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Evidentiary Rules in Reinsurance Arbitrations

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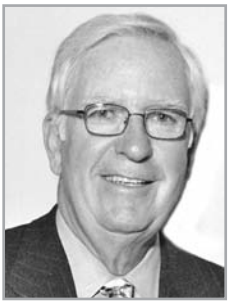

T. Richard Kennedy

editor's comments

Our cover article in this issue, *Evidentiary Rules in Reinsurance*, by Patricia Taylor Fox and Wm. Gerald McElroy, reviews the principles that underlie judicial evidentiary rules.

Although the rules, of course, are not binding on arbitrators, an understanding of their rationale can provide a very useful framework for a panel when called upon to rule on a hotly disputed evidentiary question. The article provides both an excellent refresher piece for lawyers, who have been trained in the rules of evidence, and for non-lawyers who seek a better understanding of evidentiary principles.

Robert M. Hall, in *"Inherent Authority" of Arbitration Panels to Grant Attorney's Fees and Costs*, reports on a very significant decision recently handed down by the Second Circuit. The author discusses the importance of the case on several different levels. The report is must reading, particularly for those who may still believe that the authority of an arbitration panel is limited to that expressly granted in the arbitration clause of the contract.

We are pleased also to present in this issue a report relating to the opening of the reinsurance market in Brazil. Attorney Luiz Felipe Conde, in *Arbitration in Brazilian Reinsurance Market,* points out why it is especially important in Brazil to arbitrate, rather than litigate, disputes, and examines some of the requirements, as well as potential pitfalls, for parties seeking to enter into arbitration contracts there.

Editor Gene Wollan, in his usual inimitable style, describes the qualities he would look for in a hypothetical "good lawyer." Please read *A Good Lawyer is Hard to Find*. See if you do not agree with me that the qualities listed by Gene would make not only a good lawyer, but also a good arbitrator or a good executive.

Selected for publication here are three case summaries from the many excellent Law Committee reports that appear in the ARIAS-US website. The summaries provide important information regarding how the courts are deciding issues relating to arbitration proceedings.

Summertime is upon us once again. In any leisure time that may become available to you, I hope you will take the opportunity to look at the index to Quarterly articles appearing on the website, and read any significant articles you may have missed. You will be better prepared in future arbitrations if you do.

On behalf of the Editors, I wish each of you a great summer season.

T. Richard Kennedy

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VOLUME 16 NUMBER 2

Editorial Policy

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

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

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

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

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feature

Evidentiary Rules in Reinsurance Arbitrations

This article is based on a paper presented at the ARIAS 2009 Spring Conference.

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Patricia Taylor Fox

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Some of the common evidentiary issues that may arise in a reinsurance arbitration and the principles underlying the applicable rules are discussed below.

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Introduction

Arbitration clauses in reinsurance agreements typically relieve the panel from having to follow strict rules of evidence. *See generally* Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes § 14.3 (April 2004). Moreover, unless an arbitration agreement expressly provides otherwise, it is well settled that arbitrators "possess broad latitude to determine the procedures governing their proceedings, to hear or not hear additional evidence, to decide what evidence is relevant, material or cumulative, and otherwise to restrict the scope of evidentiary submissions." *Commercial Risk Reins. Co. v. Security Ins. Co. of Hartford*, 526 F. Supp. 2d 424 (S.D.N.Y. 2007); see also Uniform Arbitration Act § 15 (Arbitration Process) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to . . . determine the admissibility, relevance, materiality and weight of any evidence."). Given that reinsurance arbitrators are selected for their industry expertise, freeing them from the obligation to strictly follow evidentiary rules makes sense.

Still, arbitrators' authority to determine the procedures governing their proceedings is tempered by the requirement to hear evidence that is pertinent and material to the controversy. 9 U.S.C. § 10; *Nationwide Mutual Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002) ("Arbitrators are 'not bound to hear all of the evidence tendered by the parties,' though they 'must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.'"). And reinsurance arbitrations have become increasingly like litigation in the past several years, with the result that arbitrators are increasing called upon to resolve evidentiary disputes. Often, these disputes are resolved in favor of "letting everything in," with the panel, like a judge, sifting through the evidence. The downside of such an approach is that it tends to lengthen the hearing, without necessarily increasing the fundamental fairness afforded the parties. Thus, while arbitrators need not strictly follow evidentiary rules, a grounding in the principles that underlie formal evidentiary rules is helpful in charting evidentiary issues that may arise in the course of the arbitration. Further, even if the arbitration panel ultimately decides to admit at the hearing evidence that would be precluded in court under federal or state rules of evidence, consideration of the rules and their rationale may affect the weight the arbitrators give to the contested evidence.

Guidance Provided By Evidentiary Rules In Reinsurance Arbitrations

Some of the common evidentiary issues that may arise in a reinsurance arbitration and the principles underlying the applicable rules are discussed below.

Burden of Proof

While not strictly speaking an evidentiary rule, the issue of who has the "burden of proof" is one that the panel frequently confronts. The party that has the "burden of proof" as to a claim or defense has the job of convincing the arbitrators – who are the triers of fact – of the correctness of its claim or defense.

The general rule in insurance cases is that the insured has the initial burden to show that its claim falls within the scope of its insurance policy and that once this burden has been met, the insurer has the burden of showing an exception or exclusion to coverage in order to defeat the claim.

International Surplus Lines Ins. Co. v. Fireman's Fund Ins. Co., 1992 WL 22223 (N.D.Ill. Jan. 31, 1992). Applied in reinsurance cases, this rule places on the cedent the initial burden to prove it "suffered a loss within the scope of its reinsurance coverage." *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 38 (1st Cir. 2000). Where it applies, the follow the settlements doctrine eases the cedent's burden and allows the cedent to establish a "prima facie"[2] case by showing it paid a claim, at least a portion of which was covered by the reinsured policy. *Commercial Union v. Seven Provinces*, 217 F.3d at 38.

Relevance

Evidence is "relevant" if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence ("FRE") 401. Thus, when a party seeks to present evidence, the first question is how does the evidence relate to the claims and defenses, or "is it relevant?"

In a litigation, relevant evidence is admissible (unless excluded for another reason), and evidence that is not relevant is excluded. Although evidence is relevant, courts may consider whether its relevance is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation. FRE 403. In an arbitration, there is no jury to confuse, and arbitrators tend to trust their ability to "sort the wheat from the chaff." Thus, arbitrators tend to apply a more relaxed test of relevance than would a court, with the main limitation being restrictions on cumulative evidence that unduly prolongs the hearing.

FRE 406 codifies the common sense notion that evidence that a person has a routine practice or habit is relevant to the issue of whether that person acted in conformity with that practice on a particular occasion at issue. As a concrete example, a lack of notes regarding an allegedly important telephone call (the existence of which is disputed) would support a claim that such a call never took place if the persons who allegedly participated in the call had a practice of memorializing important calls in writing.[3]

One category of potentially relevant evidence that is generally considered "inadmissible" in court is settlements and offers to settle, including statements made in the course of settlement negotiations, when that evidence is "offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction." FRE 408. This rule is based in part on policy reasons – the desire to promote settlements – and in part on a recognition that individuals and companies may settle claims for a host of reasons, some of which have little to do with considerations of liability. *See* Notes of Advisory Committee on Federal Rules, Rule 408. Note that the rule would not require exclusion of evidence relating to settlement negotiations when offered to rebut, for example, a claim that a reinsurer failed without excuse to pay a claim. *See* FRE 408 ("This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include... negating a contention of undue delay ..."). Likewise, where the claim is not disputed as to validity or amount, a reinsurer who uses settlement negotiations to try and renegotiate its deal cannot shield its settlement communications under FRE 408 in a subsequent litigation involving that claim. *See* FRE 408 (evidence of settlement negotiations is "not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim *that was disputed as to validity or amount*. . .") (emphasis added); *see also In re B.D. Intern. Discount Corp.*, 701 F.2d 1071, 1074 (2d Cir. 1983) (trial court properly admitted evidence of a conversation where debtor acknowledged accuracy of claim but sought to negotiate new payment schedule: "Rule 408 is limited to cases of 'compromising or attempting to compromise a claim which was disputed as to either validity or amount.' At the time of negotiation B.D.I. did not dispute Chase's claim; it was simply endeavoring to get more time in which to pay.").

Hearsay

"'Hearsay' is a statement, other than one made by [the person making the statement] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c). Subject to certain exceptions, hearsay is

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In an arbitration, there is no jury to confuse, and arbitrators tend to trust their ability to "sort the wheat from the chaff." Thus, arbitrators tend to apply a more relaxed test of relevance than would a court, with the main limitation being restrictions on cumulative evidence that unduly prolongs the hearing.

As a practical matter, arbitrators routinely allow hearsay testimony at arbitration hearings, and parties to an arbitration rarely raise this objection. Where such objections are made, however, understanding the rationale for the rule and its exceptions may assist the panel in deciding whether to admit or exclude this evidence.

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not admissible in a federal or state court trial or hearing. By way of example, a federal judge would not permit cedent to elicit from one of its employees, John Smith, testimony that one of his co-workers, Sue Doe, told Smith that the reinsurance treaty negotiated by Doe was intended to cover certain claims if the purpose for eliciting this testimony is to prove that the treaty was intended to cover those claims. Other out of court statements that are hearsay include most written documents, such as minutes of a meeting, underwriting files, etc. The rationale for this rule is that where the statement is offered for its truth, the perception, memory and sincerity of the person who made the statement cannot be tested through cross-examination.

If a prior "out of court" statement is not being offered for its truth, it is not hearsay. By way of example, if a statement is offered to show the effect it had on the listener, it is not hearsay. For example, if Sue's statement is offered to prove Smith acted in good faith when he presented the claims to the treaty, then Sue's truthfulness in making the statement is a side issue, and her out of court statement would not be hearsay. Likewise, if the statement is being offered because the fact that it was made has its own significance (such as in the giving of notice of a claim), the statement is not hearsay. A witness's own prior statement is also not considered hearsay if the witness' prior statement is inconsistent with the trial testimony and was itself given under oath or is consistent with the trial testimony and is offered to rebut the claim or suggestion that the witness' trial testimony is newly fabricated. *See* FRE 801(d)(1). In federal and state court, an important exemption from the definition of hearsay is out of court statements of a party opponent. Thus, in a dispute with reinsurer, John Smith could testify (for cedent), regarding a statement made to him by a representative of reinsurer even if the purpose of the evidence is to prove the truth of that statement. *See* FRE 801(d)(2).

Even if offered for their truth, certain "hearsay" statements are admissible in federal court based on the rationale that the circumstances under which the statement is made give it some indicia of trustworthiness (in other words, the circumstances are such that the person making the statement is not likely to be lying). The question of whether the statement was in fact made, can be tested by cross-examination of the testifying witness who allegedly heard the out of court statement. Exceptions to the rule that hearsay is inadmissible include:

- Present sense impressions. These are statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FRE 803(1).
- Excited utterances. These are statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2).
- Statements regarding "then existing mental, emotional, or physical condition." FRE 801(3). "I am angry," would be a statement of then existing emotional condition. "I *was* so angry," would not.
- Recorded recollections. These are "a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately," provided it is established that the witness created the record when the matter was fresh in the mind of the witness, and the record is accurate. FRE 801(5). For example, a witness might not remember all the questions she had when she underwrote a risk five years ago, but if she memorialized those questions in a note at the time of underwriting or when the questions were fresh in her mind, and can testify that the note is accurate, the note would be a recorded recollection.
- Business records. Although hearsay, business records are admissible if they are "made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation." FRE 801(6).

As a practical matter, arbitrators routinely allow hearsay testimony at arbitration hearings, and parties to an arbitration rarely raise this objection. Where such objections are made, however, understanding the rationale for the rule and its exceptions may assist the panel in deciding whether to admit or exclude this evidence.

Expert Testimony

Because reinsurance arbitrators are chosen for their industry knowledge, reinsurance arbitrations commonly proceed without the need for separately retained expert witnesses. Sometimes, however, the parties will request an opportunity to present expert evidence, and the panel may grant that request.

Under the Federal Rules of Evidence, a witness "qualified as an expert by knowledge, skill, experience, training, or education," may provide his or her expert opinion on a fact in issue "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." FRE 702. The facts or data that the witness relies upon in forming its opinions "may be those perceived by or made known to the expert at or before the hearing." During cross examination, the expert may be required to disclose the facts or data he or she relied upon, including any privileged communications shown to the expert.

Privilege

In a reinsurance arbitration, the issue of whether a document or other evidence is privileged will generally be governed by State law. The attorney-client privilege and work product doctrine are two of the most commonly asserted privileges in reinsurance arbitrations. Disclosure of a privileged document or other privileged information can cause the privilege to be forever lost. Likewise, a determination that a document is not privileged can have consequences beyond the arbitration in question.

In reinsurance arbitrations, reinsurers may seek discovery of privileged communications between the cedent and the attorneys who acted on cedent's behalf in connection with an underlying coverage dispute, asserting that disclosure of these otherwise privileged communications are mandated under the access to records clause or that the disclosure of such communications is protected (and does not waive the privilege) based on a "common interest" between the cedent and its reinsurer.[4]

By and large, courts have rejected reinsurer's claims that the access to records clause, as commonly worded, requires the cedent to disclose to its reinsurers privileged documents regarding the underlying claim. *See North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 369 (D.N.J. 1992) ("Although a reinsured may contractually be bound to provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination, absent more explicit language, it does not through a claims cooperation clause give up wholesale its right to preserve the confidentiality of any consultation it may have with its attorney concerning the underlying claim and its coverage determination.").

Case law is mixed on the issue of whether a cedent's disclosure of otherwise privileged communications (about the underlying claim) to its reinsurer is protected based on the "common interest" of the cedent and reinsurer. *See Durham Industries Inc. v. North River Ins. Co.*, 1980 WL 112701 (S.D.N.Y. Nov. 21, 1980) (finding common interest between cedent and reinsurer sufficient to preserve the attorney-client privilege); *Great American Surplus Lines Insurance Co. v. Ace Oil Co.*, 120 F.R.D. 533 (E.D. Cal. 1988) (same). *But see Reliance Ins. Co. v. American Lintex Corp.*, 2001 WL 604080 (S.D.N.Y. June 1, 2001) (no common interest); *American Re-Ins. Co. v. United States Fidelity & Guar. Co.*, 40 A.D.3d 486, 837 N.Y.S.2d 616, 621 (App. Div. 1st Dep't 2007) (same).

The Federal Rules of Evidence were recently (December 2008) amended to allow a federal court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court." FRE 502(d). If the court issues such an order, disclosure in the federal proceeding will not be deemed a waiver in "any other Federal or State proceeding." FRE 502(d). In contrast, an agreement solely between the parties as to the effect of disclosure will not be binding upon non-parties unless the agreement is so ordered by the court. See FRE 502(e). The non-waiver protections of FRE 502(d) and (e) are new. It is not clear whether courts would accord the same protections to similar orders issued as part of an arbitration.

Practical Observations Concerning The Role of Evidentiary Rules in Reinsurance Arbitrations

Based on the discussion above and general knowledge concerning reinsurance arbitrations, the following points can be made about the role of rules of evidence in reinsurance arbitrations:

First, one size does not fit all. As the discussion above demonstrates, the rules of evidence do have a potentially meaningful role in reinsurance arbitrations. However, the role of these rules and their impact on a reinsurance arbitration depends on the nature of the arbitration and the evidentiary issues raised. An arbitration involving a relatively small amount of money and issues which can be resolved simply by reference to the custom and practice in the industry may be best resolved under a streamlined procedure with little consideration of rules of evidence. By contrast, a reinsurance arbitration involving large dollar amounts and complex scientific and expert testimony may benefit from a more careful consideration of the rules of evidence.

Second, the composition of the arbitration panel will have an impact on the role of rules of evidence in reinsurance arbitrations. A panel that includes current or retired practicing lawyers or former judges is more apt to recognize the value of the rules of evidence as a framework for resolving evidentiary issues even if they are not strictly applied. Further, such lawyers are experienced in the application of the rules of evidence and are thus apt to be more comfortable in applying them in the arbitration setting. By contrast, a panel composed exclusively of non-lawyers who are well-versed in the "custom and practice" at issue in the arbitration may be more disposed to

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Tenth, if the determination of whether to admit evidence is a close call, and does not involve an assertion of privilege, the arbitration panel should err on the side of admitting evidence. With the exception of the admission of evidence that is unduly prejudicial or inflammatory, an arbitration award is more likely to be vacated based on a decision to exclude "pertinent and material" evidence than a decision to admit evidence.

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view compliance with rules of evidence an impediment to consideration of evidence that is normally accepted in the business world. Parties to an arbitration should, of course, be mindful of this point in the arbitration selection process. If the dispute involves very complex issues which are likely to result in thorny evidentiary disputes, there is some benefit to selecting an umpire who is well-versed in rules of evidence.

Third, it is simplistic to view the rules of evidence as simply a vehicle to exclude evidence that would otherwise be admitted under a very loose standard for admissibility of evidence. In fact, the rules of evidence may provide a very useful framework for arbitrators to consider thorny evidentiary issues that would otherwise be very difficult to navigate.

Fourth, the arbitration panel should not exclude evidence based upon a technical or procedural rule that has not been made clear to the parties in advance. The problems posed by such a ruling are illustrated in Harvey Aluminum v. United Steelworkers of America, 263 F. Supp. 488 (C.D.Cal. 1967), where the court held that the arbitrator's exclusion of evidence on the ground that it was improperly offered as rebuttal evidence as opposed to being offered during the party's case in chief violated §10(c) of the Federal Arbitration Act. According to the court, it "would not be fair to preclude material evidence based on some technical rule of evidence without some warning that the rules of evidence or some portion thereof would be followed in the arbitration hearing." 263 F. Supp. at 492.

Fifth, consideration should be given to potential evidentiary issues in advance of the arbitration hearing. To the extent there are major evidentiary issues to be addressed at the hearing, the arbitration panel is well served by a thorough briefing of the issues in advance of the hearing.

Sixth, the arbitration panel should be even-handed in its application of rules of evidence. Given the wide discretion afforded to reinsurance arbitration panels, the arbitrators may choose to consider carefully or virtually ignore the rules of evidence in making evidentiary determinations without fear that their award will be vacated on appeal. However, the arbitrators should be careful not to apply (or decide not to apply) evidentiary rules differently for one party than another. For example, the panel should avoid permitting counsel for one of the parties to ask his or her witness leading questions on an important issue, while precluding such questions when posed by counsel for the other party.[5] Even if an uneven application of evidentiary rules does not constitute a basis for vacating the panel's award, it seriously taints the reinsurance arbitration process and can lead to cynicism about the fairness of the process.

Seventh, while the arbitration panel has very broad discretion in resolving evidentiary issues at a reinsurance arbitration, consideration of evidence on an ex parte basis is prohibited. See, e.g., Goldfinger v. Lisker, 68 N.Y.2d 225, 508N.Y.S.2d 159 (1970) (vacating an award where an ex parte communication between one party and the arbitrator deprived the other party of the opportunity to respond and created the appearance of impropriety).

Eighth, counsel for the parties in a reinsurance arbitration should recognize there is in some circumstances a value to raising objections based on rules of evidence even if the panel ultimately rules in its discretion to admit the evidence at issue. For example, counsel may object to the admissibility of testimony from a proposed expert on the ground that the expert lacks the qualifications to render the opinions offered. Even if the challenge is unsuccessful, counsel has the opportunity to demonstrate why the expert's opinion should be given limited (if any) weight. The same point can be made with respect to hearsay evidence.

Ninth, the arbitration panel and counsel for the parties should be sensitive to the necessity to avoid over-litigating the case by non-productive wrangling over evidentiary issues. There is, as previously stated, a benefit to consideration of evidentiary rules in reinsurance arbitrations since the rules may further the goal of reaching a fair and just result. However, evidentiary rules can easily be abused by litigants who raise evidentiary objections at every juncture (regardless of the merits) and call for a literal and strict application of evidentiary rules in all instances in which their client's interests are furthered. By failing to exercise discretion in raising evidentiary objections, counsel may lose the benefit of evidentiary rules with respect to issues where the litigant's position is strong.

Tenth, if the determination of whether to admit evidence is a close call, and does not involve an assertion of privilege, the arbitration panel should err on the side of admitting evidence. With the exception of the admission of evidence that is unduly prejudicial or inflammatory, an arbitration award is more likely to be vacated based on a decision to exclude "pertinent and material" evidence than a decision to admit evidence. In admitting evidence that is subject to a credible challenge, the arbitration panel can add the qualification that the objections will be considered in the context of the weight to be given to the evidence.

Finally, there is an interesting interplay between the role of rules of evidence in reinsurance arbitrations and the arbitrators' own knowledge of the custom and practice in the industry. While the terms of reinsurance agreements frequently emphasize the importance of such knowledge of custom and practice in the resolution of disputes, it is also important to be mindful of the guidance evidentiary rules may provide in the way in which evidence of custom and practice is presented at the arbitration.

1 Any views expressed in this article are those of the authors and do not necessarily reflect those of AIG, Zelle Hofmann or Zelle Hofmann's clients.

2 "Prima facie" evidence is evidence that is adequate to prove the case of the party with the initial burden of proof, absent substantial opposing evidence.

3 Of course, the weight of evidence is a different issue than its admissibility, and the weight to be assigned to this evidence would vary on a case by case basis.

4 For a more detailed discussion of this issue, see John M. Nonna and Patricia A. Taylor, Considerations in an Insurers' Disclosure of Privileged Documents to Its Reinsurers, Journal of Insurance Coverage, Vol. 3, No. 3 (Summer 2000), at page 104.

5 In general, the rules discourage the use of leading questions (questions that suggest the answer) on direct examination except for background or truly uncontroverted issues. Leading questions are generally permitted on cross examination. FRE 611(c).

ARIAS•U.S. Spring Training *Moves to the West Coast!*

Every few years, it is only fair to provide members in the western half of the country a closer venue for a spring conference. Therefore, the 2010 ARIAS•U.S. Spring Conference will take place at the historic Hotel del Coronado in Coronado, California, just over the bridge from San Diego.

A National Historic Landmark, the Hotel del Coronado opened in 1888 and has, over time, become the most famous hotel in the West, serving as a vacation spot for celebrities from around the World and as the location for many movies, including the award-winning *Some Like It Hot* with Marilyn Monroe in 1958.

The Del sits at the edge of the Pacific Ocean (just down the beach from the Navy Seals training area). It provides excellent meeting facilities and, after a complete renovation, offers outstanding restaurants and accommodations.

Planning for the training sessions has not yet begun, but you can be sure that it will be, as always, the best arbitration training available.

So, mark your calendars for May 5-7, 2010. You will not want to miss this historic event!

news and notices

First ARIAS•U.S. Umpires are Certified

At its meeting on May 6, the ARIAS Board of Directors approved certification of the first-ever ARIAS umpires. Previously, umpires with three completed arbitrations were included on the Umpire List. The new requirements are more stringent.

The following arbitrators are now ARIAS•U.S. Certified Umpires:

- **John B. Deiner**
- **Ronald S. Gass**
- **Martin D. Haber**
- **James J. Phair**
- **Paul C. Thomson III**

The Umpire List will continue to be used for The Umpire Selection Procedure as the number of Certified Umpires grows. Then, on January 1, 2010, the procedure will be based only upon the names of those who have been certified.

Board Approves Cynthia Lamar and Michael Walsh as Mediators

At its meeting on March 12, the Board of Directors approved Cynthia J. Lamar as an ARIAS•U.S. Qualified Mediator. Then, at its meeting on May 6, the Board added Michael T. Walsh to the list, as well.

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

Board of Directors Certifies Four New Arbitrators

At its meeting on May 6, the ARIAS Board of Directors approved certification of the following arbitrators who had not been previously certified. Their sponsors are indicated in parentheses.

- **Darleen J. Fritz** (Timothy Rivers, James Phair, John Cowley)
- **Lawrence P. Johnsen** (James Veach, Timothy Rivers, James Phair)
- **Jason L. Katz** (Jonathan Bank, Barry Weissman, John Tickner)
- **Peter Q. Noack** (Peter Gentile, Jack Koepke, David W. Smith)

Board of Directors Certifies 23 Previous Arbitrators under New Requirements

At its meeting on March 12, the ARIAS Board of Directors approved certification of the following members under the new arbitrator certification requirements:

- **Jonathan F. Bank**
- **Robert M. Hall**
- **Andrew P. Maneval**
- **Richard D. Smith**
- **Ronald L. Wobbeking**

Then on May 6, the Board approved the following arbitrators:

- **Robert A. Bear**
- **Peter H. Bickford**
- **Bruce A. Carlson**
- **Joseph E. Carney**
- **George A. Cavell**
- **John B. Deiner**
- **Ronald S. Gass**
- **Martin D. Haber**
- **Ralph C. Hemp**
- **Keith E. Kaplan**
- **Robert B. Miller**
- **James J. Phair**
- **Raymond L. Prosser**
- **Richard M. Shaw**
- **Radley D. Sheldrick**
- **David Thirkill**
- **Paul C. Thomson III**
- **Paul Walther**

All had been previously certified.

New Area of Website Provides Member Services Committee Offers

A new section of the ARIAS website has been opened that shows all special product and service offerings that have been arranged by the Member Services Committee. Currently, the location lists the two offers that were recently announced to members by email. As new arrangements are made for additional products or services, they will be listed here for easy reference.

The "Member Services Committee Offers" area can be accessed through the navigation buttons at the left of the ARIAS•U.S. website screen.

New Arbitrator Profiles Now Include vCards.

The new ARIAS Certified Arbitrator profiles have become even newer. Every profile now displays a small file card symbol with the term "vCard" next to it. Clicking on that symbol opens a window displaying contact information for the arbitrator. These cards can be exported to PDAs and address programs for efficient filing of information.

The results pages of the Advanced Search System also include vCard links for all arbitrators whose names are listed.▼

feature

"Inherent Authority" of Arbitration Panels to Grant Attorney's Fees and Costs

Robert M. Hall

I. Introduction

In the past, arbitration panels have been regarded as ad *hoc* bodies created by the agreement of the parties and with powers limited to those stated in the reinsurance contract. However, there is a growing trend in the judiciary to allow panels considerable discretion on matters not addressed in the contract (e.g., on consolidation). A recent case in the second circuit, *ReliaStar Life Ins. Co. of N.Y. v. EMC National Life Co.*, 2009 WL 941173 (2nd Cir. 2009),[1] identifies certain "inherent authority" that a panel possesses absent a specific contractual limitation on that power. The purpose of this article is examine this case and selected prior case law to highlight the evolution of this "inherent authority" with respect to attorney's fees, costs and punitive damages.

II. Selected Prior Case Law

Marshall & Co., Inc. v. Duke, 114 F.3d 188 (11th Cir. 1997) *cert. denied* 522 U.S. 1112 (1998) involved a securities dealer arbitration. The panel denied the claims of the securities investors and awarded the securities brokers substantial attorneys' fees and costs. The Uniform Submission Agreement used for securities disputes did not address such fees and costs.[2] On a motion to confirm, the district court held that the panel was within its authority to award these costs and fees on the bases: (a) the investors agreed to the panel hearing this issue; and (b) "[E]very judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the 'American Rule.'"[3] The court of appeals affirmed and as to point (b) ruled: [T]he arbitrators have the power to award attorneys' fees pursuant to the "bad faith" exception to the American Rule that each party bears its own attorney's fees."[4]

An arbitration concerning ship refitting under the rules of the AAA provided the factual backdrop for *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991). The panel denied the claims of the ship owner and granted the shipyard compensatory damages, punitive damages, attorneys' fees and costs. The panel's stated rationale for the punitive damages was that the ship owner was guilty of bad faith, deceptive practices and knowingly false representations. The rationale for attorneys' fees was bad faith during the course of the arbitration which caused it to be extended unnecessarily. The ship owner argued the panel acted in excess of its authority under law in granting punitive damages and attorneys' fees.

The district court confirmed the award and the court of appeals affirmed. As to punitive damages, the court noted that the arbitration was pursuant to the AAA rules and that Rule 43 allowed the arbitrators to grant any remedy they deem equitable and within the scope of the agreement (but it did not specifically address costs, attorney's fees or punitive damages).[5] The court of appeals stated:

> We hold that the expansive view that has been taken of the power of arbitrators to decide disputes, coupled with the incorporation of AAA Commercial Arbitration Rule 43 by the parties, provided the arbitration panel here with the authority to make the punitive damage award.[6]

Likewise with respect to attorneys' fees, the court ruled:

> Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies, particularly when a dispute arises between parties to a commercial contract with an arbitration clause that incorporates AAA Commercial Rule 43, and which applies to every dispute arising under the agreement. In light of the broad power of arbitrators to fashion

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However, there is a growing trend in the judiciary to allow panels considerable discretion on matters not addressed in the contract (e.g., on consolidation).

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

Although AAA Commercial Rule 43 allowed the arbitrator to grant remedies that were equitable and within the scope of the agreement, it found "implausible to construe" this as justifying an award against the attorney.[8] While acknowledging that a court has the power to sanction attorneys personally as part of its "inherent power to police itself," the court found no such authority for an arbitration panel to act in similar fashion...

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> appropriate remedies and the accepted "bad faith conduct" exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award the attorneys' fees.[7]

In *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2nd Cir. 1988) the arbitrator in a labor dispute granted attorneys' fees because the employer discharged an employee without just cause, failed to comply with a prior order to reinstate, acted in bad faith in violating its contractual obligations and in bringing a spurious claim of arbitrator misconduct. The relevant collective bargaining agreement contained a broad arbitration clause but, apparently, did not specifically address attorney's fees, costs or punitive damages. The employer challenged the award as violating New York public policy barring punitive damages in labor disputes. The court of appeals upheld the award as within the power of the panel and found that it was not punitive but compensatory in order to reimburse the employee for expenses he would not have incurred had he been reinstated as ordered in the initial arbitration.

A late shipment of petrochemicals provided the context for *Interchem Asia v. Oceana Petrochemicals AG*, 373 F.Supp. 2d 340 (S.D.N.Y. 2005). The arbitrator found for Interchem and ordered that attorneys' fees be paid by Oceana and its counsel. The court declined to confirm the award against Oceana's counsel individually. Although AAA Commercial Rule 43 allowed the arbitrator to grant remedies that were equitable and within the scope of the agreement, it found this "implausible to construe" as justifying an award against the attorney.[8] While acknowledging that a court has the power to sanction attorneys personally as part of its "inherent power to police itself," the court found no such authority for an arbitration panel to act in similar fashion:

> [F]inding that the Arbitrator had inherent authority to sanction [the attorney] would directly contradict the principle that an arbitrator's authority is circumscribed by the agreement of the parties. That principle flows from the basic understanding that arbitration is a consensual arrangement meant to reflect a mutual agreement to resolve disputes outside the courtroom. Arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.[9]

III. *ReliaStar Life Ins. Co. of N.Y. v. EMC National Life Co.*, 2009 WL 941173 (2nd Cir. 2009)

The arbitration clause in the relevant contract was broad in that it included any dispute with reference to any transaction relating in any way to the treaty. It called for the panel to consider custom and practice in the life or health business. Most significantly, it provided in § 10.3:

> Each party shall bear the expense of its own arbitrator . . . and related outside attorneys' fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator.[10]

At the conclusion of an arbitrated dispute under this contract, the panel awarded the cedent nearly $4 million in attorneys' and arbitrators' fees and costs on the basis that the panel viewed the conduct of the reinsurer in the arbitration as "lacking in good faith."[11] The district court declined to confirm the award of attorneys' fees on the basis that it violated § 10.3 of the treaty and thus exceeded the panel's authority.[12]

On appeal, the court characterized the issue as "whether, in light of the parties' agreement to arbitrate, the arbitrators were authorized to sanction bad faith conduct by awarding attorney's fees and arbitrator fees."[13] The court acknowledged that a party cannot be required to arbitrate a dispute that it has not agreed to submit to panel and that the authority of the panel depends on the intention of the parties as described in the arbitration clause.[14]

As a baseline for its ruling, the court made a broad, general statement on the power of arbitration panels:

> [W]e here clarify that a broad arbitration clause, such as the one in this case, . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that sanction may include an award of attorney's or arbitrator's fees.[15]

The court took its direction on the facts of this case from the reason for arbitration as a dispute resolution technique:

> Indeed, the underlying purpose of arbitration *i.e.* efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties. Consequently, sanctions, including attorney's fees, are appropriately viewed as a remedy within an arbitrator's authority to effect the goals of arbitration.[16]

Given the broad scope of the arbitration clause, the court reasoned that §10.3 was merely a statement of the American Rule on attorney's fees which is to apply to arbitrations conducted in good faith. Absent a more specific contractual limitation on the power of the panel to grant remedies in a bad faith context, the court declined to apply this section to such a context:

> Precisely because the agreement in this case conferred broad authority on the arbitrators, because inherent in such authority is the power to sanction bad faith conduct, and because bad faith is a recognized exception to the American Rule for attorney's fees, we conclude that the simple statement of that Rule in section 10.3 is insufficient by itself to swallow the exception.[17]

The dissent, citing to *Interchem Asia v. Oceana Petrochemicals*, supra, noted its "unease" with the notion of the inherent authority of the panel due to: (a) the little effort devoted by the majority to defining the scope and limits of such authority; and (b) the apparent contradiction in "the notion of authority inhering in an arbitration panel, whose authority is derived from the agreement of the parties before it . . . ."[18]

IV. Commentary

Case law uniformly acknowledges that the authority of an arbitration panel derives from the arbitration clause of the contract at issue. However, that begs the question of whether the panel's authority is determined by what authority the clause grants or what it withholds.[19] *ReliaStar Life Ins. Co. v. EMC Life Co.* seems to answer this question.

This is a very significant case on a number of different levels. For the non-lawyers among the readership, the Second Circuit includes New York which is the largest single location for reinsurance litigation and arbitration in the United States. Thus, this decision will govern the many disputes in the Second Circuit and will be influential elsewhere.

In addition, *ReliaStar* is significant due to its specific ruling *i.e.* that: (a) an arbitration panel has "inherent authority" with respect to attorney's fees and costs in order to protect the integrity of the arbitration process; and (b) restrictions on such authority must be explicit in the contract to be effective.

Finally, this case is significant for its implicit foundation *i.e.* that an arbitration panel has inherent authority which does not derive from the arbitration agreement but may be limited thereby. It remains to be seen what additional subject matters (*e.g.* punitive damages) will be included in the inherent authority of arbitration panels as case law develops.

Endnotes

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

1 The author thanks Gail Goring of Lovells, counsel for the prevailing party, for providing the briefs on this case.
2 But an Arbitrator's Manual used for guidance stated that fees might be awarded in exceptional cases. 941 F.Supp. 1207 at 1214.
3 114 F.3d 188 at 189-90.
4 *Id.* at 190.
5 943 F.2d 1056 at 1063. *See* cases cited by the court which interpret this rule as allowing the arbitrators to grant punitive damages.
6 *Id.*
7 *Id.* at 1064.
8 373 F.Supp. 2d 340 at 357.
9 *Id.* at 53-4 (internal citations and quotation marks omitted).
10 2009 WL 941173*1.
11 *Id.**2.
12 473 F.Supp.2d 607.
13 2009 WL 941173*3.
14 *Id.**2
15 *Id.**4
16 *Id.**4.
17 *Id.**6.
18 *Id.**10
19 Obviously, the parties to a dispute may choose to grant the panel authority to decide issues or provide remedies which are beyond the scope of the panel's power, inherent or contractual.

This is a very significant case on a number of different levels. For the non-lawyers among the readership, the Second Circuit includes New York which is the largest single location for reinsurance litigation and arbitration in the United States. Thus, this decision will govern the many disputes in the Second Circuit and will be influential elsewhere.

members on the move

ARIAS•U.S. 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

Fred G. Marziano has a new company name and email address, namely, CIM and fmarziano@cim-co.com. His website is www.cim-co.com. Address and phone numbers remain the same.

Jack B. Gordon is now at Baach Robinson & Lewis PLLC, 1201 F Street, NW, Suite 500, Washington, DC 20004, phone 202-659-7975, email Jack.Gordon@baachrobinson.com.

David Webster has relocated to Reynolds Porter Chamberlain LLP, Tower Bridge House, St. Katherine's Way, London E1W 1AA, phone 020 3060 6614, cell 07710 901107, email david.webster@rpc.co.uk .

Deirdre G. Johnson is now with Crowell & Moring LLP, 1001 Pennsylvania Ave., NW, Washington, DC 20004, phone 202-624-2980, fax 202-628-5116, email djohnson@crowell.com.

Martin D. Haber can now be found at 2 East End Avenue, New York, NY 10075, phone 212-879-1270, fax 212-879-9037, cell 917-374-1462, email Haberlaw@aol.com.

While still affiliated with Home Insurance, **Jonathan Rosen** is now located at Arbitration, Mediation and Expert Witness Services, 19 West 21st Street, Suite 1104, New York, NY 10010, phone 646-330 5128, cell 917-626 2645, email jonrosen55@aol.com.

Claudia M. Morehead is in a new place...The Morehead Firm, 2901 West Coast Highway, Suite 200, Newport Beach, CA 92663, phone 949-335-1235, fax 949-335-1236, cell 949-322-0813, email cmm@morehead-law.com.

Andrew Maneval has retired from The Hartford and formed a company called Chesham Consulting, LLC, P.O. Box 300, Harrisville, NH 03450, phone 617-930-9444, email andrewmaneval@gmail.com.

Lawrence P. Johnsen has also formed a consulting company called Johnsen Re-Solutions, LLC, 27 Berman Way, Middletown, NJ 07748, phone 732-615-0625, cell 917-327-8122, email lpmj27@msn.com.

Steven C. Schwartz has joined Locke Lord Bissell & Liddell LLP at 885 Third Ave., New York, NY 10022, phone 212-812-8312, fax 212-812-8392, email sschwartz@lockelord.com.

Peter Chaffetz and **David Lindsey** have ventured out to form Chaffetz Lindsey LLP, bringing members **Charlie Scibetta** and **Cia Moss** with them. They have found a home at 1350 Avenue of the Americas, New York, NY 10019. Their new contact information is as follows: Peter Chaffetz, phone 212-257-6961, fax 212-257-6950, email peter.chaffetz@chaffetzlindsey.com; David Lindsey, phone 212-257-6966, david.lindsey@chaffetzlindsey.com, Charles Scibetta, phone 212-257-6962, email charles.scibetta@chaffetzlindsey.com; Cecilia Moss, phone 212-257-6964, email cecilia.moss@chaffetzlindsey.com. ▼

feature

Arbitration in Brazilian Reinsurance Market

Luiz Felipe Conde

Luiz Felipe Conde

The Complementary Law 126,[2] in force since 2007 in Brazil, opened the reinsurance market in this country. This law classifies the reinsurance companies in three types:

a) Local reinsurer: a reinsurer domiciled in Brazil, established as a national company;

b) Admitted reinsurer: a reinsurer with representative office in Brazil, regardless of where its home office is;

c) Eventual reinsurer: foreign reinsurance company domiciled abroad, without representative office in Brazil.

The new regulation of reinsurance agreements, in particular the CNSP[3] Resolution 168,[4] determines that in reinsurance agreements covering risks in Brazil parties must submit their conflicts to Brazilian courts and will be governed by Brazilian laws, except when stipulated otherwise by an arbitration clause.

So if a reinsurance agreement does not provide arbitration as a method to solve eventual disputes, parties will have only the Brazilian courts to solve their problems.

Unfortunately, lawsuits in Brazil are too slow and the courts are congested.[5] Moreover, Brazilian courts do not offer litigants the specialized knowledge required to resolve reinsurance disputes.

Of course, arbitration is an alternative way to avoid courts. It is regulated nowadays in Brazil by the statute 9.307,[6] in force since 1996. In 2002, Brazil also ratified and promulgated the New York Convention on recognition of foreign arbitration awards.[7] Thus, besides the statute 9.307, the rules of the Convention must also be observed by the Brazilian authorities and the parties.

The Brazilian statute on arbitration, even though it has not adopted the model statute of UNCITRAL (United Nations Commission on International Trade Law), follows UNCITRAL's principles of arbitration enforcement as a way to solve disputes.

In Brazil, arbitration may be used to settle a conflict as long as eligible parties are involved and the law that is being pled has an economic component.

Therefore, to have an arbitration procedure, all one needs is the consent of the parties. The consent may happen before the dispute itself, in an "arbitration clause," or after the conflict has already taken place, which the Brazilian statute calls an "arbitration commitment."

Regardless of when it was stipulated, the statute determines that the arbitration agreement must be explicit and stated in writing, otherwise the arbitration convention shall be considered invalid.

Several articles from the Brazilian statute still refer to the Judiciary the solution of occasional omissions or problems derived from the lack of consensus between parties.

That is what happens if the parties produce an incomplete and incapable arbitration clause to commence arbitration as soon as a dispute emerges. The Brazilian act states that in case of an omission, the interested parties shall manifest their intention to initiate the arbitration. This is called an arbitration commitment.

In this case, they must notify the other parties by mail or any other means of communication, requiring a receipt, in order to sign the arbitration commitment.

The arbitration commitment, as already explained, is an arbitration agreement signed when the conflict has already taken place, and its terms fully detail the institution and procedure of the arbitration. If the parties do not agree upon signing, it shall be done before the Judiciary.

The ideal scenario for parties is to previously settle all relevant points of the arbitration in order to avoid ending up in court, which will

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However, it is fundamental to have certain requirements delineated in the agreement beforehand, to avoid having a party refusing the arbitration, with the dispute ending up in court. If not specific enough, the arbitration clause could become a simple promise of submission to arbitration.

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lead to a waste of time and money.

The Brazilian act states that arbitration is commenced upon acceptance of appointment by the sole arbitrator or all arbitrators (as the case may be).

Therefore, for an arbitration convention to be absolute and effective it must establish two essential points: (i) the acceptance of the task by the arbitrator and (ii) the scope of the arbitration.

Because the arbitration clause is agreed before the dispute, it will not have the same complexity regarding the arbitrator and the object of the controversy as the clause of an arbitration commitment.

However, it is fundamental to have certain requirements delineated in the agreement beforehand, to avoid having a party refusing the arbitration, with the dispute ending up in court. If not specific enough, the arbitration clause could become a simple promise of submission to arbitration.

Thus, the parties must define in advance the number of arbitrators who will decide the question. The Brazilian statute does not impose a limit, but does state that there must be an odd number of arbitrators. Ordinarily, the parties have to choose between one or three arbitrators. If the latter, one will be chosen by each party and the third one by mutual agreement of the two appointed arbitrators.

It is also important to identify the future arbitrators, always keeping in mind their specialization and lack of bias. A good arbitrator must be an expert on the matter to be decided, and not necessarily a lawyer. An arbitration procedure is distinguished from the state's jurisdiction precisely because of its specialized nature. What legitimizes the arbitration award is the expertise of the person that handed it down.

It is now advisable in a reinsurance agreement to stipulate that the arbitrators be current or former professionals of insurers and reinsurers with no less than ten years of experience. They also cannot have a direct or indirect interest in the question, or connection with any of the parties involved. It is also useful to appoint substitutes for those arbitrators, avoiding future problems in case of death or impediment of the selected ones.

When it comes to determining the object of the controversy, the arbitration clause must express in a clear manner the intention of the parties to submit to arbitration. The parties may want certain issues to be resolved in court, so they have to except those issues clearly when drafting the arbitration clause.

However, it may be agreed that the arbitration will serve as the procedure for all conflicts concerning the reinsurance agreement. If the parties do write the clause broadly in that way, it will avoid ambiguity about the scope of the arbitration.

Additionally, it is necessary to determine how a party will notify its adversary of the intention to commence the arbitration procedure. In this matter, it is important to state three things: 1) the means of communication; 2) how the opposite party will be notified; and 3) the obligation of the interested party.

The Brazilian statute allows the parties to delegate to certain institutions the regulation and administration of the arbitration. The most important arbitral institutions are Brazil-Canada Chamber of Commerce and Chamber of Mediation and Arbitration of the State of Sao Paulo, both in Sao Paulo.

Once the arbitration clause has established how to appoint the arbitrators and the scope of the arbitration, it becomes easier to commence the procedure as soon as a dispute arises, thus avoiding any interference of the judiciary branch.

At this point, it is worth mentioning the decision from Sao Paulo State court, which denied the possibility of litigation because the litigant had previously bound himself by means of an arbitration clause:

> *"Arbitration commitment- judicial intervention – Unnecessity –arbitration clause established by the parties –"full" type– , in which the parties appoint the arbitrator and oblige themselves to accept the rules imposed by him, pre-existent and fully known by the parties –non-applicability of the article 7, statute 9.307/96."*
>
> ***Court decision rendered by the 7th Civil Law Court of Sao Paulo's State Court. June, 2004.***[8]

Whenever the parties agree to an arbitration clause, the statute assures autonomy to it, in such a way that an occasional annulment of the agreement does not implicate the annulment of the arbitration clause itself. This requirement is also adopted by the UNCITRAL model statute of arbitration.

The arbitration clause is, in fact, an autonomous legal act. By this clause, parties agree on excluding certain controversies from courts, promising to submit their disputes to arbitration.

The arbitration allows the parties to agree freely on the rules of law applied to the procedure. For example, parties may agree that the arbiters may abstain from following the strict rules of law and govern the arbitration by general principles of law, good customs and moral practices, or also international rules of trade.

This means that, regarding the law to be applied, freedom of choice is the rule. The same can be said about the choice regarding the seat of the arbitration.

When it comes to the law to be applied to the reinsurance agreement, it is advisable for the arbitrators to use the international practices and customs to interpret the agreement and resolve the dispute, since they tend to be uniform regardless of the country, which avoids future conflicts regarding the applicable law.

The Brazilian act does not distinguish an international arbitration and a national one. However, it is worth clarifying that law 9.307 defines a foreign award as one handed down outside the Brazilian territory (article 34, sole paragraph).[9] Therefore, if the arbitration procedure occurred outside the country (even with a Brazilian arbitrator), the award will only be enforceable in Brazil if it is "homologated" by the Superior Court.

In Brazil, we call homologation the procedure that ratifies all kinds of decisions made by a foreign court/arbitration. Parties who have cases decided elsewhere must submit the decision to the Superior Court for homologation.

The authority of the Superior Court in the act of homologation is limited; it is a mere superficial judgment, which is to say that only a few formal aspects of the foreign decision are evaluated. The merit of the dispute is not re-evaluated.

The defendant may also file for a refutation of the homologation, but, as before, the defendant's reasons must be limited to those formal aspects. If the homologation is denied by the president of Superior Court, the party may appeal to the Special Court of the Superior Court.

The homologation request is denied if the following formal requirements are not present:

- The decision was made by competent authority, under the laws of the foreign country;
- The defendant was summoned;
- The decision could not be appealed under the laws of the foreign country (it is a final decision);
- The decision was legalized by a Brazilian consul with sworn translation in Brazil.

Any foreign decision violating the public order, national sovereignty and the good moral principles of Brazil may not be homologated in Brazil.

Thus, if the reinsurance agreement has to be executed in Brazil, it is better to choose the Brazilian seat, even if the reinsurance was agreed with a local, admitted or eventual reinsurer, for the award to be considered domestic and to be in force without homologation. In this way, parties gain efficiency and speed.

Accordingly, arbitration guarantees the autonomy of the parties concerning the choice of the law to be applied, the seat and the arbitrator.

The parties must also decide in which language their acts will be performed, and the deadline for handing down an award. The Brazilian Act states six months as the deadline in case of omission;[10] but the parties and the arbitrators can agree on an extension of the legal deadline.

Finally, it is important to say a few words on the ethics commitment involved when choosing arbitration.

There is no doubt that the success of the entire arbitration procedure lies in the good faith of the parties and in the neutrality of the arbitrators.

From this interchangeable duty of loyalty, transparency and good faith one can extract the arbitration's legitimacy and also obtain a voluntary execution of the arbitration award by the parties. In order to assure ethics from everyone, it is important to establish some penalties in case the good faith duty is disobeyed.

Thus, it is very important to draft the arbitration clause clearly, in order to avoid solving contractual disputes in court.

In Brazil, a trial may last six to eight years or more, and it is incompatible with the necessary speed in trade relations, especially when values at stake are considerable. Besides, the Judiciary does not provide the necessary expertise to resolve the disputes in reinsurance.

Only arbitration can ensure autonomy for the parties to define the arbiters, the applicable law, the seat, and the rules of the dispute resolution procedure. Thus, parties can be assured that their conflict will be resolved with expertise in an appropriate time and in the best possible way. That is why arbitration is the most appropriate method for resolving disputes of reinsurance.▼

1 The author gratefully thanks Raquel Ribeiro, an attorney at Pellon & Associates, for her research and initial drafting of this paper.

2 See www.fenaseg.org.br/main.asp?View

3 National Council of Private Insurance of Brazil is a deliberative body that regulates the insurance and reinsurance policy in Brazil.

4 See www.fenaseg.org.br/main.asp?View

5 In 2003, the level of congestion in Brazilian courts reached 60%. It means that, from a total of 100 law suits filed throughout that year, 60 of them had to stand in line. Data from Brazilian Council of Justice shows that the situation is more serious in the first level of state's justice, where the level of congestion reached 80% in 2004. Valor on line at 06/20/2006.

6 See www.cbar.org.br/leis_nacionais/lei_nac_9.307_96%20_ingles.html

7 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

8 See Appeal nº 296.036-4/4, Dec. 17, 2003, SP in www.tj.sp.gov.br/consulta/Acordaos.aspx

9 See www.cbar.org.br/leis_nacionais/lei_nac_9.307_96%20_ingles.html

10 See article 23, statute 9.307at www.cbar.org.br/leis_nacionais/lei_nac_9.307_96%20_ingles.html .

Spring Conference

The 2009 Spring Conference ended on Friday May 8 to the enthusiastic applause of attendees. Comments ranged from "Great" to "Best ever."

This year's conference had some new features. For the first time, a panel of outside speakers addressed issues that did not relate directly to arbitration, but that are having a significant impact on the industry. The opening panel on "Legislative and Regulatory Update" featured experts from trade associations and companies, all located in Washington, who provided extensive insight into developments and proposals about which ARIAS members need to be aware.

The panel, moderated by Karen Valanzano of ACE Group, consisted of Alessandro Iuppa, Senior Policy Advisor at Zurich; Franklin Nutter, President of Reinsurance Association of America; Leigh Ann Pusey, President and CEO of American Insurance Association; and Joel Wood, Senior Vice President of Government Affairs for the Council of Insurance Agents & Brokers.

Also new at this conference, was a breakout into 26 small groups at the end of the day on Wednesday to allow a close-in discussion of the very spirited arguments of the simulated evidentiary hearing scenes that had just occurred in general session.

That session, itself, presented a new format as attorneys Joy Langford and Stephen Schwab dramatized scenes that might occur in an arbitration hearing where witnesses were being questioned. Procedural issues about handling of witness testimony brought sharply differing arguments from the attorneys. On each of five issues, after the argument, audience members were asked to indicate their opinions using wireless keypads, then the panel deliberated and gave its opinion, and then the audience results were shown on the screen. The technique effectively involved the audience in the discussion and drew them into the reasoning involved in making such decisions by hearing the experts addressing the issues after they had voted.

On Thursday morning, the Long Range Planning Committee addressed a number of aspects of

President Stone Opens the Meeting

Rated "Great Success"

arbitrator ethics it is currently considering. Details are available on the ARIAS•U.S. website, including the entire PowerPoint presentation from that session.

Following the LRPC, members attended two workshops from a list of seven (that they had chosen at registration), including the role of rating agencies, a discussion of the boundaries of "follow the settlements," the new ARIAS certification requirements, a D&O insurance primer, Evidence 101, Privilege 101, and time, billing and conflicts software for arbitrators. Comments were highly positive about the quality of the instruction and preparation of the presenters.

On Friday, the conference welcomed The Honorable Dennis G. Jacobs, Chief Judge of the United States Court of Appeals for the Second Circuit, who heard oral arguments on a petition to vacate an arbitration award in a fictional scenario. Following the hearing, Judge Jacobs rendered a detailed decision on the issues presented. Hearing the thorough reasoning of U.S. Chief Judge on a significant issue was a unique experience for nearly everyone.

The conference ended with a stimulating debate among distinguished arbitration practitioners from Bermuda, London, and the U.S., moderated by Dorothy Cory-Wright of London. Each participant defended the practices of his/her home country. The debate ended in a tie.

Of course, there was a time out on Thursday afternoon for rest and recreation, including golf and tennis tournaments chaired by Jim Stinson and Eric Kobrick., respectively. The tournaments drew 85 golfers and 16 tennis players.

In all, the conference was one of the most thoroughly educational events ARIAS has mounted. The 345 attendees gave rave reviews in their evaluations. The only complaint heard was that the sun was too bright at lunch on Wednesday. Additional umbrellas were brought in on Thursday, as barely a cloud was seen all through the week.

Al Iuppa, Legislative and Regulatory Panel

Legislative *and* Regulatory Panel

Al Iuppa

Leigh Ann Pusey

Joel Wood

Frank Nutter

"Scenes *from* *a* Hearing Room"

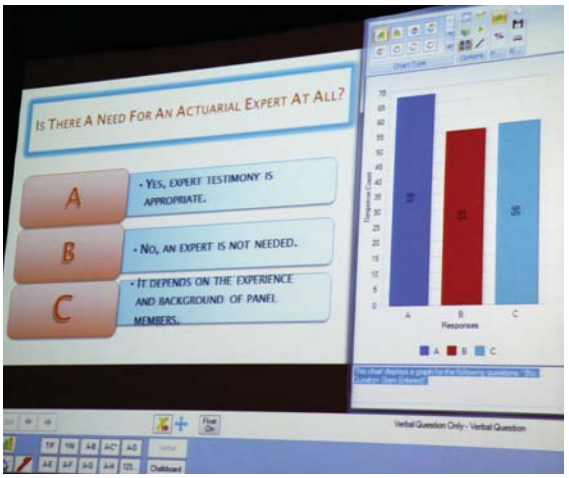
Attorneys argued.

The panel, James Phair, Robert Green and Elizabeth Thompson, questioned attorneys.

Joel Wood

The witnesses, Dennis Loring and Susan Claflin, testified.

The moderator, John Nadas, moderated.



The audience voted.

Small Group Discussions

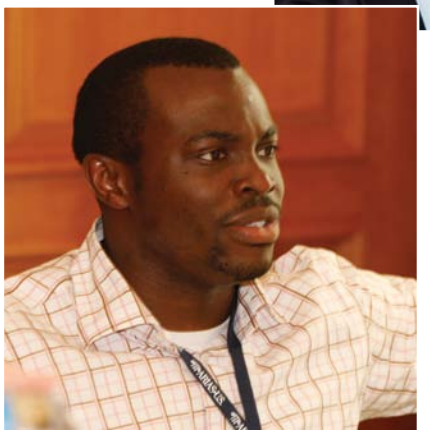
Twenty-six groups gathered around 26 tables to exchange thoughts on the issues in "Scenes from a Hearing Room."

Paul Aiudi

Clive Becker-Jones

Peter Gentile

George Pratt



Aluyah Imoisili

Steve Kennedy

Dick Shusterman

Post *Award* Challenge

Linda Dakin Grimm presents oral argument to Chief Judge Dennis Jacobs.

Breaks *and* Receptions Provided Time *for* Networking

Tony Parker, Dick White, Tony Pye and Clive Becker-Jones take a time out for a photo.

Left: Tom Geissler, Charlie Foss, Rick Rosenblum, Dick Shusterman

Carol Ann O'Dea & Dierdre Johnson

Above: Paul Hawksworth, Irene Haber, Marty Haber

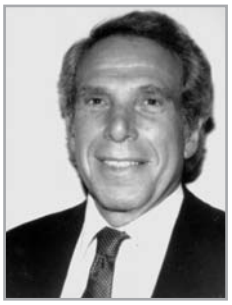
Dan Schmidt, Rich Voelbel, Larry Schiffer

off the cuff

This column appears periodically in the Quarterly. It offers thoughts and observations about reinsurance and arbitration that are outside the normal run of professional articles, often looking at the humorous side of the business.

A Good Lawyer is Hard to Find

Eugene Wollan



Eugene Wollan

A recent article in the New York Times described a new test developed by two professors at the University of California, Berkeley, that is supposed to be an improvement over the LSAT (Law School Admission Test) in predicting who will be a good lawyer.

The LSAT has been in wide use for many years, though perhaps not as far back as some folks think. In my day (circa "Remember The Maine") the only credential submitted with an application to law school was the college transcript. In fact, my law school class was one of the guinea pig groups for the LSAT; after admission, we took a primitive form of the test, and the results were later measured against our actual law school performance. This tends to substantiate the most important criticism of the LSAT, which is that it measures potential achievement in law school, not in the actual practice of law.

The new test, its proponents say, measures "raw lawyerly talent." I'd love to know what that is. And I'm not at all certain that any process (short, perhaps, of extended psychoanalysis) can predict with any accuracy what it takes to be a good lawyer.

The new test, its proponents say, measures "raw lawyerly talent." I'd love to know what that is. And I'm not at all certain that any process (short, perhaps, of extended psychoanalysis) can predict with any accuracy what it takes to be a good lawyer.

One of the oldest clichés of the profession is that law school, if it does nothing else, teaches the student to "think like a lawyer." I'm not sure what that means, either, unless it is simply a description of the disciplined, focused, rational thought process that is undoubtedly essential, but is hardly exclusive to the law. What is basically the same kind of logical analysis (albeit in a different context) is certainly necessary, for example, in engineering, but I've never heard anyone say that MIT "teaches you to think like an engineer."

But I digress. What I'm really getting at is that, without the benefit of the support system available at a major university, or of any institutional funding (the Berkeley project was financed by the Law School Admission Council, which administers the LSAT), I have come up with my own checklist of the qualities I would look for in a Diogenes-like search for that hypothetical "good lawyer."

1. **Intelligence**. Not necessarily at the Einstein or even MENSA level, but at least the capacity to understand, process, and apply information. This quality in general application is not, of course, rare, but there is one area where a bit more may be demanded than average, everyday intelligence: the ability to understand, process, and apply technical information.

   Particularly in litigation, it is frequently necessary for a lawyer to acquire some degree of expertise in an entirely different discipline —- a short-lived, half-baked expertise, to be sure, but expertise nevertheless. In order to cross-examine a metallurgist, for example, on whether the steel quality was up to specification, or a chemist on the difference between a fire and some other kind of chemical reaction, or a builder on the replacement cost of a structure, or an accountant on alternate methods of valuing inventory, you obviously need a serious level of familiarity with the technical aspects of the subject matter. You can erase it all from your conscious mind as soon as the need has passed, but you cannot escape the need to study into that other discipline and process the information well enough to use it effectively. (Of course, some lawyers don't take the trouble to do this, and as a result their cross-examinations usually consist of nothing more than hapless, ineffective floundering.)

2. **Street smarts**. This is a totally different quality from intelligence. There are many very intelligent folks out there who are quite lacking in the practical wisdom that comes from getting kicked around a bit. A typical criticism of some politicians is that they "never met a payroll," which is really just a convenient shorthand way of

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

highlighting a lack of wordly experience. Just think of the stereotype of the absent-minded professor, the brilliant mind with no understanding of the realities of life. Would you want your lawyer to be cut from that cloth?

3. **Common sense**. Closely related to street smarts, but sometimes found even in individuals who haven't been around the block often enough to have acquired the ultimate in street smarts. It requires an understanding of the practical as well as the theoretical consequences of a given course of action or strategy. It's the "tilt" button that lights up in your head when something that's superficially plausible just doesn't add up, or the instinct that warns you not to browbeat a witness the jury obviously loves.

4. **Integrity**. At its most basic level, this quality imposes the obvious requirements: adherence to the canons of ethics, avoidance of conflicts of interest, diligent performance of fiduciary responsibilities, and the like. It also, however, has more subtle aspects. Consider the lawyer who has been telling the client all along that the case is really, really strong, but then calls from the courthouse during a break in jury selection to say that the case is in the tank and must be settled right away. Or the lawyer who sabotages the settlement discussions in order to keep the meter running a bit longer. Or the one who bills one case for travel time to the overseas meeting and also bills a different case for work done on the plane. As Henny Youngman would have said: "Take them—please."

5. **Patience**. Good research requires patience, whether it is research into case law or into the finances of a corporation or into the qualifications of an expert witness. Short-cuts don't work. Modern technology is obviously a huge time saver but is no substitute for thoroughness.

6. **Composure**. A lawyer needs to be able to handle stress. Kipling described one characteristic of being a "man" as being able "to keep your head while all about you are losing theirs and blaming it on you." One of the last things a client needs to see is a lawyer in the throes of panic. A sense of humor also comes in handy at moments of extreme stress.

7. **Self-confidence** (but within limits). A lawyer certainly needs the self-assurance that will instill confidence in the client as well, and the self-possession that will communicate effectively to an adversary, a jury, or an appellate tribunal. Equally, however, a lawyer needs the ability to listen. The self-confidence cannot be so exaggerated that it reflexively rejects any other point of view, or refuses to accept new information. Sometimes there is only a fine line between estimable self-confidence and downright arrogance or cockiness. A lawyer must walk the line with care.

8. **Decisiveness**. Closely related to, and perhaps even a corollary to, self-confidence. Graduate students in philosophy can indulge in the luxury of engaging endlessly in the kind of on-the-one-hand-but-on-the-other-hand theorizing they apparently find so enthralling, but sooner or later a lawyer has to give the client some actual, honest-to-goodness advice that can be acted on. Does Delaware corporate law allow this? What are the chances of success if we litigate that (and not just in generalities, if you please, but in percentages)? Is this covered by our insurance? Answers like "maybe" don't usually do the job. It is almost always possible to hedge a bit, but at the end of the day there has to be a recommendation or a prediction or some other sort of answer.

9. **Dignity**. This is my personal protest against extreme "dressing-down". I have no problem with "business casual" dress, but there are too many folks who don't know the difference between that and just plan sloppy. A very astute observer was once heard to comment that "There's something basically wrong with a lawyer wearing docksiders and a sweatshirt telling a client that he just lost a $30,000,000 case." Amen.

10. **Language skills**. This seems to me to have three primary manifestations. First is the ability to READ, by which I mean read carefully and analytically. Whether it be a statute or a stock offering or a business contract or an insurance policy or a lease, every word in the document means something. Sometimes even the placement of a punctuation mark can be significant. Do you see the difference between an insurance policy exclusion for defective "design, plan or specification" and one for defective "design plan or specification"? (Do you even know, or care, whether there is such a thing as a "design plan"?) The second essential language skill is, of course, WRITING. Regular readers of this column (are you out there?) have already been subjected to my endless complaints about the inability of so many lawyers, especially younger ones, to write a coherent, grammatical English sentence, let alone a stylish, elegant one. The lawyer must be able to convey whatever is intended to be conveyed with clarity and precision. For the litigator there is, of course, the additional necessity of being able to write persuasively, especially when the position being advocated is unsympathetic or counterintuitive. Finally, we have the language skill of ORAL PRESENTATION. This is obviously of prime importance to a litigator, but it is also significant for any lawyer ever called upon to speak, which is to say, any lawyer. Whether the audience is a jury, or an appellate bench, or a boardroom, or a teleconference, or a business dinner, or even a casual conversation, a lawyer who cannot express the thought smoothly and articulately is in trouble. This applies particularly to any lawyer who has fallen prey to the well-nigh-universal affliction of peppering every sentence with a barrage of "likes" and "y'knows." ▼

* * * *

I have no idea how this list compares with the qualities tested by the LSAT or developed by the folks at Berkeley, but I wouldn't be surprised if it's not too far off.

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.

Global International Reinsurance Co. v. TIG Insurance Co., 2009 WL 161086 (S.D.N.Y.)

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

Date Decided: January 21, 2009

Issue Decided: Whether an arbitrator abuses his discretion and exceeds his authority by deciding a motion for summary judgment without discovery and an evidentiary hearing, and based on a document upon which the movant did not rely.

Submitted by Eric A. Haab and Kerry Slade*

In Global International Reinsurance Company v. TIG Insurance Company, the Southern District of New York held that an arbitrator need not order discovery and hold an evidentiary hearing in order to decide a motion for summary judgment after receiving documents submitted by the parties and hearing oral argument on the motion. The arbitrator was within his discretion to find that the documents were clear on their face and he did not exceed his authority by basing the decision in part on a Settlement Agreement that the movant did not submit as evidence or rely upon.

Background

In a prior arbitration between the parties, the arbitral panel ruled that Global could only apply a sublimit to its exposure to losses emanating from a specific unit of TIG's business, and instructed TIG to use certain coding definitions when submitting losses arising from the sublimit unit. A Settlement Agreement between Global and TIG provided that losses incurred from 2003 onward were reviewable for proper coding under the panel's instructions. Global subsequently sought review of pre-2003 claims, and TIG agreed in "good faith" to allow Global to review specific pre-2003 claims subject to a renewed agreement that no other claims prior to 2003 would be reviewable in the future.

In 2007, Global commenced arbitration against TIG, seeking enforcement of its rights to audit pre-2003 claims. TIG moved for partial summary judgment to bar Global from challenging any losses reported before 2003. TIG based its motion on the post-settlement agreement, rather than the Settlement Agreement itself. The parties briefed the motion and submitted numerous exhibits to the arbitrator, who heard 4 hours of oral argument on the issue. The arbitrator subsequently granted TIG's motion with respect to the right to audit pre-2003 claims and granted Global's cross-motion for an audit limited to post-2002 claims. Global petitioned the court to vacate the Award in part, arguing that it was denied a fundamentally fair hearing because the arbitrator refused to hear evidence and resolved material factual disputes without discovery or an evidentiary hearing.

Holding

The court held that the arbitrator acted within his discretion in ruling on TIG's motion for summary judgment. Because arbitral fact-finding is not expected to be as complete and formal as judicial fact-finding, the arbitrator was free to decide that further testimony and extrinsic evidence were unnecessary.

Global's argument that the arbitrator disregarded the proper standards for summary judgment was also rejected. Arbitrators are not required to detail the standards used when ruling on motions and may use "an informal variation" of summary judgment procedures. Global had an adequate opportunity to present all evidence and arguments and no more was required.

The court also rejected Global's contention that the arbitrator exceeded his authority by basing the decision in part on the Settlement Agreement, rather than the subsequent agreement on which TIG founded its motion. The Court reiterated the Second Circuit's policy of construing the grounds to vacate an award under the Federal Arbitration Act narrowly and held that the Settlement Agreement gave the arbitrator broad authority to resolve any dispute relating to or arising out of the Agreement. It was proper for the arbitrator to consider the terms of the Settlement Agreement, which Global itself submitted as evidence, despite the fact that TIG did not rely on that Agreement in support of its motion.

Eric Haab *and* **Kerry Slade** *are partner and associate, respectively, in the insurance/reinsurance group of Lovells LLP. They each represent cedents and reinsurers in disputes involving a wide variety of issues.*

Lyndon Property Insurance Co. v. Founders Insurance Company, Ltd.,587 F. Supp. 2d 333 (D. Mass. 2008)

Court: United States District Court for the District of Massachusetts

Date Decided: November 24, 2008

Issue Decided: Interpretation of contractual forum selection provision is a procedural issue appropriate for the arbitrators, not the court.

Submitted by Eric A. Haab and Jennifer L. Travers*

In Lyndon Property Ins. Co. v. Founders Ins. Co., Ltd., the parties asked the court to determine which district court was the proper venue to hear a dispute arising from arbitration. The court determined that the reinsurance agreement at issue (the "Agreement") had conflicting choice of forum provisions, and that this procedural issue was appropriate for the arbitrators, not the court.

Background

Founders Insurance Company ("Founders") reinsured Lyndon Property Insurance Company ("Lyndon"). Pursuant to the Agreement, the parties entered into an arbitration to resolve a disagreement regarding the amount of money Founders needed to set aside in reserve. Lyndon, a Missouri company, and Founders, a Bermuda-based company with its headquarters in Colorado, agreed to accommodate the arbitration panel's umpire's schedule and conduct the arbitration in Massachusetts. After the arbitration hearing, the panel ordered Founders to post prejudgment security. After Founders failed to comply, Lyndon filed a suit to enforce the order in the District Court of Massachusetts.

Holding

In response to Lyndon's Massachusetts suit, Founders filed a motion to dismiss arguing that the Agreement required a Missouri court to hear the action and that Massachusetts lacked personal jurisdiction over Founders. The court reviewed the relevant provisions of the Agreement, finding that the provisions seemed to conflict on which venue would be appropriate.

The arbitration clause of the Agreement stated that an arbitration award "may be entered in any court of any proper jurisdiction and may be enforced in any such court." Another provision of the Agreement, however, stated the Agreement should be interpreted and construed pursuant to the laws of Missouri and that the reinsurer agreed to submit to jurisdiction in Missouri.

The court stated that "the ultimate issue is how the choice of forum provisions of the Agreement, which seemingly conflict, are to be interpreted." The court began its analysis by stating that contract construction requires that "each term of a contract should be given (as best the court is able) the common sense effect that was intended by the parties." Founders argued that the Agreement provided "exclusive jurisdiction to the courts of Missouri to resolve all disputes involving the interpretation of the terms of the Agreement (including disputes over the proper choice of forum)." Lyndon disagreed, and argued that the submission-to-jurisdiction provision was not inconsistent with the forum selection clause relating to arbitration, as the submission-to-jurisdiction provision only pertained to non-arbitrable disputes.

The court found both parties' arguments to be "plausible" and "common sense readings" of the Agreement. The court, however, declined to accept either party's view of which state provided the proper forum. The court stated that "the role of the federal court in arbitration disputes [is confined] to issues of arbitrability and the confirmatory (and largely ministerial) approval of an award." It further indicated that "procedural questions which grow out of the dispute and bear on its final disposition" should be left for arbitration. Basing its decision on First Circuit precedent, the Court ruled that the interpretation and reconciliation of the Agreement's forum selection provisions is a procedural issue, and therefore, an issue appropriate for the arbitrators to decide, not the court. Accordingly, the Court granted Founders' motion to dismiss and remanded the issue back to the arbitration panel.

Eric Haab* and ***Jennifer Travers* *are partner and associate, respectively, in the insurance/reinsurance group of Lovells LLP. They each represent cedents and reinsurers in disputes involving a wide variety of issues.*

Fencourt Reinsurance Co. v. ITT Industries, Inc., No. 06-4786, 2008 U.S. Dist. LEXIS 47724 (E.D. Pa. June 20, 2008)

Court: United States District Court for the Eastern District of Pennsylvania

Date Decided: June 20, 2008

Issue Decided: Enforcement of mandatory arbitration clauses against nonsignatories

Submitted by Patricia St. Peter and Jennifer M. Geelan*

The Eastern District of Pennsylvania has held that a nonsignatory reinsurer was subject to a mandatory arbitration clause under common law agency principles governing relationships between corporations and wholly owned subsidiaries and the doctrines of equitable estoppel and third-party beneficiaries. In Fencourt Reinsurance Co. v. ITT Industries, Inc., the reinsurer, Fencourt Reinsurance Co. ("Fencourt"), filed a complaint for breach of contract, unjust enrichment, promissory estoppel, and breach of the duty of good faith, claiming that the defendant, ITT Industries, Inc. ("ITTI"), breached an agreement to indemnify Fencourt for its reinsurance obligations totaling approximately $85.5 million. ITTI moved to dismiss the plaintiff reinsurer's complaint, arguing that the dispute

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was subject to a mandatory arbitration clause, or, in the alternative, that the case should be stayed pending arbitration.

While defendant ITTI maintained that a mandatory arbitration clause in an agreement governing the relationship between the parties controlled, plaintiff Fencourt argued that because it was not a signatory to that agreement, it could not be forced to arbitrate and, thus, should be allowed to proceed with its claim in court. The Eastern District of Pennsylvania agreed with the defendant, holding that Fencourt was subject to the agreement's mandatory arbitration clause. It ordered a stay pending the resolution of the arbitration proceedings between the parties.

Background

Prior to 1995, Fencourt was a wholly owned subsidiary of ITT Corp. and while a wholly owned subsidiary of ITT Corp., Fencourt was required to provide reinsurance to ITT Corp.'s insurance company Century Indemnity Company ("Century") under a domestic casualty program. Fencourt alleged that ITT Corp. promised to indemnify and hold Fencourt harmless for any net loss which Fencourt incurred in reinsuring Century under the program.

After 1995, ITT Corp. split into three unaffiliated public companies, and Fencourt became a wholly owned subsidiary of one of those public companies, ITT Hartford. In December 2004, Century made a claim for $85.5 million in reinsurance from Fencourt, and, according to Fencourt, the claim fell within the scope of the domestic casualty program. Fencourt argued that ITTI, another public company created by the ITT Corp. split, succeeded to ITT Corp.'s obligations under the domestic casualty program and asked ITTI to reimburse the losses incurred in paying Century's claim. ITTI refused to do so. When ITT Corp. split in 1995, it was accomplished through a distribution agreement ("DA") that contained a broad arbitration clause requiring mandatory arbitration for any dispute "arising out of, or in any way related to" the DA. ITTI commenced arbitration against Fencourt and ITT Hartford under the DA's arbitration clause, seeking a declaration that ITTI was not responsible for Century's demand. When Fencourt filed suit, ITTI filed a motion to dismiss, arguing that the dispute was subject to a mandatory arbitration clause or, alternatively, that the case should be stayed pending arbitration.

Parties' Contentions Regarding Application of the Mandatory Arbitration Clause

ITTI argued that Fencourt was required to arbitrate the dispute under the DA's mandatory arbitration clause. ITTI reasoned that because the DA superseded all previous agreements between the parties, Fencourt was suing under the DA and, therefore, was subject to the DA's mandatory arbitration clause. Fencourt argued that the DA's arbitration clause was irrelevant as it was suing under the indemnification agreement and not the DA. Fencourt also argued that the DA was not binding on it since Fencourt had not signed it. In response, ITTI contended that the fact that Fencourt did not sign the agreement was irrelevant since Fencourt was a third-party beneficiary under the DA. ITT Hartford and its affiliates were indemnified under the DA's indemnification provision. As Fencourt was an affiliate of ITT Hartford, it was, thus, a third-party beneficiary under the DA.

ITTI further argued that Fencourt was estopped from arguing that the DA's arbitration clause was inapplicable, because Fencourt had accepted promissory notes in connection with the DA. Finally, ITTI argued that Fencourt relied on the DA to establish that ITTI succeeded to ITT Corp.'s obligations, further estopping Fencourt from contending that the DA's arbitration provision was inapplicable.

Court's Decision

The Eastern District of Pennsylvania agreed with ITTI that Fencourt was subject to the mandatory arbitration clause in the DA, and ordered a stay of the case pending completion of the arbitration. The court held that the specific language of the DA made it clear that Fencourt was bound by the DA as a wholly owned subsidiary of ITT Corp. prior to 1995, and of ITT Hartford thereafter. Accordingly, the DA's arbitration clause covered the dispute between Fencourt and ITTI. The court concluded that the fact that Fencourt did not sign the DA was irrelevant. Under agency theory, a nonsignatory can be compelled to arbitrate. The court held that ITT Corp., as Fencourt's parent prior to the execution of the DA, and ITT Hartford, as Fencourt's parent after the execution of the DA, could bind Fencourt to the terms of the DA and did so. The court further found that Fencourt was required to arbitrate based upon the doctrine of equitable estoppel. The court noted that it is a basic premise of equitable estoppel that a party may not argue that provisions of an agreement do not apply after invoking other provisions of that same agreement. In other words, a nonsignatory may not "embrace" a contract for some purposes, and later disclaim other terms of the same contract. As Fencourt had relied on the DA and had benefited from the agreement as well, the court held that it was estopped from arguing that the DA's arbitration clause did not apply. The court's final reason for holding that Fencourt was subject to the mandatory arbitration clause in the DA was Fencourt's status as a third-party beneficiary of that agreement. Under the third-party beneficiary doctrine, a nonsignatory of an agreement may be bound by the agreement's arbitration clause where its claim arises out of the agreement under which it was intended to be a third-party beneficiary. The court held that the terms of the DA demonstrate that Fencourt was a third-party beneficiary of the DA and that Fencourt's claim against ITTI arose out of its status as a third-party beneficiary of the agreement.

* ***Patricia St. Peter*** *is a partner at Zelle Hofmann Voelbel & Mason. She concentrates her practice in the areas of complex insurance coverage, reinsurance coverage and bad faith litigation throughout the United States.* ***Jennifer Geelan*** *is an associate at the firm.*

Recently Certified Arbitrators

James S. Gkonos

James Gkonos has over 19 years experience in the insurance and reinsurance industry. He is Vice Chairman of Saul Ewing LLP's Insurance Practice Group, where he advises clients regarding an array of regulatory, transactional and litigation issues related to reinsurance/insurance including: financial guarantees; capital markets products; quota share, facultative and excess of loss reinsurance agreements; commutations; surety bonds; and insurance insolvencies. He has litigated insurance disputes in arbitration and in state and federal court.

Prior to joining Saul Ewing, Mr. Gkonos was general counsel of the surety division of Liberty Mutual Insurance Company. In that position, he was responsible for providing advice to management and underwriters on regulatory matters, structuring of domestic and international transactions, including offshore securitized transactions, and drafting of reinsurance agreements, indemnity agreements and arbitration clauses. He also handled international and domestic commercial claims, restructures and work-outs.

Preceding his employment at Liberty Mutual, Mr. Gkonos served as general counsel to the Rehabilitator of Mutual Fire, Marine and Inland Insurance Company (In Rehabilitation), then the largest U.S. insurance insolvency. His responsibilities included documentation of claim settlements for over 13,000 surplus lines claims, commutation of over 200 reinsurance agreements, supervision of arbitrations and litigation against the carrier's reinsurers, MGA's and accountants, and compliance with insurance laws and regulations. His prior positions also included positions as Associate General Counsel of Laventhol & Horwath and associate at Drinker, Biddle & Reath, specializing in complex business litigation.

Mr. Gkonos is a frequent speaker and author on issues relating to reinsurance and the intersection between insurance and the capital markets. He received his law degree from Dickinson School of Law and is licensed in Pennsylvania state and federal courts, as well as the Federal Circuit Court of Appeals and the Court of International Trade. He received his BA from the University of Delaware.▼

Lawrence P. Johnsen

Lawrence Johnsen is President and CEO of Johnsen Re-Solutions LLC ("JRS"). He serves as an arbitrator in reinsurance disputes with particular expertise in contract interpretation and complex claims. JRS also provides contract/claims analysis, audit troubleshooting, business practice reviews and contract process improvement services.

Prior to forming JRS, Mr. Johnsen was involved in the insurance and reinsurance industry for over 30 years. As Managing Director of Guy Carpenter, he coordinated all North American reinsurance contracts, managed New York claims, contracts and accounting, and served on the Contract, Claims and Fiduciary Steering Committees. Before Guy Carpenter, Mr. Johnsen was SVP, Director and Counsel of Willcox Incorporated Reinsurance Intermediaries. He directed the legal, claims, contracts, human resources, market security and catastrophe analysis areas.

Mr. Johnsen was VP of Prudential Re (now Everest Re) where he managed reinsurance contracts and worked with underwriters and claims handlers. Prior to Prudential, he was VP and Counsel of G.L. Hodson (now Willis Faber N.A.). He provided counsel on legal matters, reinsurance claims and contracts. Mr. Johnsen worked at E.W. Blanch, Co. in the mid 1980s as a broker. He structured, placed, and serviced Property and Casualty reinsurance specializing in international business. From 1978 to 1984, he was General Counsel of Ashford Holding Corporation advising companies underwriting commercial property, casualty and surety insurance, as well as the group's life, MGA, wholesale broking, reinsurance and surplus lines subsidiaries.

Mr. Johnsen served on the Broker and Reinsurance Markets Association Contract Committee during the 1980s and 1990s. He was Chairman of the Committee from 1993 to 1998. He has taught at the College of Insurance and has made numerous industry presentations. Mr. Johnsen is a graduate of New York Law School and is licensed to practice law in the State of New York. He holds the CPCU and ARe designations.▼

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James S. Gkonos

Lawrence P. Johnsen

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

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Jason L. Katz

Peter Q. Noack

Jason L. Katz

In a legal career spanning over thirty-six years, the most recent twenty-four years as the Executive Vice President and General Counsel of Farmers Insurance Group, Jason Katz has been involved in all aspects of the insurance and reinsurance industry. In his role as General Counsel, Mr. Katz was a standing member of the organization's Reinsurance Committee, Audit Committee, Executive Committee, Risk and Compliance Committee, Investment Committee, Chairman's Executive Committee and Real Estate Committee. He had responsibility for the group corporate legal function, regulatory and legislative affairs, legal counsel for the owned life company operations, claims legal services, and specialty claims litigation, corporate compliance, corporate risk and the house counsel operations. He personally provided legal oversight for major corporate acquisitions, divestitures and mergers, including all regulatory aspects.

Mr. Katz was a member of the Board of Directors of the group holding company, Farmers Group, Inc., as well as for Truck Underwriters Association, the commercial division of the organization.

As a long time advocate of Alternate Dispute Resolution, Mr. Katz introduced formal mediation and arbitration training to the organization's legal staff, and promoted the active use of ADR. Mr. Katz was personally involved in the organization's significant arbitrations and mediations, and has personally served in the capacity of arbitrator and umpire.

During his tenure, he held various positions with key industry groups and Boards, including having served on the RAND Corporation Institute for Civil Justice Board of Overseers, the Association for California Tort Reform Board of Directors, the Civil Justice Reform Group Board, as a director of the California Defense Counsel, President of Los Angeles Conference of Insurance Counsel, California State Bar Association Insurance Law Committee and the L.A. County Bar Association Corporate Law Section Executive Committee.

Mr. Katz is a frequent speaker at professional organizations on diverse insurance and reinsurance topics.▼

Peter Q. Noack

Peter Noack has over 20 years experience in the insurance industry. Most recently, he served as CEO Canada for Allianz Global. Prior to this appointment, he held various executive positions within the Cologne, Germany based Gerling Group, where he worked for 17 years. He began his career practicing law in San Francisco.

As Country CEO Canada and Chief Agent for Allianz Global Corporate and Specialty in Toronto, Mr. Noack was responsible for commercial lines business in Canada, which included large industrial risks. He served as well on the Allianz Global North America Executive Management Team.

At Gerling, Mr. Noack served as President and CEO of Gerling America Insurance Company in New York for nine years, leading a nationwide admitted property and casualty insurer. During his CEO tenure he restructured the company and profitably reunderwrote the portfolio. Concurrent with his US CEO responsibility, Mr. Noack served as Chairman of Gerling de Mexico Seguros and as Executive Director for Gerling's property and casualty business in North and South America. Prior to these responsibilities, he was Executive Vice President and Manager Western Region for Gerling America in Los Angeles. Mr. Noack began his career with the Gerling Group in Cologne, Germany as Resident US Counsel. In that capacity he was responsible for liability claims in the US and the UK. He served as Liability and Claims Manager for Gerling Spain, and did job rotations to Gerling London and Zurich, as well.

Mr. Noack has held board-level positions in all three NAFTA countries and has spent much of his career working in Europe and in Latin America. Familiar with insurance custom and practice in all these geographies, he is also fluent in German and Spanish in addition to English.

Mr. Noack received a B.A. from Lewis & Clark College (Portland), a Magister Artium from the Ludwig Maximilians Universitaet (Munich), and a JD from the University of California at Davis. He is a member of the California State Bar.▼

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INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$275	$825
FIRST-YEAR DUES AS OF APRIL 1	$183	$550 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$92	$275 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

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

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

Payment by check: Enclosed is my check in the amount of $_____
Please make checks payable to
ARIAS·U.S. (Fed. I.D. No. 13-3804860) and mail with
registration form to: ARIAS·U.S.
PO Box 9001, Mt. Vernon, NY 10552

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

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

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the By-Laws of ARIAS•U.S., and agree to abide and be bound by the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org in the About ARIAS section.

_____

Signature of Individual or Corporate Member Applicant

ARIAS U.S.
P.O. Box 9001
Mt. Vernon, NY 10552

ARIAS U.S. Board of Directors

Administration