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Have Courts Declared Open Season on Reinsurance Arbitrators?

Four Recent Court Decisions Present a Case for Reinsurance Arbitration Reform

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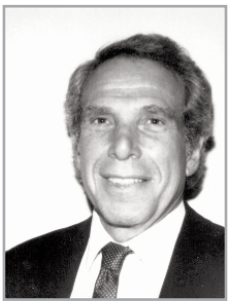

Eugene Wollan

editor's comments

The article by Charlie Fortune in our last issue was illustrative of the wide extent to which discussion within the reinsurance world has recently focused on the arbitration process itself. To keep abreast of the times, we will continue to publish opinion pieces of this genre, but will always be careful to label them as such. You will find one, by Jack Koepke, in this issue. This is a lively discussion of a hot topic, and we welcome additional views and contributions.

This is not, of course, to suggest a change in our primary focus. We continue to solicit informative or scholarly articles dealing with legal, ethical, or procedural issues. Our lead article in this issue, by Dan Perry and Aluyah Imoisili, analyzes four important recent decisions and discusses their impact on reinsurance arbitrations. Teresa Snider has contributed an illuminating discussion of the law dealing with consolidation of reinsurance arbitrations. And Ron Gass is, as usual, very au courant with his note on a case decided only weeks ago.

Many of you may remember Steve Richardson, a former Board member when he was with Equitas. His current job has apparently made it impossible for him to continue with us, so he has resigned his membership, but with these words: "I shall always look upon my time with ARIAS with fond memories and great pride. It is a wonderful organization." Hear, hear!

Since assuming the Editor role, I have become dramatically aware of the contribution made by Bill Yankus and his staff. The Editorial Board is involved with the substantive content of the Quarterly, but Bill and his folks do all the really tough stuff - layout, art work, meeting notices, bios, certifications, Members on the Move, and much, much more — and they do it extraordinarily well. My hat is off to them.

Personal note, in response to inquiries from several well-meaning "friends": Yes, that's a pretty old photo of me, and No, I have no intention of updating it.

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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

Have Courts Declared Open Season on Reinsurance Arbitrators? Four Recent Court Decisions Present a Case for Reinsurance Arbitration Reform

This article is based upon a paper presented at the ARIAS•U.S. 2010 Spring Conference.

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Four recent, high profile decisions from courts in Pennsylvania, New York, and Illinois suggest a growing judicial intolerance for certain practices in reinsurance disputes

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I. Introduction

Just two years ago, in *Hall Street Associates L.L. C. v. Mattel, Inc.*,[1] the Supreme Court shook the arbitration world by throwing into question the continued use of "manifest disregard of law" as a basis for challenging arbitration awards under the FAA.[2] The FAA authorizes a court to vacate or modify arbitration awards where: (i) the award was procured by corruption, fraud, or undue means; (ii) there was "evident partiality" or corruption by the arbitrators; (iii) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[3] In *Hall Street*, the Court held that these four enumerated grounds were exclusive and could not be expanded by agreement among the parties. Since then, a number of federal courts addressing the issue have interpreted *Hall Street* to mean that the FAA grounds are exclusive and that "manifest disregard of the law" is no longer a basis to vacate or modify arbitration awards.[4] Some commentators anticipated that the potential elimination of this well-known vehicle for challenging arbitration awards would result in a substantial expansion of the arbitrators' power, particularly in reinsurance disputes where the parties frequently employ "honorable engagement" clauses providing arbitration panels with substantial discretion and authority. But in the wake of *Hall Street*, courts have still shown a willingness to examine rigorously the conduct of reinsurance arbitration panels. Courts have done so by utilizing the authority granted by the FAA, state law, and the contractual language contained in the reinsurance treaties themselves to exercise oversight over arbitration panels. Four recent, high profile decisions from courts in Pennsylvania, New York, and Illinois suggest a growing judicial intolerance for certain practices in reinsurance disputes.

In *PMA*, the court vacated an award for "exceeding authority" and criticized the arbitration panel for reaching a decision that was contrary to the express language of the treaty. The court characterized the panel's award as "completely irrational," despite the presence of an honorable engagement clause authorizing the panel to stray from the law or the language contained in the treaty in the interests of fairness.[5] In *Scandinavian Re*, the court struck a panel's award for "evident partiality" because two of the arbitrators failed to disclose non-economic conflicts of interest that arose out of their service on a panel hearing a related dispute.[6] In *Trustmark*, the court issued a preliminary injunction preventing a party-appointed arbitrator from serving on a panel because of an alleged breach of a confidentiality agreement by the arbitrator stemming from his service as an arbitrator on a prior related arbitration between the parties. The court suggested that the arbitrator could be liable to the opposing party for the breach.[7] Finally, in *Amerisure*, the court found that the arbitrators

"exceeded their powers" by awarding attorneys' fees where neither the parties' contract nor governing state law authorized the panel to issue such an award despite the panel's conclusion that the award was based on a violation of the duty of utmost good faith.[8] Each of these decisions is being (or is likely to be) appealed.

These decisions each touch on a number of "hot button" issues at the heart of the debate on the direction of modern reinsurance arbitration practice, including the reliance on "honorable engagement" clauses, the parameters of the duty of utmost good faith, the failure to provide reasoned awards, conflicts of interest stemming from the relatively insular nature of the industry, disclosure of conflicts, and repeat appointments of arbitrators in related proceedings. Each of these four decisions warrants examination.

II. Discussion

A. *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*

On September 17, 2009, the United States District Court for the Eastern District of Pennsylvania vacated an arbitration award for "exceeding authority" under FAA Section 10(a)(4). The court found that the award was "completely irrational" because it departed from the provisions of the treaty at issue. The court did so notwithstanding an "honorable engagement clause" that provided the panel with discretion in fashioning its award in the case. This decision is particularly noteworthy because it suggests that arbitrators cannot depart from the agreed upon language contained in a treaty just because the treaty contains an "honorable engagement" clause.

1. Background

In PMA, St. Paul Re provided reinsurance coverage to PMA Capital Insurance Company under an excess of loss reinsurance contract covering 1999 to 2001. The St. Paul Re agreement provided for an "experience account" into which PMA paid funds. To the extent that losses exceeded funds in the account, St. Paul Re was obligated to pay the excess amount. If any amounts remained in the account at the end of the contract, PMA was entitled to a "profit commission" in the amount of the account balance. In 2002, St. Paul transferred its reinsurance business to Platinum Underwriters Bermuda, Ltd., and in 2003 Platinum entered into a new excess of loss agreement with PMA. The 2003 agreement contained a "deficit carry forward" provision stating that any deficit in the 1999-2001 agreement with St. Paul Re would be applied to the experience account in the 2003 agreement and would offset any positive balances. Platinum was then obliged to return any remaining balance in the experience account at the earlier of the time that losses had reached Platinum's limits (or were commuted) or December 31, 2021. The 2003 agreement had this honorable engagement clause:

> The arbitrators will interpret this Agreement as an honorable engagement and not merely as a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They will make their award with a view to affecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.[9]

When a dispute arose concerning the validity and scope of the deficit carry forward provision in the 2003 agreement, PMA demanded arbitration against Platinum. PMA sought a determination by the panel that Platinum was not entitled to the benefit of the deficit carry forward provision because it was not a party to the 1999-2001 agreement, and that there was no deficit under the 1999-2001 agreement (although PMA had reported to the Pennsylvania Insurance Department that there was a $6 million deficit). Platinum in response sought a declaration that it was entitled to the deficit carry forward provision and that there was a deficit of $10.7 million. The parties requested that the panel retain jurisdiction over the dispute after the completion of the arbitration. After a hearing on the merits, the panel issued an award stating in its entirety that (i) PMA pay Platinum $6 million, (ii) all references to the deficit carry forward provision in the 2003 agreement be removed from the contract, and (iii) all other requests of the parties be denied. The panel provided no reasoning for its decision.

PMA filed a petition to vacate or modify the panel's award on the basis that the panel exceeded its authority under the FAA because the award was contrary to the relief sought by the parties and the language of the 2003

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In *PMA*, the court vacated an award for "exceeding authority" and criticized the arbitration panel for reaching a decision that was contrary to the express language of the treaty. The court characterized the panel's award as "completely irrational," despite the presence of an honorable engagement clause authorizing the panel to stray from the law or the language contained in the treaty in the interests of fairness.

The result might have been different if the *PMA* panel had simply explained itself in a reasoned award. While many reinsurance disputes are relatively straightforward and do not require the panel to express itself in a reasoned award, one lesson from *PMA* is that it is imperative for a panel to explain itself where it seeks to alter the written agreement between the parties or otherwise fashion a "creative" result that differs from the relief requested by the parties.

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agreement.

The court agreed with PMA and vacated the panel's award. The court held that the award could not be rationally derived from the 2003 agreement because the conditions in the contract necessary to trigger the deficit carry forward had not been achieved. Although the court acknowledged that the honorable engagement clause gave the arbitrators broad powers to fashion remedies, the court concluded that the clause did not empower the panel to modify the contract or eliminate provisions negotiated by the parties and written into the treaty:

> The [Honorable] Engagement Clause allowed the Arbitrators to stray from "Judicial formalities" and the 2003 Contract's "literal language" to effect in a "reasonable manner" the Contract's "general purposes." No court has held that such a clause gives arbitrators authority to rewrite the contract they are charged with interpreting. Rather, courts have held just the opposite [...]. The 2003 "contract itself" requires the enforcement of the Deficit Carry Forward Provision, not its elimination.[10]

Relatedly, the court criticized the panel's award because it was not derived from the parties' submissions. Neither party had requested that the panel eliminate the deficit carry forward provision or order PMA to pay any deficit to Platinum.

As a result, the court held that the panel's award did not "draw its essence" from the 2003 agreement and thus concluded that the award was "completely irrational."[11] The court specifically criticized the panel for failing to provide a reasoned award: "Any evaluation of the Arbitrators' decision is made more difficult by their failure to offer any supporting explanation or reasoning."[12] Without the ability to analyze the panel's reasoning, the court concluded that the panel simply sought to dispense "rough justice" by eliminating the deficit carry forward provision and compensating Platinum for the loss of the provision through the $6 million payment:

> The Panel apparently believed that it could "reasonably" resolve these disagreements by eliminating the Provision itself. Accordingly, acting on [the honorable engagement provision's] "rough justice" imperative, the Arbitrators simply took the Provision out of the contract. This, in my view, is "completely irrational," the Panel's broad authority notwithstanding. [...]. I have found no decision [...] that an Honorable Engagement Clause authorizes arbitrators, acting *sua sponte*, to eliminate material provisions of the contract they are charged with interpreting.[13]

2. Lessons From *PMA*: Reliance on the "Honorable Engagement Clause" to Reach Creative Results Contrary to the Parties' Agreement Risks Vacatur of the Award

There are several important lessons from *PMA*. Panels that use an honorable engagement clause in reinsurance agreements to achieve the "right" or "just" result may risk vacatur of their award when they seek to circumvent or otherwise undo express contractual provisions bargained for by the parties in the treaty. The *PMA* court perceived that the arbitrators were doing "rough justice." This case represents a major challenge to the broad use of the honorable engagement clause, particularly where the clause is invoked to undo express contractual provisions.

The case is also interesting because it is not clear that the *PMA* panel's decision was, in fact, "completely irrational." Indeed, the court acknowledged that the arbitrators were trying to prevent further disputes over the carry forward provision: "The Panel apparently believed it could "reasonably" resolve these disagreements by eliminating the [deficit carry forward provision] itself."[14] It appears that the panel sought to give Platinum the value of the deficit carry forward (at the amount that *PMA* itself had represented to the Pennsylvania Insurance Department) in order to end further disputes by simply removing the provision from the 2003 agreement altogether. The panel's effort to minimize the opportunity for future litigation is not necessarily "irrational" in light of the fact that (i) the parties asked the panel to retain jurisdiction over their dispute after the conclusion of the arbitration and (ii) the treaty at issue did not conclude until December 31, 2021. Rather than subject the parties to the potential for years of future

litigation, the panel apparently determined to fashion an award that provided finality and clarity for both parties.[15]

The result might have been different if the *PMA* panel had simply explained itself in a reasoned award. While many reinsurance disputes are relatively straightforward and do not require the panel to express itself in a reasoned award, one lesson from *PMA* is that it is imperative for a panel to explain itself where it seeks to alter the written agreement between the parties or otherwise fashion a "creative" result that differs from the relief requested by the parties. Other courts have expressed frustration where a panel fails to provide a reasoned award.[16] And had the *PMA* panel provided reasons for its decision, the court might not have had a basis to rule that its decision was "completely irrational."

B. Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.

On February 23, 2010, the United States District Court for the Southern District of New York vacated an arbitration award for "evident partiality" of the arbitrators under FAA Section 10(a)(2). *Scandinavian Re* arose out of the same group of parties and agreements at issue in the PMA arbitration discussed above. In *Scandinavian Re*, two of the arbitrators (a party-appointed arbitrator and the umpire) failed to disclose their involvement in the PMA arbitration. The PMA arbitration involved a common witness, similar issues, and the entity that succeeded St. Paul as the reinsurer. *Scandinavian Re* illustrates the perils associated with service of arbitrators in related proceedings and the failure to provide robust and continuing disclosure of potential conflicts.

1. Background

Scandinavian Reinsurance Company Limited reinsured St. Paul under a finite retrocessional casualty stop loss agreement. An arbitration clause in the contract required that the panel be "disinterested." In September 2007, after a dispute arose concerning, among other things, whether the retrocessional agreement created one experience account that applied to the entire term of the agreement or separate experience accounts for each year of the agreement, St. Paul demanded arbitration against Scandinavian Re. The panelists disclosed their relationships with the parties and affiliates both prior to and at the organizational meeting. The arbitrators subsequently made supplemental disclosures, including disclosures concerning their relationships with the witnesses. But at no time did two of the arbitrators disclose that they had also been chosen to arbitrate the PMA case or that a witness in the Scandinavian Re arbitration had been a witness in the PMA case. After conducting a full hearing on the merits, in August 2009, a majority of the panel issued an award in St. Paul's favor. Scandinavian Re did not discover that the two arbitrators had served on the PMA panel until October 2009.

Scandinavian Re moved to vacate the arbitration award on the basis that there was "evident partiality" on the part of the two arbitrators under FAA Section 10(a)(2). St. Paul in response argued, *inter alia*, that the undisclosed relationships were not material because neither of the arbitrators had any financial interest in the outcome of the Scandinavian Re arbitration or any direct relationship with St. Paul.

The court vacated the Scandinavian Re award. The court found that (i) the two arbitrators failed to disclose that they were involved in the PMA arbitration, (ii) there was a common witness and common issues in both arbitrations, and (iii) those facts were material. The court rejected St. Paul's argument that the lack of a financial interest on the part of the arbitrators was dispositive: "[T]he absence of these factors is not dispositive as to whether a relationship is material-all of the circumstances must be considered, including the timing of the arbitrators' relationships with each other, and with witnesses to the arbitration."[17] The court reasoned that, by virtue of their participating in both arbitrations, there was a risk that the arbitrators (i) received *ex parte* information about the kind of reinsurance business at issue in the Scandinavian Re arbitration, (ii) were influenced by credibility determinations about the witness from the PMA arbitration, and (iii) could have influenced one another on issues relevant to the Scandinavian Re arbitration because of their experience in the PMA arbitration. According to the court, the arbitrators' failure to disclose the potential conflict deprived St. Paul of the opportunity to object to the arbitrators' service in both arbitrations or to adjust its arbitration

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In *Scandinavian Re*, two of the arbitrators (a party-appointed arbitrator and the umpire) failed to disclose their involvement in the PMA arbitration. The PMA arbitration involved a common witness, similar issues, and the entity that succeeded St. Paul as the reinsurer. *Scandinavian Re* illustrates the perils associated with service of arbitrators in related proceedings and the failure to provide robust and continuing disclosure of potential conflicts.

In this case, the court acknowledged that the nature of reinsurance arbitration practice lends itself to potentially troublesome "relationship" conflicts: "'a principal attraction of arbitration is the expertise of those who decide the controversy,' that '[e]xpertise in an industry is accompanied by exposure [...] to those engaged in it, and the dividing line between innocuous and suspect relationships is not always easy to draw."

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strategy. The court also rejected the argument that the arbitrators subjectively believed in good faith that they would not be influenced by the information they learned during the PMA arbitration. Instead, the court followed Second Circuit precedent "'that' evident partiality' [...] will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[18]

2. Lessons From Scandinavian Re: Courts Will Strictly Review Disclosed and Undisclosed Conflicts of Interest

On its face, the result in the *Scandinavian Re* matter—vacating an expensive and thoroughly litigated arbitration before a respected panel—seems harsh. But it is not at all surprising that a federal court reviewing a dispute would take a strict view of conflict issues. Federal judges themselves are, in theory, subject to rigorous recusal standards: "Any justice, judge, or magistrate judge of the United States **shall** disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[19] In this case, the court acknowledged that the nature of reinsurance arbitration practice lends itself to potentially troublesome "relationship" conflicts: "'a principal attraction of arbitration is the expertise of those who decide the controversy,' that '[e]xpertise in an industry is accompanied by exposure [...] to those engaged in it, and the dividing line between innocuous and suspect relationships is not always easy to draw."[20] Nevertheless, the court decided to vacate the award after determining that the conflict evidenced partiality (from the perspective of an objective, third-party observer) on the part of the panel.

The decision has broad implications for counsel and arbitrators evaluating potential conflicts. *First*, it is noteworthy that the conflict identified here did not involve a financial interest or other relationship with a party or counsel. The court focused on the unfairness to Scandinavian Re resulting from the fact that its adversary's party appointed arbitrator and the umpire had access to information and testimony given in similar proceedings in which Scandinavian Re did not participate. Obviously, that reasoning has potentially broad implications for reinsurance practice, where the pool of arbitrators qualified to serve on any given matter is often relatively limited and the industry participants in the proceedings frequently have familiarity with the litigants outside of their service in the dispute in which they are retained to serve. *Second*, the court noted that a substantial deficiency was the failure of any disclosure of the related proceedings. Nevertheless, the court did not hold that the disclosure failure was itself dispositive, suggesting that the nature of the conflict was such that open disclosure might not have cured the potential for partiality. *Third*, the *Scandinavian Re* decision underscores that the "evident partiality" inquiry is not subjective. An arbitrator's personal view about whether he or she can be impartial is irrelevant. Instead, the court will make the determination of the arbitrator's impartiality from the perspective of an objective "reasonable person." *Finally*, this was a conflict that appears to have been entirely avoidable. The PMA engagement apparently arose after the organizational meeting conducted in the Scandinavian Re matter. This suggests that counsel and potential arbitrators would be well advised to evaluate conflicts more broadly than current practice, particularly where there is the possibility that a new engagement is somehow related to an existing engagement involving different parties.

C. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*

The United States District Court for the Northern District of Illinois, on January 21, 2010, disqualified a party-appointed arbitrator serving in a dispute substantially similar to a prior proceeding in which he had served as the party-appointed arbitrator for the prevailing party. The prior proceeding involved the same parties, the same contracts, and substantially similar issues in dispute. Unlike *Scandinavian Re*, the arbitrator at issue in *Trustmark* fully disclosed whatever potential conflict of interest might have existed at the outset of the proceedings. We anticipate that the result in *Trustmark* will be thoroughly criticized by commentators within the reinsurance community.[21] For present purposes, however, the decision suggests that parties need to carefully negotiate confidentiality agreements at the outset of

any engagement and consider whether, in an abundance of caution, it is ever advisable to engage a party-appointed arbitrator used in a prior related proceeding.

1. Background

Trustmark provided both retrocessional and reinsurance coverage to Hancock under certain reinsurance agreements. Each of the agreements contained an arbitration clause, requiring that the party-appointed arbitrators and the umpire be "disinterested." In 2002, Trustmark challenged billings from Hancock, arguing that the reinsurance agreements did not cover retrocessional business and could not be ceded. Hancock initiated arbitration on this issue in 2002. The parties and the arbitrators signed a confidentiality agreement prohibiting disclosure of information from the arbitration . The confidentiality agreement did not contain an arbitration clause. In March 2004, after a hearing, the panel found that retrocessional business was covered under the agreements and issued an award in Hancock's favor. The United States District Court for the Northern District of Illinois confirmed the award. When Hancock submitted a new billing, Trustmark again refused to honor the billing. Hancock initiated a second arbitration against Trustmark and appointed the same arbitrator that it had used in the first arbitration. At the organizational meeting in the second arbitration, Trustmark nevertheless expressed concern over the ability of Hancock' s party appointed arbitrator to honor the confidentiality agreement from the first arbitration. The arbitrator too voiced his concern about being able to segregate information he had learned in the prior arbitration. Trustmark eventually agreed to the appointment.

Following the panel's appointment, Hancock asked the second panel to "'authorize the use of all materials from [the first arbitration], without limitation [,]' so that the parties could avoid relitigating issues decided in [the first arbitration]-namely, whether retrocessional business was covered under the agreements." [22] Over Trustmark's objection, a majority of the panel, *i.e*, Hancock's arbitrator (who did not recuse himself from deliberations on the request) and the umpire, ordered that the confidentiality agreement be accepted and extended to the second arbitration, thus allowing materials from the first arbitration to be used in the second arbitration. Soon after, Hancock moved the panel for an order prohibiting Trustmark from litigating several issues that Hancock argued had been resolved in the prior proceeding, including the issue of whether retrocessional business was covered under the agreements. The majority of the panel- again comprised of Hancock's arbitrator from the first arbitration and the umpire- granted Hancock's motion.

After some discovery had occurred and before the full hearing, Trustmark sought a preliminary injunction in federal court requesting, among other relief, an order enjoining the second arbitration from going forward to (i) prevent the second panel from resolving disputes between the parties over the confidentiality agreement (which Trustmark contended was non-arbitrable) and (ii) prevent Hancock's arbitrator from continuing to serve on the second panel because he breached the confidentiality agreement in deliberating on whether the agreement should apply to the second arbitration and, as a result, was no longer "disinterested" as required under the reinsurance agreements.

The court agreed with Trustmark that Hancock's arbitrator was not "disinterested" and granted the preliminary injunction. The court reasoned that Hancock's arbitrator breached the confidentiality agreement (and the court's earlier order confirming the first award), and therefore he could be subject to liability to Trustmark depending on the circumstances that arise in the second arbitration. The court also observed that Hancock's arbitrator had (as a result of his breach of the confidentiality agreement) become "a fact witness not subject to examination" and that he had demonstrated that he could not "disregard the knowledge he already had" from the prior proceeding. Consequently, the court held that Hancock's arbitrator was not disinterested and concluded that a preliminary injunction was appropriate

2. Lessons From *Trustmark*: Take Care in Drafting Confidentiality Agreements and Appointing an Arbitrator to a Subsequent Related Dispute

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The court agreed with Trustmark that Hancock's arbitrator was not "disinterested" and granted the preliminary injunction. The court reasoned that Hancock's arbitrator breached the confidentiality agreement (and the court's earlier order confirming the first award), and therefore he could be subject to liability to Trustmark depending on the circumstances that arise in the second arbitration.

Nevertheless, the precedent set forth in the Trustmark matter counsels in favor of caution in negotiating the terms of confidentiality agreements and in appointing arbitrators to a panel when they have previously served in a related dispute. Indeed, the precedent set by the *Trustmark* court will undoubtedly have a chilling effect on reinsurance practice: the court went so far as to rule that the party-appointed arbitrator acting on behalf of Trustmark had potentially incurred personal liability in acting in contravention of the confidentiality agreement.

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The *Trustmark* court plainly disapproved of Hancock's party-appointed arbitrator's service in the second arbitration in light of the confidentiality agreement executed during the first arbitration. It is, however, difficult to see how *Trustmark* was harmed by this service and why sophisticated counsel could not have addressed any perceived harm through educating the panel in the second arbitration. Nevertheless, the precedent set forth in the *Trustmark* matter counsels in favor of caution in negotiating the terms of confidentiality agreements and in appointing arbitrators to a panel when they have previously served in a related dispute. Indeed, the precedent set by the *Trustmark* court will undoubtedly have a chilling effect on reinsurance practice: the court went so far as to rule that the party-appointed arbitrator acting on behalf of Trustmark had potentially incurred personal liability in acting in contravention of the confidentiality agreement.

Practitioners should also note that, as suggested above, disclosure does not necessarily cure any potential taint in the eyes of a reviewing court. Trustmark's party-appointed arbitrator's previous service was disclosed and plainly apparent to the parties. Nevertheless, the court was willing to enjoin the proceedings until the panel was reconstituted. While disclosure of a potential conflict often serves to excuse the potential taint, disclosure is certainly not a panacea in the eyes of the courts reviewing reinsurance arbitration disputes. And cautious counsel and arbitrators would be well served to address potential conflicts and step aside or decline to serve where there is a possibility that their prior service or relationships might cause an objective observer to question whether they are "disinterested."

D. *Amerisure Mut. Ins. Co. v. Global Reinsurance Corp. of Am.*

Most recently, on March 15, 2010, the Appellate Court of Illinois vacated a portion of an arbitration award for a panel "exceeding its powers" under the Uniform Arbitration Act.[23] The court rejected the panel's award of attorneys' fees for breach of the duty of utmost good faith because neither the treaty at issue nor governing state law authorized the award of attorneys' fees to the prevailing party. Similarly to the *PMA* matter, this decision highlights the fact that courts are loathe to permit arbitrators to use the discretion accorded them under a treaty to affirmatively rewrite the parties' written agreement.

1. Background

In 2001, Global Reinsurance Corporation of America (f/k/a Gerling Global Reinsurance Corporation of America) agreed to reinsure Amerisure Mutual Insurance Company under a quota share reinsurance treaty. When Global refused to pay a $1.5 million claim, Amerisure demanded arbitration. Amerisure sought the amounts due under the treaty as well as "interest, costs and exemplary damages." The treaty provided that the AAA rules[24] and Illinois law governed any disputes between the parties.

Before the arbitration hearing, Amerisure argued in its prehearing briefing and in meetings with the panel that it was also seeking attorneys' fees pursuant to Illinois Insurance Code Section 155, which punishes an insurer for "vexatious and unreasonable" conduct in settling claims, and "reinsurance custom and practice" which imposes a duty of utmost good faith on the parties. Global responded that Section 155 did not apply to reinsurance relationships and could not support an award of attorneys' fees. After conducting the arbitration hearing, the panel issued an award in Amerisure's favor that comprised of the principal amount due, interest, and Amerisure's attorneys' fees "as billed and paid in an amount not to exceed $1,500,000 *based on the finding by this panel of [Global's] violation of its duty of utmost good faith* to [Amerisure]."[25] Amerisure ultimately sought $861,176 in attorney's fees.

Global paid the principal amount due and interest, but did not pay Amerisure's attorneys' fees. Amerisure moved in state court to confirm the award. Global filed an answer and a counter application to reject the award on the basis that the panel "exceeded its authority" by awarding the attorneys' fees. Global then filed a summary judgment motion, arguing, among other things, that the panel exceeded its authority because the award was not authorized by Illinois law and was not based on an issue submitted by the parties. The circuit court denied Global's summary judgment motion, granted Amerisure's motion to confirm, and entered judgment for Amerisure. Global appealed.

The Illinois appeals court reversed the circuit court's decision. The appeals court held that the panel exceeded its authority by awarding attorneys' fees because it relied on Section 155 of the Illinois Insurance Code although Section 155 does not authorize arbitrators to award attorneys' fees. The appeals court explained that AAA Rule 43(d)(2), which governed the arbitration, provided three bases to award attorneys' fees: (i) if all of the parties had requested the award, (ii) if it was authorized by law, or (iii) if it was authorized by the parties' agreement. Because both parties did not request an award of attorney's fees and the agreement was silent on fee shifting, the court examined whether such an award was authorized under Illinois law. The court concluded that Section 155, as interpreted by Illinois courts, reserved the authority to award attorneys' fees for courts, and not arbitrators. Therefore, the panel's award of attorneys' fees exceeded its authority and there was a "gross error on the face of the award.[26] The court rejected the panel's efforts to rely on the duty of utmost good faith, noting that the treaty expressly provided that the AAA rules govern the dispute and that those rules provided the only parameters under which attorney's fees might be awarded.

2. Lessons From *Amerisure*: The Duty of Utmost Good Faith Does Not Permit a Panel to Rewrite a Treaty

The *Amerisure* decision underscores that reviewing courts will scrutinize any effort by a panel to impose "rough justice" by disregarding the negotiated terms of the treaty. In *Amerisure*, the panel relied on a violation of the duty of utmost good faith (stemming from the failure of the reinsurer to pay a *bona fide* claim) to justify an award of attorneys' fees.

The panel's urge to compensate Amerisure for having to prosecute a claim in the face of what the panel concluded was a meritless defense is certainly understandable. Indeed, Amerisure incurred over $860,000 in fees litigating a $1.5 million claim. But nothing in the treaty permitted the panel to award attorneys' fees. The parties could have negotiated and written such a provision into the treaty. Instead, the parties agreed to be bound by the AAA rules, which expressly governed when and how attorneys' fees could be awarded. For arbitrators, the decision is another example of how courts are limiting their ability to contravene or otherwise depart from the written terms of a treaty. For industry participants, the decision underscores the notion that a party seeking to recovery its fees incurred in a successful arbitration best provide for a fee shifting provision in the treaty itself.

III. Conclusion: The Case for Reform

Each of these decisions provides insight into possible avenues for reform in the industry. *PMA* suggests that arbitrators can no longer rely solely on "honorable engagement" provisions to justify reaching creative results not contemplated by the language of the reinsurance agreement before them. Similarly, *Amerisure* suggests that arbitrators cannot rely on the broad duty of utmost good faith to rewrite negotiated written provisions within a treaty. *Scandanavian Re* illustrates that disclosures of potential conflicts of interest are a continuing obligation and that courts will review undisclosed and disclosed conflicts through an objective standard without regard to the subjective good faith of the arbitrators involved. Similarly, *Trustmark* illustrates that courts will scrutinize confidentiality agreements, particularly in the context of subsequent proceedings where a party seeks to appoint an arbitrator who served on a prior panel.

It may be that the courts have declared "open season on arbitrators" in the reinsurance industry. But it is more likely that the courts, through judicial oversight and scrutiny, have identified conduct within the industry that all would be well served to review and consider whether reform is necessary and appropriate.▼

1 552 U.S. 576 (2008).
2 The Federal Arbitration Act, 9 U.S.C. § 1 et seq. (West 2010).
3 9 U.S.C. § 10(a).
4 *See Householder Group v. Caughran*, No. 09-40111, 2009 U.S. App. LEXIS 25507, at *8 (5th Cir. Nov. 20, 2009) ("based on the Supreme Court's recent decision in *Hall Street*, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA"); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (1l th Cir. 2009) ("As the Supreme Court recently confirmed, sections 10 and 11 of the FAA offer the exclusive grounds for expedited vacatur or modification of an award under the statute"); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1289 (9th Cir. 2009) (holding that "manifest

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The panel's urge to compensate Amerisure for having to prosecute a claim in the face of what the panel concluded was a meritless defense is certainly understandable. Indeed, Amerisure incurred over $860,000 in fees litigating a $1.5 million claim. But nothing in the treaty permitted the panel to award attorneys' fees. The parties could have negotiated and written such a provision into the treaty.

It may be that the courts have declared "open season on arbitrators" in the reinsurance industry. But it is more likely that the courts, through judicial oversight and scrutiny, have identified conduct within the industry that all would be well served to review and consider whether reform is necessary and appropriate.

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disregard of the law remains a valid ground for vacatur [but only as] a part of § 10(a)(4)"); *Stolt-Nielson SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) (same); *Crawford Group,Inc. v. Holekamp*, 545 F.3d 971, 976 (8th Cir. 2008) (citing *Hall Street* for the proposition that"[a]n arbitral award may be vacated only for the reasons enumerated in the FAA"). *But see Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 380 (6th Cir. 2008) ("It is true that we have said that 'manifest disregard of the law' may supply a basis for vacating an award, at times suggesting that such review is a 'judicially created' supplement to the enumerated forms of FAA relief. *Hall Street*'s reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But, either way, we have used the 'manifest disregard' standard only to vacate arbitration awards, not to modify them").

5 *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631, 638-39 (E.D. Pa. 2009).

6 Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 09 Civ. 9531 (SAS), 2010 U.S. Dist. LEXIS 15952, at * 45 (S.D.N.Y. Feb. 23, 2010).

7 *Trustmark Ins. Co. v. John Hancock Life Ins Co.,* No. 09 C 3959, 2010 U.S. Dist. LEXIS 4698, at * 15 (N.D. Ill. Jan. 21, 2010).

8 *Amerisure Mut. Ins. Co. v. Global Reinsurance Corp. of Am.*, No. 1-09-0820,2010 Ill. App. LEXIS 198, at *34 (Ill. App. Ct. Mar. 15, 2010).

9 *PMA Capital Ins. Co.*, 659 F. Supp. 2d at 636.

10 *Id.* at 636-37.

11 The PMA court analyzed whether the award was "completely irrational" within the confines of FAA § 10(a)(4). *See also Silicon Power Corp. v. GE Zenith Controls, Inc.*, 661 F. Supp. 2d 524, 537 (E.D. Pa. 2009) ("In order to obtain vacatur under § 10(a)(4), the movant must establish that the terms of the arbitration award are 'completely irrational'") (citing *Southco, Inc. v. Reell Precision Mfg. Corp.*, 556 F. Supp. 2d 505, 511 (E.D. Pa. 2008), *aff'd Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 Fed. Appx. 925 (3rd Cir. 2009)). However, the Third Circuit has not specifically addressed whether the "completely irrational" test survives *Hall Street* as a non-statutory ground for vacating arbitration awards. *See, e.g., Danieli Corus, Inc. v. ATSI, Inc.*, No. 09-78, 2009 U.S. Dist. LEXIS 45458, at *12-13 (W.D. Pa. May 29, 2009) (declining to consider non-statutory grounds for vacating arbitration awards, including whether the award was "completely irrational," in light of *Hall Street*).

12 *PMA Capital Ins. Co.* 659 F. Supp. 2d at 639

13 *Id.* at 639.

14 *Id.*

15 Indeed, courts have struck down attempts by arbitration panels to retain jurisdiction over subsequent disputes between the parties after resolving the immediate dispute before the panel. *See, e.g., KX Reinsurance Co. v. General Reinsurance Corp.*, 08 Civ. 7807 (SAS), 2008 U.S. Dist. LEXIS 92717, at *19-20 (S.D.N.Y. Nov. 14, 2008) (vacating portion of award that vested subsequent jurisdiction over disputes in the same panel because "[s]uch an open-ended submission would effectively allow the Panel unlimited authority and the power to exist indefinitely [...]. It would also deprive [the petitioner] of its implicit right under the Treaties to choose the arbitrators and umpires it deems most suitable to resolve the specific issues in contention").

16 *See, e.g., British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 515 (S.D.N.Y. 2000) (internal citations omitted) ("We note, though, that the panel's repeated decision to refuse to give any rationale for its acts has enhanced the task presented by the pending motions. [...] A greater effort on the part of the panel's majority to explain their actions would have made this decision, and any subsequent decision, easier to confirm").

17 *Scandinavian Reinsurance Co.*, 2010 U.S. Dist. LEXIS 15952, at *37.

18 *Id.* at *24 (citing *Morelite Construction Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)); *see also Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A..S.*, 492 F.3d 132, 137 (2d. Cir. 2007) (upholding vacatur of award for evident partiality where one arbitrator failed to investigate potential conflict of interest between a branch of his company and a parent of the petitioner); *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1109 (9th Cir. 2007) (internal citations and quotation marks omitted) (upholding vacatur of arbitration award for evident partiality and reasoning that "[the arbitrator's] decision to accept a new high-level executive job at a company in the same industry as the parties during the arbitration is precisely the type of situation where an arbitrator has reason to believe that a nontrivial conflict of interest might exist and should investigate to determine the existence of potential conflicts").

19 28 U.S.C. § 455(a) (emphasis added); *see also* Code of Conduct for United States Judges, Canon 3C.

20 *Scandinavian Reinsurance Co.*, 2010 U.S. Dist. LEXIS 15952, at * 25 (internal citations omitted).

21 *See, e.g., Daniel L. FitzMaurice, Trustmark v. John Hancock: A Significantly Flawed Decision with the Potential to Wreak Havoc for Confidentiality Agreements in Arbitration*, 20-22 Mealey's Litig. Rep. Reinsurance, Mar. 19, 2010, at 14.

22 *Trustmark Ins. Co.*, 2010 U.S. Dist. LEXIS 4698, at *3.

23 710 Ill. Comp. Stat. 5/1 *et. seq.* (2009).

24 The American Arbitration Association's Supplementary Procedures for the Resolution of Intra-industry United States Reinsurance and Insurance Disputes. The parties agreed that all AAA rules were waived except Rule 43(d).

25 *Id.*, at *5 (emphasis in original).

26 26 *Id.*, at *31.

DID YOU KNOW...?

THE ARIAS•U.S. QUARTERLY ARCHIVES INCLUDE ALL ISSUES PUBLISHED SINCE 1997. ARTICLES ARE EASILY LOCATED BY AUTHOR NAME, ARTICLE TITLE, ISSUE DATE, OR CONTENT KEYWORD. SIMPLY GO TO THE "ARIAS•U.S. QUARTERLY" BUTTON ON THE WEBSITE'S LEFT-SIDE NAVIGATION. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

news and notices

Tom Daschle Is Fall Conference Keynote

Former United States Senate Majority Leader Thomas A. Daschle will provide the Keynote Address on November 4 at the ARIAS•U.S. 2010 Fall Conference in New York City. Senator Daschle, a Democrat from South Dakota, was the Minority Leader for five years beginning in 1995. Thereafter, he served as Majority Leader from 2001 through 2004.

In his positions as Minority and Majority Leader, Senator Daschle was credited with keeping the Democrats unified. He was also applauded for his ability to promote good relations between the Senate and the White House. As former White House Chief of Staff John D. Podesta once commented, the White House "absolutely put our fate in the hands of Tom Daschle." His keynote address at the conference will focus on the federal regulation of insurance.

Hilton Reservation System Is Open

The ARIAS home page now has a link to the "Welcome ARIAS" page of the Hilton New York's reservation system. The special group rates of $345 and $395 (a saving of $84 from the open rate) are pre-set in the system.

The 2010 Fall Conference will take place on November 4-5. Reservations should be made for the nights of November 3 and 4. Complete details about the conference were sent to all members at the end of August and are on the website, www.arias-us.org, along with online registration. **The deadline for hotel reservations at the group rate is October 8**.

Board Certifies Forty-Nine Previous Arbitrators under New Requirements

At its meeting on June 2, the Board of Directors approved certification of the following arbitrators under the new certification requirements; all had been previously certified. The application deadline was June 1.

- **Paul Aiudi**
- **Paul Bates**
- **Clive Becker-Jones**
- **David L. Beebe**
- **Katherine L. Billingham**
- **David A. Bowers**
- **Paul D. Brink**
- **Peter C. Brown, Jr.**
- **Paul Buxbaum**
- **Stephen P. Carney**
- **Charles W. Carrigan**
- **John Chaplin**
- **John D. Cole**
- **Howard D. Denbin**
- **Andrew Ian Douglass**
- **Michael W. Elgee**
- **Suzanne Fetter**
- **Michael FitzGibbons**
- **Peter A. Gentile**
- **James Gkonos**
- **Bernard Goebel**
- **Thomas A. Greene**
- **William G. Hauserman**
- **Paul Hawksworth**
- **Douglas G. Houser**
- **Gary F. Ibello**
- **Nancy Braddock Laughlin**
- **Soren N. S. Laursen**
- **Jim Leatzow**
- **Joseph Loggia**
- **Henry C. Lucas III**
- **Richard Mancino**
- **Merton E. Marks**
- **Paul J. McGee**
- **Edward J. McKinnon**
- **Steven Mestman**
- **Roger M. Moak**
- **Claudia Morehead**
- **Jeffrey L. Morris**
- **Edward J. Muhl**
- **Elliot S. Orol**
- **Steve J. Paris**
- **George M. Reider, Jr.**
- **David R. Robb**
- **Angus H. Ross**
- **Savannah Sellman**
- **James E. Tait**
- **Thomas Tobin**
- **Emory L. White, Jr.**

Former United States Senate Majority Leader Thomas A. Daschle will provide the Keynote Address on November 4 at the ARIAS•U.S. 2010 Fall Conference in New York City. Senator Daschle, a Democrat from South Dakota, was the Minority Leader for five years beginning in 1995. Thereafter, he served as Majority Leader from 2001 through 2004.

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news and notices

The Board of Directors has chosen the Ritz-Carlton in Key Biscayne, Florida as the site of the 2014 ARIAS Spring Conference. Key Biscayne is a beautiful island just south of the Miami Beach barrier island. It is accessed by a causeway from Miami and is convenient to Miami International Airport. The conference will take place on May 7-9, 2014.

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Board Certifies Three New Arbitrators

Also, at its meeting on June 2, the Board approved certification of the following arbitrators for the first time. Their sponsors are indicated in parentheses.

- **Cynthia Koehler** (George Cavell, Timothy Stalker, David Attisani)
- **Thomas S. Orr** (Mark Gurevitz, John Dattner, Mark Wigmore)
- **Brent A. Sorenson** (Richard Voelbel, Peter Noack, Thomas Geissler)

The complete list of Certified Arbitrators can be found on the ARIAS•U.S. website at www.arias-us.org.

Two ARIAS-U.S. Umpires Are Certified

In addition, at the June 2 meeting, the Board approved certification of two more umpires. The following arbitrators are now ARIAS-U.S. Certified Umpires:

- **Clive A. R. Becker-Jones**
- **Thomas M. Tobin**

The complete list of Certified Umpires also can be found on the website.

ARIAS Chooses Ritz-Carlton Key Biscayne for Spring 2014

The Board of Directors has chosen the Ritz-Carlton in Key Biscayne, Florida as the site of the 2014 ARIAS Spring Conference. Key Biscayne is a beautiful island just south of the Miami Beach barrier island. It is accessed by a causeway from Miami and is convenient to Miami International Airport. The conference will take place on May 7-9, 2014.

Certified Umpires Move into Umpire Appointment Procedure

With the retirement on June 30 of the former Umpire List, the ARIAS•U.S. Umpire Appointment Procedure now makes its selections from the list of *Certified* Umpires. For the past 20 months, the Board has been certifying umpires under the new certification requirements. To be certified as an umpire, an arbitrator must have served on panels for five completed arbitrations that each included at least three days of evidentiary hearings. There are now 47 ARIAS•U.S. Certified Umpires from which random selections are drawn. Complete details about the procedure are in the "Selecting an Umpire" section of the website.

Board Approves Additional Certified Arbitrators and Umpires in June

Since the June Board of Directors meeting took place one day after the deadline for applications to be submitted for certification under the new requirements, there was not enough time for many of the submissions to be approved by the Certification Committee. Therefore, later in June, the Board voted electronically to certify the following arbitrators and umpires.

17 Previously Certified Arbitrators

- **John P. Allare**
- **James P. Corcoran**
- **Thomas M. Daly**
- **John S. Diaconis**
- **James Engel**
- **Mark J. Fisher**
- **Gregory C. Frederick**
- **Michael Gabriele**
- **John H. Haley**
- **Stephen C. Klein**
- **Rodney D. Moore**
- **James M. Oskandy**
- **Michael Pado**
- **Don A. Salyer**
- **Timothy W. Stalker**
- **Peter Suranyi**
- **James Veach**

Two New Certified Arbitrators

The new arbitrators' sponsors are indicated in parentheses.

- **Lawrence W. Pollack** (Michael Knoerzer, Thomas Tobin, Deirdre Johnson)
- **Miguel Roure** (Cristobal Colon, Keith Chapman, Antonio Dominquez)

Four New Certified Umpires

- **David Appel**
- **Thomas M. Daly**
- **Peter A. Gentile**
- **James J. Powers**

New Language Feature in Website Search

When ARIAS converted to the more fully detailed arbitrator profiles, a new information item was added to the Credentials section, namely, language fluency. As there were few entries in the beginning, it was not included in the search system.

However, a recent survey of the information entered by arbitrators suggests that there are sufficient entries that it should be made searchable. Therefore, a new section, entitled "Languages," has been added at the bottom of the "Arbitrator, Umpire, and Mediator Search" page. That page can be found through the website's left-side navigation.

Arbitrators who have fluency in languages other than English should confirm that their information is up to date. The arbitrator data entry system can be accessed by logging in through the yellow button on the ARIAS•U.S. home page.

Board Certifies Arbitrators and Umpires in August

Several previously certified arbitrators missed the June 1 deadline for submitting applications for recertification and were too late to clear the Certification Committee for the June electronic vote. Therefore, the Board scheduled a second electronic vote for August 4. Also, some first-time arbitrator and umpire candidates had submitted applications, which were also reviewed.

The following arbitrators were approved by the ARIAS-U.S. Board of Directors for certification under the new requirements.

17 Previously Certified Arbitrators

- **David S. Brodnan**
- **Cecil D. Bykerk**
- **Pierre Charles**
- **Joelle de Lacroix**
- **Ian G. A. Hunter**
- **T. Richard Kennedy**
- **William M. Kinney**
- **Cynthia J. Lamar**
- **Anthony M. Lanzone**
- **Mitchell L. Lathrop**
- **Lawrence C. Magnant**
- **Charles J. Moxley, Jr.**
- **Eileen Robb**
- **William P. Walsh**
- **Richard L. White**
- **William Wigmanich**
- **Lawrence Zelle**

Three New Certified Arbitrators

The new arbitrators' sponsors are indicated in parentheses.

- **David L. Fox** (Robert Redpath, Martin Haber, Mary Ellen Burns)
- **Mitchell W. Gibson** (Dale Diamond, John Bado, Bruce Friedman)
- **James W. Macdonald** (John Dore, Lydia Kam Lyew, Harry Tipper)

Four New Certified Umpires

- **Ian G. A. Hunter**
- **T. Richard Kennedy**
- **Rodney D. Moore**
- **Richard L. White**

ARIAS•U.S. Now Has 246 Certified Arbitrators

After reaching a high of 352 certified arbitrators at the end of 2008, the number has been declining. Now that all certifications under the previous requirements have expired, more names were removed from the list in June. As of early August, there were 246 ARIAS•U.S. Certified Arbitrators and 47 Certified Umpires.

news and notices

...a new section, entitled "Languages," has been added at the bottom of the "Arbitrator, Umpire, and Mediator Search" page. That page can be found through the website's left-side navigation.

Arbitrators who have fluency in languages other than English should confirm that their information is up to date. The arbitrator data entry system can be accessed by logging in through the yellow button on the ARIAS•U.S. home page.

feature

Consolidation of Arbitration Proceedings

Teresa Snider

Teresa Snider

In the years since *Howsam* and *Bazzle* were decided, the federal Courts of Appeals that have considered the issue have all held that the issue of whether to consolidate multiple arbitration proceedings should be decided by the arbitrators.

Teresa Snider is a partner at Butler Rubin Saltarelli & Boyd LLP. Her practice is concentrated in the areas of reinsurance litigation and arbitration.

Consolidation is the process by which multiple disputes are combined into a single proceeding. In the reinsurance arbitration context, the disputes might involve (1) two or more reinsurers on the same contract; (2) the same reinsurer on two or more layers and/or underwriting years of a single program; (3) the same reinsurer on unrelated contracts; (4) two or more reinsurers on different layers of a single program; or (5) a combination of these. Some reinsurance contracts explicitly address the consolidation of disputes with multiple reinsurers on the same contract.[2] But there are few arbitration provisions in reinsurance contracts that address any other types of situations where the issue of consolidation might arise, and most arbitration clauses in reinsurance contracts are silent on the issue of consolidation.

The Supreme Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588 (2002) and *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 5. Ct. 2402 (2003), both of which are discussed here, have been interpreted by a number of lower courts to mean that arbitrators, not courts, have the authority to decide whether multiple disputes should be consolidated into a single proceeding. However, the Supreme Court's April 27, 2010 decision in *Stolt -Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. —-„ 130 S. Ct. 758 (2010), likely means that courts will need to reconsider whether courts or arbitrators have the authority to resolve disputes over consolidation of arbitration proceedings and what standard should be applied in deciding whether the parties have agreed to consolidation.

The *Howsam* case arose out of an NASD arbitration proceeding instituted by a customer against her brokerage firm, Dean Witter. 537 U.S. at 81-82. Dean Witter filed a court action seeking to enjoin the arbitration, contending that the arbitration was time-barred because the NASD Code of Arbitration Procedure required that an arbitration demand be filed within six years of the time of the event giving rise to the dispute and the dispute was more than six years old. *Id.* The issue for the Supreme Court to resolve was whether the NASD arbitrator or the court should decide whether to apply the time bar rule to the underlying dispute. The Court characterized the time bar issue as an aspect of the underlying controversy to be arbitrated that was presumptively for the arbitrator to decide, as opposed to an issue as to whether the parties agreed to arbitrate in the first place, which a court would need to resolve. *Id.* at 85. The Court explained:

> "in the absence of an agreement to the contrary, issues of substantive arbitrability. . . are for a court to decide and issues of procedural arbitrability, i.e. whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."

Id. (quoting Revised Uniform Arbitration Act, § 6, comment 2 (adding emphasis)).

In *Bazzle*, the issue was whether a court or an arbitrator should decide whether an arbitration agreement permitted arbitration of a class action, where the agreement was silent on the issue. 539 U.S. at 447. Four justices concluded, in an opinion by Justice Breyer, that the arbitrator should decide whether class arbitration was permissible, because the arbitration agreement included all disputes "relating to this contract" and the issue of a class action arbitration had to do with "what kind of arbitration proceeding the parties agreed to," not whether the parties had agreed to arbitrate in the first place. *Id.* at 451-53. The plurality opinion did not, however, offer any guidance for arbitrators on how to decide whether to order that the arbitration proceed on a class action basis. In view of the plurality nature of the *Bazzle* decision, some courts have declined to rely on *Bazzle* in addressing the issue of consolidation of arbitration proceedings, instead focusing on the reasoning in *Howsam*.

In the years since *Howsam* and *Bazzle* were decided, the federal Courts of Appeals that have considered the issue have all held that the issue of whether to consolidate multiple arbitration proceedings should be decided by the arbitrators. *Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union*, 321 F.3d 251 (1st Cir. 2003) (whether to consolidate three separate disputes between the same parties was a procedural matter to be decided by the arbitrator); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 100 (2d. Cir. 2008) (holding that arbitrators must approach consolidation, joint hearings, and class representation "as issues of contract interpretation to be decided under the relevant substantive contract law"); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3rd Cir. 2007) (consolidation is for arbitrators to decide); *Employers Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir. 2006) ("We find based on Howsam that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve."); *Certain Underwriters at Lloyds v. Cravens Dargan & Co.*, 197 Fed. Appx. 645 (9th Cir. 2006) (affirming the district court's decision that it was for the arbitrators to decide whether a single arbitration panel should resolve multiple reinsurance disputes). *See also Dockser v. Schwartzberg*, 433 F.3d 421, 427 (4th Cir. 2006) (dictum stating that procedural questions, including consolidation, should be directed to the arbitrators). Although the Sixth Circuit Court of Appeals has not yet ruled on the issue, a district court in the Sixth Circuit has also held that arbitrators rather than courts are to decide if consolidation should be ordered. *See Dorinco Reinsurance Co. v. ACE Am. Ins. Co.*, No. 07-12622, 2008 WL 192270 (E.D. Mich. Jan. 23, 2008) (the arbitrators should determine the structure of the parties' arbitration absent an express provision in-the arbitration. agreement); *but see ReliaStar Life Ins. Co. v. Canada Life Assur. Co.*, No. 04-74, 2005 WL 615830 (D. Minn. March 14, 2005) (granting motions by five reinsurers to compel separate two-party arbitration proceedings with ceding company where the arbitration provisions did not contain a consolidation clause).

Despite these decisions by the First, Second, Third, Fourth, Seventh, and Ninth Circuit Courts of Appeals, it now appears not to have been definitely resolved whether arbitrators have the authority to decide whether to consolidate disputes. On April 27, 2010, the U.S. Supreme Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).[3] The Supreme Court reversed the Second Circuit's decision upholding the arbitrators' decision to allow class arbitration and remanded the case. Id. at 1777. The Court held that imposing class arbitration where an arbitration clause was "silent" on the issue was inconsistent with the Federal Arbitration Act. *Id*. at 1775.

In reaching its decision, the Court expressly addressed the impact of the *Bazzle* plurality opinion. The Court explained that the *Bazzle* plurality and Justice Stevens (who joined in the judgment) addressed three questions:

> The first was which decision maker (court or arbitrator) should decide whether the contracts in question were "silent" on the issue of class arbitration. The second was what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this a question left entirely to state law?) The final question was whether, under whatever standard was appropriate, class arbitration had been properly ordered in the case at hand.

130 S. Ct. at 1771. Although the plurality and Justice Stevens addressed all three questions in *Bazzle*, the *Stolt-Nielsen* court ruled that the *Bazzle* plurality "decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed 'silent' on the issue of class arbitration." *Id.* Justice Stevens did not endorse the majority's rationale, however, and "his analysis bypassed the first question noted above and rested instead on his resolution of the second and third questions." *Id*. at 1772. As a result, the *Stolt-Nielsen Court* held that *Bazzle* does not require that arbitrators, and not courts, decide whether a contract permits class arbitration. *Id*. However, because Stolt-Nielsen and AnimalFeeds had stipulated that the arbitrators would decide whether the contract permitted class arbitration (having mistakenly assumed that was what *Bazzle* required), the Court declined to address the question and thus left open the possibility that it might be up to the courts and not arbitrators to decide whether a contract permits class arbitration. *See id.*

Because "*Bazzle* did not establish the rule to be applied in deciding whether class arbitration should be permitted," the majority laid out the principles to be applied (whether by a court or arbitrator) in deciding that question. *Id*. at 1772-1776. The Court first emphasized that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is 'a matter of consent, not coercion." *Id*. at 1773 (citations omitted) The Court then reiterated some of the principles it had expressed in prior decisions:

> • "[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms." *Id.* at 1773 (citations omitted).
>
> • "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.' In this endeavor, 'as with any other contract, the parties' intentions govern." *Id*. at 1773-1774

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Because the *Stolt-Nielsen* decision leaves open the issue of whether class-action arbitration is a matter for the courts or the arbitrators to resolve, the Supreme Court's ruling may result in court battles over consolidation of arbitration proceedings even in those Circuits where the Courts of Appeals have previously held that consolidation is a matter of procedure for the arbitrators to resolve.

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(citations omitted).

• "[P]arties are 'generally free to structure their arbitrations as they see fit.' For example, we have held that parties may agree to limit the issues they choose to arbitrate, and may agree on the rules under which any arbitration will proceed. They may choose who will resolve specific disputes." *Id.* at 1774 (citations omitted).

The Court concluded: "[w]e think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes." *Id.* Such contractual limitations must be given effect by courts and arbitration and, "when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id*. at 1774-1775.

Turning to the specific question presented in the *Stolt-Nielsen* case, the Court rejected the arbitrators' decision to require class arbitration where the agreement was silent as to the issue.[4] The Court explained that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*. at 1775. The Court held that, although some procedural matters are for the arbitrator to decide even if not explicitly addressed in the arbitration agreement, class arbitration is not one of them: "[t]his is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. The Court pointed out "crucial differences", *id*. at 1776, between class and bilateral arbitration that led to its conclusion that the class arbitration is required only when the parties *agreed to authorize* class arbitration:

> An arbitrator chosen according to an agreed upon procedure. no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, "the presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations...., thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.

Id. (citations omitted).

Because the *Stolt-Nielsen* decision leaves open the issue of whether class-action arbitration is a matter for the courts or the arbitrators to resolve, the Supreme Court's ruling may result in court battles over consolidation of arbitration proceedings even in those Circuits where the Courts of Appeals have previously held that consolidation is a matter of procedure for the arbitrators to resolve. Leaving aside the issue of who decides, several other important questions arise as a result of the *Stolt-Nielsen* decision. First, are there "crucial differences" implicated by consolidating arbitration proceedings such that it is improper to infer an agreement to consolidate from the mere existence of an agreement to arbitrate? Whether such crucial differences are found to exist may depend on such factors as the number of parties and contracts involved in the proposed consolidated proceedings, the dollar value of the disputes, whether the method(s) of arbitrator selection in the contracts vary, and whether different procedures are established by the different arbitration clauses. Second, if courts or arbitrators apply the reasoning of *Stolt -Nielsen* to decide it is improper to infer an agreement to consolidate from an agreement to arbitrate, "what contractual basis may support a finding that the parties agreed to authorize" consolidation? *Id*. at n. 10. Depending on the law applicable to interpreting the arbitration agreement and the terms of the arbitration agreement itself,

courts may look to expert evidence of custom and practice in order to establish intent.

Many of the practical problems that, at least prior to *Stolt -Nielsen*, fell to the arbitrators to decide remain unresolved by the court cases that have addressed consolidation of arbitration. Such practical problems include which of multiple panels should decide the issue of consolidation, what happens if multiple panels are constituted and reach differing conclusions on consolidation, how cases are to be transferred among panels, and what criteria arbitrators should apply in determining whether consolidation is appropriate.

The courts have reached differing conclusions as to whether one panel or multiple panels should be charged with deciding consolidation, although the trend seems to be appointment of a single panel to resolve the threshold issue of consolidation. In the *Employers v. Century* case, the parties were at odds over proper interpretation of the district court's decision on how to proceed with arbitration:

> Century maintains that the opinion requires Wausau to appoint one arbitrator, for one arbitration covering both Agreements. Wausau maintains that the opinion requires it to appoint two arbitrators, one for each of two arbitrations (one under the First Excess Agreement, and one under the Second).

443 F.3d at 581. The Seventh Circuit Court of Appeals held that the district court had ruled that a single panel be constituted — even though there were two separate arbitration agreements — and that panel would decide whether separate arbitrations were required. *Id*. Similarly, both the Third Circuit and Ninth Circuit Courts of Appeals have upheld district court orders requiring the parties to constitute a single arbitration panel, which would then resolve the issue of consolidation. *Underwriters at Lloyd's v. Westchester* 489 F.3d at 584, 589; *Underwriters at Lloyd's v. Craven Dargen*, 197 Fed. Appx. at 646. *See also Dorinco v. Ace*, 2008 WL 192270 at * 11 (ordering Respondents "to collectively select a single arbitrator to appoint to each of the demanded panels to determine the sole issue of consolidation…"). .

In contrast, in the *Lloyd's v. Century* case, the Pennsylvania district court ordered that five separate arbitrations proceed under the five contracts in dispute and that if a party "desire[s] consolidation, they must direct such a request to the respective arbitration panels." *Certain Underwriters at Lloyd's v. Century Indem. Co,* Case Nos. Civ.AA.05-2809, Civ.A.05-2810, Civ.A.05-2811, Civ.A.05-2812, Civ.A.05-2813, 2005 WL 1941652, at *2 (E.D. Pa. Aug. 1, 2005). On its face, the Pennsylvania district court's order requires that each panel be asked to decide the issue of consolidation, leading to the possibility of conflicting decisions on whether to consolidate and which panel would hear a consolidated arbitration. In another Pennsylvania district court case, *Argonaut Insurance Co. v. Century Indemnity Co*., Case No. 05- 5355, 2007 WL 2668889 (E.D. Pa. Sept. 5, 2007), the court refused to decide which of four panels should resolve the question of consolidation. In that case, the cedent had issued four different arbitration demands, but contended that the fourth demand superseded the prior three demands by incorporating the claims that were the subject of those demands. The reinsurer objected to the consolidation of the parties' disputes into a single proceeding. The parties agreed that, under a recent Third Circuit decision, "the choice between separate or consolidated proceedings is one of arbitral procedure that must be decided by the arbitration panel itself," but asked that the court resolve which panel should decide the issue of consolidation. *Id*. at * 1. Both parties contended that the "first-in-time" rule should govern the decision as to which panel was authorized to decide consolidation;[5] the parties disagreed, however, on which of the four panels was the first to be formed. The cedent argued that the panel formed under the fourth arbitration demand was really the "first in time" because it had been formed pursuant to a demand that revoked the prior demands and was the only panel in which both parties had actually appointed a party-arbitrator *Id*. at *4 The reinsurer disagreed. The court held that the issue of which panel or panels were fully formed, and whether the first three demands were effectively withdrawn, was "a question of procedure arising out of the process of arbitration, and not a question of arbitrability." *Id*. at *6. Although the court noted that "principles of efficiency strongly favor a single arbitration panel's determination of whether consolidation of reinsurance claims is appropriate," it held that unless the parties "can sensibly jointly design a procedural roadmap," all four arbitration panels "will have to agree upon a reasonable solution as to which panel must decide the issues." *Id*. (citation omitted).

Where there are no contract terms expressly addressing consolidation and the parties do not agree on consolidation,[6] the parties — and the arbitrators — may have different criteria that they believe should be applied in deciding whether consolidation is appropriate. Among the criteria that might be considered in deciding whether to consolidate disputes are:

> (1) whether the arbitration agreements provide different venues for the hearing;
>
> (2) whether the arbitration agreements have the same procedural provisions;
>
> (3) whether there are choice of law provisions calling for the application of the law of different states;
>
> (4) whether the same claim has been ceded to more than one reinsurance contract;
>
> (5) whether there are common legal or factual issues;
>
> (6) whether there is a possibility of conflicting results if separate arbitrations are held;
>
> (7) whether the contracts involved are multiple years or layers of the same program;
>
> (8) whether the contracts reinsure the same underlying business;

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The parties agreed that, under a recent Third Circuit decision, "the choice between separate or consolidated proceedings is one of arbitral procedure that must be decided by the arbitration panel itself," but asked that the court resolve which panel should decide the issue of consolidation.

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(9) whether the same underwriter(s) wrote the contracts;

(10) whether a single broker was used to place all of the contracts;

(11) whether more than one reinsurer is involved;

(12) the inception and expiration dates of the various contracts;

(13) whether the parties will be unable to obtain complete relief in the absence of a consolidated proceeding; and

(14) what the parties intended with respect to consolidation.

The relative importance of these factors is also likely to be a matter of debate between the parties and among the arbitrators. However, the Supreme Court's decision in Stolt-Nielson makes clear that the most important factor is the intent of the parties.

CONCLUSION

Because reinsurance arbitrations tend to be governed by confidentiality agreements, there is little other than anecdotal evidence as to how arbitration panels have elected to address consolidation. Some possible solutions may include, alone or in combination:

- Constituting multiple panels, which would hold concurrent hearings but individually reach decisions as to the claims involved;[7]
- Having all claims resolved by a single panel;
- Staying one or more sets of proceedings pending a decision in the other proceedings;
- Sequencing the hearings;
- Entering a confidentiality order that permits the parties to use discovery and the award in other proceedings involving the parties so long as the same claims and/or contracts are involved; and
- Requiring the parties to work out a proposed consolidation protocol to be presented to and approved by the Panel(s).▼

The views expressed in this paper do not necessarily reflect the views of Butler Rubin Saltarelli & Boyd LLP or any of its attorneys, or those of its clients.

2 For example, the arbitration clause may provide that "[i]f more than one reinsurer is involved in an arbitration where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results, all such reinsurers will constitute and act as one party for purpose of this clause." *See also* Brokers & Reinsurance Markets Association ("BRMA") Arbitration Provision 6Q, ¶H2 ("Consolidated Hearing. Upon request of the Company. . . , the Board may order a consolidated hearing between Company and all affected Reinsurers to this Agreement if the Board is satisfied in its discretion that the issues in dispute affect more than one Reinsurer and a consolidated hearing would be in the interest of fairness and a prompt resolution of the issues in dispute. If the Board orders a consolidated hearing, all other affected participating Reinsurers shall join and participate in the arbitration at the Company's request under time frames established by the umpire and shall be bound by the Board's decision and award unless excused by the Board in its discretion. . . ."). This sample Arbitration Provision can be found on BRMA website, www.brma.org.

3 Justice Alito delivered the opinion of the Court, in which Justices Roberts, Scalia, Kennedy, and Thomas joined. Justice Ginsburg filed a dissenting opinion, in which Justices Stevens and Breyer joined. Justice Sotomayor did not take part in the decision.

4 Stolt-Nielsen and AnimalFeeds stipulated that the contract was silent as to whether it permitted class arbitration and that the contract was not ambiguous so as to call for parol evidence. 130 S. Ct. at 1770.

5 In considering which of multiple panels should decide the issue of consolidation, parties may argue, *inter alia*, that the decision should be made by (1) the panel that is constituted under the first arbitration demand to be served; (2) the first panel that is constituted; (3) the first panel to rule on the issue of consolidation; and/or (4) the panel with the claim(s) with the highest dollar value.

6 Because arbitration is a matter of consent, the parties are free to agree to consolidate their disputes into a single proceeding.

7 It appears from comments at recent ARIAS conferences that this method has been used where a number of parties had disputes involving the same reinsurance program. Multiple panels were constituted, with one panel designated as the lead panel to rule on overarching discovery and evidentiary issues. Each panel deliberated separately and issued its own award.

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 here, 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

John Dore's office address has changed to Sheridan Ridge Advisers LLC, 5th Floor, 626 W. Jackson Blvd., Chicago, IL 60661. Phone, fax, and email remain the same.

Mark Fisher's new address is: 627 Ramapo Road, Teaneck, NJ 07666. All of the other information remains unchanged.

In addition to its offices in Scottsdale and Tucson, AZ, **Merton Marks**'s firm, Arbitration and Mediation Services, has opened an office at 34300 Lantern Bay Drive, No. 105, Dana Point, CA 92629, phone 949-500-4940, fax 949-258-5589.

Robert W. Tomilson has joined Cozen O'Connor's Philadelphia office. His new address is Cozen O'Connor, 1900 Market Street, Philadelphia, PA 19103, phone 215-665-5587, email rtomilson@cozen.com.

At the same time, **John D. LaBarbara**, **Benjamin A. Blume**, **Daisy Khambatta**, and **Nicole J. Moody** have joined Cozen O'Connor's Chicago office. Their new addresses are Cozen O'Conner, 333 West Wacker Drive, Suite 1900, Chicago, Illinois 60606, phone 312-382-3111, emails jlabarbara@cozen.com, bblume@cozen.com, dkhambatta@cozen.com, and nmoody@cozen.com .

The entire team at **Grais & Ellsworth LLP** has just moved down Madison Avenue from 55th Street. They are now located at 40 East 52nd Street, New York, NY 10022. All phone numbers and email addresses remain the same.

Jonathan Gaines has moved to 24 Bolton Gardens, Bronxville, NY 10708. Phone and email are unchanged.

Thomas S. Orr is now self employed as an arbitrator and consultant at 42 Kingsbury Drive, Trumbull CT 06611, phone 203-375-2686, cell 203-218-4902, email tsorr@sbcglobal.net .

Email Address Changes

William Wigmanich
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opinion

The Spirit of Arbitration

This article represents the author's opinion. The Quarterly welcomes additional views and opinions from other members.

Jack E. Koepke

Jack E. Koepke

What about the rather common situation where an ARIAS non-neutral arbitrator provides disclosures at the Organizational Meeting revealing a long list of prior assignments from the same company on virtually the same central issue...

Jack E Koepke is an ARIAS•U.S. certified arbitrator who spent his career as a lawyer in the area of insurance and reinsurance claims. He was head of Global Claims for GenRe in Stamford until retiring and now lives in Cologne, Germany and Arizona, USA.

Introduction:

In writing this article I have reflected upon the "spirit of arbitration" envisioned many years ago when arbitration clauses were first written into contracts. Clearly, the original expectation was that arbitration, as contrasted to litigation, would be a more practical, expeditious dispute resolution process, conducted in private, without formal procedures, by professionals familiar with the business. Courts still strongly favor arbitration because it helps judges better manage calendars and allegedly provides the reputed benefits mentioned.

Is the spirit of arbitration alive and well today in 2010? In answering this question, I think it is fair to suggest that the US arbitration process should be at least as fair and reasonable as the US judicial process. If the arbitration process is producing results deemed less just than parties might expect from the judicial process, something is wrong. In my view, requiring reasoned awards would act as a check on what I see as the current trend of appointing pre-disposed arbitrators and umpires. This added transparency would enhance the fairness of reinsurance arbitrations by requiring Panels to explain the rationale for their awards.

The Party-Appointed Arbitrator:

A party appointing an arbitrator generally looks for a nominee with a state of mind favorable to the appointing party's case. *ARIAS•U.S. Guidelines for Arbitrator Conduct*, Canon II permits a person to serve even if initially pre-disposed towards the appointing party's position:

> "Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract), they should avoid reaching a final judgment until after both parties have had a full and fair opportunity to present their respective cases and the panel has fully deliberated the issues."

We must, therefore, accept as given that party-appointed arbitrators are by nature not neutral. ARIAS Canon II goes on to state:

> "Party-appointed arbitrators are obligated to act in good faith with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly. After accepting an appointment, arbitrators should avoid entering into any financial, business, professional, family or social relationship or acquiring any financial or personal interest which would likely affect their ability to render a just decision."

Note the words "*after* accepting an appointment." What about the rather common situation where an ARIAS non-neutral arbitrator provides disclosures at the Organizational Meeting revealing a long list of prior assignments from the same company on virtually the same central issue and then explains that none of this could affect his/her judgment—because he/she always aims to act in a fair and objective manner in considering the evidence and rendering decisions? The other party then faces a dilemma: Challenge the Panel in the faint hope some court might ultimately validate its concerns? Or just make the best of the situation?

Does the receiving of frequent repeat assignments from the same party constitute "a material financial interest" for a party-appointed arbitrator? Where the same arbitrator time and again earns substantial fees from the same company, does he/she becomes captive to the good will of that company? Does the arbitrator actually have

something at stake which all of the disclosures in the world can never cure? The sad reality that the parties too often feel compelled to confirm prospective Panels where members of the prospective Panel have fairly obvious conflicts does not mitigate or resolve the matter. As a result, the onus must first rest upon the prospective arbitrator to accept only appropriate assignments where his or her objectiveness cannot be doubted.

The Umpire Selection Process:

Because of the appointment of non-neutral or "pre-disposed" arbitrators, umpire selection has, not surprisingly, become a hot button. Where each party, in addition to external and internal Counsel and non-neutral arbitrator advocates, is also nominating essentially *non-neutral* Umpire candidates believed favorable to its own positions the arbitration process is in jeopardy of devolving into "coin-flip" justice. This would certainly not be in the spirit of seeking a just arbitration. This discussion has been going on for a very long time , but I believe many people are now becoming increasingly concerned. Again, the onus must initially fall on prospective umpire candidates to accept only appropriate assignments where his or her neutrality cannot be doubted.

Discretion:

The ARIAS•U.S. Long Range Planning Committee Status Report to Membership, presented to the ARIAS Fall Conference on the 13th of November 2009, recommended certain changes to the ARIAS Guidelines for Arbitrator Conduct. These ARIAS LRPC recommendations state:

> "(New) 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 proceeding; where the candidate has a fixed view on the central issue(s) expected to be involved, such that the candidate cannot reasonably be considered to be open to consider the evidence from these parties; where the candidate does not believe that he/she can render a decision based solely on the evidence presented to all members of the panel."

The words "must refuse to serve" are categorical and non-discretionary where certain conditions are met. But when are the conditions met? Similar words are found in Canons II and IV, which also refer to "financial " concerns. Note also that the LRPC recommendations include "candidate for appointment as an Umpire, non-neutral or party-appointed arbitrator" in the same breath without any differentiation. The ARIAS Canons, under "Purpose", similarly declare:

> "Unless inconsistent with the agreement of the parties or applicable law, the two arbitrators appointed by the parties should observe the same ethical standards as a single arbitrator or an Umpire on a panel of arbitration except where noted below."

The LRPC proposed wordings, nevertheless, state that a "candidate for appointment as an Umpire, non-neutral or party-appointed arbitrator must only *refuse* to serve" if *any* of the above three conditions are met. However, the LRPC provides three important discretionary modifiers:

The first clause is modified by the words "that could be substantially affected by the outcome of the proceeding." The second clause is modified by "such that the candidate cannot reasonably be considered to be open to consider the evidence from these parties." The third clause is modified by "where the candidate does not believe that he/she can render a decision based solely on the evidence presented to all members of the panel."

The modifiers attached to the clauses render the conditions almost completely discretionary. I have yet to encounter an Umpire or arbitrator who felt he/she could not set aside personal views, be open to the evidence, and not let circumstances affect the outcome of the proceedings. Clearly there remains too much discretion.

Thus the ARIAS Guidelines for Arbitrator Conduct, including proposed LRPC revisions, place profound reliance upon the integrity of ARIAS Umpires and arbitrators, and on

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Even after full disclosure, the nominee's own discretion remains the decisive factor. This discretion is exercised within an ethical framework that ARIAS describes in general terms. One is encouraged to hope that ethical problems can be abated by high flown language and great aspirations presuming the best underlying standards of integrity even where lucrative relationships are at stake.

If Panels were forced to state their reasoning, I believe the quality of awards would increase by virtue of the inherent discipline of rational analysis and written explanation. This may or may not lead to more judicial review. But judicial review of a litigious process is appropriate, especially where due process is potentially at stake. To argue that transparency will erode finality and lead to endless litigation is essentially to suggest that finality is a higher good than the inherent reasonableness of the arbitration award itself. This seems clearly wrong.

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disclosure. Both these pillars, however, while appearing positive and useful, should be seen as residing primarily within a fundamentally discretionary framework. The ARIAS Guidelines, including the proposed revisions, still frame ethical issues almost entirely in subjective terms. Even after full disclosure, the nominee's own discretion remains the decisive factor. This discretion is exercised within an ethical framework that ARIAS describes in general terms. One is encouraged to hope that ethical problems can be abated by high flown language and great aspirations presuming the best underlying standards of integrity even where lucrative relationships are at stake.

Reasoned Awards:

The well-worn arguments against issuance of reasoned awards do not directly speak to the key issues of transparency and due process. Indeed, arguments against reasoned awards have been more than sufficiently refuted. See John Nonna and Marc Abrams, "Of Cabbages and Kings," in the ARIAS Quarterly, 2004, 4' Quarter, Vol. 11, No. 4, p.16. This article refreshes John Nonna's "Modest Proposal" favoring neutral panels and reasoned awards published about ten years earlier.

Some arbitrators oppose calls for the issuance of reasoned awards because they fear that their awards are being unduly questioned or that reasoned awards might lead to judicial challenge. The better response would be to ask if transparency in the deliberative process outweighs the possibility of increased appeals. And the answer here should be sought not from the perspective of a Panel seeking to avoid scrutiny, but from the perspective of the losing party requesting some reasonable explanation for what just happened. If Panels were forced to state their reasoning, I believe the quality of awards would increase by virtue of the inherent discipline of rational analysis and written explanation. This may or may not lead to more judicial review. But judicial review of a litigious process is appropriate, especially where due process is potentially at stake. To argue that transparency will erode finality and lead to endless litigation is essentially to suggest that finality is a higher good than the inherent reasonableness of the arbitration award itself. This seems clearly wrong.

Checks and Balances:

Undue reliance upon global abstractions such as "fairness," "honesty," "justice," "diligence", "good faith," "objectivity", and "truthfulness" can have the unintended consequence of enabling the very conduct one is trying to prevent. Conflicts of interest do not go away just because arbitrators and Umpires make forthright disclosures, weigh options, and then declare themselves fit. Arbitration often appears less just than litigation because unchecked discretion and opaque awards are enemies of due process. We probably have miles to go before we get to neutral Panels or any lifting of confidentiality. I propose that requiring reasoned awards is an entirely necessary and appropriate first step toward greater fairness. The arbitration process has over the years become more and more litigious; it now needs to be more transparent in order to become more fair. Ethical conduct thrives in sunshine.▼

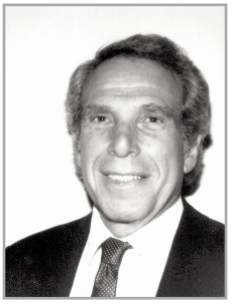
DID YOU KNOW...?

THE ARIAS•U.S. WEBSITE CALENDAR INCLUDES THE LATEST INFORMATION ON ALL FUTURE CONFERENCES, WORKSHOPS, AND SEMINARS, TO THE EXTENT THEY HAVE BEEN PLANNED. THE CALENDAR CAN BE ACCESSED FROM THE WEBSITE'S LEFT-SIDE NAVIGATION. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

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.

off the cuff

Ah! Sweet Mysteries of Life



Eugene Wollan

I consider myself to be a reasonably intelligent creature, but there are certain aspects of life I will never understand, no matter how often they are explained to me:

- Einstein's Theories of Relativity;
- The rules of cricket;
- Calculus;
- Why in movies the propellers on a World War II airplane seem to be revolving backwards;
- How six or seven operas can be transferred onto my tiny iPod and still leave room for the complete Cole Porter songbook;
- Why the New York City Taxi and Limousine Commission doesn't do something about the phenomenon of what seems to be every taxi in the city lighting up its "Off Duty" sign and heading to its garage for a shift change precisely when the afternoon rush hour is at its peak;
- Why the New York Giants fell apart in 2009;
- Rap and Hip-Hop Music (if you can call it music);
- How a computer works;
- Stonehenge.

This is, obviously, a pretty eclectic sampling of my areas of ignorance, chosen deliberately to illustrate their range and diversity. I must confess, however, that many areas of ignorance exist even if I narrow the playing field down to subject matter I'm supposed to be pretty knowledgeable about.

[To all you linguistic purists out there: yes, I ended that last sentence with a preposition. My defense is what Winston Churchill is reported to have responded when accused of that same solecism, "Your arrant snobbishness concerning the English language is something up with which I will not put." The defense rests.]

For example (in no particular order of importance):

- I do not understand how an adjuster can begin his work on a claim that might seem even remotely to have the potential for becoming contentious without routinely issuing a reservation of rights.
- I do not understand how an underwriter can issue a policy that excludes flood but covers surface water without defining both terms.
- I do not understand how a reinsurer can wait until a book of business has generated a triple-digit negative number result before invoking the Access to Records clause.
- I do not understand why more underwriters are not incorporating anti-concurrent causation clauses in their wordings (even though some courts might refuse to enforce them).
- I do not understand why a broker or risk manager would place the first party all-risk property coverage and the boiler-and-machinery coverage with two different insurers, thus practically inviting a dispute and probably an arbitration if there's ever an explosion-type event.
- I do not understand how so many judges, who would never think of distorting the meaning or violating the intent of any other private contract, are delighted to do exactly that when it comes to an insurance contract.
- I do not understand how a London broker can act for the insured, the insurers, the reinsurers, and the retrocessionaires, and never consider the possibility of a conflict of interest.
- I do not understand why lawyers who advertise on television are not universally perceived as demeaning the profession.
- I do not understand why some umpires do not discount more fully the views expressed by a party arbitrator who is clearly more interested in advocacy than in adjudication.

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I do not understand how a London broker can act for the insured, the insurers, the reinsurers, and the retrocessionaires, and never consider the possibility of a conflict of interest.

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.

I do not understand how an arbitration panel, having directed payment of a sum of money that should have been paid years ago, can fail to include interest in the award.

I do not understand how a lawyer can cross-examine an expert witness without having read the witness's own writings on the subject at hand (I'm not making that up either!).

I do not understand why more companies and brokers are not using ARIAS certification as an alternate basis for qualification as an arbitrator.

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- I do not understand why so many attorneys for insureds still seem to believe that mere utterance of the phrase "bad faith" will strike fear and panic into the soul of an experienced insurance lawyer.
- I do not understand why a competent, experienced arbitration panel would need to hear expert testimony on "general industry custom and practice" (even ignoring the redundancy).
- I do not understand how an arbitration panel, having directed payment of a sum of money that should have been paid years ago, can fail to include interest in the award.
- I do not understand why so many umpires permit "casual" (i. e., sloppy) dress at what is, after all, a quasi-judicial proceeding.
- I do not understand how a jury can reject an arson defense after the insured has actually admitted setting the fire to collect the insurance (I'm not making that up!).
- I do not understand how a lawyer can cross-examine an expert witness without having read the witness's own writings on the subject at hand (I'm not making that up either!).
- I do not understand how a country like Colombia can really believe that enacting a law making payment of a ransom illegal will actually deter an international corporation from negotiating for the release of a kidnapped employee.
- I do not understand why so many lawyers think that they can get away with taking credit for a case that's won but avoiding any responsibility for a case that's lost.
- I do not understand where some courts draw the line between an error of law (a/k/a ordinary disregard of the law) and "manifest disregard of the law."
- I do not understand how a court reporter can make sense out of two or three opposing lawyers talking heatedly at the same time.
- I do not understand why so many litigators seem to believe that a raised voice is the most effective method of persuasion.
- I do not understand why the ARIAS all-neutral panel selection procedure seems to be just about as popular as Yankee fans at Fenway Park.
- I do not understand why more companies and brokers are not using ARIAS certification as an alternate basis for qualification as an arbitrator.

This recital doesn't begin to exhaust the list of things I don't understand, either in my chosen field or life in general. As Yul Brynner said, "Is a puzzlement." But it does keep life interesting.▼

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.

When Arbitrators Resign: Second Circuit Affirms New Rule That a Substitute Arbitrator Should be Appointed Instead of Starting Arbitration Anew

case notes corner

Ronald S. Gass

Ronald S. Gass

Less than a year ago, an unusual New York federal district court decision addressing the question of what happens when an arbitrator resigns from a panel was featured in this Case Notes Corner column. Ronald S. Gass, *Federal Court Rules that Party-Arbitrator's Resignation Due to Illness and Subsequent Recovery Does not Require Arbitration to Start Anew*, 16 ARIAS-U.S. Quarterly 26 (3rd Quarter 2009). Now the U.S. Court of Appeals for the Second Circuit has weighed in with what will undoubtedly be an influential opinion concerning arbitrator resignations. For nearly twenty years, it has been the well-settled rule in that circuit that when a party-arbitrator dies during the pendency of an arbitration, the arbitration must commence anew. See Ronald S. Gass, *When an Arbitrator Dies: Federal Court Rules that Arbitration Must "Begin Afresh,"* 11 ARIAS•U.S. *Quarterly* 30 (4th Quarter 2004). Whether this rule should be extended to resignations, however, remained unresolved. Distinguishing between these two panel vacancy scenarios and without overruling its arbitrator death precedent, the Second Circuit upheld the district court ruling that, if a party-arbitrator resigns because of illness but subsequently recovers, he can be reappointed to the original panel, and if he is unwilling or unable to rejoin the panel, then the appointing party must designate a new party arbitrator to the existing panel; otherwise, the district court has the power to select a replacement pursuant to § 5 of the Federal Arbitration Act.

In this case, the Insurance Company of North America ("INA") and other entities were embroiled in a reinsurance arbitration against Public Service Mutual Insurance Company ("PSMIC"). In early April 2008, the panel unanimously granted PSMIC's motion for summary judgment disposing of INA's main legal defense to payment of the settlement of certain ceded pollution claims. INA moved for reconsideration of the panel's decision, and the panel established a briefing schedule. On May 2, 2008, however, INA's party-arbitrator informed the parties and the panel that he had been diagnosed with cancer requiring immediate and intensive treatment and that he was doubtful that he could perform his duties as arbitrator "in a professional or timely manner." Consequently, his resignation from the panel was accepted by the parties.

In the wake of the arbitrator's resignation, the parties became deadlocked over how to proceed. On May 5, 2008, the remaining panel members "ordered" INA to appoint a replacement arbitrator, but INA declined, stating that it was unsure whether it would be proper for it to do so and suggesting that a new panel might have to be constituted. Having the advantage of the original panel's favorable summary judgment ruling, PSMIC objected to starting anew and contended that a replacement arbitrator should be appointed by either INA or a court. Litigation ensued with INA filing a petition in New York federal district court for a stay of arbitration and an order disqualifying the existing panel and compelling the arbitration to start over with a new panel. PSMIC filed a cross-petition to compel INA to proceed before the existing panel and a replacement arbitrator.

The starting point for the New York federal district court was the Second Circuit's well-settled rule that, absent "special circumstances," when 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. Applying this precedent to the instant case, the court ruled on December 10, 2008 that a new panel must be appointed and the arbitration started anew.

In January 2009, while the parties' cross-appeals to the Second Circuit were pending, PSMIC's counsel learned that the health of INA's arbitrator had improved to the point that he was now actively seeking arbitration work. PSMIC's counsel contacted the resigning arbitrator, copying the panel and opposing counsel, asking if he might be available to rejoin the panel, which would have obviated the pending appeal. Before the arbitrator could reply, INA's counsel responded stating

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Mr. Gass is an ARIAS-U.S. Certified Umpire and Arbitrator. He can be reached via e-mail at rgass@gassco.com or through his Web site at www.gassco.com. Copyright © 2010 by The Gass Company, Inc. All rights reserved.

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that INA was unwilling to agree to allow him to rejoin the prior, and now "defunct," panel. When the arbitrator subsequently responded to PSMIC, he confirmed that he was not willing to rejoin the panel, he felt he had no right to do so, and he was unwilling to attempt to change his resignation status. In February 2009, PSMIC's counsel also learned that the resigning arbitrator had attended the November 2008 ARIAS-U.S. fall conference as did INA's counsel, and that the latter did not bring this to the attention of the district court during oral argument a week later.

Armed with this newly discovered evidence of the resigning arbitrator's potential availability to rejoin the panel, PSMIC returned to the district court on a motion seeking reconsideration of its December 2008 ruling. Persuaded by this new evidence, the court revised its decision, finding that a "special circumstance" existed justifying a departure from the Second Circuit's general rule, which it observed was premised on the *permanent* unavailability of the arbitrator. Because the resigning arbitrator in this instance was actively soliciting new arbitration engagements, according to the court, his reappointment to the panel was appropriate pursuant to § 5 of the FAA. If he was unwilling or unable to rejoin the panel, then INA would have to appoint a replacement to the existing panel. When the resigning arbitrator subsequently informed the court that he would not accept reappointment to the panel, INA appointed a replacement arbitrator. It also filed an appeal before the Second Circuit.

In affirming the district court, the Second Circuit held that the general rule articulated in *Marine Products Export Corp. v. M.T. Globe Galaxy*, 977 F.2d 66 (2d Cir. 1992), which involved an arbitrator's death, does not apply to vacancies resulting from resignations because those situations are factually distinguishable. Application of the *Marine Products* rule in a resignation context would create problems that do not arise when the vacancy is caused by an arbitrator's death, *i.e.*, "principally the potential for manipulation by a party that, perceiving itself to be losing the arbitration, could disrupt the arbitration and obtain a new proceeding by pressuring its appointed arbitrator to resign." One important reason for the court's reluctance to extend *Marine Products* to resignations was what it described as the "manifest inefficiency" of requiring a new panel to be constituted.

Applying the Marine Products rule to resignations, according to the Second Circuit, would "open the door to significant potential for manipulation." Although no such manipulation was alleged in this case, the court noted that "it would be tempting for a party to pressure its party-arbitrator, implicitly or explicitly, to resign following an adverse ruling so that it could get another shot at winning before a new panel" – a concern not present in cases involving an arbitrator's death. The court acknowledged the potential unfairness to a party when a substitute arbitrator is appointed and required to decide issues on which the original panel members have had previous argument and discussion; balancing the policy considerations, however, it found that this potential unfairness was not sufficiently strong to extend the *Marine Products* rule to resignations. The unfairness of requiring a party to appoint a substitute arbitrator "who will likely be disadvantaged because of his or her absence during previous deliberations outweighs the necessary waste and expense of commencing an arbitration completely anew." In further support of this approach, the court noted that two sister circuits, the Seventh and Eighth Circuits, had also declined to apply the *Marine Products* rule to arbitrator resignations.

In light of these policy considerations, the Second Circuit held that it was "well within" the district court's discretion to choose an alternative course that involved significantly less waste by having INA appoint a new arbitrator, observing that this was a reasonable way to balance the potential prejudice to either party. While INA might be prejudiced because its substitute arbitrator could be disadvantaged in deliberations because the other two panel members had previously heard evidence and deliberated together in the case, PSMIC would also be prejudiced if INA were given a "do-over" before a new panel after having won an important issue. Hence, the district court's decision to reappoint the resigning arbitrator or require INA to appoint a replacement in the event he declined was not an abuse of discretion.

The Second Circuit's ruling clarifies that arbitrator resignations will now be treated differently from cases involving deaths. It remains to be seen, however, whether variations of this new precedent will emerge depending on the timing of the arbitrator's resignation and whether the resigning arbitrator is a party arbitrator or the umpire. In this case, the party arbitrator resigned prior to the hearing but after the panel had decided an important summary judgment motion and a motion for reconsideration was pending. The district court did not view the panel's summary judgment to be tantamount to a partial final award, and the Second Circuit observed in a footnote that there had been no interlocutory confirmation of the panel's summary judgment order that would interfere with INA's still-pending reconsideration motion.

But what if the party-arbitrator had resigned during panel deliberations on the summary judgment motion or after it had been confirmed by the district court? What if the resignation occurred during or after a hearing on the merits? Would the court require the appointment of a substitute arbitrator in those situations? While a newly appointed arbitrator could probably get up to speed in a purely documents-driven case, particularly one ripe for summary disposition, it would be quite difficult, if not impossible, for the replacement to deliberate and rule on the evidence if he or she had not heard the witnesses testify, particularly if credibility was an issue. In the months and years ahead, expect further tweaking of the Second Circuit's new arbitrator resignation rule as its limits are tested in other resignation contexts.

Insurance Company of North America v. Public Service Mutual Insurance Company, Docket No. 09-3640-cv, 2010 U.S. App. Lexis 12853 (2d Cir. June 23, 2010).▼

Recently Certified Arbitrators

David L. Fox

Cynthia R. Koehler

David L. Fox

David Fox has been engaged in the litigation and arbitration of various matters for over 40 years and has specialized in insurance and reinsurance disputes for the past 20 years. He has special expertise in matters involving relations between Insurance Companies, Managing General Agents, Producers and Claims Administrators. He has tried numerous insurance arbitrations, and has a great deal of experience in connection with proceeding to stay arbitrations, and enforce or vacate arbitrator's awards.

In addition to his litigation and arbitration practice, Mr. Fox advises numerous insurance company clients on various regulatory and transactional issues. Many of these involved disputes concerning program business, bad faith, fiduciary duties and profit sharing.

Mr. Fox was a founding partner of Felcher Fox & Litner PC from 1977 to 2005, a partner at Herrick Feinstein from 2006 to 2010 and is currently counsel to Smith Gambrell & Russell LLP, in New York City.

He received his LLB from Columbia University School of Law in 1966 and served in the U.S. Army from 1967 to 1968.

Mr. Fox has been AV rated for many years and is admitted to the bar of the State of New York, The United States District Court for the Southern and Eastern Districts of New York and the Second Circuit Court of Appeals. He is a member of the New York City Bar Association and the American Bar Association.▼

Cynthia R. Koehler

Cynthia Koehler has more than 23 years of experience in the insurance and reinsurance industry. In her current position as Vice President and Assistant General Counsel at Liberty Mutual Insurance Company in Boston, Ms. Koehler manages the Complex & Emerging Risks Legal Department ("CERC"), overseeing direct exposures arising out of asbestos, environmental and other complex tort claims, as well as all related insurance coverage proceedings involving the Company. Since 2003, Ms. Koehler's responsibilities also include overseeing Liberty Mutual's reinsurance litigation, mediation and arbitration proceedings for all APH and clergy claims, as well as advising on reinsurer insolvencies and negotiating commutations.

Prior to joining Liberty Mutual, Ms. Koehler spent two years at Eastern Casualty Group as Senior Corporate Counsel, where she was asked to create an in-house legal department for the expanding Massachusetts domiciled property/casualty insurance company. In her role at Eastern Casualty, she was responsible for all property and liability claims litigation, resolution of catastrophic workers compensation claims, all non-claims related litigation, subrogation matters, fraud detection programs and premium collection litigation. She also managed Eastern Casualty's licensing and regulatory compliance operations in thirty-four states, as well as all administrative proceedings involving government agencies and state insurance departments for Eastern Casualty Group Companies. While at Eastern Casualty, she also served as the company's Chief Compliance Officer.

Prior to joining Eastern Casualty, Ms. Koehler spent more than 12 years in private practice at the Boston law firm of Morrison, Mahoney & Miller, LLP. Her practice concentrated on complex first-party insurance coverage and litigation matters, with emphasis on commercial property contracts, fidelity/surety, Financial Institution Bonds, arson/fraud cases and bad faith claims and litigation. Ms. Koehler also managed a nationwide Errors and Omissions Coverage Program for Life, Health & Accident Agents for a Fortune 100 Insurance Company. Her varied practice also included representing insurance companies as creditors in bankruptcy proceedings. She also handled all types of alternative dispute resolution proceedings, including Arbitration, Mediation, Reference and Appraisal, and tried cases and argued appeals in both state and federal courts.

Ms. Koehler received a B.A. in Government, magna cum Laude, from Colby College in 1982, where she was also a member of Phi Beta Kappa. Ms. Koehler earned a J.D. from Georgetown University Law Center in 1987.▼

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

in focus

Lawrence W. Pollack

Thomas S. Orr

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

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Lawrence W. Pollack

Lawrence Pollack has assisted counsel in the settlement of numerous significant insurance disputes during his 28 years in private practice. His career has featured an extensive litigation resume, with specialization in insurance and reinsurance matters, including trial and arbitration of virtually all facets of marine and non-marine insurance matters. He now brings this experience to bear as an arbitrator and mediator, through affiliation with JAMS, the international dispute resolution provider, which began in January, 2010, upon his retirement from the firm.

Mr. Pollack spent his career in private practice at Dewey & LeBoeuf, LLP, and its predecessor firms, LeBoeuf, Lamb, Greene & MacRae, LLP, and LeBoeuf, Lamb, Leiby & MacRae. In 1999, Mr. Pollack began a ten-year service as a Chairman of his firm's Litigation Department. He became a member of the firm's Executive Committee in 2003 and served on that committee until his retirement. Mr. Pollack's substantial administrative and management duties at Dewey & LeBoeuf and its predecessors, combined with his substantive expertise, honed his ability to focus on the critical building blocks to sound decision making.

Mr. Pollack's ADR experience includes:

- Settlement of insurance claims concerning alleged respiratory injury following clean-up of the September 11, 2001 disaster (2009)
- Settlement of insurance claims lodged by the Port Authority of New York and New Jersey with certain London insurers, in relation to substantial property damage arising out of the September 11, 2001 disaster (Port Authority of New York and New Jersey) (2008)
- Litigation and eventual settlement of high profile insurance recovery action arising out of massive explosion on an oil platform off the coast of Brazil (2003-2006)
- Arbitration of six (confidential) matters involving extended warranty reinsurance coverage provided by certain London Market reinsurers, and ongoing provision of advice concerning related issues (1999-2009).▼

Thomas S. Orr

Thomas Orr is an attorney with 37 years of experience in the fields of reinsurance and property/casualty claims management. His career has focused on the resolution of high value, complex liability claims and the resolution of insurance and reinsurance coverage matters including asbestos, toxic tort and hazardous waste claims.

Mr. Orr began his insurance career in 1973 at Aetna Life & Casualty as a claims representative investigating and adjusting multi-line casualty claims. In 1979, he joined the Home Insurance Company as a claim litigation supervisor responsible for directing the activities of claim representatives, staff attorneys and outside counsel in resolving casualty claims in suit. This background in direct claims handling served him well when he joined General Reinsurance Corporation in 1981. At General Re, Mr. Orr was initially engaged in evaluating and resolving treaty and facultative reinsurance claims directly with ceding companies. In 1990, he was appointed Vice President and Claims Counsel and served as the primary legal advisor to claims management on reinsurance coverage matters, assisted in the collection of retrocessions, and consulted with underwriters on contract drafting. In this role, he also had responsibility for managing reinsurance arbitrations and coverage litigation on direct excess policies involving environmental and toxic tort claims. Mr. Orr was appointed Senior Vice President and Manager of North American Claims in 2002, with responsibility for all casualty/property reinsurance claim functions in General Re's six North American claim offices.

Mr. Orr earned a Bachelor of Arts degree from Valparaiso University and a Juris Doctor with high honors from Chicago-Kent College of Law. He also holds the designations Chartered Property and Casualty Underwriter (CPCU) and Associate in Claims (AIC).

During his career, Mr. Orr has actively participated in various industry groups. He was General Re's representative on the Claim Committee of the Reinsurance Association of America from 1995 to 2010 and served as Chairman from 2000 to 2002. He served on the Board of Directors of ARIAS•U.S. from 1999 to 2005 and was President in 2004 and Chairman in 2005. Mr. Orr was also a member of the Insurance and Reinsurance Dispute Resolution Task Force from 1997 to 2004.▼

in focus

Miguel Roure

Brent A. Sorenson

Miguel Roure

Miguel Roure is an attorney and partner of Eversheds Lupicinio. He is also a member of Eversheds insurance and reinsurance group. He is the head of the insurance and reinsurance department responsible for Spain, and coordinates with the UK office on Latin America Insurance issues.

Mr. Roure has extensive management experience, having been a director for over 10 years working in Insurance and Reinsurance financial services. He provides dispute and risk management advice to domestic and international financial institutions, including banks, fund managers and insurers/reinsurers. He also has a respected professional liability practice focussed on accountants, financial institutions, directors and officers and intermediaries. Mr. Roure has considerable experience in handling, defending and investigating counterparty disputes and other claims and complaints involving financial institutions as a consequence of sponsor liability, negligent advice or management and execution errors in a transactional and wholesale trading context.

Mr. Roure has participated in many insurance conferences and is a member of Insurers Global Panels. His underwriting, dispute and operational experience also serves him in good stead when looking at new income generating facilities that are mutually beneficial for his customers, including the recent intensive acquisition activity in Latin America. Before joining Eversheds Lupicinio, he was Director of Close Premium Finance (Close Brothers Group), Senior Council of Winterthur Insurance and Key accounts and Brokers of OCASO SEGUROS Y REASEGUROS as Director of key accounts and Brokers Division, creating the operative and regulation processes of underwriting, commissioning and claims in conformity with mediation law and insurance contracts law.

Mr. Roure has a Law Doctorate from the University Complutense of Madrid, PMD from IESE BS SCHOOL, MBA in LAW from ISDE and MBA-executive by CEF. ▼

Brent A. Sorenson

Brent Sorenson has 36 years of insurance experience. In 1983 he joined Allianz, with his most recent position being Global Head of the Discontinued Business Division. He is responsible for all aspects of legacy or discontinued business in North America, Germany, France and the UK with a reserve value of approximately three billion dollars. Primary areas of focus include claims and reinsurance (both ceded and assumed) in general liability, products liability, property, workers compensation, aviation and marine.

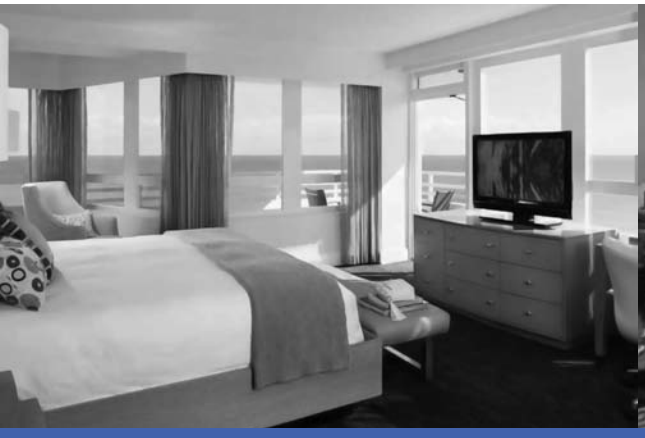
Prior North American positions at Allianz have included Senior Vice President ñ Claims, Vice President ñ Branch Technical and Operations and Vice President - Workers Compensation. Responsibilities included claims and reinsurance. Additionally, he managed all aspects (technical and reinsurance) of major catastrophes which included the World Trade Center, the 2005 Hurricanes (Katrina, Rita & Wilma) and major molestation claims in California. All lines of business involved both primary and excess exposures.

Before joining Allianz, Mr. Sorenson was at Pacific National Insurance Company, with his most recent position as Home Office Claims Manager with responsibility for House Counsel, complex litigation, claims and reinsurance. Business written included both personal and commercial lines in liability, automobile, home owners, property and workers compensation.

He began his career with Liberty Mutual Insurance Company where he received extensive multi-line field claims training.

Mr. Sorenson has served as an expert witness in various bad faith litigations and has managed and/or served as company representative in 20+ arbitrations.

He received his Bachelor of Arts degree from California State University at Los Angeles in 1974. ▼



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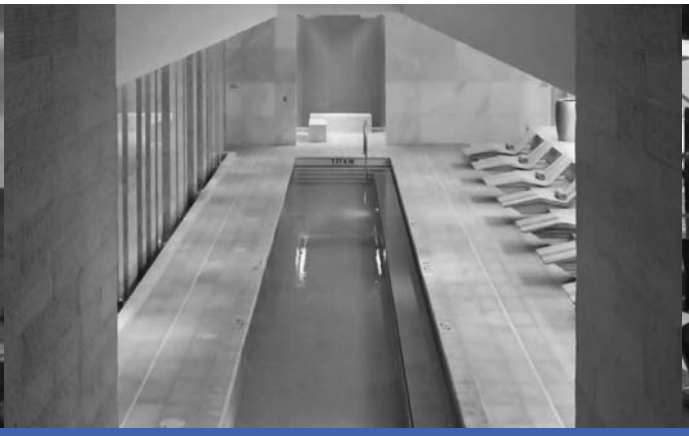
MAY 4-6, 2011



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.

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 August, 2010, ARIAS•U.S. was comprised of 364 individual members and 122 corporate memberships, totaling 1,034 individual members and designated corporate representatives, of which 246 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.

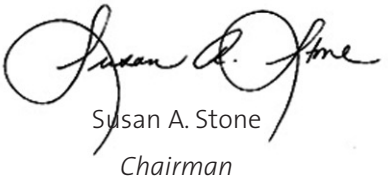
Over the years, ARIAS•U.S. has held conferences and workshops in Chicago, Marco Island, San Francisco, San Diego, Philadelphia, Baltimore, Washington, Boston, Miami, New York, Puerto Rico, Palm Beach, Boca Raton, Las Vegas, Marina del Rey, Amelia Island, and Bermuda. The Society has brought together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



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Chairman

Daniel L. FitzMaurice
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
PO BOX 9001
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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	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$350	$995
FIRST-YEAR DUES AS OF APRIL 1	$233	$663 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$117	$332 (JOINING JULY 1 - SEPT. 30)
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** 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 $250 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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_____

Signature of Individual or Corporate Member Applicant

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

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