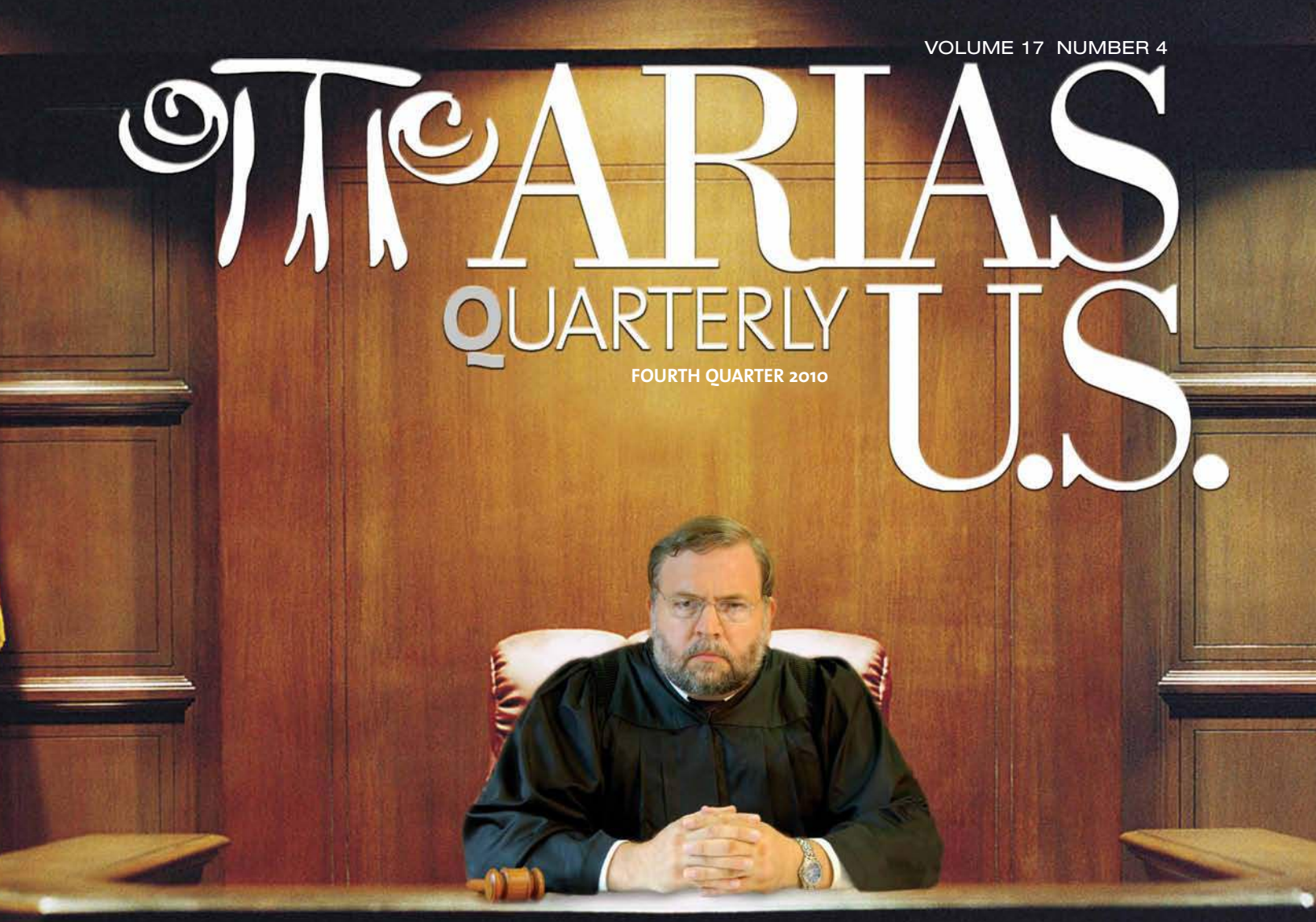
VOLUME 17 NUMBER 4

ARIAS U.S. QUARTERLY

FOURTH QUARTER 2010



Federal Jurisdiction of Insurance and Reinsurance Arbitration Disputes Under The New York Convention

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ARIAS U.S.
VOL. 17 NO. 4
FOURTH QTR. 2010

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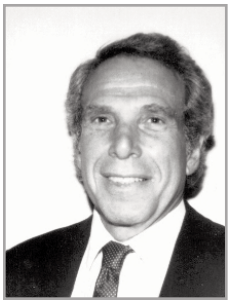
The ARIAS•U.S. Quarterly (ISSN 7132-698X) is published Quarterly, 4 times a year by ARIAS•U.S., 131 Alta Avenue, Yonkers, NY 10705. Periodicals postage pending at Yonkers, NY and additional mailing offices.

POSTMASTER: Send address changes to ARIAS•U.S., P.O. Box 9001, Mt. Vernon, NY 10552



Eugene Wollan

editor's comments

Our lead article in this issue, authored by Cary Lerman, is a scholarly examination of arbitrations in the context of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The discussion of jurisdictional issues should be particularly helpful to anyone involved in a proceeding subject to the Convention, but should also be of interest to all of our readers. It is especially relevant in light of the focus on International Arbitrations at this year's Annual Meeting.

Larry Schiffer examines the criticisms that have recently been leveled at the arbitration process, and concludes that much, if not most, of the difficulty is not endemic to the process itself but rather arises from the behavior of those members of our community who abuse the process. Or, as Cassuis memorably said: "The fault, dear Brutus, is not in our stars, but in ourselves..." Larry very judiciously ventures no opinion on whether the abusers of the process are few or many, but I'm sure we would all like to think that they are few indeed.

Michael Olsan has contributed a structural analysis of reinsurance arbitrations and discusses some alternatives to the usual procedures that certainly warrant thoughtful consideration.

As will be apparent from the preceding two paragraphs, the contributions we have been receiving recently tend to focus more on the pros and cons of the process itself than on substantive analysis. We want both kinds of discussions, of course, but more of the latter would be particularly welcome.

Speaking of which, the Law Committee has furnished for this issue summaries of three cases addressing exactly the kinds of subjects that are especially apt for discussion in this publication: confidentiality agreements, resignation of an arbitrator, and waiver of privilege.

My own submission this time is (even more than usually) of the stream-of-consciousness genre. I would welcome additional ideas for irreverent treatment.

Happy Holidays to all!

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Editorial Policy

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

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feature

Federal Jurisdiction of Insurance and Reinsurance Arbitration Disputes under The New York Convention

Cary B. Lerman

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An alternative basis for federal jurisdiction can be found under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention."

Cary B. Lerman is a partner in the Los Angeles office of Munger, Tolles & Olson LLP. He practices in the areas of insurance and reinsurance with an emphasis on litigation and international arbitration. He regularly teaches law school courses on international arbitration.

I. Introduction

Most lawsuits seeking to enforce arbitration agreements or to affirm or vacate an arbitration award must be filed in state court unless there is an independent basis for subject matter jurisdiction in the federal courts. The reason is that the Federal Arbitration Act ("FAA"), which governs most arbitration agreements and provides the substantive bases for affirming and/or vacating arbitration awards, does not by itself confer subject matter jurisdiction that would give a party the option of bringing its dispute to the federal courts.[2] A party wishing to litigate an arbitration-related claim in federal court under the domestic part of the FAA[3] must establish an independent basis for subject matter jurisdiction, such as diversity of citizenship or the Foreign Sovereign Immunities Act.[4]

An alternative basis for federal jurisdiction can be found under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention." This Convention, ratified by the United States in 1970, provides an often overlooked basis for parties to obtain a federal forum for the resolution of their arbitration-related dispute. The scope of coverage of the New York Convention is such that many insurance and reinsurance disputes will fall within the ambit of its jurisdiction, permitting parties to file initially in federal court or to remove state court disputes to federal court.

There are many reasons why a litigant might prefer a federal forum under the New York Convention to resolve an arbitration dispute. Besides considerations that are present in every case (such as impartiality, speed of resolution, and expertise), parties may prefer to assert jurisdiction under the Convention because of the lack of an amount in controversy requirement (FAA, § 203), the ability to confirm an award within three years of an arbitration award rather than within the FAA's ordinary one-year period (compare FAA § 207 and 9), its broad venue provisions (FAA, § 204), the availability of federal procedures, the perceived unwillingness of many federal courts to vacate arbitration awards, and, somewhat surprisingly (considering how difficult it is to obtain vacatur in federal court), additional potential grounds for vacating an award.[5]

II. Statutory Provisions at Issue

A. Agreements Falling Within The New York Convention.

The New York Convention is an international treaty designed to promote the enforcement of international arbitration agreements. See 9 U.S.C. § 201 note. Congress implemented this treaty by enacting Chapter 1 of the FAA. *Id*. § 201-208. Among other things, this Chapter provides that the Convention shall be enforced in United States courts and creates federal court jurisdiction over actions falling under the Convention. *Id*. § 201, 203. Section 202 of the FAA defines the arbitration agreements that "fall under" the Convention:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Thus, any arbitration dispute that falls under Section 202 can be brought in the federal court, even if all the parties are non-diverse domestic citizens. An agreement will fall under the Convention if (1) the award was made in a foreign country but a party seeks to enforce it in the United States or (2) the award was rendered in the United States but it is considered sufficiently "foreign" so as not to be considered a domestic award. *See Republic of Argentina v. BG Group PLC*, No. 08-485 (RBW) 2010 WL 2264957 (D.D.C. June 7, 2010). An award rendered in the United States between two United States citizens may fall under the Convention if, under Section 202 of the FAA, there is a reasonable relationship with a foreign state. As one court has framed the issue,

> "A Court in the United States 'faced with a request to refer a dispute governed by Chapter Two to arbitration performs a 'very limited inquiry' into whether an arbitration agreement exists and falls within the Convention's coverage." *DiMercurio v. Sphere Drake Ins.. PLC.* 202 F.3d 71. 74(1st Cir. 2000) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982)). The court in DeMercurio identified the following four prerequisites to determine whether the Convention applies:
>
> "(1) is there a written agreement to arbitrate the subject of the dispute? (2) does the agreement provide for arbitration in the territory of a signatory of the Convention? (3) does the agreement arise out of a commercial relationship? (4) is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?"

Id. at 74 n. 2. *Certain Underwriters at Lloyd's, London v. Simon*, No. 07-0899 (LJMWTL) 2007 WL 304 7128 *5 (S.D. Ind. 2007). *See also Riley v. Kingsley Underwriting Agencies, Ltd*. 969 F.2d 953, 959. (10th Cir. 1992)

As noted, section 202 defines what agreements "fall under" the Convention. All insurance and reinsurance agreements arise out of a contractual, commercial relationship, meaning that, where both parties are domestic entities, the critical issue of whether insurance policies "fall under" the Convention will turn on whether the parties' relationship (1) involves property located abroad, (2) envisages performance or enforcement abroad, or (3) has some other reasonable relation with one or more foreign states.[6]

Some courts have analyzed and have found the requisite foreign connection in cases involving only United States citizens. For example, in *Freudensprung v. Offshore Technical Services, Inc*., 379 F.3d 327 (5th Cir. 2004), the Fifth Circuit held that an agreement between a rig worker and an employment service, both of whom were United States citizens, whereby the worker would perform services on a barge in West Africa, fell under the Convention because the agreement "envisaged performance abroad." *Id*. at 340-41. The court further explained that the Convention applies to agreements between domestic parties "provided that there is a reasonable relation between the parties' commercial relationship and some important foreign element." *Id.* at 340 (internal quotation marks omitted). Similarly, in *Lander Co. v. MMP Investments, Inc*., 107 F.3d 476 (7th Cir. 1997), the Seventh Circuit held that an agreement between two U.S. corporations fell under the Convention because the contract was to be performed in Poland, notwithstanding that the agreement required the arbitration to take place in New York. *Id*. at 478, 482; *see also New Avex, Inc. v. Socata Aircraft Inc*., No. 02-6519, 2002 WL 1998193 (S.D.N.Y. Aug. 29, 2002) (holding that a contract for distribution of airplanes between two domestic entities fell under the Convention because, among other things, it contemplated that the buyer would take title to the planes in France, where the seller's parent was located); *Fuller Co. v. Compagnie des Bauxites de Guinee*, 421 F. Supp. 938, 942-44 (W.D. Pa. 1976) (holding that an agreement between two American companies for the provision of equipment at a plant in Guinea fell under the Convention because it envisaged performance abroad and because, among other things, the participation of a foreign entity was contemplated under the terms of the agreement).

In a case involving multiple parties and an alleged broad-based fraud, the court in *Amato v. KFMG LLP*, 433 F. Supp. 2d 460 (M.D. Pa. 2006), *reconsideration granted in part on other grounds*, No. 06-39, 2006 WL 2376245 (M.D. Pa. Aug. 14, 2006), held that an agreement between an investor and

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Thus, any arbitration dispute that falls under Section 202 can be brought in the federal court, even if all the parties are non-diverse domestic citizens. An agreement will fall under the Convention if (1) the award was made in a foreign country but a party seeks to enforce it in the United States or (2) the award was rendered in the United States but it is considered sufficiently "foreign" so as not to be considered a domestic award.

Turning to the question of whether the *relationship* "envisaged performance abroad," the court stated that "the relevant jurisdictional inquiry is not whether an arbitration agreement itself envisages performance abroad, but whether the relationship out of which the agreement arose envisages performance abroad." Id. at 478 (emphasis in original).

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Deutsche Bank fell under the Convention. At issue in that case was an alleged "Offshore Portfolio Investment Strategy" that was purportedly executed by Deutsche Bank, KPMG, and a law firm to assist investors in reducing their tax burden. The court first held that the relationship at issue involved property abroad, because to execute the OPIS strategy, the plaintiff had purchased securities that required resale of stock on German stock exchanges and had taken a loan from Deutsche Bank. *Id*. at 478. Turning to the question of whether the *relationship* "envisaged performance abroad," the court stated that "the relevant jurisdictional inquiry is not whether an arbitration agreement itself envisages performance abroad, but whether the relationship out of which the agreement arose envisages performance abroad." *Id*. at 478 (emphasis in original).

> [W]e find[s] that the parties envisaged that certain steps in Plaintiffs' OPIS investment strategy would involve performance abroad.... Plaintiffs' reliance upon the choice of law clause in the Customer Agreement [which provided for New York law to govern], focuses the Court far too narrowly on a single provision of one agreement, as opposed to the whole commercial relationship between the parties. We are in agreement with Defendants that such a narrow focus cannot defeat jurisdiction under the Convention, which directs a court to analyze the totality of the commercial relationship out of which the Customer Agreement arose.

Id. Finally, the court held that the commercial relationship between plaintiffs and Deutsche Bank entities bore a "reasonable relationship to a foreign state" because the OPIS strategy involved loans from Deutsche Bank AG (a German corporation) as well as trading in foreign markets, and because plaintiff explicitly agreed to arbitrate with Deutsche Bank AG. *Id*. at 478-79 ("Although Plaintiffs argue that their participation in the OPIS Strategy was purely a domestic affair, they appear to gloss over the fact that the execution of such strategy necessarily involved several foreign participants.").

Courts have rejected application of the Convention where the connection to a foreign element is more limited. For example, in *Jones v. Sea Tow Services, Inc*., 30 F.3d 360 (2d Cir. 1994), the Second Circuit held that the Convention did not apply to a salvage agreement between U.S. citizens and a U.S. salvor where the salvor rescued the citizens' yacht off of Long Island, New York but where the agreement provided for arbitration in London under English law. The court explained that "[n]either the salvor casualty relationship, nor the. . . agreement relationship has any *reasonable* relation with England in this ease. The purported salvage operation took place just off the coast of the United States, and the [agreement] was presented. . . for signature in the United States. It is not sufficient that English law was to be applied in the resolution of the salvage dispute and that the arbitration proceeding was to be held before an English arbitrator in England." *Id*. at 366 (emphasis in original).

Similarly, in Ensco *Offshore Co. v. Titan Marine L.L.C*., 370 F. Supp. 2d 594 (S.D. Tex. 2005), the court held that an agreement between two U.S. companies to salvage a rig off the coast of Louisiana, where the salvaged materials would be delivered to Texas, did not fall under the Convention. Defendant argued that the relationship had a sufficient foreign connection because the rig was in international waters, because English underwriters had insured the rig, and because the contract anticipated sub-contracts that involved British entities. The court rejected these arguments:

> [T]here is not a reasonable link between the legal relationship and England or any other foreign state. The United States is the only country with a vested interest in this dispute. Insurers in London or subcontractors, such as the owners of the British flag vessel BOLD ENDEAVOR, who are not parties to the contract and, therefore, not part of the legal relationship or dispute at issue herein, do not sway the analysis. As critical as their role may have been in the motivation of these two parties, § 202 requires that in order to fall under one of its exceptions, the foreign element must involve the legal relationship in which the arbitration agreement or arbitral award arises. English insurers or subcontractors are not

> part of the legal relationship between Ensco and Titan and, therefore, do not bring this contract under the auspices of the Convention.

Id. at 601 (footnote omitted); *see also id*. at 601 n.5 ("The parties are U.S. corporations. The rig is considered U.S. property. It was to be towed to the United States and repaired in Brownsville, Texas. The presence of English insurance syndicates or subcontractors— not parties to the contract or dispute and not involved in what § 202 terms the 'legal relationship'—are not enough to place this contract under § 202's exceptions." (citation omitted).

In *Wilson v. Lignotock U.S.A., Inc*., 709 F. Supp. 797 (E.D. Mich. 1989), the court held that it lacked jurisdiction over a contract between a domestic sales representative and a domestic seller of automotive parts manufactured in Europe where the contract provided that the plaintiff-sales representative would sell the defendant- distributor's products in the United States. It provided for arbitration in Zurich, but also provided that any award would be considered a U.S. award and would be enforceable in the United States. The court rejected defendant's argument that the agreement reasonably related to a European venue:

> The contract clearly calls for performance within the United States. Lignotock, an American corporation, maintained offices in Michigan. Plaintiff's sales market existed exclusively in the United States. Although it was plaintiff's duty to sell products manufactured abroad, all sales contracts generated by plaintiff were made in Michigan. The products sold by plaintiff were eventually installed in the United States in vehicles sold, in the United States. Plaintiff's trips to Europe were incidental to the performance of plaintiff's contractual duty of selling Lignotock products to U.S. automobile manufacturers.

Id. at 799. Thus, the Court held that removal under the Convention was improper.

> Where one of the parties to the Agreement is a foreign entity, the agreement will likely fall under the Convention as a treaty involving a foreign signatory. *See, e.g., Danieli & C. Officine Meccaniche S.p.A. v. Morgan Constr. Co*., 190 F. Supp. 2d 148, 153 (D. Mass. 2000) (Convention applies where "a commercial agreement involving a party who is not an American citizen contains an arbitration clause providing for arbitration in the territory of a signatory to the Convention"); *see also Acosta v. Master Maint. & Constr*., 52 F. Supp. 2d 699, 703 (M.D. La. 1999) ("Bermuda.. . is bound by the Convention pursuant to the United Kingdom's Instrument of Accession and subsequent extensions to Bermuda.").

It is likely that an insurance or reinsurance policy would fall under the Convention if it extends coverage to property located outside the United States, indemnifies for liability arising in a foreign jurisdiction, provides for claims handling in a foreign country, expressly contemplates the investment of premiums abroad, or incorporates substantive foreign laws, among other considerations. A party to an insurance contract who desires the intervention of a court to enforce an arbitration clause or to affirm or vacate an arbitration award and who would prefer a federal forum should look closely at the policy and the risks insured to determine whether it can be said that the policy bears some reasonable relationship with a foreign state.

B. Removal of State Actions to Federal Court

Chapter 2 of the FAA specifically authorizes defendants to remove actions first filed in state courts to the federal court if the requirements of Section 205 are met. Section 205 states:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

When sections 202 and 205 are read together, they give any party the ability to remove a state court action so long as the claims at issue (1) "relate to" an agreement that (2) "falls under" the Convention. Both of these requirements must be met.

Some courts have interpreted the scope of section 205 broadly and reasoned that removal under section 205 should be more liberally granted than under the ordinary removal statutes in Title 28. *See Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002) ("easy removal is exactly what Congress intended in § 205"); *Pinnoak Resources, LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 827 (S.D. W. Va. 2005) (same); *Amato v. KPMG*, supra, 443 F. Supp.2d at 476 ("the standard for demonstrating removal under the Convention is a lenient one."). This is not a universal view. In at least one section 205 case, a court noted the general preference in favor of remanding to state courts. *See Jacada (Europe), Ltd v. Int'l Mktg. Strategies, Inc*., 401 F.3d 701, 704 (6th Cir. 2005) (in a section 205 case, court observed that "it is the stated policy of this court that all doubts as to the propriety of removal are resolved in favor of remand" (internal quotation marks and alteration omitted)); *see also AT&T Corp. v. Am. Ridge Ins. Co*., No. 04-3851, 2005 WL 3406391, at *2 (D.N.J. Dec. 13, 2005) (in a section 205 case, court noted that removal statutes should be

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Courts have permitted removal of state court cases under Section 205 even where one of the parties in the state court proceeding is not a signatory to the relevant arbitration agreement. Courts generally have read section 205 as permitting removal when the arbitration provision will operate as a defense to the action.

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strictly construed and doubt resolved in favor of remand).

When confronted with a state court lawsuit, the defendant has the right to remove it to federal court under Section 205 of the FAA, but it is not sufficient that an agreement falls under the Convention. The second requirement is that the state court action must "relate to" the Agreement.

A state court action "relates to" an arbitration agreement when that agreement can plausibly affect the outcome of claims asserted. The Fifth Circuit has explained that

> whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiffs case, the agreement 'relates to' the plaintiffs suit. Thus, the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of "relates to."

Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir. 2002) (emphasis in original).

As noted, section 205 provides that a defendant can remove "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." *Id*. at 666 n. 1. A plain language interpretation of this statutory provision suggests that defendants can remove in a wide range of cases—that is, in virtually any case that bears a relationship to a foreign arbitration agreement. The Supreme Court has repeatedly commented on the elastic nature of the term "related to." *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-87 (1992) (defining "relating to" as meaning "having a connection with or reference to" and characterizing the term as broad). One court has observed that section 205 "is clearly broader than the general removal statute codified at 28 U.S.C. § 1441. Most strikingly, the Convention only requires that the removed action be 'related to' an arbitration agreement or award under the Convention. Under the general removal statute, however, the removed case itself, or sometimes certain separate or independent claims, must either fall under a district court's diversity or federal question jurisdiction." *Caringal v. Karteria Shipping, Ltd.*, 108 F. Supp. 2d 651, 653 (E.D. La. 2000).

Typically, virtually any state lawsuit will "relate to" an arbitration agreement falling under the Convention if the defendant contends that the dispute is subject to an arbitration clause subject to the New York Convention or if it involves an effort to enforce or vacate an arbitration award that is subject to the New York Convention.

Courts have permitted removal of state court cases under Section 205 even where one of the parties in the state court proceeding is not a signatory to the relevant arbitration agreement. Courts generally have read section 205 as permitting removal when the arbitration provision will operate as a defense to the action. In *Beiser v. Weyler*, *supra*, the plaintiff, a consultant in the oil and gas industry, was the director and only employee of Horizon, a company organized in the Channel Islands. Horizon contracted with a company called Huffington, Inc. with respect to the acquisition of development rights to an oil and gas field in Hungary. Horizon also entered into a line of credit agreement with Hungarian Horizon Energy, Ltd. Both agreements contained clauses providing for arbitration of any dispute in London. The plaintiff signed both agreements on behalf of Horizon. Plaintiff sued Huffington and Hungarian Horizon in Texas state court, claiming that they wrongfully deprived him of his financial interest in the Hungary field under state-law theories. The defendants removed to federal court, contending that plaintiff's case "related to" the two agreements containing arbitration clauses. They also moved to compel arbitration. Plaintiff moved to remand, arguing that he was not a party to either of the agreements.

The district court denied the motion, and the Fifth Circuit affirmed. Reading the term "relating to" quite broadly, the court held that defendants could remove Beiser's claims: "[a]lthough Beiser did not formally commit to any of the agreements, it is at least conceivable that a court might pierce the corporate veil and hold [Beiser) personally responsible for the contracts designed to

secure his personal involvement on the Hungary development.... Because the arbitration agreements could conceivably affect the disposition of Beiser's claims, those agreements 'relate to' his claims, and the district court had removal jurisdiction under § 205." *Id*. at 669-70.

Not all courts will permit a non-signatory to an arbitration agreement to remove under Section 205. In *Hawkins v. KPMG, LLP*, 423 F. Supp. 2d 1038 (RD. Cal. 2006), the court considered whether defendants—non-signatories to the relevant agreement—could remove an action on the basis of an arbitration agreement entered into between plaintiff and a third entity. The court held that "to establish jurisdiction defendants must show, based on the pleadings and petition for removal, as well as judicially noticeable materials, that there is a reasonable possibility that defendants will be able to assert the arbitration clause to compel arbitration of plaintiffs claims in this lawsuit." *Id*. at 1047. Defendants failed to satisfy this standard, the court concluded, because the plaintiff's claims did not depend on the content of the agreement, and the defendants were not parties to the agreement. *Id*. at 1049. The court also rejected defendants' argument that they could enforce the arbitration provision under the doctrine of equitable estoppel, further adding that even if they could make out a prima facie showing that equitable estoppel applied, the defendants' "unclean hands" foreclosed their reliance on the doctrine. Defendants' hands were tainted, the court said, because they had stipulated previously that the agreement was fraudulent and because the defendants had failed to choose arbitration in their own engagement letters with plaintiff Id. at 1052-1053 ("What defendants ask this court to do—enforce an arbitration clause in a fraudulent contract, not signed by defendants, involving a phantom, now-defunct company, and bearing only an incidental relationship to the dispute at the heart of this lawsuit—would make a mockery of this court's equitable powers.").[7]

In *In re Conoco EDC Litigation*, 123 F. Supp. 2d 340 (W.D. La. 2000), a group of plaintiffs sued Conoco, Condea Vista, and other defendants. Condea Vista filed a cross-claim against Conoco and a third-party demand against four of Conoco's insurers, three of whom were foreign entities. The insurers sought to remove the action based by virtue of arbitration provisions in their insurance coverage agreements with Conoco. The court remanded the case, stating:

> The Convention Act does not encourage absolute and systematic defeat of state court jurisdiction by the incidental impleading of foreign parties, nor does it prevent the adjudication in state courts of claims tangentially touching on foreign parties, by allowing removal to federal court for every third-party agreement containing an arbitration clause. If we were to read such overbreadth into the Convention Act's removal provision, we would, in effect, be rewarding all parties who buy their policies from foreign insurers with virtual guarantees against state court litigation—an interpretation which could cause, among other adverse effects, a sharp decline in the fortunes of America's insurers. This cannot have been the intention of the lawmakers, nor do we find such an interpretation of the Convention Act or its intent lurking in the shadows of this case.

Id. at 343. The court noted that the plaintiffs were not signatories to the insurance agreements between Conoco and the foreign insurers, did not sue the foreign insurers, had no contractual relationship with them, and did not seek redress for wrongs suffered by Conoco, by the foreign insurers, or by any other signatories to the insurance agreements. *Id*. at 343-44.

C. Waiver

The right to remove from state to federal court under the New York Convention can be waived by a party by a "clear and unequivocal waiver" in the agreement. In *Ensco International, Inc. v. Certain Underwriters at Lloyd's,* 579 F.3d 442, 443-444 (5th Cir. 2009), the Fifth Circuit set forth three ways in which a party can waive its right to remove: (1) explicitly stating that it is doing so; (2) allowing the other party the right to choose venue; or (3) establishing an exclusive venue within the contract. In *Ensco International*, the Court held that a property insurer waived its right to remove by including in the policy a forum selection clause that fixed exclusive venue for litigation in the "courts of Dallas

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If we were to read such overbreadth into the Convention Act's removal provision, we would, in effect, be rewarding all parties who buy their policies from foreign insurers with virtual guarantees against state court litigation—an interpretation which could cause, among other adverse effects, a sharp decline in the fortunes of America's insurers.

A party to an insurance contract who desires a federal forum to resolve an arbitration-related dispute needs to consider whether the New York Convention offers subject matter jurisdiction that would otherwise be lacking. This is particularly useful when a party finds itself in an unwanted state court and is not able to remove under the customary removal statute. 28 USC § 1441.

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County, Texas." In *McDermott International, Inc. v. Lloyd's Underwriters*, 944 F.2d 1199 (5th Cir. 1991), the Court reached the opposite conclusion, holding that the service of suit clause under which the insurer agreed to submit to the jurisdiction of any court of competent jurisdiction within the United States was not sufficiently clear and unequivocal to constitute a waiver. Apparently, the fact that the forum selection clause in McDermott did not provide that a state court had exclusive jurisdiction saved it from being construed as a waiver of the right to remove. ▼

III. Conclusion

A party to an insurance contract who desires a federal forum to resolve an arbitration-related dispute needs to consider whether the New York Convention offers subject matter jurisdiction that would otherwise be lacking. This is particularly useful when a party finds itself in an unwanted state court and is not able to remove under the customary removal statute. 28 USC § 1441.

1 Cary B. Lerman is a partner at Munger, Tolles & Olson LLP, in its Los Angeles office. He would like to thank Amiee A. Feinberg, a lawyer in the San Francisco office of Munger Tolles & Olson LLP, for her contributions to this paper.

2 Section 4 of the FAA does not provide an independent basis for federal question jurisdiction under 28 USC Section 1331. See *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n. 32 (1983), which explained the unusual place of the FAA in US jurisprudence:
"The [FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction... [T]here must be diversity of citizenship or some other independent basis for federal jurisdiction." Id.

3 By "domestic" part of the FAA, we refer to the provisions that apply to purely domestic disputes and have no relationship with a foreign state.

4 Some courts have held that there is no subject matter jurisdiction under the FAA simply because the underlying claim involves federal laws which, if brought in a lawsuit, would qualify for federal jurisdiction. See *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981(5th Cir. 1992)(securities law violations)

5 While beyond the scope of this article, there is an issue of whether the grounds for vacating an arbitration award are broader under the New York Convention than under the domestic FAA. For example, Section 10 of the FAA sets forth four grounds for vacating an award. Traditionally, the federal courts have added additional grounds, such as manifest disregard of law and violation of public policy. Recently, the United State Supreme Court held that the four grounds set forth in the FAA are exclusive and cast doubt on whether judicially-created grounds for vacating an award are permitted. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). However, the New York Convention expressly provides that a court may refuse to enforce an award if it finds that it would be contrary to the public policy of the country in which enforcement is sought. See Article V 2(b) of the Convention. Section 207 of the FAA provides that a court shall confirm an award falling under the Convention unless it finds one of the grounds for refusal specified in the Convention. This suggests that the grounds for refusing to enforce an arbitration award, such as public policy, may be broader under the Convention than the domestic FAA. *See China Nat'l Metal Products Import/Export Co. v. Apex Digital, Inc.* 379 F.3d 796, 799 (9th Cir. 2004) (207 of the FAA incorporates New York Convention's exceptions or defenses to enforcement of awards).

6 If one of the parties is a foreign entity, then the requirements of Section 202 will be met without regard to whether the parties' relationship falls within any of these three categories.

7 In *AtGames Holdings Ltd. v. Radica Games Ltd.*, 394 F. Supp. 2d 1252 (C.D. Cal. 2005), the court held that it lacked jurisdiction under section 205 because the defendant was not a party to any arbitration agreement with plaintiff.

Seminar Registration **Is Open!**

The next ARIAS•U.S. Educational Series seminar will take place in Philadelphia on February 7, 2011. Substantive reinsurance issues will be explored from various perspectives, including from the business side. The ARIAS•U.S. website calendar provides details.

This is one of two Educational Seminars that will take place in 2011; the second will be on November 2, the afternoon before the Fall Conference in New York.

Registration is open now on the website home page; it will close on January 24.

February 7, 2011
Sheraton Philadelphia University City Hotel
3549 Chestnut Street
(Near University of Pennsylvania, six blocks from 30th Street Station)
Lunch starting at 12:00 Noon
Meeting from 1:00 p.m. until 5:00 p.m.

news and notices

Board Certifies Three Previous Arbitrators under New Requirements

At its meeting on September 22, the Board of Directors approved certification of the following arbitrators under the new certification requirements; all had been previously certified.

- **Charles F. Cook**
- **Raymond M. Neff**
- **David W. Smith**

Board Certifies Two New Arbitrators

Also, at its meeting on September 22, the Board approved certification of the following arbitrators for the first time. Their sponsors are indicated in parentheses.

Stephen M. Rogers (Dale Frediani, John Morgan, Richard Voelbel)

Christy M. Schweikhardt (Joseph McCullough, Robin Dusek, Stephen Klein)

Another ARIAS•U.S. Umpire Certified

In addition, at the September 22 meeting, the Board approved certification of **Thomas A. Green** as an ARIAS-U.S. Certified Umpire.

The complete list of Certified Umpires can be seen on the website, under "Selecting an Umpire."

Board Recertifies Eight Previously Certified Arbitrators

Then, at its meeting on November 4, the Board of Directors certified the following eight members who had been certified under the previous requirements.

- **Robert C. Bruno**
- **James I. Cameron**
- **Carol K. Correia**
- **Michael S. Davis**
- **Thomas E. Geissler**
- **Klaus H. Kunze**
- **Michelle A. Levitt**
- **Thomas M. Zurek**

Four New Arbitrators Are Certified

At the same meeting, the Board approved the following four members as ARIAS•U.S. Certified Arbitrators for the first time. Their sponsors are indicated in parentheses.

- **Raja Bhagavatula** (Charles Cook, John Cole, Mark Wigmore)
- **Louis A. Ontanon** (Suzanne Fetter, Stephen Kidder, Joseph Loggia)
- **Charles Platto** (Lawrence Brandes, David Brodnan, Gary Born, John Cashin, Barry Ostrager)
- **Richard A. Rasmussen** (Lawrence Magnant, John Sullivan, William Fox, David Tritton)

The complete list of Certified Arbitrators can be seen on the website.▼

members on the move

In each issue of the Quarterly, this column lists employment changes, relocations, 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 ARIAS•U.S. Membership Directory on the website is 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

George Grode's new address is 68 Greenwood Circle, Wormleysburg, PA, 17043. All telephone and e-mail contact information is unchanged.

Sonnenschein Nath & Rosenthal LLP and **Denton Wilde Sapte LLP** became **SNR Denton** on October 1, 2010.

Linda Martin Barber has changed everything to 4530 West Lake Road, Mayville, NY 14757, phone 716-789-9292, cell 716 581 1817, email lbarber4530@windstream.net.

John LaBarbera can now be found at Cozen O'Conner's office at 333 West Wacker Drive, Suite 1900, Chicago, IL 60606, phone 312-382-3111, email jlabarbera@cozen.com.

Robert Tomilson can now be found at Cozen O'Conner's office at 1900 Market Street, Philadelphia, PA 19103, phone 215-665-5587, email rtomilson@cozen.com.▼

feature

Mirror, Mirror on the Wall

Larry P. Schiffer

Larry P. Schiffer

It seems that no matter what legal or dispute resolution system is created, it is always viewed by some people as broken. Reinsurance arbitration obviously is no different. For years, critics have been complaining that reinsurance arbitration is too costly, that it can be gamed, that it is more and more like litigation, and that it results in incomprehensible decisions. Every reinsurance conference or meeting has a panel about "fixing" the current reinsurance arbitration system.

There is no doubt that many of the identified criticisms can be problematic. There is no question that changes and modifications to the way parties to a reinsurance contract resolve their disputes are needed over time. The real question is whether the traditional system of reinsurance arbitration is actually broken. Just maybe the system itself is generally fine, but other factors that influence the use of the system have caused the perceived problems.

The real question is whether the traditional system of reinsurance arbitration is actually broken. Just maybe the system itself is generally fine, but other factors that influence the use of the system have caused the perceived problems.

This article examines traditional reinsurance arbitration and considers some of the complaints about the system. It then explores whether those complaints lie at the foot of a cause other than the system itself.

Fundamentals of Traditional Reinsurance Arbitration

Traditional reinsurance arbitration is meant to be a private, confidential dispute resolution mechanism used to resolve disagreements among industry participants to a contract of reinsurance before a panel of experienced industry arbitrators. The concept behind traditional reinsurance arbitration is to bring a business resolution to a contractual dispute that cannot otherwise be resolved by the parties themselves. Arbitrators are to consider the reinsurance contract as an honorable engagement and not strictly as a legal document so as to bring that industry custom and practice sensibility to crafting a just, businesslike resolution to the dispute.

Arbitration was meant to be a quicker and cheaper alternative to litigation (as most commercial arbitrations were supposed to be) without all the trappings of court litigation. Rules of evidence were relaxed and custom and practice was an important consideration.

The typical reinsurance arbitration would commence after the parties were unable to resolve their dispute through business negotiation. One party would serve a simple demand for arbitration on the other, often in letter form, and request that the other appoint its arbitrator within the time frame set forth in the arbitration clause. The arbitrators would then choose a third arbitrator or umpire. Once the panel was selected, an organizational meeting would be held and a schedule for the arbitration hearing would be set. A hearing would take place with business representatives as witnesses and the arbitration panel would issue a fairly bare-boned award stating which side had prevailed. The losing party would then accept the award and pay what (if anything) was due.

When disputes were in the thousands and not the tens of millions of dollars, reinsurance arbitrations worked fairly effectively and were fairly quick and economical. But as the amounts in dispute grew, the reinsurance arbitration process became more complicated and less efficient.

The Changing Face of Reinsurance Arbitration

Over a period of time, reinsurance arbitrations became more complex. This change grew in part out of the alterations that took place in the reinsurance industry. The industry expanded; new players who were not familiar with each other or industry custom and practice entered the reinsurance space. The days of the handshake deal faded into memory and no longer existed. Disputes became more heated as the amounts in issue rose. Underlying losses were significantly more costly than in the past, in part because of the expanded tort

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system and the new liabilities foisted upon insurers for environmental, asbestos, and other long-tail claims. Requests for discovery and depositions, and other trappings of standard commercial litigation, expanded as the stakes rose.

As more and more reinsurance disputes arose with significant amounts in controversy, more and more law firms less experienced with the customs and practices of the industry were retained as counsel. Lawyers, as you know, like rules, so more procedures were introduced and reinsurance arbitrations became more and more like court litigation.

Although it is certainly possible to have a relatively quick and efficient reinsurance arbitration today, it is now the exception and not the rule. A typical reinsurance arbitration today may take one to two years from demand to award; and some may suggest that one to two years is on the fast side. In highly contentious cases it may take months just to empanel the arbitrators. In a large dispute, it may take years to complete document discovery and depositions. Some arbitration hearings last for weeks at a time. Collateral proceedings and court applications often disrupt and slow down the reinsurance arbitration. And court challenges to arbitration awards may add years to a final resolution.

Who Controls the Reinsurance Arbitration Process?

There are three constituent groups to a reinsurance arbitration: The parties, the lawyers, and the arbitrators. The parties have the contractual relationship and have reached the point where at least one of them believes that arbitration is necessary to resolve the dispute. The parties hire counsel and often are deeply involved in the selection of the arbitrators.

The lawyers, obviously, work for their clients. While lawyers are hired for their independent professional judgment, they are obligated to handle matters as directed by their clients within the bounds of ethical propriety. The level and depth of involvement of in-house counsel or other client representatives will affect the amount of control and influence the outside lawyers have over the day-to-day reinsurance arbitration process.

The arbitration panel, once appointed, is an independent quasi-judicial body that has control over the reinsurance arbitration process in the procedural sense within the confines of the authority granted to the arbitrators by the arbitration clause in the reinsurance contract. The arbitration panel's decisions on how to manage the arbitration process generally will be upheld by the courts if challenged, unless the arbitrators' decisions breach the clear terms of the arbitration agreement or are so fundamentally unfair as to deprive a party of due process.

The reinsurance arbitration process is, in reality, controlled by the parties and the arbitrators, with outside counsel playing the role allowed by the client. The fundamental power to structure the process lies with the parties who, through the arbitration clause and the invocation of any particular set of rules desired, if any, may contract for the type of reinsurance arbitration process they choose. The authority to manage the actual process of a specific arbitration, however, lies with the arbitration panel.

Analyzing the Criticisms

One of the biggest criticisms of the reinsurance arbitration process is that it has become just like court litigation. Organizational meetings often look like scheduling conferences in court, resulting in a detailed outline of discovery, motion, and exhibit exchange dates. In many arbitrations, the parties now agree on "motion" procedures for discovery motions and sometimes even a schedule for dispositive motions. Schedules include not only the typical document discovery and depositions time periods, but also notification and exchange of expert witnesses and reports. Discovery disputes look and feel like discovery disputes in court, with arbitrators reviewing documents in *camera* to make disclosure and privilege decisions. Pre-hearing conferences are held and witness lists and exhibits are exchanged. These are just some of the litigation-like procedures now used in many reinsurance arbitrations.

Does the reinsurance arbitration process need litigation-like rules to operate efficiently? No, but if parties abuse the system the outcry for rules increases in volume. Moreover, the arbitration panel has the absolute authority to shape the procedure in such a way that abuse is limited. Of course, over-regulation is not

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The reinsurance arbitration process is, in reality, controlled by the parties and the arbitrators, with outside counsel playing the role allowed by the client. The fundamental power to structure the process lies with the parties who, through the arbitration clause and the invocation of any particular set of rules desired, if any, may contract for the type of reinsurance arbitration process they choose.

If the goal of reinsurance arbitration is to reach a fair and reasonable business resolution to a dispute, then parties should not be looking to game the system. Parties should be appointing high quality arbitrators and listing high quality umpire candidates. The fate of the dispute should not be settled by a flip of a coin.

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necessary if parties cooperate and agree on reasonable discovery and depositions, and meet and confer regularly to avoid discovery and other disputes coming to the attention of the arbitration panel. Impossible, you say? No, it's not impossible, but it requires work and commitment by both the parties and counsel for it to happen.

Nothing is wrong with proper organization, a schedule, and managing the hearing in the most efficient manner. In fact, some of these procedures probably have cut down on the inefficiencies that can happen in an *ad hoc* proceeding where there is little cooperation or communication between the parties and the arbitration panel. But in many cases, there is so much procedure brought into the reinsurance arbitration process that it is very difficult to distinguish between court litigation and reinsurance arbitration.

Another major criticism is the arbitration panel selection process. The ability to select a party-appointed arbitrator who may be predisposed to the point of view of the appointing party, coupled with essentially a coin-flip to determine the umpire, often leads to unsatisfactory results. This is because the traditional *ad hoc* system is easily abused by the parties.

Let's take an example. A cedent commences arbitration against a recalcitrant reinsurer to recover a substantial recoverable under a treaty. The reinsurer has no reason or incentive to part with its funds to pay the cedent any earlier than it has to. The treaty has a traditional arbitration clause that requires the arbitrators to be present or former officers of insurance or reinsurance companies and does not expressly preclude the party-appointed arbitrator from being predisposed. The cedent appoints a well-known reinsurance arbitrator. The reinsurer appoints an arbitrator that has a reputation for siding with its appointed party. The arbitration clause requires the parties to exchange a list of three umpire candidates, strike two from the other party's list, and then draw lots to select the umpire from the remaining two candidates. The cedent lists three experienced and well-known umpire candidates. The reinsurer selects three candidates that apparently worked for insurance or reinsurance companies, but who have no real experience as umpires or as arbitrators. Additionally, the reinsurer's candidates all know the reinsurer's arbitrator. Under this scenario, the cedent is faced with a 50% chance of losing the arbitration just by virtue of the umpire selection.

Is this a flaw in the system or the fault of the parties and counsel that try to game the system by stacking the umpire selection? Some would say that it is the fault of the current system because it allows for this kind of abuse. Fair comment, but the ultimate fault lies with the parties that either demand or allow counsel to try to influence the outcome of the arbitration in this way. If the goal of reinsurance arbitration is to reach a fair and reasonable business resolution to a dispute, then parties should not be looking to game the system. Parties should be appointing high quality arbitrators and listing high quality umpire candidates. The fate of the dispute should not be settled by a flip of a coin. Imposing a neutral panel selection process avoids this issue in its entirety, but it is a rare day that a completely neutral selection process is found in a reinsurance arbitration clause.

A third major criticism of the current reinsurance arbitration system is that the arbitration award is often very dissatisfying to both parties because of its cryptic nature. Of course, nothing stops the parties from requiring a reasoned arbitration award in their arbitration clause. Yet it is pretty rare to see a requirement for a reasoned award. Nevertheless, parties and counsel complain that reinsurance arbitration awards leave them with little to derive the basis or rationale for what one party or the other may see as an arbitrary decision. Put another way, parties often complain that reinsurance arbitration awards merely "split the baby" without any basis in fact or law.

There certainly have been cases where the award makes little sense and it may seem as if the panel merely picked a number in an arbitrary fashion, which ends up dissatisfying both parties. These kinds of awards, I believe, are the exception and not the rule. For the most part, arbitration panels decide disputes on the basis of the evidence presented. The basis for the result is often reasonably clear and articulated.

There is absolutely no incentive for arbitrators to issue arbitrary awards. An arbitrator that regularly issues "split the baby" decisions may find him or herself with few appointments. As a matter of preserving one's reputation, it behooves arbitrators to render awards that

have a basis in the evidence adduced at the hearing. Again, this comes down to the selection of the panel. If a party is trying to game the system with arbitrator appointments of candidates with questionable practices, then it will be no surprise if the award is less than satisfactory.

Related to the dissatisfaction over awards is the inability to appeal an adverse award. While a party may seek to modify or vacate an award, the grounds are quite narrow. The disadvantage of a non-reasoned award with no visible rationale is that a petition to vacate the award is not the same as an appeal of a court order where the rationale is erroneous. None of the limited grounds for vacating an arbitration award go to whether the award was correct or whether the arbitration panel failed to articulate a valid basis for the award. An arbitration award will be confirmed unless it is clearly in violation of one of the limited grounds for vacatur. Even if the arbitration panel was wrong in its decision, as long as there is a reasonable basis for the award under the terms of the arbitration provision and the reinsurance contract, the award will be upheld.

The final area of criticism to discuss is discovery. Discovery abuse is well known in the courts and rules are regularly modified to reign in discovery abuse. Yet it continues in many courts in spite of efforts to curb the enthusiasm that some lawyers have for scorched earth discovery. Reinsurance arbitration is certainly not immune from discovery abuse. Because of the ad hoc nature of reinsurance arbitration, the lack of rules leaves open the opportunity for significant discovery abuse. But is that the fault of the system or the users of the system?

Document production and depositions have become integral elements in nearly every reinsurance arbitration, although traditional arbitration clauses say nothing about discovery and the Federal Arbitration Act is nearly silent as well. This lack of a legal or contractual entitlement to discovery has not prevented an exponential growth of discovery in reinsurance arbitration. Discovery in reinsurance arbitrations, much like court litigation, is usually the highest cost. Naturally, discovery in reinsurance arbitration comes under severe criticism because of that cost in both time and money.

Critics often point to discovery rules in federal court as a better model. But under the federal rules, discovery is quite broad and reaches to the outer limits of information that "may" lead to the discovery of admissible evidence. Moreover, third-party subpoenas are regularly issued in court litigation, while those subpoenas recently have had limited value in reinsurance arbitration in the discovery context. In reinsurance arbitration, the panel can limit and control discovery in any reasonable manner. The test is whether the parties have had a fair opportunity within the context of due process to present their case. If only three depositions are permitted, that a fourth or fifth deposition was denied generally is unlikely to jeopardize the validity of the final arbitration award.

Once again, the abusive discovery alleged to be crippling reinsurance arbitration cannot happen unless the parties allow their counsel to engage in abusive discovery behavior. Of course, one party's claim of abuse is another party's claim that it has been deprived of necessary evidence. But we all know what is really abusive and unnecessary, and that kind of behavior should not be permitted by the parties or tolerated by arbitration panels.

Conclusion

Perhaps it's time that everyone involved in reinsurance arbitration take a hard look in the mirror before complaining that the system is broken. While the ad hoc nature of traditional reinsurance arbitration provides an environment that can easily lead to abuse, there is no real excuse for the abuse to occur. Zealous advocacy on behalf of a client is one thing, but deliberately trying to game the system to eviscerate its purpose is shameful.

Each constituent member of the reinsurance arbitration community shares blame for the criticisms that have been leveled at the system. The parties, who voluntarily put arbitration clauses in their reinsurance contracts, should think about whether they really want a private business resolution to their reinsurance disputes before a panel of industry experts. If they do, then they must rein in their counsel and party-appointed arbitrators when things start getting out of control. Arbitration clauses can be written to take the gamesmanship out of umpire selection and discovery can be regulated and controlled. Put another way, if you don't like the traditional way umpires are selected, write in a method that you do like in your arbitration clause or adopt one of the many neutral umpire selection procedures that now exist.

Arbitration counsel need to consider the effect of asking for extensive discovery — as we all know, sometimes you get what you wish for — and the ramifications of trying to game the system with arbitrator and umpire appointments that are questionable. And arbitrators need to continue to take a more proactive role in keeping reinsurance arbitrations under control. More importantly, arbitrators need to make sure their awards are truly based on the evidence presented so that parties and counsel feel confident in those awards.

Is the system perfect? No. Is it broken? Take a look in the mirror.▼

Put another way, if you don't like the traditional way umpires are selected, write in a method that you do like in your arbitration clause or adopt one of the many neutral umpire selection procedures that now exist.

feature

Altering the Structure of Reinsurance Arbitrations: Are Old Habits Too Hard to Break?

Michael S. Olsan[1]

Michael S. Olsan

Since the early 1800s, particularly in English marine reinsurance disputes, the reinsurance industry has been using arbitration as a dispute resolution mechanism.[2] The utilization of a three-member panel is similarly historic.

Michael S. Olsan is a partner with White and Williams LLP and Chair of the Reinsurance Practice Group. Mr. Olsan focuses his practice on the litigation and arbitration of reinsurance and complex insurance coverage disputes.

I. Introduction

For over a century, reinsurance disputes, as rare as they may have been in the past, have been resolved through arbitration as opposed to litigation. Ceding companies and reinsurers alike felt so strongly about this method of dispute resolution that it became commonplace to include an arbitration clause in most reinsurance contracts, and this practice largely continues today. Given the important and ongoing business relationship between cedent and reinsurer, arbitration was seen as a better way to resolve disputes. Some of the advantages to arbitration, which continue to this day, include: (1) having a case decided by experienced and knowledgeable decision-makers rather than a judge or jury to whom reinsurance is foreign; (2) maintaining the confidentiality of the dispute; (3) providing a method of dispute resolution generally considered to be more economical and efficient; and (4) basing an award on custom and practice in the industry rather than simply on the literal meaning of the contract itself or on applicable state law.

Recently, however, with the proliferation of reinsurance arbitrations combined with increased contentiousness and expense, some in the industry have begun to question the efficacy of arbitration. Among the reasons for this disillusionment are: (1) the fact that interim procedural rulings are unpredictable; (2) a few select arbitrators are used over and over again by the same party; (3) there are insufficient ethical boundaries and restraints on arbitrators; (4) some arbitrators have an economic incentive to rule in favor of the party most likely to appoint them in the future; and (5) the willingness of certain panel members to issue a compromise award. These issues have caused some parties to contemplate eliminating arbitration clauses from new reinsurance contracts. But maybe this drastic measure can be avoided and the current concerns about arbitration can be resolved by altering the structural way in which arbitrations are conducted.

The purpose of this paper is to introduce some structural alternatives to what has become the typical arbitration process with two party appointed arbitrators and an umpire; a process largely controlled by the parties and not the arbitrators, as originally envisioned. Some or all of these structural changes can be achieved under old contracts by agreement of the parties and should be considered by companies when negotiating renewals or new reinsurance agreements.

II. The Origins of the Three-Member Panel with Two Party-Appointed Arbitrators and an Umpire and the Increased Frequency of Arbitrations

Since the early 1800s, particularly in English marine reinsurance disputes, the reinsurance industry has been using arbitration as a dispute resolution mechanism.[2] The utilization of a three-member panel is similarly historic. For example, a Munich Reinsurance Company contract from 1895 contained this provision:

> In the event of any difference hereafter arising between the contracting parties with reference to any transaction under this treaty the same shall be referred to two Arbitrators who are to be chosen amongst the Managers or Secretaries of Accident Insurance Companies, one to be chosen by each Company and to an Umpire chosen by the said two Arbitrators, who shall interpret the present contract rather as an honourable engagement than as a merely legal obligation, and their award shall be final and binding on both parties.[3]

Historically, the industry turned to arbitration, utilizing arbitrators experienced in the business, in part to maximize the

chances of resolving a dispute without jeopardizing a business relationship.[4] Before the 1990s, arbitrated disputes were the exception as cedent and reinsurer worked to amicably resolve any disputes in the interest of their ongoing business relationship.[5] It is not surprising, then, that the parties had a level of trust that the panel would be selected as envisioned when the treaty was underwritten and not in a way to "game the system," with each side vying for control and undue advantage. This historical approach changed dramatically with the increase in cessions involving environmental, asbestos and other long-tail claims, coupled with the fact that an increasing number of ceding companies and reinsurers were in runoff. With runoff, the goal of maintaining a future relationship was gone, the need for arbitrations increased, and contentiousness both in panel formation and in the arbitration process as a whole -rose.

As the stakes got higher, arbitration began to look more like litigation, starting with maneuvering for the "best" panel, just as some litigants engage in forum shopping. This maneuvering tactic became most prevalent in umpire selection as many parties began to feel that the case could be won or lost depending upon the umpire. Many contracts, including the quoted 1895 Munich Re treaty, require the two party-appointed arbitrators to choose the umpire. Notice that the umpire was to be elected by the arbitrators, not by the parties or -counsel. In many contracts that contain a similar provision, it is only if the two arbitrators cannot agree on an umpire that some alternative method, like drawing lots, is undertaken. In other words, drawing lots was designed to be a last resort. Now, however, drawing lots has become the norm, is done with the heavy influence of counsel or the parties, and is often viewed as a mechanism for parties to "game the system."[6] This method of panel selection may also provide an avenue for delay, minimizing one of the advantages of arbitration quick resolution.[7]

While there are alternatives to this usual arbitration structure, some of which are discussed here, the wheels of change move so slowly that it may be years (or even decades)before we see any real shift in the structure of reinsurance arbitrations. Of course, change can come in different shapes and sizes, including how a panel is selected, the number of arbitrators, the role of the arbitrators, and the general procedures followed throughout the course of the proceeding.

III. Arbitration Before a Single Arbitrator

One obvious alternative to the three-person panel is to have a single arbitrator. In the United Kingdom, for example, a single arbitrator is the default mechanism when there is no agreement between the parties or contract provision mandating the number of members on the panel. As the U.K. Arbitration Act of 1996, § 15(3) provides: "If there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator."[8] Of course, self evident benefit to a single arbitrator proceeding is economics; each party pays for half an arbitrator instead of one- and a half arbitrators (party-appointed plus half the umpire).

Where the rubber hits the road in the single arbitrator proceeding is the method of selection. There are some organizations like AAA that provide procedures for the selection of the arbitrator.[9] Pursuant to section R-1 5 of AAA's Procedures for the Resolution of Intra Industry U.S. Reinsurance and Insurance Disputes Supplementary Rules, "if the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed."[10] The appointment of a single arbitrator may be achieved in accordance with Rule R-l 1(a) and (b) of AAA's Commercial Arbitration Rules.[11] Under that provision:

> (a) If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
>
> (b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.[12]

While the parties and counsel have a role in this method of arbitrator selection, the fact that the original slate is chosen for them should reduce each party's ability to "game the system" and will decrease the "over-use" of certain arbitrators.

The recently enacted AIRROC Dispute Resolution Procedure similarly offers a mechanism for the selection of a single arbitrator)[13] Under that Procedure, AIRROC will select 15 names at random from its list of approved arbitrators, or from an alternative list as agreed by the parties, and submit a disclosure form for

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The basic premise of the mini-trial is to provide an opportunity to a senior executive from each party to assess the strengths and weaknesses of the case in a controlled environment that is not emotionally charged.[29] The senior executives who participate should not be involved in the underlying claim that is at the heart of the dispute.[30] This helps to remove the emotions that the day-to-day handlers have in the dispute.

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those candidates to complete.[14] Once those disclosure forms are returned, AIRROC will notify the parties about those candidates available to serve.[15] Each party will then select just over half of the candidates on the list (*e.g.* if 11 candidates remain on the list, each party will select 6) and exchange those names.[16] By selecting just over half, there will be at least one common name on each list.[17] If there is just one match, that person will be the arbitrator)[18] If there is more than one match, AIRROC will decide the arbitrator by lot among the matched candidates.[19]

The Insurance and Reinsurance Dispute Resolution Task Force provides another appointment method for a single neutral in the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes ("Procedures"). Pursuant to the Alternative Streamlined Procedures contained in the Procedures, selection of the neutral is as follows: (1) each party submits a list of 8 candidates; (2) questionnaires are sent to each candidate; (3) each party strikes the other party's list down to three arbitrators; (4) if there is a common individual, that person is the arbitrator; (5) if there is more than 1 common individual, the parties draw lots to select the arbitrator; (6) if there are no common individuals, each party ranks the six candidates in order of preference (1 being the most preferred) and exchange rankings.[20] The individual with the lowest combined number is the arbitrator.[21] If there is a tie, the parties draw lots to select the arbitrator.[22]

Finally, the ARIAS•U.S. Newer Arbitrator Program contains an option for expedited proceedings with a single arbitrator selected from the newer arbitrator list.[23] The neutral is selected in accordance with the ARIAS Umpire Selection Procedure.[24] Briefly, the process for selecting the neutral consists of: (1) obtaining a random list of candidates from ARIAS; (2) sending a questionnaire to the first 10 candidates; (3) each party selecting five candidates from the list of 10; and (4) each party selecting 3 candidates from the other party's list of 5. If there is one name appearing on both lists, that person will be the neutral. If there is more than one common candidate, the neutral is selected by drawing lots. If there is no common candidate, each party will rank the candidates, with the person with the lowest number being named the neutral.[25]

In a single arbitrator proceeding, there may be some time savings. First, for the purposes of scheduling, there is only one calendar with which to contend (in addition to those of counsel and parties) instead of three. Second, during the course of the arbitration, there is no conferring necessary among decision-makers, so discovery or evidentiary rulings may be made more quickly. Third, following the hearing, there is no debate among decision-makers so deliberations may be shorter. Fourth, there may be less chance of a compromise award. There are many who believe that compromise awards are becoming all too frequent and are not serving the needs of the parties. One philosophy is that 3-person panels issue compromise awards as a way to achieve a unanimous result or as a consequence of one of the two party-appointed arbitrators exerting some influence on the umpire. With only one arbitrator, those reasons for compromise awards disappear.

IV. The Mini-Trial: A Chance for Resolution

The mini-trial was born in 1977 in an effort to resolve a complex patent dispute between TRW Inc. and Telecredit, Inc.[26] The *Telecredit* case had languished in court for years with no imminent trial date set.[27] The parties had each spent several hundred thousand dollars in legal fees and decided there must be another way to resolve the dispute.[28] Over several months, the parties negotiated a procedure for a mini-trial.[29] Once there was an agreement over the procedure, the mini-trial itself took place over a two- day period.[30] After the respective presentations, the parties were able to achieve a settlement within a half-hour.[31]

The basic premise of the mini-trial is to provide an opportunity to a senior executive from each party to assess the strengths and weaknesses of the case in a controlled environment that is not emotionally charged.[32] The senior executives who participate should not be involved in the underlying claim that is at the heart of the dispute.[33] This helps to remove the emotions that the day-to-day handlers have in the dispute.

In a mini-trial, a business executive from each party, as well as a neutral, jointly selected by the parties, sit on a panel to hear the dispute.[34] In *Telecredit*, each party nominated 2 people to act as a neutral and then came to an agreement as to whom should be appointed.[35]

Subsequently, the parties engaged in an expedited period of targeted discovery, including a limited exchange of documents and abbreviated depositions of key witnesses.[36]

Typically, counsel present each side's "best case;" however, on occasion, witnesses, fact and/or expert, may be used.[37] Questions may be asked by any of the panel members, including the neutral.[38] To make sure the case that is presented is the most comprehensive possible, it is best if the mini-trial takes place towards the end of discovery.[39] Following the presentations, the two business executives meet in an attempt to achieve some amicable resolution.[40] To the extent the executives cannot reach a compromise, they can request the neutral to provide a non-binding advisory opinion setting forth the strengths and weaknesses of each side's case.[41] Once that advisory opinion is reviewed, the parties may return for another round of negotiation.[42]

The mini-trial process is designed to be flexible rather than a one-size-fits-all.[43] The parties are free to agree on the rules and procedures that will apply to the mini-trial.[44] Although. the selection of the umpire in an arbitration is often viewed as the "game changer," the nonbinding nature of the mini-trial puts the neutral in a different light. The neutral should have technical expertise with respect to the issues in dispute and should be someone whom both parties respect.[45] Generally, the parties agree that the mini-trial is confidential, that rules of evidence will not apply, and that the scope of evidence presented should not be limited, even if it may be precluded in litigation or arbitration.[46] This elimination of restrictions ensures that the business executives fully appreciate the strengths and weaknesses of both side's cases.

An important component of the mini-trial is that it is confidential.[47] This is of critical importance especially when the procedure is non-binding.[48] Each party needs assurance, for example, that the neutral's opinion about each side's strengths and weaknesses, and about a likely outcome, to the extent given, is not used in the later arbitration or litigation.[49]

While most mini-trials are non-binding in nature, there is nothing to prevent the parties from agreeing in advance to make it binding. The parties could agree that the business executives will first attempt to reach a resolution, but if that is not achievable, the neutral will issue a binding award. The downside to such an approach is that the selection of the neutral becomes all the more important, which can lead to more contentiousness in the neutral selection process. The prospect of an amicable resolution, however, may outweigh this risk.

Even if there is no final resolution of the dispute following the mini-trial, it can help to narrow the issues that need to be litigated or arbitrated. While some have argued that an unsuccessful mini-trial just adds to the cost of an already expensive litigation or arbitration,[50] others argue that the work done in preparation for the mini-trial needed to be done anyway, so any additional cost (i.e., the neutral) is minimal.[51]

V. "Baseball" Arbitration

As the name suggests, the *origin* of "baseball" arbitration is Major League Baseball. Certain players in Major League Baseball are eligible for salary arbitration.[52] Prior to the arbitration, the team and the player each submit a proposed salary figure to the panel of three arbitrators.[53] At the hearing, each side presents its case in support of the figure submitted and each side has an opportunity to rebut the other's case. Following the hearing, the Panel only has authority to order one salary or another, that's it. [54]

"Baseball" arbitration can be applicable to other fields, including reinsurance disputes. It could be particularly useful if a reinsurer acknowledges it owes an amount of money to its ceding company, albeit less than the amount claimed by the ceding company. In such a scenario the two sides can present their cases to a panel of arbitrators and the arbitrators can award either the amount the reinsurer submitted or the one submitted by the ceding company. This would, of course, eliminate any risk of a compromise award. However, this type of arbitration would be unworkable if, for example, the reinsurer claimed to owe nothing or was seeking declaratory relief or rescission. In other words, "baseball" arbitration would appear to be less appealing if the parties are at opposite extremes.

There are a couple of variations on the "Baseball' arbitration theme that parties may wish to consider. One alternative would be where two amounts are presented to the Panel but those amounts form a high and a low for the Panel, so that it can award either extreme or any number in between. Similarly, the parties can decide on a high and a low figure about which the Panel is unaware. In that case the parties decide on the highest amount the party seeking damages can recover and the lowest amount. If the Panel awards an amount higher or lower than the extremes, the high-low number will apply. If the Panel awards anything in between, that is the amount that will be awarded. Again, compromise awards under this scenario would be minimized and there would be less risk that the umpire (or party-appointed arbitrators) would rule out of a sense of loyalty to one party or the other.

VI. Mediator-to Arbitrator or Arbitrator-to-Mediator

In litigation a potential conflict may present itself if the judge who will act as the trial judge compels the parties to attend a settlement conference before him or her. In that situation, parties may be required to reveal weaknesses about their case before the very person who will preside over the case. While some judges recognize this dichotomy and send the parties to another judge for a settlement conference, some see nothing wrong with the practice, believing they can discount whatever was said during the course of settlement negotiations. Of course, the trial judge who serves as finder of fact in a bench trial may be more likely to ask another judge to conduct the settlement conference.

In an arbitration, which is consensual by nature, the parties could agree on almost anything, including having a mediator become the arbitrator if in fact mediation fails. The central problem with such an arrangement is that the

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parties may be disinclined to be forthright during the mediation, fearing that facts (that may otherwise be inadmissible) will be revealed that would hurt their case if arbitration is necessary. On the other hand, the mediator will be familiar with the case as he puts on his arbitrator hat, reducing the cost of getting someone else up to speed on the case.

The reverse situation, arbitrator turned mediator, may be less of a problem in terms of a conflict situation. This may be particularly so in a single arbitrator scenario. If, at the conclusion of the hearing but prior to the rendering of any award, the single arbitrator indicated to the parties that she thinks the parties could reach a compromise with her help in light of what she has heard, the parties may want to take advantage of that facilitation service. To protect the parties and encourage absolute candor, the arbitrator could issue an award and seal it. She can then offer her services to the parties in an effort to facilitate a compromise. In the event the case does not settle, the award will be unsealed. This arrangement guarantees that settlement discussions will not sway the decision-maker one way or the other. The disadvantage is that the parties have already expended considerable time and expense going through a full blown hearing. At that point, one or both parties may just prefer to get the award. On the other hand, given the uncertainties of arbitration, business minds may prevail in favor of an amicable compromised resolution.[55]

VII. Conclusion

While it is understandable that some members in the industry are disenchanted with the current structure of reinsurance arbitrations, there are alternatives to consider before parties begin to abandon reinsurance arbitrations altogether. The benefits of arbitration (having experienced decision-makers, maintaining confidentiality, realizing economical benefits, maintaining efficiencies, relying on custom and practice, etc.) still abound and should not be disregarded arbitrarily or casually. The intent of this paper was to provide a few alternative structures that parties in existing contracts should consider and possibly agree upon, and contract drafters should consider including in new contracts; it in no way is meant to be exhaustive. As an industry of experts, all we need is some creativity and we should be able to reduce some of the negative aspects of arbitration we currently face while holding on to the time- honored custom of arbitrating, rather than litigating, reinsurance disputes.▼

1. The views expressed in this paper do not necessarily reflect the views of White and Williams LLP, any of its attorneys, or those of its clients.
2 Bank & Winters, *Reinsurance Arbitration: A US. Perspective*, 7 Journal of Insurance Regulation 324 (1989).
3 Reinsurance Association of America, *Manual for the Resolution of Reinsurance Disputes*, *A Historical Perspective on the Growth of Arbitration in the US. and its Introduction to the Reinsurance Industry*, 8n.. 17(2008 ed).
4 *Id*. at 9.
5 Bank at 323.
6 Some contracts provide for the two arbitrators to decide the case with the umpire playing a role only if the two arbitrators are unable to agree on a final disposition. This practice is still followed in the United Kingdom but appears to have been abandoned in the U.S. even if a strict reading of the contact requires it.
7 One way to minimize this distraction is to select a panel in accordance with the literal language of the contract, that is let the two party appointed arbitrators select an umpire without the influence of the parties or counsel as is the case in the United Kingdom.
8 Arbitration Act, 1996, ch. 23.
9 AAA's Procedures for the Resolution of Intra Industry U.S. Reinsurance and Insurance Disputes Supplementary Rules can be found at www.adr.org.
10 American Arbitration Association, Resolution of Intra-Industry U.S. Reinsurance Disputes Supplementary Rules, R-I 5 (2005).
11 *Id*. at 4.
12 American Arbitration Association, *Commercial Arbitration Rules and Mediation*, R-1 1(2009).
13 Association of Insurance and Reinsurance Run-Off Companies, *The AIRROC Dispute Resolution Procedure*) § *III (2009).*
14 *Id*.
I5 *Id*. at IIIA.
16 *Id*. at IIIB.
17 *Id*.
18 *Id*.
19 *Id*.
20 [1] *Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes*, § 16 (2009)
21 *Id*.
22 *Id*.
23 ARIAS Newer Arbitrator Program, www.arias-us.org.
24 *Id*.
25 ARIAS Umpire Appointment Procedure, www.arias-us.org.
26 Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 Willamette L Rev. 531,535(1985).
27 E. Green, The CPR Legal Program Mini-Trial Handbook, MH-22 (1982).
28 *Id*.
29 *Id*.
30 *Id*.
31 *Id*.
32 Davis at 541.
33 *Id*.
34 American Arbitration Association, *Mini-Trial: Involving Senior Management*, 2(2007).
35 Green at MII-I-23.
36 *Id*.
37 Green at MI-I-24.
38 Davis at 542.
39 *Id*. at 537.
40 *AAA Mini-Trial* at 3.
41 *Id*.; Davis at 532.
42 AAA Mini-Trial at 3.
43 Green at MI-I2 I.
44 *Id*.
45 Davis at 534.
46 *Id. at* 539, 543.
47 *Id. at* 543.
48 *Id*.
49 *Id*.
50 Civil Litigation: The Judicial Mini-Trial, Alberta Law Reform Institute 5(1993).
51 Davis at 532.
52 Ray, How Baseball Arbitration Works: MLB Rules Governing the Eligibility and Process of Arbitration, www.baseball.suite101.com (2008).
53 *Id*.
54 *Id*.
55 Pursuant to some arbitration clauses in newer reinsurance contracts, the parties agree to attend mediation in advance of any arbitration. Such a clause helps to ensure that parties, especially those in an ongoing business relationship, make an attempt to amicably resolve their disputes short of arbitration, Those responsible for contract drafting would be wise to consider this approach, as well as any other alternatives discussed herein.

Daniel Fitzmaurice and Elaine Caprio Brady Chosen as Chairman and President

Vyskocil is President Elect; Rubin is Vice President; Kobrick Replaces Lattal

At the Board of Directors meeting held during the 2010 Fall Conference, **Daniel L. FitzMaurice**, a partner in Day Pitney LLP's Hartford office, was elected Chairman of ARIAS•U.S. He succeeds **Susan A. Stone**, a Sidley Austin LLP litigation partner, who has retired as chairman, but remains on the Board for two more years. **Elaine Caprio Brady**, Vice President and Manager of Ceded Reinsurance Operations for Liberty Mutual Group, was elected President, succeeding Mr. FitzMaurice.

Also at that meeting, **Mary Kay Vyskocil**, a litigation partner at Simpson Thacher & Bartlett LLP, was elected President Elect, and **Jeffrey M. Rubin**, Senior Vice President and Director, Global Claims, of Odyssey America Reinsurance Corporation, was elected Vice President, joining **George Cavell** of Munich Re America in that title.

In addition, **Eric S. Kobrick**, Deputy General Counsel and Chief Reinsurance Legal Officer at American International Group, Inc., was elected as a new member of the Board of Directors, replacing departing Board member Frank A. Lattal of ACE, Ltd. Mary Kay Vyskocil and Jeffrey Rubin were re-elected to the Board for their second three-year terms and Susan Stone was elected for a two-year term.

Daniel FitzMaurice represents Day Pitney clients in trials, arbitrations, and appeals of complex commercial disputes in the United States and internationally. He has extensive experience trying cases before judges, juries, and arbitrators. He has also handled appeals in the U.S. Courts of Appeals for the Second, Third, Ninth, and District of Columbia Circuits, as well as the Connecticut Supreme Court.

Mr. FitzMaurice has represented ceding companies and reinsurers in reinsurance disputes regarding property-casualty insurance, surety, mortgage insurance, financial guaranty, life insurance, annuities, health insurance, disability insurance, and long-term care. He speaks frequently at national and international conferences on issues relating to reinsurance, insurance, financial services, arbitration, and trial practice.

Mr. FitzMaurice received degrees from the University of Michigan School of Law, J.D., cum laude, and the University of Connecticut, B.S., *summa cum* laude.

As Vice President and Manager of Ceded Reinsurance Operations for Liberty Mutual Group, Elaine Caprio Brady is responsible for managing credit risk and the corporate reinsurance portfolio, as well as establishing policies and procedures for reinsurance placement and contract administration, including reinsurer and broker relationships.

In her former role as Senior Corporate Counsel at Liberty Mutual, Ms. Brady advised Liberty departments worldwide who handle ceded and/or assumed facultative, treaty and retrocessional reinsurance matters. She handled arbitrations, analyzed coverage issues, drafted reinsurance-related contracts, negotiated reinsurance collections and commutations, and advised on insolvencies and schemes of arrangement.

Ms. Brady received a B.A., *magna cum laude*, from Providence College and a J.D., *cum laude*, from Suffolk University Law School. She was featured as a Woman to Watch by *Business Insurance* in 2007.

Daniel L. FitzMaurice

Elaine Caprio Brady

Mary Kay Vyskocil

Jeffrey M. Rubin

Eric S. Kobrick

Fall Conference Studies Lessons from Abroad

GENERAL SESSION

The ARIAS•U.S. 2010 Fall Conference turned to the international arena more than usual this year. Entitled "***Arbitration without Borders: Lessons We Can Learn from International Arbitration***," the conference brought a significant number of speakers from other countries. In the two opening panels, six of the ten panelists were from outside the U.S. and the discussion was heavily focused on practices in overseas arbitrations that were said to improve the arbitration process to achieve faster, more transparent, and less expensive outcomes.

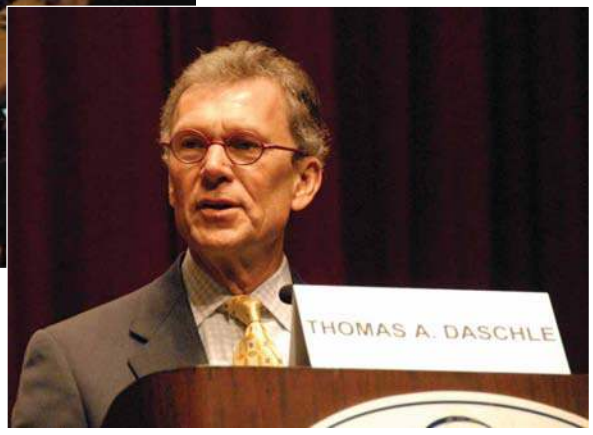
Susan Stone welcomes attendees.

The event took place on Thursday, November 4 and Friday, November 5 at the Hilton New York Hotel in New York City. It was preceded, on the previous afternoon, by two half-day educational seminars presented by the Education Committee that, for the first time, ran simultaneous sessions. One seminar took a fresh look at "Discovery in the Arbitration Process," including eDiscovery. The other offered the first advanced-level seminar on "Difficult Issues, Even for Experienced Arbitrators." These seminars were designed to support the requirements for arbitrator certification renewal.

The conference itself began with a keynote address from Senator Tom Daschle, former Senate Majority Leader, who presented a timely discussion of the political evolution in Washington, including the election two days earlier. Then, the opening panel took up a spirited discussion of what works and what does not in arbitration proceedings under the differing jurisdictions in Bermuda, France, the UK, and the US. The next panel addressed the extent to which custom and practice are meaningful and useful concepts as they apply in different countries, and it raised the many conflicts that occur as a result of widely different laws and regulations that impact on decisions when trying to apply the dictates of custom and practice in various countries.

Damon Vocke welcomes Tom Daschle

Thursday afternoon workshops ranged widely in topic, but all appealed to various segments of the membership and were well attended. Subjects ranged from an analysis of how judicial enforcement varies by country, to whether the process would be improved with more transparency, to how arbitration clauses have changed and have been interpreted by the judiciary. Also addressed were the ethical issues that arise when parties select arbitrators or when arbitrators face conflicts, and the intricacies of handling mediations in different countries and across borders. With so many good options, registrants reported difficulty in deciding which two to attend.



Former Senate Majority Leader Tom Daschle

On Friday morning, attendees first heard guest speaker Stewart Boyd describe his experiences from the early days of arbitration in the UK and around the world. A Queens Counsel for nearly 20 years, Mr. Boyd literally wrote the book on UK arbitration and is considered an authority on its application across the full range of disputes and jurisdictions. Then, the Friday panel described "The View from the Bench," with great authority. Veteran arbitration practitioners and senior judges discussed the economics and practicality of arbitration, litigation, and mediation as alternate forums for the resolution of complex reinsurance disputes.

Although the Hilton's Grand Ballroom lacked the wide screens mounted on pillars at both sides of the stage that Stanford University Alumni had in place at last year's conference, the consensus among attendees was that this year's event was an exceptional learning experience.

Ian Woloniecki (far right) moderates panel on The World Cup: U.S. vs. the World, with (from left) Sophie Cochery, Gerard Honig, Mary Ellen Burns, Vivien Tyrell, and Richard Jacobs.

Ronald Lepinskas (far right) moderates panel on Discerning Custom & Practice and Public Policy: The Challenges & Pitfalls, with (from left) Jerome Roth, Ali Rifai, Albert Hilber, and Ian Hunter.

WORKSHOPS

◀*Steven Agosta, Brian Snover, and John Jacobus ask about* **More Transparency in Arbitration: Yes, No, Maybe?**

▶*Sheila Birnbaum, Aidan McCormack, and Michael Collins address* **Mediation: Special Challenges in International Disputes and Lessons to Be Learned.**

◀*Sophie Cochery, Cary Lerman, and Paul Stanley get into the details of* **Judicial Enforcement of Arbitration Awards in the U.S. and Abroad: How and When Does It Work?**

▶*Larry Schiffer, Elaine Caprio Brady, and Leslie Davis look at* **Use and Enforcement of Arbitration Clauses: A Survey of What Is and What Is Not Being Used.**

◀*William Fiske, Mary Kay Vyskocil and John Mathias take an ethical look at the* **Makeup of the Arbitration Panel: The Selection Process, Recusals, and Challenges to the Panel.**

ANNUAL MEETING

▲ *Susan Stone, Daniel FitzMaurice, Frank Lattal, and Peter Gentile address the 2010 Annual Meeting.*

▼ *Susan Stone reviews her year as Chairman.*

▲ *Peter Gentile examines the 2010 financial results and 2011 budget.*

▲ *Frank Lattal receives Meritorious Service Award from Daniel FitzMaurice as he leaves the Board of Directors.*

◀ *He is even happier to receive a gold ARIAS pin from Richard Kennedy.*

▲ *Former Chairmen Tom Forsyth and Tom Orr.*

▲ *Henry McGrier and Rick Rosenblum*

▲ *Paul Koepf and Frank Lattal*

And then, a chance to Relax a Bit. . .

◀ *Marty Haber, Andy Walsh, and Charlie Fortune*

▲ *Richard Jacobs, Colin Croly, and Richard Waterman*

◀ *John Dattner, Doug Walker, and Bracken O'Neill*

news

Board Promulgates Additional Ethics Guidelines

As many readers are undoubtedly aware, the Long Range Planning Committee recommended, and the ARIAS•U.S. Board of Directors approved after some revisions, several additional guidelines that elucidate and expand on the ethical considerations embodied in the existing *ARIAS•U.S. Guidelines for Arbitrator Conduct*, also known as *The Code of Conduct*. These new guidelines relate to:

- The pre-appointment interview;
- Whether to accept an appointment;
- Disclosures;
- Ex Parte communications.

These materials are intended to offer additional guidance respecting the ethical behavior of umpires and arbitrators, consistent with the overall objective of maintaining and, where possible, improving the integrity and fairness of the arbitration process. The Guidelines cannot, of course, supersede any specific agreements of the parties or any applicable laws, nor do they purport to alter or add to existing grounds for judicial review or existing legal duties of umpires or arbitrators.

The Committee also proposed, and the Board approved with revisions, a new recommended form of "Arbitrator/Umpire Questionnaire," for use by parties in screening candidates.

These Guidelines and Questionnaire are available permanently on the ARIAS•U.S. website in a section called "Additional Ethics Guidelines." The guidelines are reproduced here for the convenience of our readers. The Questionnaire is not here, because of its length; it is located in the Forms section of the website.

Guidelines on Ex Parte Communications

- An arbitrator should not reveal the deliberations of the Panel. To the extent an arbitrator predicts or speculates as to how an issue might be viewed by the Panel, the arbitrator should at no time repeat statements made by any member of the Panel in deliberations, even his or her own.

- An arbitrator can make suggestions with respect to issues he or she feels are not being clearly presented. An arbitrator can also make suggestions about what arguments or aspects of argument in the case to emphasize or, alternatively, to abandon.

- An arbitrator can make suggestions as to the usefulness of expert evidence relating to certain issues in a case, and can encourage or discourage a party to put forward such expert evidence.

- An arbitrator may be consulted by a party as to whether certain arguments or facts should be included in a filing or pre-hearing brief. However, an arbitrator should not edit briefs, interview or prepare witnesses, or preview demonstrative evidence to be used at the hearing.

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Guidelines for Party-Appointed Arbitrators In the Context of the Pre-Appointment Interview

1. Ascertain the identities of the parties; identities of counsel; identities of witnesses (to the extent known); general factual background; and the anticipated issues and positions of the parties.

2. Be sure to pin down any relationships that could lead to a challenge, including affiliate relationships that may not be obvious. Ask the party to provide a list of current and former affiliates.

3. It must be emphasized throughout the discussion that any decision will be based on the evidence presented.

4. Do not offer any assurances, or even predictions, as to how you will decide the dispute, except as called for by the evidence.

5. Do not state a position on any particular issue except as similarly qualified, i.e., expressly subject to the evidence as it develops.

6. Do not accept or review any documentary material that counsel would not be willing to produce to the other side.

7. Do not offer a commitment to dissent, or to work for a compromise, in the event you disagree with the majority's proposed award.

8. It is appropriate to advise whether or not you would be willing to render a reasoned award if requested.

9. It is appropriate to discuss your availability and your billing practices.

10. Be sure to disclose any information that might be considered as reflecting on your impartiality, including:

    a. relevant positions taken in published works or expert testimony;

    b. any past or present involvement in a business or professional context with this transaction or these issues;

    c. the extent of previous appointments by the same party and/or the same law firm; and

    d. the extent of relationships with other arbitrators, to the extent known.

All such disclosures should not be limited to yourself as an individual, but also, where appropriate, to your law firm if you are a lawyer and (to the extent disclosed by reasonable inquiry) to your company if you are a company employee.

Guidelines for Arbitrator Disclosures

Complete, timely, and accurate disclosures of arbitrators' qualifications and of any potential conflicts or other impediments to their ability to serve are essential to the integrity of the arbitral process. Two Canons of the *ARIAS•U.S. Guidelines for Arbitrator Conduct* (Code of Conduct) stress the importance of accuracy and truthfulness: (a) Canon III of the Code provides that candidates must accurately represent their qualifications to serve; and (b) Comment 2 to Canon IX provides that "Arbitrators shall make only accurate and truthful statements about their skills or qualifications." Further, Canon IV calls for candidates to "disclose any interest or relationship likely to affect their judgment." The commentary to this canon expands upon this duty:

1. Before accepting an arbitration appointment, candidates should make a reasonable effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their judgment, including any relationship with persons they are told will be potential witnesses.

***

3. The duty to disclose all past and present interests or relationships is a continuing obligation throughout the proceeding. If any previously undisclosed interests or relationships described in Comment 1 are recalled or arise during the course of the arbitration, they should be disclosed immediately to all parties and the other arbitrators.

Although the first comment is framed in terms of information that a candidate must disclose before accepting an arbitration appointment, this form of comprehensive disclosure is appropriate to be made to all parties by all arbitrators, once a panel has been selected. The third comment makes clear that the duty to disclose is ongoing: any additional information should be disclosed immediately. Canon IV further provides that "[a]ny doubt should be resolved in favor of disclosure."

The format for disclosure may vary depending upon the protocols or procedures used by the parties in an arbitration. The *ARIAS•U.S. Practical Guide to Reinsurance Arbitration Procedure 2004* includes a suggested form of umpire and party-arbitrator questionnaire. That questionnaire has been updated and is available with this set of guidelines and in the Forms section of the ARIAS•U.S. website at www.arias-us.org. The disclosure items included in the questionnaire are not intended to be exhaustive; the parties are free to include other questions and requests they consider appropriate. Initial and/or supplemental disclosures may also be made orally during conference calls, at organizational meetings, or at hearings. In light of the importance of disclosures, the better practice is that they be made in a format that can be preserved – i.e., in writing or in a transcribed telephone call or transcribed in-person proceeding, rather than to only in verbal form. Moreover, the parties should have the opportunity to ask follow up questions and to seek individual, appropriate information so that the disclosures are comprehensive, accurate, and intelligible.

Although the operating presumption favors disclosure, the duty to disclose is not limitless. Confidentiality obligations may restrict some of the information that can be disclosed. See Code of Conduct, Canon VI. When confronted with a conflict between the duty to disclose and the obligation to preserve confidentiality, an arbitrator should attempt to reconcile to two objectives, e.g.,

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by providing the substance of the information without identifying details, if that can be done in a manner that is not misleading. An arbitrator who decides that it is necessary and appropriate to withhold certain information should notify the parties of the fact and the reason that information has been withheld. For example, it might be appropriate for an arbitrator to disclose that he or she served as an arbitrator in another matter involving one of the parties in the current matter and further disclose that he or she will not reveal the name of the other party to preserve the confidentiality of the other arbitration. The disclosure that the arbitrator has withheld certain information puts the parties on notice of that fact and allows for reasonable requests of additional information that may be pertinent, without compromising the confidentiality the arbitrator is bound to maintain.

It is conceivable that the conflict between the duty to disclose and some other obligation, such as a commitment to keep certain information confidential, may be irreconcilable. When an arbitrator is unable to meet the ethical obligations of disclosure because of other conflicting obligations, the arbitrator should withdraw from participating in the arbitration.

Guidelines on Whether to Accept Appointment as Arbitrator or Umpire

- Canons I and II require, among other things, that arbitrators/umpires serve only in those matters in which they can render a just decision.
- It is not only important that arbitrators/umpires can render a just decision, but that the parties have complete confidence that the arbitrators/umpires can do so.
- The parties' confidence in the arbitrator'/umpires' ability to render a just decision is influenced by many factors, which arbitrators/umpires should consider prior to and during their service.
- Therefore, a candidate for appointment as an umpire, non-neutral or party-appointed arbitrator must refuse to serve:
    - where the candidate has a material financial interest in a party that could be substantially affected by the outcome of the proceedings; and/or
    - where the candidate does not believe that he/she can render a decision based on the evidence and legal arguments presented to all members of the panel.
- Candidates for appointment as an umpire, non-neutral or party-appointed arbitrator should weigh these factors as they decide whether to accept an assignment:
    - whether they currently serve as an umpire on a panel involving the company that has proposed to appoint them in a non-neutral role;
    - whether they currently serve in a non-neutral role on a panel involving the company and are now being proposed for an umpire role in an arbitration involving that party;

- whether they currently serve or have served as a consultant or expert witness for a party and are being proposed to serve as an umpire or in a non-neutral role in an arbitration involving that party;

- whether they currently serve as an umpire or in a non-neutral role and they are being proposed as a consultant or expert witness for a party;

- whether they have involvement in the contracts or claims at issue such that they could reasonably be called as a fact witness;

- whether they have previously served as a lawyer for either party on issues that are closely associated with the central issue(s) expected to be involved in the merits of this matter;

- whether they have, or previously had, any significant professional, familial or personal relationships with any of the lawyers, factual witnesses or expert witnesses involved such that it would prompt a reasonable person to doubt whether they could render a just decision;

- whether a significant percentage of their prior appointments as an arbitrator come from the company involved;

- whether a significant percentage of their prior appointments come as an arbitrator from the law firm involved;

- whether a significant percentage of their revenue earned as an arbitrator or consultant or expert witness comes from the company involved; and

- whether a significant percentage of their revenue earned as an arbitrator or consultant or expert witness comes from the law firm involved.

• While a candidate sits as an umpire in one matter, he or she should carefully consider whether to take any party-appointed role from any party that is involved in that matter.

• Sitting arbitrators, umpires or non-neutrals should continually evaluate whether the same factors and prohibitions that are identified above would allow them to continue to serve if they arose following acceptance of the appointment.

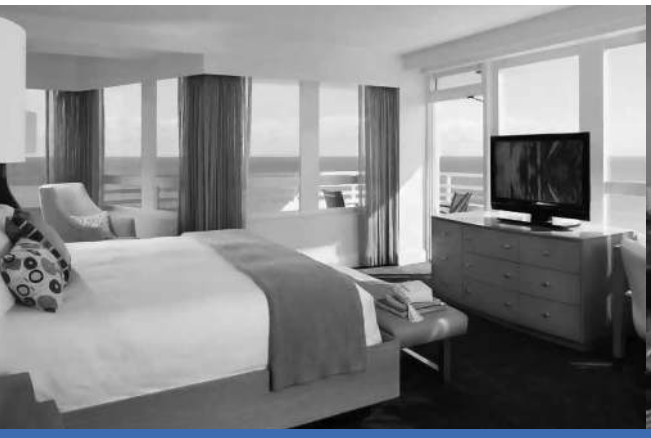
Seminar Registration **Is Open!**

The next ARIAS•U.S. Educational Series seminar will take place in Philadelphia on February 7, 2011. Substantive reinsurance issues will be explored from various perspectives, including from the business side. The ARIAS•U.S. website calendar provides details.

This is one of two Educational Seminars that will take place in 2011; the second will be on November 2, the afternoon before the Fall Conference in New York.

Registration is open now on the website home page; it will close on January 24.

February 7, 2011
Sheraton Philadelphia University City Hotel
3549 Chestnut Street
(Near University of Pennsylvania, six blocks from 30th Street Station)
Lunch starting at 12:00 Noon
Meeting from 1:00 p.m. until 5:00 p.m.

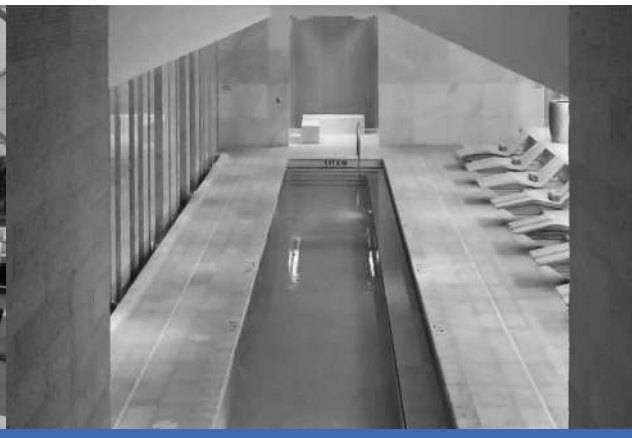


FONTAINEBLEAU

ARIAS U.S.

2011 SPRING CONFERENCE

MAY 4-6, 2011



THE FONTAINEBLEAU TAKES ARIAS·U.S. BACK TO THE FUTURE IN 2011

MIAMI BEACH

Next May, ARIAS·U.S. will take its Spring Conference to the hotel that came to symbolize the glamorous lifestyle of the 50s in Miami Beach. Built in 1954, it was the largest hotel in town and it attracted celebrities from around the world. Presidents stayed there, "Goldfinger," "The Bodyguard," "Tony Roma," and "Bellboy" were filmed there, and top entertainers visited often, including Elvis Presley, Bob Hope, Lucille Ball, Jackie Gleason, Judy Garland, Milton Berle, Jerry Lewis, Debbie Reynolds and Sammy Davis, Jr.

In 2007, after the hotel was long past those glory days, a new owner closed it down, took it apart, and spent over a billion dollars to put it back together, adding two towers, and creating new modern interiors that echoed the style of the earlier era.

With the renovation came new meeting room facilities, allowing the Fontainebleau to provide state-of-the-art support for conferences such as ours.

SAVE THE DATE!

With easy access, just 15 minutes from Miami International Airport (which offers direct flights from across the U.S. and Europe), this is a conference to put on your calendar now. The dates are **May 4-6, 2011**. The sessions will run from Wednesday noon until Friday noon.

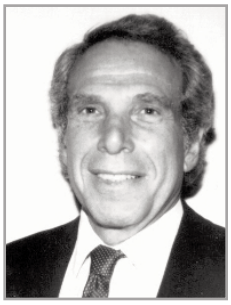
An announcement brochure will be sent to members and posted on the website in February, along with online registration and a link to the Fontainebleau's reservation system.

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 unconventional side of the business.

Random Thoughts

Eugene Wollan



Eugene Wollan

James Joyce probably came as close as anyone could to capturing on the printed page the stream-of-consciousness thought processes the human mind undergoes, but those processes can never really be reproduced with anything approaching true accuracy. The brain flicks constantly hither and yon, often without conscious connection or sequential continuity of thought.

We all have random, disjointed thoughts, and I here make bold to record some of my own.

About New York, for example:

- The most overused and abused word in this city is "gourmet."
- Wouldn't it be nice if drivers only leaned on their horns to signal real danger, instead of just venting their frustration?
- I would vote for any mayoral candidate whose platform promised to ban street fairs and repave the washboard street surfaces.
- Why do MTA buses always keep the air conditioning at a level that calls for a parka and thermal sox?
- On a visit to a grandchild's fourth grade classroom, I spotted a sign posted by the teacher that said, "Be sure to take all you're belongings." If the teachers are illiterate, how can we expect the pupils to do better?
- Why, oh why, did the Dodgers leave Brooklyn?
- Watching the US Open on a flat screen HD TV set is much easier and more comfortable than going to Arthur Ashe Stadium, where a hot dog is seriously overpriced and there's a line waiting for access to the men's room.
- Judging by the readouts on the fronts of New York City buses, the most popular destination is "NOT IN SERVICE."
- My all-time favorite bumper sticker read: "Don't tell *me* what kind of day to have!"
- I have always been an opera nut, but I have now fallen seriously in love with the Met's live HD transmissions to movie theaters, including the backstage glimpses and interviews.
- Will my figure-skating granddaughter make it to the Olympics?
- I love Italy for its language, its music, its art, its food, and especially for its people, whose primary ambition is to enjoy life; nothing works quite right, but nobody seems to care.
- When Maria Callas appeared as Tosca, the fiery, emotional prima donna devoted to her lover, she didn't just perform the role -- she lived it.
- There was a certain sinister allure about Times Square before it was Disney-fied.
- How can every Ray's Pizzeria be the "original" one?
- The cruise ships that I see from my office window entering and leaving the harbor seem to be getting bigger and bigger every year, and will probably soon accommodate as many passengers as there are residents of a mid-western zip code.
- The city would immediately eliminate any budget deficit if it could devise a way to issue a summons to every driver who changes lanes or makes a turn without signaling.

Closer to home:

- Is "self-insured" really very different from "uninsured"?
- How many exclusions must there be in an "all-risk" policy before it becomes a "some-risk" policy?
- It would be nice if every broker and risk manager actually read, understood, and thought about the coverages they are buying.

How many exclusions must there be in an "all-risk" policy before it becomes a "some-risk" policy?

Has there ever been a jury that started out pre-disposed in favor of insurance companies?

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

- It would be nice if drafters of policy and treaty wordings would recognize that what they are preparing are business contracts, not updated versions of the Ten Commandments, and would stop using pretentious language ("shall" instead of "will" or "hereinafter" instead of "here") that would fit more comfortably into the King James version.
- It would be nice if every arbitrator demonstrated (as most do) as much respect for the process as for the appointing party.
- It would also be nice if newly certified arbitrators got more assignments.
- Why do my adversaries always try to find some quote they can lift out of my book and cite, out of context, against me?
- Has there ever been a jury that started out pre-disposed in favor of insurance companies?
- Is an actuary really an accountant who found life too exciting?
- It would be great if more young lawyers could write a literate, coherent English sentence.
- Which quality is more important for a litigator, a towering intellect or an instinct for the jugular? (And are the two ever combined in a single person?)
- Is there a conceptual difference between a captive insurer and a captive audience?
- Will someone, in my lifetime, ever draft an ensuing loss exception to a latent defect exclusion that isn't susceptible to being held "ambiguous"?
- Is the annual Monte Carlo Reinsurance Rendezvous a business gathering, a social event, or a giant boondoggle?
- It is possible, though not easy, for a litigator to be effectively aggressive without being personally offensive.
- When an arbitration panel issues a 3-0 ruling, sometimes it's warranted on the merits, but often it's just an old-fashioned compromise.
- Electronic technology has made it easier, not harder, to bury an adversary under mountains of paperwork.
- Why don't the talking heads (and, for that matter, the public) recognize that there are "trial lawyers" out there who are not plaintiffs' negligence or medical malpractice specialists?
- Why are lawyers south of the Mason-Dixon line addressed respectfully as "Attorney so-and-so" while their northern brethren barely rate even a begrudging "Mister"?
- What would happen to ARIAS membership if every applicant for certification were required to write a sample "reasoned award"?

And finally:

- What would happen to my self-esteem if people stopped reading this stuff?▼

Electronic technology has made it easier, not harder, to bury an adversary under mountains of paperwork.

It would be nice if drafters of policy and treaty wordings would recognize that what they are preparing are business contracts, not updated versions of the Ten Commandments, and would stop using pretentious language ("shall" instead of "will" or "hereinafter" instead of "here") that would fit more comfortably into the King James version.

DID YOU KNOW...?

THE ARIAS•U.S. WEBSITE SEARCH SYSTEM ALLOWS SELECTION OF ARBITRATORS, UMPIRES, AND MEDIATORS, BASED ON A WIDE RANGE OF CHARACTERISTICS. YOU CAN SEARCH BY NAME, LOCATION, MARKETS, VERY DETAILED WORK EXPERIENCE DESCRIPTORS, LEADERSHIP ROLE IN INSURANCE COMPANIES, ARBITRATION EXPERIENCE, MEDIATION EXPERIENCE, AND LANGUAGES SPOKEN. THE SYSTEM CAN BE ACCESSED FROM THE WEBSITE'S LEFT-SIDE NAVIGATION. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

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.

Trustmark Ins. Co. v. John Hancock Life Ins. Co. and Trustmark Ins. Co. v. Clarendon National Ins. Co.

Trustmark Insurance Company v. John Hancock Life Insurance Company, No. 09 C 3959 (N.D. 2010) (Judge Zagel) and *Trustmark Insurance Company v. Clarendon National Insurance Company and Clarendon America Insurance Company*, No. 09 C 6169 (N.D. Ill. 2010) (Judge Leininweber)

Court: United States District Court, Northern District Of Illinois

Dates Decided: January 21, 2010 and February 1, 2010

Issues Decided: Whether an arbitrator subject to a confidentiality agreement entered in one arbitration is considered "disinterested" in a subsequent arbitration when appointed by the same party in both and where the issues are the same or similar. Whether a court may remove an arbitrator for partiality or misconduct in an arbitration before a final award has issued.

Submitted by: Thomas Stillman*

In two separate cases in the Northern District of Illinois decided within less than two weeks of each other, Trustmark moved to disqualify the other party's arbitrator and for other relief. In the first case Trustmark was successful but in the second it was not. Both decisions have been appealed.

In *Trustmark v. John Hancock*, the first case, Hancock initiated arbitration in 2002 after Trustmark refused to honor billings associated with Hancock's retrocessional business. The issue was whether the parties intended such business to be covered. The contract specified that all arbitrators were to be disinterested in the outcome of the arbitration. During the arbitration the parties entered into a Confidentiality Agreement regarding the documents and testimony of the case, as well as the award. However, the Confidentiality Agreement, itself, did not provide for arbitration. The panel issued an award which determined that the business was covered. The Court entered an order confirming the award and its confidentiality pursuant to the Confidentiality Agreement.

Subsequently, Trustmark disputed a new billing and Hancock initiated another arbitration. Hancock appointed the same arbitrator who had served on the first panel. At the organizational meeting, Trustmark questioned Hancock's arbitrator about his ability to honor the Confidentiality Agreement entered in the first arbitration. He stated that while he "would scrupulously abide by confidentiality he might find it 'hard to segregate, difficult to deal with' particular knowledge" he had acquired during the first proceeding, which Trustmark's arbitrator and the umpire in the second arbitration lacked. Nonetheless, Trustmark did not object to his appointment.

During the hearing Hancock moved to authorize the use of materials from the first arbitration so that the parties could avoid relitigating whether retrocessional business was covered. Over Trustmark's objection, with Hancock's arbitrator and the umpire voting in favor, the panel issued an interim award which "'extend[ed] and accept[ed] the confidentiality of the [F]irst [A]rbitration'" to Trustmark's arbitrator in the second arbitration, as well as the umpire.

Later in the hearing, Hancock moved to bar Trustmark from relitigating certain matters, which Hancock argued were resolved in the first arbitration, including the issue of whether the contracts covered retrocessional business, With Trustmark's arbitrator again objecting, the panel by majority vote granted Hancock's motion.

At this point Trustmark filed an action for a preliminary injunction. In an opinion granting relief the Court considered Trustmark's motions (1) to enjoin the panel from resolving disputes over the Confidentiality Agreement on the ground that it was not subject to arbitration; and (2) to remove Hancock's arbitrator because he was no longer disinterested as required by the reinsurance contract. The basis for this motion was that he had breached the Confidentiality Agreement, had infected the panel by participating in the deliberations on the issue of extending the Confidentiality Agreement, and had served as Hancock's party appointed arbitrator in the first arbitration.

In granting relief, the Court first rejected Hancock's assertion that the challenge to its arbitrator's partiality was premature, as the

7th Circuit, in *Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533 (7th Cir. 2008), had affirmed a pre-award injunction where the contract did not provide for arbitration of a specific dispute at issue. Here, Trustmark was not alleging partiality under the FAA but breach of the Confidentiality Agreement, which lacked an arbitration clause.

On the issues of breach of the Confidentiality Agreement and disqualification, the Court concluded that: (1) Hancock's arbitrator had breached his duty to Trustmark under the Confidentiality Agreement; (2) Trustmark "may seek to hold [him] liable for his breach depending on the circumstances which arise as the Second Arbitration proceeds;" and (3) his "position now renders him interested in the outcome of the arbitration" in violation of the reinsurance agreement. The Court stated that:

> by breaching the Agreement, [Hancock's arbitrator] had become a fact witness not subject to examination. We typically operate under the presumption that judges and arbitrators can disregard what they already know. This is a strong presumption with regard to arbitrators since, due to the non-binding [sic] nature of arbitration, they must routinely determine whether or not to consider an earlier arbitration in the course of a subsequent one.

However, Hancock's arbitrator had rebutted the presumption by his statements at the organizational meeting in which he expressed doubts about segregating information from the first arbitration and dealing with the other panel members who did not have such knowledge. Further, the arbitrator's hypothetical doubts were actually realized in the second arbitration. During a conference he recounted his recollection of the first arbitration to dispute the account by one of the parties of what had occurred therein. Noting that an award may be vacated for arbitrator misconduct, the Court found that Trustmark "had demonstrated a strong likelihood of success on the merits" on its claim to disqualify.

As to whether the contract claim regarding the Confidentiality Agreement was subject to arbitration, the Court also found that Trustmark had shown a strong likelihood of success in showing there was no agreement to arbitrate. It held that the question of whether the parties had agreed to submit a particular dispute to arbitration was for the Court to decide under *Duthie v. Matria Healthcare*, 535, F. 2d, 909, 915 which followed *Howsam v. Dean Witter Reynolds Inc.*,537 U.S. 79, 82 (2002). It observed that the Confidentiality Agreement lacked an agreement to arbitrate. Relying on *Industrial Electronics Corp. Of Wisconsin v. iPower Distribution Group, Inc.*, 215 F.3d 677, 681 (7th Cir. 2000), the Court determined the arbitration clause in the reinsurance contract was not a bar to litigation because the Seventh Circuit had held that where one agreement contains an arbitration clause but the other does not, issues arising under the agreement lacking the clause may be litigated "even where the two agreements are closely intertwined." The Court concluded that "[i]t is difficult to see how the Confidentiality Agreement relates to the performance of the Underwriting Agreement or the validity of the cession."

In *Trustmark v. Clarendon*, the second case, Clarendon reinsured Trustmark under a series of treaties in 1997 and 1998. The first, a quota share contract, "VQS I", was effective on June 1, 1997 and renewed effective June 1, 1998, "VQS II". The parties also entered into excess of loss agreements, referred to as "the 1998 XOL Treaties" ("XOL"). In all instances they agreed that in the event of arbitration, the arbitrators would be disinterested. After Trustmark demanded arbitration on both the XOL and VQS II treaties, Clarendon appointed Mary Ellen Burns as its arbitrator in both disputes.

In the XOL arbitration, Clarendon moved to consolidate, which Trustmark opposed. The panel denied the motion. At the time, the VQS II panel had yet to convene. During the XOL proceedings, which culminated in a corrected final award on March 20, 2009, the parties, as well as the panel, executed a standard ARIAS Confidentiality Agreement.

In August, 2009, Burns contacted Trustmark's arbitrator to select an umpire for the VQS II dispute. Trustmark objected to her service as Clarendon's arbitrator, citing concerns with her duties under the XOL Confidentiality Agreement and whether she was disinterested as required by the VQS II arbitration clause.

It then filed an action in which it sought a preliminary injunction to disqualify Burns as an arbitrator in the VQS II dispute, find Clarendon in breach of the XOL Confidentiality Agreement for appointing her, and enjoin Clarendon from participating in the arbitration if Burns remained on the panel. Clarendon moved to dismiss the complaint, appoint an umpire, and order Trustmark to return to arbitration.

Regarding Trustmark's claim that Burns must be removed because she was not disinterested as required by the arbitration clause, the Court found that Trustmark was unlikely to succeed on the merits because under the FAA courts could vacate an arbitration due to arbitrator "misbehavior" after an award had been issued, but lacked the power to remove an arbitrator on a bias or partiality challenge before then. Citing a Seventh Circuit opinion in a similar case, he noted this result could not be avoided by couching the challenge as a breach of contract claim.

Turning to the Confidentiality Agreement, the Court first rejected Trustmark's contention that Clarendon's appointment of Burns had breached the Confidentiality Agreement by repudiating it. Trustmark had only described its concerns regarding a future breach of confidentiality but had failed to prove repudiation by pointing to a statement by either Clarendon or Burns that they had intended to breach the Agreement.

It then rejected Trustmark's argument that a breach was inevitable because the parties had acknowledged that the XOL decision

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would be an important part of the VQS II arbitration. Trustmark maintained that it followed that Burns would "inevitably disclose confidential information regarding the decision making process of the 1998 XOL Treaties Arbitration Panel". The Court found that Trustmark had "failed to detail any mechanism or facts making this disclosure 'inevitable' such that [Clarendon's] arbitrator is unable to perform without breaching the Confidentiality Agreement." The opinion noted that Clarendon's arbitrator could still make her decision on the VQS II record before her without any reference to the XOL case; she did not need to disclose confidential information to fulfill her duties as an arbitrator, nor was she a fact witness. The Court distinguished *Trustmark v. John Hancock*, on the ground that there the arbitrator had already breached a confidentiality agreement, thereby rebutting the presumption recognized by the Hancock Court that "arbitrators can disregard what they already know." It concluded that the essence of Trustmark's claim was merely a fear of a breach, for which there was no cause of action. The court granted Clarendon's motion to dismiss and denied Trustmark's motion for injunctive relief.

Although there was no deadline in the reinsurance contract for agreeing upon an arbitrator, the Court held that because there had been a four month period in which no umpire had been appointed it would appoint one itself. It also granted Clarendon's motion to compel Trustmark to return to arbitration.▼

**Tom Stillman is an ARIAS-certified arbitrator and was formerly Senior Vice President and Deputy General Counsel of the CNA Insurance Companies*

In re Insurance Co. of North America

In re Insurance Co. of North America, , 2008 WL 5205970 (S.D.N.Y)

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

Date Decided: December 12, 2008

Issue Decided: Resignation or death of a party-appointed arbitrator prior to a partial final award by the arbitration panel.

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

In *In re Insurance Co. of North America*, the Southern District of New York ruled that an arbitration proceeding must begin anew if one arbitrator of a panel must resign before the panel provides its final decision. While the court noted that the general rule in the Second Circuit is that "where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel", the court still stated that its holding was "based on the unique facts of this case."

Background

Insurance Company of North America and INA Reinsurance Company ("INA") reinsured Public Service Mutual Insurance Company ("PSMIC"). A dispute arose after PSMIC settled an environmental liability claim and allocated the loss pro rata across fifteen policies it issued to its insured over a fifteen year period. After receiving its portion of the reinsurance bill, INA disputed PSMIC's method of allocating the settlement costs pro rata.

Pursuant to the parties' reinsurance contracts, each party chose an arbitrator and those arbitrators selected an umpire. Following discovery, PSMIC moved for summary judgment, seeking payment of the entire balance it claimed was due from INA. After oral argument, the arbitration panel issued a partial judgment — deciding in favor of PSMIC on the question of which state's law applied, but leaving the issue of whether PSMIC's allocation was unreasonable or made in bad faith undecided until a complete hearing. Prior to that hearing date, INA served a motion for reconsideration of the panel's Summary Judgment Order. Before that motion was fully briefed, INA's appointed arbitrator resigned from the panel citing health problems. As a result, PSMIC requested that INA appoint a replacement arbitrator. INA filed suit to compel a new arbitration.

Holding

As an initial matter, the Court stated that the general rule in the Second Circuit is that "where one member of a three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel." However, the Court also acknowledged an exception to this general rule when the arbitration panel "had issued a 'partial final award.'" Citing two Second Circuit cases, PSMIC argued its arbitration was exactly the type that fit into the exception.

Turning to *Trade & Transport v. Natural Petroleum Charters*, 931 F.2d 191 (2d Cir. 1991), the first case cited by PSMIC in support of its

argument, the Court distinguished this case from PSMIC's situation. At the suggestion of the district court involved, the panel in Trade & Transport bifurcated the arbitration issues and ordered a "partial final award" as to one of those issues. Although the losing party filed a motion for reconsideration, the panel denied the motion and stated that, with respect to the partial award, the panel was *functus officio*. One year after the denial of the motion for reconsideration, one of the party-appointed arbitrators died. The Trade & Transport court refused to order a new arbitration relating to the partial final award because that award "conclusively decide[d] every point required by and included in the first part of the parties' modified submission." Distinguishing this set of facts, the PSMIC Court found that the panel's Summary Judgment Order was not a final judgment, as the arbitrators had not yet ruled on PSMIC's request for damages, and the motion for reconsideration still pending made the panel's Summary Judgment Order non-final. *Id*. at *5. Accordingly, the PSMIC Court determined the Summary Judgment Order was merely an "interim decision on a matter of law." *Id*.

The court also distinguished PSMIC's second cited case, *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007). The court in Zeiler did not require a new arbitration after one of the party-appointed arbitrators resigned from the panel. However, the Zeiler arbitration involved a unique arbitration panel consisting of three Jewish rabbis for a religious tribunal whose purpose was to unwind a complex business relationship over several years. The Zeiler court refused to start the arbitration anew holding that the issue was one of contract interpretation and that the Jewish 'Zabala' method of arbitration allowed for the two remaining rabbis to continue the arbitration without the presence of a third arbitrator. Accordingly, the Court distinguished Zeiler, holding that PSMIC and INA's arbitration was not an "ongoing and complex arbitration" like that in Zeiler — instead, it was a simple insurance coverage dispute. Further, unlike Zeiler, the reinsurance contracts at issue did not provide for any procedure in the event of the death or resignation of an arbitrator.

The court acknowledged that the Second Circuit's general rule could lead to potential abuse by a losing party who wants a "second bite at the apple" and arranges for its arbitrator to resign. In this case, however, the court noted that there was no evidence of misconduct by INA and that both parties agreed that INA's arbitrator needed to resign for serious health problems. Additionally, the court emphasized that its decision is "expressly premised on the unique facts of this case where the resignation occurred while pending before the panel was a motion for reconsideration of an order that itself cannot be fairly considered a 'partial final award.'" Accordingly, the court ordered that INA and PSMIC each have the opportunity to choose a new arbitrator, and for the arbitration to start anew. ▼

**Eric Haab is a partner in the Insurance and Reinsurance Litigation Group at Foley & Lardner LLP. Jennifer Travers is an associate at Steptoe & Johnson LLP.*

AIU Insurance Company v. TIG Insurance Company

AIU Insurance Company v. TIG Insurance Company,2008 WL 5062030 (S.D.N.Y.)

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

Date Decided: November 25, 2008

Issue Decided: Whether an insurer waives attorney-client and work product privileges when it files suit against its reinsurer for breach of contract, where the reinsurer asserts a prompt-notice affirmative defense.

Submitted by Eric A. Haab and Kerry Slade*

In *AIU Insurance Co. v. TIG Insurance Co*., the Southern District of New York held that an insurer had not implicitly waived attorney-client and work product privileges by filing suit against its reinsurer because filing suit was not a sufficient affirmative act to place the privileged communications "at issue," and the material was not "vital" to the reinsurer's affirmative defense of prompt notice.

Background

In January 2007, AIU sought reimbursement from its reinsurer, TIG, for payments made to third-party Foster Wheeler under umbrella insurance policies. In 2006, Foster Wheeler and AIU had settled an action for declaratory relief and AIU began to make payments to Foster Wheeler pursuant to the settlement agreement.

After receipt of AIU's claims, TIG requested information about when AIU first received notice of potential liability to Foster Wheeler. AIU sent TIG an opinion of its coverage counsel, which provided background to the dispute and demonstrated that AIU had received notice of its potential exposure in March of 1992. TIG then requested an audit of AIU's records relating to these claims, and AIU granted TIG access to all records relating to Foster Wheeler under a Confidentiality Agreement that specifically reserved all

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privileges.

After the audit, AIU filed suit against TIG, alleging that TIG breached the reinsurance contracts by failing to indemnify AIU for the settlement payments. TIG asserted an affirmative defense of "prompt-notice," claiming that AIU breached the contracts by failing to provide prompt notice of AIU's potential exposure to Foster Wheeler. In support of its defense, TIG sought documents concerning AIU's knowledge of its potential exposure under the umbrella policies, including some documents created by AIU's coverage counsel that were provided to TIG during the audit. AIU objected to TIG's request on the grounds of attorney-client and work product privilege. TIG argued that any privilege had been waived implicitly, because AIU put the documents at issue by bringing its breach of contract claim against TIG, or expressly when AIU provided TIG with the documents during the 2007 audit.

Holding

The court held that AIU had not implicitly waived its claims of privilege by filing suit against TIG because TIG had not proven any of the three elements of the "at-issue" doctrine that governs implied waivers of privilege under New York law. First, AIU's act of filing suit to obtain coverage was not a sufficient "affirmative act" to place the documents at issue, and TIG's affirmative defense could not constitute an affirmative act by AIU. Second, AIU had not placed the communications "at issue" because it did not intend to rely on the contents of the privileged documents. The court reasoned that while the advice of AIU's coverage counsel may be relevant to the dispute, it was not "at issue" in the breach of contract claim. Last, upholding the privilege would not have prevented TIG from discovering material "vital" to its prompt-notice defense because the defense relied on an objective evaluation of AIU's knowledge of the facts of its liability. TIG was able to discover such facts through normal discovery methods.

The distinction between insurance and reinsurance contracts under New York law was crucial to the court's decision in favor of AIU. In disputes over insurance contracts, prompt notice is a condition precedent that the insured must plead and prove in order to prevail on the merits. With regard to reinsurance contracts however, prompt notice is not a condition precedent to coverage absent clear language in the contract; rather, prompt notice is an affirmative defense of the reinsurer. Because there was no express language in the contract between TIG and AIU requiring AIU to prove that it gave prompt notice of claims, AIU had not placed prompt notice at issue by suing TIG.

The court also rejected TIG's assertions that AIU had expressly waived the privilege by providing TIG with privileged documents during the 2007 audit. TIG argued that the Confidentiality Agreement signed by the two parties at the outset of the audit applied only to disclosure of documents to third parties. The Court held that this interpretation was at odds with the language of the agreement and that the documents were protected by the Confidentiality Agreement.

AIU, however, had waived its privilege surrounding the counsel opinion that it sent to TIG in response to TIG's initial request for information regarding AIU's notice of Foster Wheeler's claims. The court reasoned that AIU was aware of the possibility of litigation when TIG expressed concern about the promptness of notice of the claims, so the parties' interests were not aligned when AIU voluntarily exposed the document to TIG.

The court also ordered AIU to produce documents from previous claims paid to Foster Wheeler's affiliate and indemnified under the TIG reinsurance contracts because they were relevant to determining how AIU gave notice under the contracts in previous circumstances. Additionally, because AIU had provided TIG with such documents during the audit in order to assist TIG in understanding the resolution of Foster Wheeler's claims, AIU had implicitly conceded that the documents were relevant to the current dispute.▼

**Eric Haab is a partner in the Insurance and Reinsurance Litigation Group at Foley & Lardner LLP. Kerry Slade is an associate at Freeborn and Peters LLP.*

DID YOU KNOW...?

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Recently Certified Arbitrators

Mitchell W. Gibson

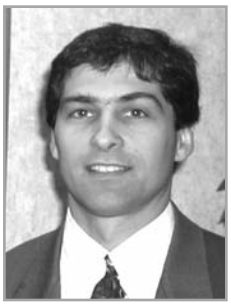
Mitchell Gibson has over 20 years of experience in the insurance and reinsurance industry. In his current position as Assistant Vice President at AXA Liabilities Managers, Inc. he supervises the expedited run-off of AXA's largest portfolio, Colisee Re Canada, transitioning from the Head of Commutations (US). Prior to his appointment as the Head of Commutations (US), Mr. Gibson was involved in handling AXA's North American Casualty facultative portfolio and managing the treaty business of distressed primary companies.

Mr. Gibson began his career at a small regional carrier in 1989 as an actuarial analyst working with the CFO and outside actuaries on loss reserves, loss triangles, reconstruction of loss history, and the annual statement schedule P information. He joined AIG's Miscellaneous Professional Liability department, where he negotiated high exposure and complex coverage cases involving public officials, real estate agents, management consultants and land surveyors. He subsequently joined Constitution Reinsurance where he supervised and audited treaty and facultative reinsurance programs. He handled medical malpractice, product liability, environmental pollution, professional liability, general liability, automobile and workers' compensation accounts.

He joined Frontier Insurance Company in 1996, where he managed complex coverage and multi-jurisdictional claims involving general liability, directors' & Officers' liability, professional liability, and pharmaceutical exposures. He returned to AIG in 2000, becoming responsible for all assumed Toxic Tort facultative claims, while providing technical input and quality assurance on all written correspondence to reinsurers and intermediaries.

Mr. Gibson earned a Bachelor of Science degree in Business from Mankato State University and a Master of Science degree in Insurance Management from Boston University. He has earned eight insurance designations, including the Charter Property and Casualty Underwriter (CPCU), Registered Professional Liability Underwriter (RPLU), Society of Claims Law Associates (SCLA), Associate in Risk Management (ARM), Associate in Reinsurance (ARe), Associate in Insurance Accounting and Finance (AIAF), Associate in Claims (AIC), and Associate in Underwriting (AU).

Mr. Gibson's ADR experience includes managing multiple arbitrations as AXA's primary company representative.▼



Mitchell W. Gibson

James W. Macdonald

James Macdonald is an independent consultant offering dispute resolution services for attorneys, insurers, reinsurers, policyholders, and MGAs. In addition, he provides strategic advisory services to investment bankers, industry analysts, and as a Senior Fellow for the RAND Corporation's Institute for Civil Justice.

Mr. Macdonald has 38 years of diverse experience with industry leaders including General Re, Munich Re, AIG, ACE-INA, Marsh, and CNA. He also has experience as a managing general agent (or "MGA') in Canada and the USA. Since he became a consultant in 2006, this diverse background has afforded an unmatched perspective as an expert witness, particularly to disputes involving program business, "fronting" practices, or issues related to claims made or excess liability policies. Notable accomplishments as an insurer, reinsurer, or MGA include:

- The development of the first commercial umbrellas in the early 1970s, the authorship of a unique casualty insurance policy for a large group captive insurer in 1980, the marketing and underwriting of the first environmental impairment liability policies in the early 1980s, co-authorship of the industry's first employment practices liability insurance policy in 1992, and, most recently, the creation of a new generation of property and liability terrorism insurance programs.
- Extensive involvement in the underwriting of new forms of financial insurance or "finite" reinsurance including retroactive coverages, loss portfolio transfers, novation agreements, warranty insurance, credit insurance, and financial guarantees.

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James W. Macdonald

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

Charles Platto

Richard A. Rasmussen

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- The development of dozens of new casualty MGA programs including all forms of Directors & Officers Liability, Medical and Non-Medical Professional Liability, General Liability, and Workers Compensation insurance.
- The resolution of over $400 million in reinsurance receivable disputes, and countless complex disputes with policyholders and producers including claims ultimately closing at more than $100 million.

Mr. Macdonald's recent publications include a detailed RAND report on the need for regulatory reforms in Workers Compensation, and two chapters on Reinsurance for International Risk Management Institute (or "IRMI"). Mr. Macdonald is a graduate of the University of Notre Dame with a BA in Literature and Philosophy. His professional insurance designations include CPCU, ARM, and a license as a P&C agent.▼

Charles Platto

Charles Platto is a principal of the Law Offices of Charles Platto in New York, where he provides domestic and international commercial and insurance and reinsurance arbitration, mediation, expert witness and litigation management and oversight services. He spent the first half of his career as an associate and partner at Cahill Gordon & Reindel in New York and Paris specializing in complex insurance and commercial litigation. He then founded his own national boutique insurance firm in Vermont and New Hampshire and at the same time served for a period as head of the United States practice of the international law firm Salans. In recent years, Mr. Platto moved back to New York to head the insurance practice group at Wiggin and Dana LLP before reestablishing his own firm and beginning to serve as an arbitrator and mediator.

Mr. Platto has been adjunct professor of insurance law and litigation for the last 20 years, first at NYU Law School, followed by Vermont Law School and currently at Fordham Law School.

He is a Vice Chair of the ABA TIPS Insurance Coverage Litigation Committee (ICLC) and Chair of the ICLC Academics Subcommittee, and is a member of the editorial board of the Insurance Coverage Litigation Reporter (Thomson/Reuters). He is a member of the New York State Bar Association Dispute Resolution Section and of the New York City Bar International Commercial Disputes Committee and a former member of the House of Delegates of the NYSBA. He was previously Chair of the International Bar Association International Litigation Committee and Chair of the IBA Task Force on litigation worldwide.

Mr. Platto is the editor of nine books on international commercial litigation and arbitration and has written several chapters and articles on insurance matters. He is author of the chapter on principal exclusions in the ABA CGL policy text (2010) and editor of the ABA Additional Insureds text (in process). He was named a 2010 Super Lawyer for Insurance Coverage.

Mr. Platto is a member of the distinguished panels of neutrals of the Center for Public Resources (CPR) Institute for Conflict Prevention Dispute for insurance, insurer policyholder, environmental, international and New York. He is also a member of the panel of international arbitrators of the AAA International Centre for Dispute Resolution (ICDR), and a registered arbitrator, mediator and expert with the International Chamber of Commerce (ICC). He is a member of the Reinsurance Mediation Institute (Remedi). Mr. Platto has been involved in arbitrations and mediations and related proceedings in the United Kingdom, South Africa and the United States. ▼

Richard A. Rasmussen

Richard Rasmussen retired as President and CEO of Michigan Millers Mutual Insurance Company in 2010. He has 38 years experience in property and casualty insurance as an underwriter and an executive. He also served as the reinsurance officer of Michigan Millers for over 25 years. He has the CPCU designation and the Associate in Reinsurance (Are) designation. Upon his retirement, he formed Caddis Insurance Services LLC to offer arbitration, expert witness and consulting services.

Mr. Rasmussen spent 32 years of his career at Michigan Millers. He was President and CEO from 2007 to 2010. Prior to that, he served as Chief Operating Officer from 2005 to 2007. From 1993 to 2005, he served as the First Vice President having oversight responsibilities for underwriting, loss control, marketing and actuarial. He served as the underwriting vice president from1985 to 1993 having responsibility for commercial property and casualty, personal lines and commercial agribusiness. Prior to that, he served in underwriting management.

Mr. Rasmussen also served as the reinsurance officer for the company from 1985 to 2010. He was responsible for all ceded reinsurance as well as a modest book of assumed reinsurance. He is well known and respected in the reinsurance community.

Prior to working for Michigan Millers, from 1972 to 1978, Mr. Rasmussen served in underwriting and field positions with Shelter Insurance Companies.

He is a graduate of the University of

Missouri and lives in the Lansing, Michigan area. He has served on the boards of Michigan Millers Mutual Insurance Company, the Insurance Institute of Michigan, the Mid Michigan Business Travel Coalition, the Sparrow Hospital Foundation, the Boy Scouts of America Chief Okemos Council Development Board, the Lansing Economic Area Partnership, the Michigan Basic Property Insurance Association and the Mid Michigan Chapter of CPCU.▼

Stephen M. Rogers

Stephen Rogers is an attorney with 36 years of insurance and reinsurance experience. He has been a partner at Zelle Hofmann Voelbel & Mason LLP in its Boston office for the past 10 years. His practice focuses on counseling insurer and reinsurer clients in connection with property insurance claims and dispute resolution nationally. Representative reinsurance matters include number of occurrences, treaty reinstatement, recoverability of loss adjustment expenses, applicability of aggregate limits, scope of facultative reinsurer's liability, and allocation of subrogation recovery between a cedent and treaty and facultative reinsurers. Representative insurance matters include property damage and time element claims and litigation arising out of the 9/11 terrorist attack on the World Trade Center; claim handling and coverage issues, including related litigation and ADR proceedings arising out of Hurricanes Frances, Jeanne, Katrina, Rita and Wilma; builder's risk losses including hard costs, delayed start-up and soft costs issues; and boiler-machinery coverage.

Prior to joining Zelle Hofmann, Mr. Rogers was employed at Industrial Risk Insurers for over 26 years. He began his insurance career in 1974 as a loss prevention engineer prior to moving over to the underwriting side of the business. Following law school, he served as Claims Counsel and as Vice President & General Counsel before becoming Senior Vice President – Claims from 1989 to 2001 with senior management responsibility for all claim operations globally, including direct, assumed and ceded reinsurance claims.

Mr. Rogers's broad experience within the industry has provided a unique perspective to his representation of insurance and reinsurance clients at Zelle Hofmann. In addition to his legal practice, he has served as an expert witness on property insurance coverage, claim handling and bad faith, as well as serving as a party-appraiser and party-arbitrator.

Mr. Rogers is admitted to practice in Massachusetts, Connecticut and Ohio. He is a member of the Massachusetts Reinsurance Bar Association, Federation of Defense & Corporate Counsel, Property Insurance Law Committee of ABA/TIPS (Past Chair), Loss Executives Association (Past President), Property Loss Research Bureau (Affiliate Advisory Board) and Connecticut Bar Association Insurance Law Section (Executive Committee).

He received his B.A. (1974) and J.D. (1979) from the University of Akron. He served in the USAF from 1968 to 1972.▼

Stephen M. Rogers

Christy M. Schweikhardt

Christy M. Schweikhardt

Christy Schweikhardt is the Vice President of Litigation for HCC Insurance Holdings, Inc., a leading international specialty insurance group. Ms. Schweikhardt joined HCC's corporate legal team in 2002 to manage the Company's corporate litigation, including reinsurance arbitrations and litigation, insurance bad faith litigation and arbitration, MGA and MGU issues, international insurance arbitrations and complex litigation matters.

Prior to joining HCC, Ms. Schweikhardt was a litigator in the Health Law Department of Fulbright & Jaworski LLP where she handled healthcare ERISA, FEHBA, Medicare HMO cases and other HMO and health insurance coverage litigation. She also defended hospitals and medical staff in medical peer review and other health care related cases and advised clients regarding HIPAA and other medical record privacy laws.

Ms. Schweikhardt earned her mediator certification from the AA White Alternate Dispute Resolution Center in 1994 and has conducted pro bono mediations. In addition, she has participated in various legal and other organizations including:

- State Bar of Texas
- American Bar Association–Litigation and Health Law Sections
- Member of the Public Affairs and Public Relations Committee of the State Bar of Texas from 1994 to 1998
- Health Law Section of the State Bar of Texas
- Litigation Section of the State Bar of Texas
- Insurance Law Section of the State Bar of Texas
- Fort Bend County Dispute Resolution Center – Mediator
- American Society for Healthcare Risk Management
- Greater Houston Society for Healthcare Risk Management
- Texas Association of Defense Counsel
- Toastmasters from 1989 to 1995

Prior to earning her law degree in 1993 from South Texas College of Law, graduating *magna cum laude*, Ms. Schweikhardt worked as an oil and gas exploration geologist for American International Energy Corporation.▼

ARIAS U.S.

Do you know someone who is interested in learning more about ARIAS•U.S.?

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

An Invitation…

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of December, 2010, ARIAS•U.S. was comprised of 385 individual members and 124 corporate memberships, totaling 1,059 individual members and designated corporate representatives, of which 262 are certified as arbitrators.

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

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

This website offers the "Arbitrator, Umpire, and Mediator Search" feature that searches the extensive background data of our Certified Arbitrators who have completed their enhanced biographical profiles. The search results list is linked to those profiles, containing details about their work experience and current contact information.

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

For many years, the Society published the *ARIAS•U.S. Membership Directory*, which was provided to members. In 2009, it was brought online, where it is available for members only. ARIAS also publishes the ARIAS•U.S. *Practical Guide to Reinsurance Arbitration Procedure* and *Guidelines for Arbitrator Conduct*. These publications, as well as the *Quarterly* journal, special member rates for conferences, and access to educational seminars and intensive arbitrator training workshops, are among the benefits of membership in ARIAS.

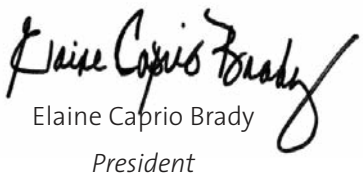
If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill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

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

Sincerely,

Daniel L. FitzMaurice

Chairman



Elaine Caprio Brady

President

ARIAS U.S. Membership Application

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MOUNT VERNON, NY 10552

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

914-966-3180, ext. 116

Fax: 914-966-3264

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Online membership application is available with a credit card through "Membership" at www.arias-us.org.

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Fees and Annual Dues: Effective 10/1/10

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$375	$1,075
FIRST-YEAR DUES AS OF APRIL 1	$250	$717 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$125	$358 (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.*

*** As a benefit of membership, you will receive the ARIAS·U.S. Quarterly, published 4 times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

NOTE: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $300 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.

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