitration under the insurance contract.

His background involves extensive experience in adjustment, negotiation and settlement of major property losses in Florida, the Eastern Seaboard and the Caribbean. Most of his work was with the London market and domestic excess and surplus line carriers.

Mr. Wiggins is certified as an umpire by Florida Windstorm Network and the Collins Center in Tallahassee, Florida. He is a former member of the International Institute of Loss Adjusters, the Loss Executive Association, and was a corporate member of NAPSLO and AAMGA.▼

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