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NAVIGATING THROUGH THE ETHICAL THICKET IN REINSURANCE ARBITRATIONS

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Issues for Courts vs. Issues for Panels Supreme Court Clarifications

The Sanctity of...English Arbitration Awards

OFF THE CUFF: Is Everything Clear (and Unambiguous)?

Case Notes Corner

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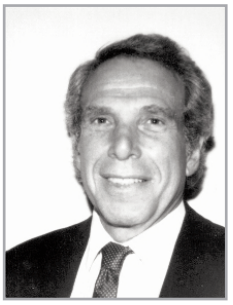

Eugene Wollan

editor's comments

Our contents in this issue cover a wide gamut of relevant and interesting subjects. We delight in this kind of diversity. Both scholarship and controversy are welcome contributions to these pages.

We are particularly grateful to Jerry McElroy for his thoughtful and informative analysis of a number of hot-button ethical issues in our lead article. These issues continue to generate lots of debate, and will probably never be resolved to everyone's satisfaction, but an article like this provides a solid foundation as well as a springboard for future discussion.

The report on English arbitration awards by (Editorial Board Member) Jonathan Sacher and David Parker highlights the international scope of ARIAS and its members. It may also bring to mind the observation usually attributed, perhaps apocryphally, to George Bernard Shaw, that the United States and the United Kingdom are two nations separated by a common language.

Bob Hall has furnished an interesting exploration of the threshold question that frequently arises of whether a particular issue should be resolved by the court or the arbitration panel.

Ron Gass's case note reminds us of, and illustrates, the extraordinary latitude enjoyed by arbitrators when subjected to judicial review.

I can be found, as usual, wearing my curmudgeon persona and ragging on about a linguistic fine point.

There is a continuing need for articles of the high quality we have set as our standard. Writing one is often not as difficult or intimidating a task as it might at first seem. An Argument Point in a brief or a portion of an in-house corporate presentation could, for example, be modified fairly easily into a Quarterly piece. The same is true of handout materials prepared by faculty members for our Annual or Spring Meetings. Please keep us in mind!

Those who would like to be heard (or sound off) on a particular point without constructing an entire article have another option as well: we are now encouraging Letters to the Editor. We will be happy to publish any such items that seem to us to be of general interest. We would like very much to see this become a regular feature, and perhaps even generate stimulating debate.

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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.

Manuscripts should be submitted as email attachments to ewollan@moundcotton.com .

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feature

Navigating through the Ethical Thicket in Reinsurance Arbitrations

Wm. Gerald McElroy, Jr.

Wm. Gerald McElroy, Jr.

Introduction[1]

Ethical issues continue to be a hot topic with respect to reinsurance arbitrations — in large part because of concerns about the fairness of the arbitration process. Consideration of ethical issues in reinsurance arbitrations is important to enhance the fairness and integrity of the process. In addition, as reflected in recent judicial decisions, the courts have (rightly or wrongly) become more active in vacating awards because of purported ethical violations. An understanding of ethical issues is thus important to avoid having awards vacated and the attendant time and expense involved in going through another arbitration.

An understanding of ethical issues is thus important to avoid having awards vacated and the attendant time and expense involved in going through another arbitration.

This article addresses key ethical issues that affect the fairness and integrity of the reinsurance arbitration process, such as what conduct constitutes "evident partiality," the type of disclosures that should be required of arbitrators and umpires, limits on the partisanship of party arbitrators, the impact on umpire neutrality of party arbitrator appointments by one of the parties to an arbitration, problems with "gaming the system" in the umpire selection process, ethical issues surrounding neutral arbitrations, and the advisability of creating more stringent guidelines to address the conduct of party arbitrators and umpires.

I. What Conduct Constitutes "Evident Partiality"?

Under Section 10(a)(2) of the Federal Arbitration Act (FAA), a court can vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them."[2] It is not easy to define what constitutes "**evident partiality**" under the FAA since the judicial decisions concerning this issue are inconsistent. One court has remarked that "evident partiality" is like pornography: one "knows it when one sees it."[3] This observation is not, however, of much assistance.

Commonwealth Coatings

One of the problems in defining "evident partiality" is that the seminal case addressing what constitutes "evident partiality" is itself hardly a model of clarity. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US. 145 (1968), the U.S. Supreme Court vacated an arbitration award where the neutral arbitrator (an engineering consultant) failed to disclose that he had a "sporadic" business relationship with one of the parties to the arbitration (a contractor).

Although this holding is unremarkable in itself, there are three opinions to consider in analyzing the decision. Justice Black authored an opinion joined in by three other justices; Justice White authored a concurring opinion joined in by one justice; and Justice Fortas authored a dissenting opinion joined in by two justices.

In his opinion, Justice Black acknowledged that the arbitrator in *Commonwealth Coatings* had no business dealings with the contractor during the year immediately preceding the arbitration. 393 U.S. at 146. Nonetheless, the "contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years, and the relationship even went so far as to include the rendering of services on the very projects involved in the lawsuit." *Id.* There was no claim that the neutral arbitrator "was actually guilty of fraud or bias in deciding this case," and Justice Black conceded that there was no reason, "apart from the undisclosed business relationship", to "suspect him of any improper motives." *Id.* at 147. Further, Justice Black acknowledged that the payments received by the arbitrator from the contractor constituted a very small percentage of his income. *Id.* at 148. Nonetheless, Justice Black argued that the award should be vacated on the same

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principles as those on which a judge's judgment would be subject to challenge where there is the "slightest pecuniary interest" on the part of the judge in a proceeding. *Id*. According to Justice Black:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review. **We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.** *Id*. at 147-148 (boldface added).

Justice Black's opinion analogized the ethical standard applicable to arbitrators to those applicable to Article III judges. Further, Justice Black adopted an "appearance of bias" standard to be applied to arbitrators.

In his concurring opinion, Justice White said that he joined in Justice Black's opinion. *Id*. at 150. But his opinion includes points and a perspective that are absent from Justice Black's opinion. Justice Black's opinion appears to be based on the premise that the standards for disqualification of a neutral arbitrator are as strict as those governing judges. By contrast, Justice White went to some pains to state at the outset: "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." Id. According to Justice White, "[i]t is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function." Id. Balancing these business realities with the need to guard against "outright chicanery" in giving effect to an arbitration award, Justice White said that arbitrators are "not automatically disqualified" by a business relationship with the parties to the arbitration if: (1) both parties are "informed of the relationship in advance"; or (2) "they are unaware of the facts but the relationship is trivial." *Id*. Justice White could "see no reason automatically to disqualify the best informed and most capable potential arbitrators." *Id*.

Justice White emphasized that it is "far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity." The alternative was to "have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award." Justice White's characterization of challenges to arbitration awards is noteworthy. According to him, the judiciary "should minimize its role in arbitration as judge of the arbitrator's impartiality. This role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business." *Id*. at 151.

Justice White acknowledged that the arbitrator's business relationships "may be diverse indeed, involving more or less commercial connections with great numbers of people." *Id*. Thus, the arbitrator "cannot be expected to provide the parties with his complete and unexpurgated biography." *Id*.

Justice White's opinion reflects a sensitivity to the business environment in which arbitrators operate and sets forth limitations on vacating an arbitration award for non-disclosure that are not present in Justice Black's opinion. Justice Fortas's dissenting opinion goes further and would limit arbitrator disqualification for "evident partiality" to "conduct — or at least an attitude or disposition — by the arbitrator favoring one party rather than the other." *Id*. at 154. As Justice Fortas pointed out in his dissent (joined by two other justices), the arbitration award was vacated in *Commonwealth Coatings* even though there was no disagreement on these points: (1) the neutral arbitrator was "innocent of any actual partiality or bias, or improper motive"; (2) there was no suggestion of any intentional concealment on the part of the neutral arbitrator; to the contrary, it appeared to be an "innocent failure to volunteer information"; and (3) counsel for the party challenging the award conceded that he would not have challenged the arbitrator if he had disclosed the relationship prior to the arbitration. *Id*. at 153.

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...Justice White said that arbitrators are "not automatically disqualified" by a business relationship with the parties to the arbitration if: (1) both parties are "informed of the relationship in advance"; or (2) "they are unaware of the facts but the relationship is trivial."

How do you resolve the tension between the preservation of the fairness and integrity of the arbitration process on the one hand and, on the other, the recognition that arbitration is intended to be a more efficient and less costly means of resolving disputes with decision-makers who are well versed in the subject matter of the dispute and who have wide professional relationships?

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According to Justice Fortas, there was no basis in the FAA or "jurisprudential principles" for fashioning the "per se" rule adopted by the court that "regardless of the agreement between the parties, if an arbitrator has any prior business relationship with one of the parties of which he fails to inform the other party, however innocently, the arbitration award is always subject to being set aside." *Id*. at *154*. Justice Fortas argued that the failure of an arbitrator to volunteer information about business dealings with a party to the arbitration constitutes "prima facie" evidence of partiality or bias, but, that presumption is overcome where (as in *Commonwealth Coatings*) there was "no suggestion that the nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct." *Id*. at 154.

The three opinions in *Commonwealth Coatings* raise two key questions:

- Should innocent failures to disclose be ignored where there is no evidence that the arbitrator was biased in favor of any party and where the decision itself does not appear to be tainted? (Justice Fortas would answer in the affirmative.)
- How do you resolve the tension between the preservation of the fairness and integrity of the arbitration process on the one hand and, on the other, the recognition that arbitration is intended to be a more efficient and less costly means of resolving disputes with decision-makers who are well versed in the subject matter of the dispute and who have wide professional relationships?

Divergent Responses to *Commonwealth Coatings*

Given the lack of clarity on the "evident partiality" standard reflected in the divergent opinions in *Commonwealth Coatings*, it is not surprising that the subsequent decisions interpreting the "evident partiality" standard are inconsistent. While the cases addressing the "evident partiality" issue since *Commonwealth Coating* are diverse, and the holdings frequently driven by the particular facts in the cases, the ultimate decision by the court is frequently dictated by how much emphasis the court places upon the fairness and integrity scale as opposed to the efficiency scale. The courts that have emphasized the fairness and integrity scale typically view Justice Black's opinion favorably and adopt an "appearance of bias" standard in resolving the "evident partiality" issue. By contrast, the courts emphasizing the efficiency scale adopt a less stringent standard for the arbitrator and typically attack Justice Black's opinion and favor instead Justice White's opinion. The contrast between these two approaches is reflected in *Morelite Construction Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79 (2d Cir. 1984), and Crow Construction Co. v. Jeffrey M Brown Assoc., Inc., 264 F.Supp.2d 217 (E.D. Pa. 2003).

In *Morelite*, the Second Circuit vacated an arbitration award because of the father-son relationship between an arbitrator and one party to the arbitration, applying a standard that requires more than an "appearance of bias" and less than an "actual bias." 748 F.2d at 83-84. The court was critical of Justice Black's opinion in *Commonwealth Coatings*, much of which it characterized as *dictum*, and held 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." *Id*. at 82-84.

In *Crow Construction*, the court criticized the Second Circuit's interpretation of *Continental Coatings* and vacated an arbitration award on the basis of an "appearance of bias standard." 264 F.Supp.2d at 22 1-222. The court's holding was based on the failure of two of the arbitrators to disclose that they were simultaneously serving as arbitrators in another matter involving one of the parties to the arbitration (Jeffrey M. Brown), the failure of one of them to disclose she was a mediator in a case involving Brown while the arbitration was proceeding, and the failure of the other of them to disclose his appointment as an arbitrator in another matter involving counsel for Brown while the arbitration was proceeding.

Cases Rejecting Challenges to Arbitration Awards Based on Allegations of "Evident Partiality"

Despite the fact-sensitivity of the cases rejecting challenges to arbitration awards

alleging "evident partiality," certain generalizations can be made about these cases:

First, it is very difficult to overturn arbitration awards on the basis of allegedly biased rulings. In *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003), for example, the court held that "actual bias" was not demonstrated by adverse rulings by the neutral umpire, including a decision to appoint as an expert an individual who had been appointed three times as a party arbitrator by one of the parties to the arbitration. *See also Householder Group v. Caughran*, 354 Fed. App'x. 848, 852 (5th Cir. 2009) (holding that the panel's refusal to require the defendant to comply with discovery orders and one-sided rulings were insufficient to establish "evident partiality"), and *BellAerospace Co. Div. of Textron, Inc. v. Local 516*, 500 F.2d 921, 923 (2d Cir. 1974) ("evident partiality" not established where arbitrator "consistently relied on evidence and reached conclusions favorable to one party").

Second, courts have refused to vacate awards where the alleged misconduct was remote or speculative or the failure to disclose involved trivial issues. Thus, in *Lagstein v. Certain Underwriters at Lloyds*, 607 F.3d 634 (9th Cir. 2010), the court rejected a challenge to an arbitration award based on alleged misconduct of an arbitrator more than a decade before the arbitration. In *Midwest Generation EME, LLC v. Continuum Chemical Corp.*, No. 08 C 7189, 2010 U.S. Dist. LEXIS 61635 (N.D. Ill. June 21, 2010), the court rejected a challenge to an arbitration award based on claimed/speculative impropriety between a party arbitrator and counsel for the other party to the arbitration. In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. 2007), the court refused to vacate an award where a single arbitrator had failed to disclose that he had represented the same party in a non-related patent suit as counsel for one of the parties to the arbitration. In *Transit Casualty Co. v. Trenwick Reinsurance Co., Ltd.*, 659 F.Supp.1346 (1987), aff'd, 841 F.2d 1117 (2d Cir. 1988), the court refused to vacate an arbitration award where the neutral arbitrator had been appointed as a neutral in another arbitration by a party arbitrator and where the neutral had failed to disclose a "trivial" financial interest in a party to the arbitration.

Third, some decisions reflect a reluctance on the part of the courts to vacate awards for a failure to disclose. In *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978), the Second Circuit refused to vacate an arbitration award where the neutral arbitrator had failed to disclose that he had in the recent past sat on nineteen arbitration panels with the president of one of the parties to the arbitration and that in twelve of these cases the president had selected him as the neutral; the court could "find only one instance after *Commonwealth Coatings* where an appellate had any success in this court on a claim of insufficient disclosure." 579 F.2d at 700. In *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir. 1983), the Seventh Circuit "extracted from the cases" a "reluctance to set aside arbitration awards for failure of the arbitrator to disclose a relationship with a party" and rejected a challenge to an arbitration award based on a neutral arbitrator's failure to disclose he had worked under a party's president and principal stockholder during a three year period seventeen years before the arbitration. According to the court:

> We do not want to encourage the losing party to every arbitration to conduct a background investigation of each of the arbitrators in an effort to uncover evidence of a former relationship with the adversary. This would only increase the cost and undermine the finality of arbitration, contrary to the purpose of the United States Arbitration Act of making arbitration a swift, inexpensive, and effective substitute for judicial dispute resolution. 714 F.2d at 683.

Cases Vacating Awards for "Evident Partiality"

In some of the cases where the courts have vacated awards for "evident partiality," the arbitrator failed to disclose information that was clearly germane to whether the arbitrator should serve on the panel. In *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), the court vacated an award where the law firm of the arbitration panel's chairperson had represented the parent company of one of the parties to the arbitration in at least nineteen cases over a thirty-five year period; the court found a duty on the part of the arbitrator to inform himself of this representation. In *Billie Allayne Ceriale v. Amco Insurance Co.*, 55 Cal.Rptr.2d 685 (Calif.Ct.App. (1996), the court vacated an award where an arbitrator failed to disclose that she was involved as counsel in a non-binding arbitration where counsel for one of the parties to the arbitration was the arbitrator. The court said that there was a clear potential that the arbitrator's decision would be influenced by concern about the impact of the decision on how counsel would decide the non-binding arbitration. In *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret v Sanayi*, A.S., 492 F.S.3d 132 (2d Cir. 2007), the Seventh Circuit vacated an arbitration award because of the failure of the chairman of the arbitration panel to reveal a business relationship between his company and one of the parties to the arbitration.

More recently, in *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, No.09 Civ. 9531 (SAS), 2010 U.S.Dist. LEXIS 15952 (S.D.N.Y.Feb. 23, 2010), Judge Scheindlin vacated an arbitration award where two of the arbitrators failed to disclose their simultaneous involvement in an arbitration that involved a common witness, similar disputed issues and contract terms, and a company that succeeded to the business of one of the parties to the arbitration. The court ruled that the two arbitrators should have disclosed their involvement in the other arbitration, particularly since the arbitrators did disclose in the other arbitration in general terms their involvement with the arbitration at issue in the case. However, there was no evidence that the failures to disclose

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Despite the inconsistencies in the case law regarding the "evident partiality" standard, one point emerges from all of the judicial decisions: arbitrators should make full disclosures at the outset to avoid what Justice White characterizes as pretextual challenges by a "suspicious or disgruntled party."

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were intentional. While the party challenging the arbitration claimed that it would have challenged the arbitrators if they had made a timely disclosure, it was not at all clear that disqualification of the arbitrators would have been warranted if the disclosures had been made. Further, while Judge Scheindlin cited in support of her decision Second Circuit case law regarding the vacating of arbitration awards and the potential that the arbitrators' decisions in the arbitration were influenced by testimony and evidence in the undisclosed arbitration, the standard applied to vacate the arbitration award appears to approximate the "appearance of bias" standard in the *Crow Construction* case, discussed previously, more than the Second Circuit standard requiring more than an appearance of bias but less than actual bias to vacate an award.

The Duty to Investigate and Disclose

Despite the inconsistencies in the case law regarding the "evident partiality" standard, one point emerges from all of the judicial decisions: arbitrators should make full disclosures at the outset to avoid what Justice White characterizes as pretextual challenges by a "suspicious or disgruntled party." 393 U.S. at 151. As the *Scandinavian Reinsurance* case illustrates, the penalty for even innocent failures to disclose (i.e., the vacating of an award and a new arbitration proceeding) is very high. There is, of course, the issue of what types of disclosures should be made. The *ARIAS•U.S. Guidelines for Arbitrator Conduct* — Canon IV[4] provides a very useful guideline with respect to the disclosure requirement: "[c]andidates should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure." Comment 1 to Canon IV provides specific guidance with respect to the content of the disclosures and the need for the arbitrator candidate to investigate potential conflicts:

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

Comment 3 to Canon IV makes clear that the duty to disclose is a continuing one:

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

Even when timely disclosures are made, a dispute may arise concerning whether an arbitrator candidate or arbitrator should be disqualified by virtue of the relationships that are disclosed. Comment 2 to Canon IV addresses how an arbitrator should respond when a challenge has been raised:

> 2. In the event that an arbitrator is requested by all parties to withdraw, the arbitrator must do so. In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when one of the following circumstances exist: (a) When procedures agreed upon by the parties for resolving challenges to arbitrators have been followed and require withdrawal; if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly; or if required by the contract or law.

There can hardly be disagreement with the provision requiring the arbitrator to withdraw when all parties request withdrawal. The more difficult situation arises where the party appointing the arbitrator disputes the other party's challenge to the arbitrator. Such a challenge may be based on information disclosed by the arbitrator about relationships with the parties, or on the discovery of an arbitrator's failure to disclose. Presumably, the neutral arbitrator/umpire would be in a position to resolve any such dispute. In cases where the

challenge arising from an arbitrator's failure to disclose occurs during the pendency of an arbitration, the umpire must confront the same issue confronting courts that address post-arbitration challenges based on a failure to disclose: how to interpret and apply the "evident partiality" standard.

II. Select Ethical Issues Related to the Party-Appointed Arbitrator

Many of the concerns about the fairness of the reinsurance arbitration process relate to the conduct of the party-appointed arbitrator. While the judicial decisions are in agreement that the party-appointed arbitrator in a tripartite arbitration is not required to be neutral, ethical issues continue to be raised concerning how partial the party-appointed arbitrator can be and how loyal the party-appointed arbitrator can be to the party making the appointment.

Case Law Related to the Conduct of Party-Appointed Arbitrators

In cases addressing the "evident partiality" standard in the FAA and other ethical issues relating to reinsurance arbitrations, the courts have applied a more relaxed standard with respect to the conduct of the party-appointed arbitrator than to the neutral in a tripartite arbitration. This point is illustrated in the well-known case *Sphere Drake Ins. Ltd. v. American Life Ins. Co.*, 307 F.3d 617 (7th Cir. 2002), where American Life Insurance Company sought to vacate an award in favor of Sphere Drake Insurance Ltd. on the ground that Sphere Drake's party-appointed arbitrator displayed "evident partiality." The district court ruled in favor of American on the ground that its party-appointed arbitrator (a lawyer) had been retained four years before the arbitration by the Bermuda subsidiary of Sphere Drake in an unrelated matter in connection with an international arbitration that settled shortly after the initial meeting of the panel and counsel. The Seventh Circuit overturned the district court's ruling and noted that the challenged arbitrator would not have been subject to disqualification even if he had been a federal judge subject to stricter ethical rules than party arbitrators.

The holding in *Sphere Drake* is itself unremarkable, but the comments by the court about the distinction between the disclosure requirements of the party-appointed arbitrator and the neutral are significant. The court noted that it was not surprising that there was no federal case since the enactment of the FAA in 1925 vacating an award because of the "evident partiality" of the party appointed arbitrator as opposed to the neutral. 307 F.3d at 620. According to the court, "evident partiality" for a party-appointed arbitrator must be limited to conduct in transgression of contractual limitations"; the norms governing the party arbitrator's conduct differ from those governing neutrals. The court further stated that *Commonwealth Coatings* did not "so much as hint that party appointed arbitrators are governed by norms under with neutrals operate." *Id.* at 623.

The more relaxed standard applied to the conduct of party-appointed arbitrators is also reflected in *Federal Vending, Inc. v. Steak & Ale of Florida, Inc.*, 71 F.Supp.2d 1245, 1249-50 (S.D. Fla. 1999), where the court refused to vacate an award even though the court considered it to be "serious and troubling" that an arbitrator failed to disclose that he had upheld in another arbitration the clause at issue in the arbitration at issue; and in *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621 (6t Cir. 2002), where the court refused to vacate an arbitration award because Nationwide's party-appointed arbitrator was allegedly soliciting business from Nationwide during the pendency of the arbitration. According to the Sixth Circuit, the alleged partiality "must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." 278 F.3d at 626 (citing *Adersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998).

In *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F.Supp.2d 10, 12 (D.Mass.2002), the court refused to vacate an award where Nationwide's party-appointed arbitrator had "previously been an underwriter for First State's Casualty Excess Account with a reinsurance company called INA Re" and had expressed an opinion eighteen years prior to the arbitration that each individual helmet injury represented a separate claim in a product liability case involving defective helmets; the dispute at issue involved the number of claims in an asbestos bodily injury

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In cases addressing the "evident partiality" standard in the FAA and other ethical issues relating to reinsurance arbitrations, the courts have applied a more relaxed standard with respect to the conduct of the party-appointed arbitrator than to the neutral in a tripartite arbitration.

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case. Nationwide's party-appointed arbitrator also allegedly had an *ex parte* communication with Nationwide in which she revealed that she and the umpire were willing to rule in Nationwide's favor in a discovery dispute which was then pending; Nationwide's counsel and First State's counsel were engaged at the time in discussions regarding a resolution of the dispute. 213 F. Supp. 2d at 13. In support of its ruling, the court emphasized the heavy burden First State had in establishing "evident partiality" with respect to a party-appointed arbitrator. Unlike the umpire, the party-appointed arbitrator was "not required to be neutral;" partisan arbitrators were permissible. *Id*. at 17. According to the court, "Nationwide had the right to choose some one [sic] who was an expert in reinsurance contracts and who had encountered and resolved similar disputes in the past, and it had a right to speak confidentially with its arbitrator in the early stages of the proceeding." *Id*. at 18-19.

In *Nationwide v. First State*, the court cited with approval *Delta Mining Holding Co. v. AFC Coal Properties, Inc*., 280 F.3d 815 (8th Cir. 2001), where the Eighth Circuit overturned the district court's decision to vacate an award because a party arbitrator had assisted the party appointing him in preparation for a mediation, including participation in a mock arbitration held days before the hearing. As the court noted in *Nationwide v. First State*, the arbitration agreement at issue in *Delta Mining* "expressly permitted the selection of an interested person as an arbitrator." 213 F.Supp. 2d at 17.

ARIAS•U.S. Guidelines Related to the Conduct of Party Arbitrators

While the courts have displayed considerable reluctance to provide limitations on the conduct of party-appointed arbitrators apart from the obligation to make disclosures about potential conflicts, the *ARIAS•U.S. Guidelines for Arbitrator Conduct* and the recently promulgated Additional ARIAS•U.S. Ethics Guidelines[5] do attempt to place some strictures on the conduct of the party-appointed arbitrators.

- **Multiple Appointments of Party-Appointed Arbitrators: How Many is Too Many?**

The ARIAS•U.S. Arbitrator and Umpire Disclosure Questionnaire requires disclosure of the party-appointed arbitrator's prior appointments by the parties to the arbitration and their counsel as well as experience as an expert witness on behalf of the parties or their counsel.[6] This form is unquestionably valuable in providing information about potential bias on the part of the party-appointed arbitrator due to the number of appointments. However, even if the disclosure indicates that the party-appointed arbitrator has been appointed numerous times by the party or counsel for the party making the appointment, there is in the ARIAS•U.S. guidelines no actual prohibition of the arbitrator's appointment again in the arbitration. Nor is a court likely to support a challenge to a party-appointed arbitrator based simply on the number of times the individual has been appointed by the party, assuming, of course, that the party-appointed arbitrator has disclosed the prior appointments.

The ARIAS•U.S. Arbitrator and Umpire Disclosure Questionnaire would be more useful if it were accompanied by a guideline concerning the number of prior appointments that would disqualify an individual from serving again as a party-appointed arbitrator because of an excessive number of prior appointments by the party or counsel for the party. The problem, however, is defining how many prior appointments is too many. Stated another way, it is difficult to define a bright-line test that could be used to bar a party-appointed arbitrator from serving again by virtue of the number of prior appointments by the party or counsel for the party. Nonetheless, there is a benefit to the disclosure of prior appointments by the party to an arbitration or counsel. At the very least, a large number of appointments may suggest to the umpire the potential for bias arising from the party-appointed arbitrator's dependence upon the party or counsel for income. Further, when combined with other evidence of excessive bias, the information may be useful in connection with a motion to disqualify the party-appointed arbitrator or to vacate an arbitration award.

- **Pre-Arbitration Communications with the Appointing Party**

Canon V of the *ARIAS•U.S. Guidelines for Arbitrator Conduct* provides: "**Communication With the Parties: Arbitrators, in communicating with the parties, should avoid impropriety or the appearance of impropriety.**" Comment 2 to Canon V states:

> 2. Party-appointed arbitrators may communicate with the party who is considering appointing them about their fees and, excepting those who by contract required to be "neutral" or the equivalent, may also communicate about the merits of the case prior to acceptance of the appointment until the date determined for the cessation of ex parte communications. The party-appointed arbitrator should, at the first meeting with the parties, disclose whether communications with the party or its counsel have taken place. In complying with this disclosure requirement, it is sufficient that the party-appointed arbitrator disclose the fact that such communication has occurred without disclosing the content of the communication, except that the party-appointed arbitrators should identify any documents that they have examined relating to the proceeding. Party-appointed arbitrators may also consult in confidence with the party who appointed them concerning the acceptability of persons under consideration for appointment as the third arbitrator or umpire.

The substance of the communications between the prospective party-appointed arbitrator and the party and counsel proposing to appoint the individual is important. As Canon V provides, it is reasonable for the prospective arbitrator to be informed about and discuss the merits of the case prior to appointment. The key issue, of course, is how much information may properly be provided to the prospective arbitrator about the merits of the case and whether it is permissible to obtain a commitment from the arbitrator to the correctness of the position being taken by the party proposing the appointment. Canon V does not fully address this issue. Guideline No. 4 of the ARIAS•U.S. Guidelines for Party-Appointed Arbitrators in the Context of the Pre-Appointment Interview[7] states: "Do not offer any assurances, or even predictions, as to how you will decide the dispute, except as called for by the evidence." Canon V, however, does not require the party-appointed arbitrator to disclose at the organizational meaning the contents of the communications with the party making the appointment or its counsel. Instead, the party-appointed arbitrator is required to identify any documents examined relating to the proceeding. This guideline appears to be a reasonable one. Reinsurance arbitrations have become increasingly litigious. Requiring party-appointed arbitrators to disclose the content of prior communications with the appointing party and counsel at the organizational meeting would most likely lead to needless disputes over the propriety of the communications. Further, there is always the problem of selective amnesia on the part of one or both of the party-appointed arbitrators about the content of the communications concerning the merits of the case.

- **Conduct during the Arbitration Hearing**

The Comments to **Canon VII** of the *ARIAS•U.S. Guidelines for Arbitrator Conduct* include: ". . . Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time." This guideline correctly makes clear that the role of the party-appointed arbitrator is distinct from that of counsel for the party making the appointment.

- **Rendering a Decision:**

Canon II of the *ARIAS•U.S. Guidelines for Arbitrator Conduct* provides:

> **Fairness: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.**

The Comments to Canon II state:

> Although party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by 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. It is preferable that arbitrators advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented to the arbitration objectively. 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.

Several points should be noted with respect to the Comments to Canon II:

First, there is somewhat of a disconnect between the tepid and equivocal statement that it is "preferable that arbitrators advise the appointing party, when accepting the appointment, that they will ultimately decide issues presented to the arbitration objectively" and the strong and unequivocal assertion that the party-appointed arbitrators "should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly." If there is an unequivocal obligation on the part of the party-appointed arbitrators to render ultimately decisions that are just without consideration of the interests of the appointing parties, the party-appointed arbitrators should most assuredly make this position clear in discussions with the appointing parties when accepting their appointments.

Second, while it is laudable to establish a guideline requiring the party-appointed arbitrators to render a just decision without being influenced by "their appointment," the practical reality is that certain party-appointed arbitrators will ignore this guideline and be influenced to some degree (if not entirely) by their recognition that they were appointed by a party to the arbitration and their financial interests may be best served by ruling in favor of the appointing party.

Third, there is simply no way to enforce the requirement that the party-appointed arbitrators render ultimately just decisions without consideration of their appointment. Part of the problem is that lip service may be paid to this requirement even if the party-appointed arbitrators ultimately vote with their pocketbook and in reality ignore the requirement. The truly effective partisan party-appointed arbitrator does not act like a "homer" from day one but rather appears to keep an open mind before rendering the decision that was ordained at the time of the initial appointment.

The Trustmark Cases and the Reappointment Issue

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

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It is, however, ultimately the decision of the party-appointed arbitrator concerning whether he or she can remain open to the evidence presented at the arbitration even though a decision has already been rendered on the precise issue in dispute in the prior arbitration. While one may view with skepticism the decision by the party-appointed arbitrator to accept a reappointment, this does not mandate that the party-appointed arbitrator turn down a reappointment in a subsequent arbitration involving the same issues and parties.

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Ins. Co., No. 09 C 3959, 2010 U.S.Dist. LEXIS 4698 (N.D. Ill. Jan. 21, 2010) ("*Trustmark 1*"), the court disqualified a party-appointed arbitrator on the basis of a purported breach of a confidentiality agreement that was executed in connection with a prior arbitration involving the same parties and issues in which the disqualified party-appointed arbitrator participated as a party-appointed arbitrator. The court enjoined the arbitration from proceeding with the disqualified arbitrator participating on the arbitration panel. Interestingly, in *Trustmark Ins. Co. v. Clarendon National Ins. Co.*, No. 03 C 6169, 2010 U.S.Dist. LEXIS 8078 (N.D. Ill. Feb. 2, 1010) ("Trustmark II), another federal district court judge in the same district rejected a request to disqualify a party arbitrator on the ground that she would disclose confidential information from a prior arbitration involving the same parties in breach of a confidentiality agreement.

As one commentator has observed, *Trustmark I* was wrongly decided for numerous reasons; indeed, each of the grounds for the court's decision is seriously lacking in merit.[8] Not surprisingly, the Seventh Circuit overturned the district court's decision in *Trustmark I*.[9] In addition to holding that the requisite "irreparable harm" was not present to justify the injunctive relief granted, the court addressed the merits of the case and stated that the party arbitrator in question did not have a disqualifying "interest" in the arbitration simply because he had knowledge about the dispute from the prior arbitration.[10] According to the court, its conclusion on this issue was not affected by the fact that the party arbitrator in question had signed the confidentiality agreement since he did so as an adjudicator.[11] Finally, the court stated that the district court erred in concluding that the arbitrators were "powerless to construe the confidentiality agreement."[12]

> Leaving aside the confidentiality agreement issues addressed in *Trustmark I and II*, one issue raised by both cases is whether it is acceptable for a party-appointed arbitrator in one arbitration to serve again as a party- appointed arbitrator in another arbitration involving the same parties and issues. From the standpoint of the party who prevailed at the first arbitration, it makes sense to reappoint the same individual as a party-appointed arbitrator. The party losing the first arbitration, on the other hand, would most likely not be inclined to reappoint the same party-appointed arbitrator who was appointed in the prior arbitration. Thus, the party-appointed arbitrator for the prevailing party in the first arbitration is likely to possess knowledge and information that the party-appointed arbitrator for the other party in the second arbitration does not possess. Further, assuming a new neutral is appointed for the second arbitration, the party-appointed arbitrator for the prevailing party would also possess knowledge and information that the umpire did not have. In addition, since the party-appointed arbitrator from the first arbitration has already resolved the issue in favor of the party appointing him or her, it is highly likely that the party-appointed arbitrator is predisposed to rule again in favor of the party making the appointment.

If one assumes that a candidate for a party-appointed arbitrator or umpire position should refuse to serve on a panel where the candidate has a fixed view of the key issue to be resolved at the arbitration and is not likely to consider fairly evidence supporting a contrary view, it can be argued with some force that an individual serving as a party-appointed arbitrator in one arbitration should not accept a reappointment as a party-appointed arbitrator in a new arbitration involving the same issues and parties. After all, the party-appointed arbitrator who has already resolved the issue in dispute arguably has a fixed view of the key issue to be resolved at the arbitration. It is, however, ultimately the decision of the party-appointed arbitrator concerning whether he or she can remain open to the evidence presented at the arbitration even though a decision has already been rendered on the precise issue in dispute in the prior arbitration. While one may view with skepticism the decision by the party-appointed arbitrator to accept a reappointment, this does not mandate that the party-appointed arbitrator turn down a reappointment in a subsequent arbitration involving the same issues and parties.

Should Guidelines for Party-Appointed Arbitrator Conduct Be Strengthened or Relaxed?

While the ARIAS•U.S. guidelines provide useful limitations with respect to the conduct of the party-appointed arbitrator, one may question whether significant changes in the guidelines are required to address the conduct of the party-appointed arbitrator. There are two directions in which such revisions can be made while still preserving the tripartite arbitration structure. On the one hand, the guidelines could be revised so that the party-appointed arbitrator's connection with, and loyalty to, the party making the appointment is weakened and the party-appointed arbitrator is closer to a neutral arbitrator. For example, constrictions could be placed on the content of the communications between the party-appointed arbitrator and the party about the merits of the case, so that there is no discussion about the party-appointed arbitrator's position with respect to the issue to be resolved at the arbitration. While proponents of the European arbitration system laud the neutrality and independence of their party-appointed arbitrators, the culture with respect to reinsurance arbitrations in the United States is different from that in Europe. It is thus not likely that there would be acceptance of guidelines that would loosen completely the connection between the party and the party-appointed arbitrator.

The other alternative is to tighten the bond between the party-appointed arbitrator and the party making the appointment so that the party-appointed arbitrator is free to advocate the position of the appointing party and all constrictions on predisposition to a particular result are eliminated. Stated differently, the party arbitrators will be free to "go at it" in tandem with the lawyers for the parties appointing them. As reflected in the *Delta Mining* decision, the party-appointed arbitrators would be free to work with counsel and the party appointing them to obtain a favorable result. The umpire/sheriff in this wild-west scenario would be charged with establishing some semblance of order. This proposal is not as far-fetched as it would seem. One of the problems with the current tripartite arbitration system is that party-appointed arbitrators may perceive their roles quite differently. One party-appointed arbitrator may take the ARIAS guidelines seriously and keep an open mind about the merits of the case until all evidence is presented. The other party-appointed arbitrator may feel a strong bond of loyalty to the party making the appointment, never be open to the possibility of voting against the party, and do everything possible to obtain a favorable result for the party. This imbalance is one of the reasons for criticism of the reinsurance arbitration process.

While the second alternative does correct this imbalance, it is not likely to be accepted. Despite criticism of the reinsurance arbitration process, the companies participating in reinsurance arbitrations do not appear to be amenable to a drastic change in the process. Further, a movement to the wild-west alternative would not likely increase confidence in the fairness and integrity of the reinsurance arbitration system, even assuming that there are strong umpires/sheriffs to attempt to assure a fair ultimate result.

III. Select Ethical Issues Related to the Umpire

Under the tripartite arbitration system, the role of the umpire is critical in assuring that a fair result is obtained. The courts and parties to reinsurance arbitrations seem to acknowledge the reality that the party-appointed arbitrator may feel a strong bond of loyalty to the party making the appointment and may ultimately vote accordingly. The umpire's vote is thus critical. Further, a strong neutral is the strongest defense against the unduly partisan party-appointed arbitrator. In the first place, the biased party-appointed arbitrator may lose credibility with the neutral by too close an association with the views of the party making the appointment. Second, the umpire can assure that the arbitration proceedings are not adversely affected by an overly aggressive party- appointed arbitrator. Given the importance of the umpire in assuring the fairness and integrity of the tripartite arbitration process, it is essential to do everything possible to assure the objectivity and fairness of the umpire.

One of the key issues with respect to the umpire is the selection process. There is considerable dissatisfaction in the reinsurance industry with the coin toss

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While proponents of the European arbitration system laud the neutrality and independence of their party-appointed arbitrators, the culture with respect to reinsurance arbitrations in the United States is different from that in Europe. It is thus not likely that there would be acceptance of guidelines that would loosen completely the connection between the party and the party-appointed arbitrator.

The ARIAS Guidelines on Whether to Accept Appointment as Arbitrator or Umpire do not distinguish between the arbitrator or umpire with respect to the factors to be considered in deciding whether to accept the assignment. Although the factors may be the same, the umpire candidate should be scrutinized more closely with respect to these issues after appropriate disclosures have been made.

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method of selecting an umpire where the two party-appointed arbitrators are unable to agree on an umpire. In a keynote address at the Massachusetts Reinsurance Bar Association's Second Annual Symposium in September 2010, David Robb characterized as an "urban myth" the claim that the party who wins the coin toss is guaranteed a victory in an arbitration. Nonetheless, there is something primitive about using a coin toss as a way of selecting an umpire. ARIAS•U.S. has developed an Umpire Appointment Procedure as an alternative to the coin toss method, which begins with the development of a random list of twelve candidates generated from a select list.[13] Although not perfect, this procedure represents an advance over the coin toss method.

The umpire candidate must, of course, make the appropriate disclosures. One of the ethical issues raised is whether the umpire candidate's prior or current appointments as a party-arbitrator or prior or current nominations as an umpire or prior or current selections as an expert witness by the parties to the arbitration or their counsel render the umpire candidate potentially biased. As with the party-appointed arbitrator, there does not appear to be any bright-line test with respect to the number of prior or current appointments or nominations that is acceptable. However, the consideration of this issue in connection with the potential umpire candidate is of greater importance to the fairness of the reinsurance arbitration process than in connection with the potential party arbitrator. The ARIAS Guidelines on Whether to Accept Appointment as Arbitrator or Umpire do not distinguish between the arbitrator or umpire with respect to the factors to be considered in deciding whether to accept the assignment. Although the factors may be the same, the umpire candidate should be scrutinized more closely with respect to these issues after appropriate disclosures have been made. Further, the umpire candidate should weigh the factors more heavily and carefully than if the individual is proposed as a party-appointed arbitrator.

It is really up to the reinsurance industry to tighten the ethical standards with respect to the umpire as opposed to relying upon the courts to define the standards. The courts will vacate an award where an umpire has clearly crossed the line. In *Thomas Kinkade Co. v. Lighthouse Galleries*, LLC, No. 09-10757, 2010 U.S. Dist. LEXIS 6443 (E.D. Mich. Jan. 27, 2010), for example, the court vacated an arbitration award where the neutral engaged in mid-arbitration business relationships with a party arbitrator and party to the arbitration and exhibited partiality in his conduct in connection with the arbitration. Further, as noted, the courts do recognize that an umpire is to be neutral and not subject to partisanship in the same way as the party-appointed arbitrator. Nonetheless, the courts have been loathe to vacate arbitration awards because of the umpire's appointments as a party-appointed arbitrator, even where the appointments have been made during the pendency of the arbitration. In *Arrowood Indemnity Co. v. Trustmark Ins. Co.*, No.Civ. 3:03-CV-1000 (D. Conn. Feb. 2, 2010), for example, the court refused to vacate an arbitration award in favor of Arrowood where the neutral was appointed as a party arbitrator in six other cases by a party to the arbitration while the arbitration was pending. Similarly, in *Ario v. Cologne Reins. (Barbados), Ltd.*, No. 1: CV-98-0678, 2009 U.S. Dist. LEXIS 106133 (M.D. Pa. Nov. 13, 2009), the court rejected a challenge to an arbitration award where the umpire was selected during the pendency of the arbitration to be the umpire in another arbitration where Cologne's party arbitrator was also a party arbitrator.

There are currently no ARIAS•U.S. guidelines that prohibit an umpire from accepting appointments as a party-appointed arbitrator or nominations as an umpire by a party or counsel to a party during the pendency of an arbitration proceeding. The ARIAS•U.S. Guidelines on Whether to Accept Appointment as Arbitrator or Umpire provide: "[w]hile a candidate sits as an umpire in one matter, he or she should carefully consider whether to take any party-appointed role from any party that is involved in that matter." This guideline does not appear to go far enough. In view of the possibility that such appointments or nominations may be made in order to influence the decision of the umpire in a pending arbitration, or at least may appear to be made for that reason, serious consideration should be given to the adoption of a bright-line rule prohibiting an umpire from accepting such appointments or nominations during the pendency of an arbitration.

IV. Ethical Considerations Related to Neutral Panels

Because of the ethical problems arising from the tripartite arbitration structure, neutral panels have been proposed as an alternative. One important advantage of the neutral panel is that arbitrators on the panel do not have to deal with the loyalty tug from the parties appointing them. At least in theory, the arbitrators on the neutral panel are not aware of which parties proposed them for the panel. It is beyond the scope of this article to address in detail the neutral panel alternative, but it is important to note that as long as you have reinsurance disputes resolved by the more typical tripartite arbitration panels, even the purportedly "neutral" panels are not free from potential bias. It is still necessary to deal with the disclosure requirements with respect to the relationships the arbitrators have had with the parties and counsel for the parties. Further, given the likelihood that members of the neutral panel have been appointed as party arbitrators, nominated as neutrals, or selected as expert witnesses by parties to the arbitration or their counsel in the past, and may potentially be appointed or nominated to tripartite arbitration panels or selected as expert witnesses in the future, there is still the danger that the decisions by the arbitrators on the neutral panel will be influenced by business considerations. In addition, the issue of how many prior appointments or nominations are too many still persists even in the context of the neutral panels.

Conclusion

There is some element of frustration in considering ethical issues in reinsurance arbitrations. Indeed, there is some sense in which the continuation of the discussion of ethical issues relating to reinsurance arbitrations is like a dog chasing its own tail. The same ethical problems are identified with some hope that there will be a resolution. However, there is ultimately no resolution, and the chase continues unabated. And no, the dog never does catch its tail! There is, however, a real benefit to continued discussion and debate about ethical issues relating to reinsurance arbitrations. As the courts have frequently commented, there is a price to be paid for an arbitration system in which individuals with an expertise in the subject area are selected as arbitrators and neutrals. Given the relative small size of the reinsurance industry, there will inevitably be relationships developed among individuals in the industry that have an impact on the fairness and objectivity of the arbitrators (including umpires) in resolving disputes. Continued consideration of the ethical issues that arise in this setting and the refinement of guidelines concerning the conduct of the arbitrators does ultimately improve the process. Further, as recent case law makes clear, the courts will sometimes intervene and vacate awards on the basis of ethical considerations. Unless the ethical issues raised in these cases are discussed and addressed, there is the danger that arbitration awards will be vacated and the substantial time and expense incurred in connection with the arbitrations wasted.▼

1 Any views expressed in this article are those of the author and do not necessarily reflect those of Zelle Hofmann Voelbel & Mason LLP or its clients. The author acknowledges with gratitude the research assistance of Christine Phan, an associate at Zelle Hofmann, in connection with the preparation of this article. The title of this article is the same as the title for a panel on ethical issues on which the author participated as moderator at the Massachusetts Reinsurance Bar Association Second Annual Symposium on September 23, 2010 in Boston.

2 9 U.S.C. § 10(a)(2) (2000) (boldface added).

3 *Federal Vending, Inc. v. Steak & Ale of Florida, Inc.*, 71 F.Supp.2d 1245, 1246 (D.Fla. 1999).

4 The *ARIAS•U.S. Guidelines for Arbitrator Conduct* can be found in the Code of Conduct section of the ARIAS•U.S. website at www.arias-us.org.

5 The Additional ARIAS•U.S. Ethics Guidelines can be found in the Additional Ethics Guidelines section of the ARIAS•U.S. website at www.arias-us.org.

6 This questionnaire can be found in the Forms section of the ARIAS•U.S. website at www.arias-us.org.

7 These guidelines are contained in the Additional Ethics Guidelines section of the ARIAS•U.S website at www.arias-us.org.

8 *See* Daniel L. Fitzmaurice, "Trustmark v. John Hancock: A Significantly Flawed Decision With The Potential To Wreak Havoc for Confidentiality Agreements In Arbitration," Mealey's Litigation Report: Reinsurance (March 19, 2010).

9 *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, No. 09-3682 (7th Cir. January 31, 2011).

10 *Id.*, Slip Op., p. 7.

11 *Id.*, p. 8.

12 *Id.*

13 *See* http://www.arias-us.org/index, Selecting an Umpire, for a detailed description of this procedure.

Continued consideration of the ethical issues that arise in this setting and the refinement of guidelines concerning the conduct of the arbitrators does ultimately improve the process. Further, as recent case law makes clear, the courts will sometimes intervene and vacate awards on the basis of ethical considerations.

news and notices

All ARIAS•U.S. Certified Arbitrators are required to attend one educational seminar every two years for renewal of certification.

February Seminar Had 53 Students

After a slow registration start, the ARIAS Educational Series that took place at the Sheraton Philadelphia University City Hotel on the afternoon of February 7, 2011 ended up with 53 students. Along with twelve faculty members and leaders, participants totaled 65.

Cynthia Koehler of Liberty Mutual and veteran ARIAS•U.S. Certified Arbitrator **Mary Ellen Burns** were Co-Chairs of the event. The seminar addressed substantive issues in reinsurance.

The afternoon was divided into two panel discussions with a half-hour refreshment break in between. Issues addressed were (1) Recent Case Law Developments and (2) Aggregation and Accumulation of Latent Injury Claims.

The program received enthusiastic reviews from attending students. All ARIAS•U.S. Certified Arbitrators are required to attend one educational seminar every two years for renewal of certification. Other two-year requirements are attendance at a spring or fall conference and completion of an online ethics course.

Intensive Workshop at Dewey & LeBoeuf

The spring Intensive Arbitrator Training Workshop, is scheduled to take place on March 22 at the New York City offices of Dewey & LeBoeuf LLP. At press time, nine arbitrator students had registered.

Details about the workshop are on the website calendar.

Anyone who has not been an arbitrator in at least two completed arbitration and who intends to apply for ARIAS•U.S. certification, is required under Options B and C of the Certification Requirements to attend an intensive workshop.

Board Certifies Barnes and Recertifies Cashin

At its meeting on January 13, the Board of Directors approved certification of **Christopher E. Barnes** as an ARIAS-U.S. Arbitrator and recertified **John R. Cashin**, who had previously been certified.

Mr. Barnes was sponsored by James Engel, Constance O'Mara, David Bowers, and Douglas Houser.

A complete list of Certified Arbitrators can be found on the ARIAS•U.S. website.

Three ARIAS•U.S. Umpires Are Certified

In addition, at the January 13 meeting, the Board approved the following arbitrators as ARIAS-U.S. Certified Umpires.

- **James F. Dowd**
- **Klaus Kunze**
- **Roger M. Moak**

A complete list of Certified Umpires can be found on the ARIAS•U.S. website.

Fontainebleau Reservation System is Open for ARIAS•U.S.

In late December, the "Welcome ARIAS" section of the Fontainebleau Miami Beach reservation system opened; it can be accessed through the ARIAS website home page. Rooms are available through April 8 in five categories from $269 to $399 per night for single or double occupancy. Additional occupants add $30 per person per night. Anyone preferring to make reservations on the telephone should call 800-548-8886.

The conference will run from Wednesday noon until Friday noon, May 4-6. Registration for the conference, itself, opened in mid-February on the ARIAS home page. The final deadline is April 22. Full details are available in the announcement brochure on the home page of the website.

Richard E. Smith

Richard E. Smith, a former member of ARIAS, died on November 15. Most recently, he had been with NorthPort Advisors in Fairfield, Connecticut. Previously, he was Chief Executive of Converium North America and, earlier, was with Guy Carpenter and A. M. Best Company.

A memorial service was held on Saturday, January 8th at the Wilton Congregational Church.

feature

Issues for Courts Vs. Issues for Panels: Supreme Court Clarification?

Robert M. Hall

I. Introduction

The distinction between issues properly addressed by the courts and by arbitration panels has been a bit opaque in the past. This has led to uncertainty by both counsel and arbitrators as to the proper venue for a dispute. In 2010 the U.S. Supreme Court issued opinions on two non-reinsurance matters that may help clarify this distinction. The purpose of this article is to examine these two cases, highlighting the distinction drawn by the Court over the issues properly addressed by the court vs. those properly addressed by arbitration panels.

II. Granite Rock Co. v. International Brother of Teamsters et al., 130 S.Ct. 2772 (2010)

This case involved a labor dispute. A union local was on strike until July 2, 2004 when it voted to accept a collective bargaining agreement (CBA) with the employer, Granite Rock. At the time of the vote, the Local did not have a hold harmless agreement that would protect it from damages suffered by Granite Rock during the strike. The International Union advised the Local not to return to work without the hold harmless, and the Local reversed its position and did not return to work. Granite Rock sued for damages and an injunction against the strike. On August 22, 2004, the Local again voted to accept the CBA and returned to work, thus mooting the injunction issue, but Granite Rock continued to seek damages.

Since the CBA contained a no-strike clause, the effective date of its ratification became an issue with respect to the calculation of damages. The Local argued that the effective date of the ratification should be determined by the arbitrator pursuant to the CBA, and Granite Rock argued that it should be determined by a court. The district court held in favor of Granite Rock (*i.e.* that the court should determine the issue). The Court of Appeals reversed on the bases that the dispute was covered by the arbitration clause of the CBA and the national policy in favor of arbitration. The Supreme Court reversed with Mr. Justice Thomas writing the opinion for seven members of the court and with two members concurring in part and dissenting in part.

The majority opened its opinion with the observation that prior case law indicates that these issues generally are for determination by the courts: whether (a) a contract was formed between the parties that contains an arbitration clause ("Formation Issue"); and (b) the dispute in question falls within the ambit of the arbitration clause. Since arbitration is a creature of contract, there must be a contract between the parties that gives an arbitration panel the power to resolve disputes, and the dispute in question must fall within the range of issues the parties have empowered the panel to decide.

The majority criticized the Court of Appeals for over-reliance on the presumption of arbitrability which applies to whether or not the dispute falls within the arbitration clause but does not apply to the Formation Issue. This presumption, or other policy considerations, can never override the principle that a court can submit to arbitration "only those disputes. . .. which the parties have agreed to submit."[1] The majority ruled that the issue in this case was a Formation Issue, which required:

> [J]udicial resolution of two questions central to Local's arbitration demand: when the CBA was formed and whether its arbitration clause covers the matters that Local wishes to arbitrate.[2]

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Robert M. Hall

The majority criticized the Court of Appeals for over-reliance on the presumption of arbitrability which applies to whether or not the dispute falls within the arbitration clause but does not apply to the Formation Issue.

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

The district court held for the employer, ruling that the Arbitration Agreement clearly gave the arbitrator the power to decide enforceability issues. The Court of Appeals reversed, ruling that the enforceability of the Arbitration Agreement was a matter for the courts. Mr. Justice Scalia, writing for a five member majority, reversed the Court of Appeals and ruled that enforceability of the Arbitration Agreement was for the arbitrator to decide.

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As additional reasons to overturn the lower court decision, the majority observed that the dispute over the ratification date, which went to the very existence of the CBA, could not "arise under" the "relatively narrow" arbitration clause of the CBA. Also, the arbitration clause made it clear that labor disputes were to be arbitrated rather than disputes about the ratification of the CBA.[3]

The dissent observed that after the strikes were concluded, the parties made the CBA retroactive to May 1, 2004 (i.e. before either of the ratification votes) so that the Formation Issue was moot.[4] In addition, the dissenters re-defined the issue in the case as whether or not the no-strike clause proscribed the work stoppage and were of the opinion that this issue plainly "arose out of" the CBA and was subject to arbitration.

III. *Rent-a-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010)

The issue in this case was the arbitrability of an employment discrimination action. As part of a larger employment arrangement, the employee signed an Arbitration Agreement by which he agreed to arbitrate, among other things, the enforceability of the Arbitration Agreement. The employer sought to enforce the Arbitration Agreement and the employee challenged it as unconscionable. The district court held for the employer, ruling that the Arbitration Agreement clearly gave the arbitrator the power to decide enforceability issues. The Court of Appeals reversed, ruling that the enforceability of the Arbitration Agreement was a matter for the courts. Mr. Justice Scalia, writing for a five member majority, reversed the Court of Appeals and ruled that enforceability of the Arbitration Agreement was for the arbitrator to decide.

The majority first addressed the provision delegating the issue of enforceability of the Arbitration Agreement to the arbitrator ("Delegation Provision"). It ruled that gateway issues, such as that of arbitrability, which would usually be handled by the courts, may properly be addressed by the arbitrator as long as the delegation to the arbitrator is clear. Next, the Court dealt with challenges to the validity of the contract under § 2 of the Federal Arbitration Act. The Court observed that challenges to the arbitration clause of a contract are for the courts to determine but challenges to other clauses or the contract generally are for the arbitrator:

> If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. . . .
>
> But even where. . . . . the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract — we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.[5]

Arbitration clauses are severable in that they may be enforced by the courts while the arbitrator addresses the rest of the contract.

In this case, the employer was seeking enforcement of the Delegation Provision, which gave the arbitrator the authority to decide the enforceability of the contract. Regardless of the fact that the remainder of the contract was an agreement to arbitrate, the majority ruled that the employee's unconscionability challenge had to be addressed to the Delegation Provision specifically, and not the Arbitration Agreement generally, for it to be a matter for the court to decide. In reviewing the record, the majority concluded that the unconscionability challenge was to the Arbitration Agreement generally and not to the Delegation Provision specifically. Therefore, the enforceability issue was for the arbitrator to decide.[6]

Mr. Justice Stevens wrote an articulate dissent for four members of the court. He focused on the fact that this was a challenge, general as it might be, to an agreement to arbitrate and that prior precedent had assigned challenges to arbitration provisions (*i.e.* in broader contracts) to the courts. The minority also dissented on the Delegation Provision, arguing that the unconscionability defense undermined the employee's consent to it. Finally, the dissenters objected to the narrowness of the challenge necessary to require resolution of the issue by the courts:

> Today the Court adds a new layer of severability — something akin to

> Russian nesting dolls — into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator....
>
> [B]ecause we are dealing in this case with a challenge to an independently executed arbitration agreement — rather than a clause contained in a contract related to another subject matter — any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement.[7]

IV. Commentary

Trying to interpret a trend in Supreme Court cases is a tricky business, particularly when only two cases are involved. Differences in facts, issues, and the respective records may explain more than judicial philosophy.

Nonetheless, these cases seem to cut in opposite directions despite apparent agreement as to the legal principles behind the court vs. panel issue. These principles are:

A. The courts determine whether a contract has been formed between the parties that contains an arbitration clause (formation) and whether or not the dispute falls within the arbitration clause (arbitrability);

B. The parties may contract to delegate certain threshold issues, such as arbitrability, to the arbitrator so long as the delegation is clear; and

C. The arbitrator determines challenges to the contract even if the problem that allegedly infects the contract infects the arbitration clause as well.

In *Granite Rock*, the majority found a waiver of an argument that the dissent argued should have been considered to do justice to the Local. Relying on this waiver, the majority found an issue with the formation of contract that required resolution by the court.

In *Rent-a-Center*, five members of the Granite Rock majority took an extremely narrow view of the type of challenge to the arbitration agreement necessary for the court to resolve this issue.

On this narrow view, the majority reached a conclusion opposite from that in *Granite Rock*, *i.e.*, that the arbitrator should decide the issue.

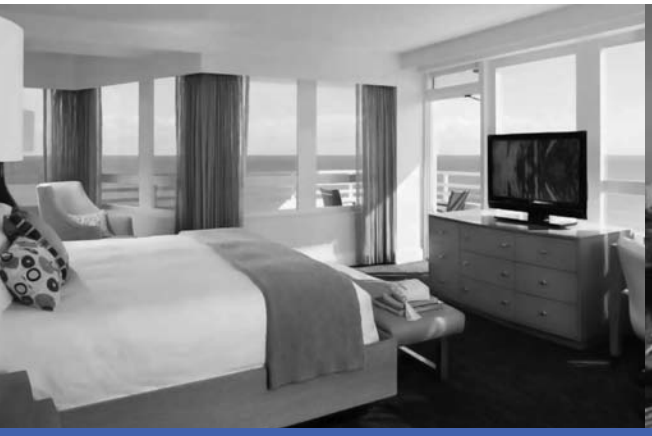
Given the unusual facts involved in these cases, it may be difficult to take much more from these rulings than apparent agreement on the legal principles on which they are based.▼

ENDNOTES

The views expressed in this article are those of the author and do not reflect the views of his clients. Additional background on the author and his other publications can be found on his website: robertmhall.com.

1 130 S.Ct. 2847 at 2860 quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) at 943.
2 *Id.*
3 *Id.* at 2862.
4 The majority ruled that the Local had waived this argument. *Id.* at 2861.
5 130 S.Ct. 2272 (2010) at 2278.
6 *Id.* at 2780-1.
7 *Id.* at 2786-7.

In this case, the employer was seeking enforcement of the Delegation Provision, which gave the arbitrator the authority to decide the enforceability of the contract. Regardless of the fact that the remainder of the contract was an agreement to arbitrate, the majority ruled that the employee's unconscionability challenge had to be addressed to the Delegation Provision specifically, and not the Arbitration Agreement generally, for it to be a matter for the court to decide.



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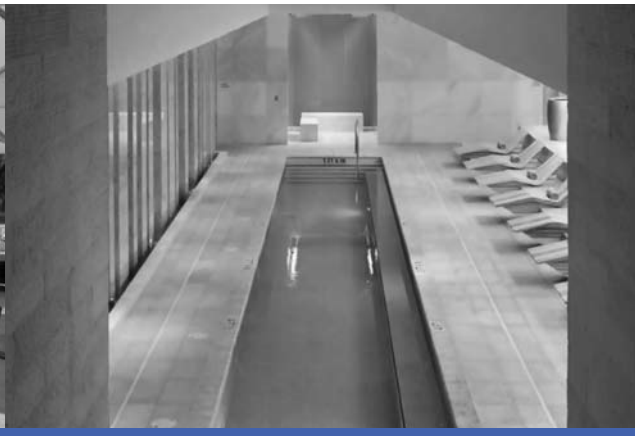

THE FONTAINEBLEAU TAKES **ARIAS·U.S.** BACK TO THE FUTURE

MIAMI BEACH

This 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.

REGISTER NOW!

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 sign up for now. The dates are **May 4-6, 2011**. The sessions will run from Wednesday noon until Friday noon.

An announcement brochure with complete details was sent to members and posted on the website in February, along with online registration and a link to the Fontainebleau's reservation system. **The deadline for *first come, first served* hotel reservations is April 8.**
The deadline for conference registrations is April 22.

members on the move

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

Although we will continue to highlight changes and moves, remember that the 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

Bernard J. Turi is now a Senior Vice President with Utica Mutual Insurance Company. His contact information remains unchanged.

Susan E. Mack has moved to the full-time practice of insurance/reinsurance ADR, providing arbitration, mediation, and expert witness services. Her address is Portia Consultiing Services, LLC, 264 Royal Tern Rd. N., Ponte Vedra Beach, FL 32082, phone 904-280-7779, cell 904-477-6361, email susanemack@aol.com.

Zurich Insurance Company has appointed **John R. Cashin** General Counsel, Head of Compliance and Government and Industry Affairs (GAIA) for Middle East and Africa. His new contact information is as follows: Zurich Insurance Company Ltd, Level 6, East Wing, The Gate, Dubai International Financial Centre, P.O. Box 50389, Dubai, United Arab Emirates, phone +971 4 364 7358, cell +971 5 0104 0657, fax +971 4 364 7301, email john.cashin@zurich.com.

In addition to her work as a practicing reinsurance lawyer at Chadbourne & Parke LLP, **Mary A. Lopatto** has been named Washington, DC Office Managing Partner. Her contact information remains unchanged.

William D. Hager has moved within Boca Raton, Florida. His new location is 301 Yamato Road, Suite 1240...same zip code, phone numbers, and email address.▼

feature

The Sanctity of... English Arbitration Awards

Jonathan Sacher
David Parker

At a time of U.S. Courts' recent apparent interest in challenges or appeals to reinsurance arbitration awards, the English court has, once again, reiterated that it will do all it can to maintain the sanctity of arbitration awards.

The approach in England remains that if arbitration awards are easily challenged, there is a danger that the entire arbitration process becomes simply a costly and time consuming pre-match "warm up" to traditional litigation. In which case, why would the English reinsurance market habitually include clauses in its policies whereby disputes between reinsureds and reinsurers are to be referred to arbitration?

Finality

In choosing whether to agree to submit contractual disputes to arbitration (rather than having disputes decided by the courts), a major consideration in the minds of the contracting parties is often the extent to which the arbitration process offers "finality" to disputes. Traditionally, one of the major advantages in selecting arbitration as a dispute resolution process is that it is said to offer parties the chance to have issues determined conclusively, often by individuals with vast experience of the markets themselves, at reduced cost and greater speed to those available in court.

We have written previously[1] on the increased scope (in theory at least) to appeal arbitration awards in England under the English Arbitration Act 1996 when compared with arbitrations governed by the US Federal Arbitration Act. However, English courts have traditionally given short shrift to appeals from reinsurance arbitrators' awards.

The recent decision of the English Commercial Court in *IRB Brasil v CX*[2] *Re* confirms that the courts will continue to uphold arbitration awards where the findings of the arbitrators appear to be reasonable and commercial. The court will refrain from re-examining issues decided at arbitration, in all but the most limited of circumstances.

In fact, since the English Arbitration Act came into force in 1996, although there have been successful appeals of shipping and commodity arbitrations, there has only been one successful appeal of a reinsurance arbitration award (in 2005). *IRB Brasil v CX Re* is one of the only two other reinsurance awards that have come before the English court since 1996.

Perhaps, therefore, reinsurers and reinsureds alike can breath a sigh of relief - an arbitration award, in England at least, is "sacred".

Mechanics of challenging an English arbitration award

How does a reinsured or a reinsurer that is unhappy with the decision of an English arbitration panel go about challenging that award?

The English Arbitration Act includes three statutory mechanisms for "contesting" a domestic award: (a) a challenge based on the tribunal's substantive jurisdiction[3]; (b) a challenge based upon serious irregularity[4]; and (c) an appeal on a point of (English) law[5].

The two "challenges" are mandatory and parties cannot agree to exclude them in an arbitration agreement. The parties are, however, free to agree to exclude an appeal to the court on a point of English law[6]. This can be done expressly, or by agreeing that an award shall not be supported by written reasons (English arbitration awards are supported by written reasons, unless otherwise agreed). There can be no appeal to

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Jonathan Sacher

David Parker

In fact, since the English Arbitration Act came into force in 1996...there has only been one successful appeal of a reinsurance arbitration award (in 2005).

Jonathan Sacher is a Partner and David Parker is an Associate in the Insurance/Reinsurance Group at London law firm, Berwin Leighton Paisner.

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the English courts on a question of fact (whether an issue is one of "law" or "fact" is, of course, sometimes open to debate).

In order to appeal to the court on a point of law, an appellant has some very high hurdles to jump, even to secure permission to appeal[7]. An English court will only grant leave if the statutory criteria are satisfied, namely: (1) the determination of the question will substantially affect the rights of one or more of the parties, (2) the question is one the tribunal was asked to determine, (3) on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (4) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

IRB Brasil v CX Re (2)

This case was heard by the English Commercial Court in the Summer of 2010. The case arose out of an appeal by reinsurers, IRB Brasil, against an arbitration award in favour of its reinsured, CX Re.

IRB Brasil provided excess of loss reinsurance to CX Re, protecting its casualty book of business in the 1970s and 1980s. The reinsurance claims arose out of well known US liability losses including: silicone breast implants, contaminated blood, asbestos, and environmental pollution claims, all of which were settled by CX Re. After settling the claims and reinsurers refusing to pay, CX Re ultimately commenced arbitration seeking a recovery from IRB for a total of eight larger value claims.

At arbitration, the tribunal found the settlements "*reasonable and businesslike*" and noted that they had been "*... agreed, presented and almost universally supported/paid by the London market...*" awarding that reinsurers indemnify CX Re for each of the eight arbitrated claims. Reinsurers, however, considered that the arbitrators had made various errors of law in reaching their conclusions, and that the sums paid under the terms of the settlements were not properly recoverable under the reinsurance contracts in relation to six of the claims.

The Court initially referred to its "expressed reluctance" even to grant reinsurers permission to appeal, the Judge stating his initial view was that the arbitrators' award might be "*unimpeachable*," despite some inaccuracies in their use of words in the award.

At various points in their award, the arbitrators had used words that the court described as "*infelicitous*". In particular, the "*infelicitous*" words concerned the standard of proof that the arbitrators had applied to the question of determining whether the reinsured had proved that the claims were covered under the original insurance policies (and therefore was able to rely on a "follow the settlements" clause to recover from reinsurers).

In the award, the arbitrators stated that they had to consider whether the claims compromised fell "*arguably*" within the underlying insurance, and concluded that they were satisfied that it was "*arguable*" that the claims were within the terms of the insurance. However, at other points, the arbitrators alluded to the fact that the compromise settlements had been proven "on the balance of probabilities" to fall within the follow the settlements clause (i.e., the correct legal standard of proof in England).

Therefore, the court held that, despite the terminology used by the arbitrators, it was clear that there was no error of law and the appeal was dismissed.

Way Forward?

The English court has, once again, made it clear that it is averse to entertaining technical challenges to reinsurance arbitration awards. Even in situations where the arbitrators have used inaccurate terminology, the court will not intervene to overturn an arbitration award, in the absence of a clear error of law.

In 1985, the court gave guidance on how it viewed arbitration awards:

> *"As a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."*[8]

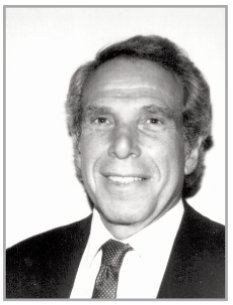
Reinsurers and reinsureds alike can take comfort from the English courts' approach not having changed. An arbitration award, generally, will continue to signal the end of the game; extra time or over time will generally not be played out in the English courts.▼

1 *Arbitration Awards and Appeal: if America is on Hall Street, which Street is England on*? ARIAS US Quarterly, 4th Quarter 2008
2 *IRB Brasil Resseguros SA v CX Reinsurance Co Ltd* [2010] EWHC 974 (Comm)
3 Section 67 of the English Arbitration Act 1996 ("the Act")
4 Section 68 of the Act
5 Section 69 of the Act
6 Section 69(1) of the Act
7 In the absence of agreement of the parties to the arbitration award that the award be appealed, the court has to give permission to appeal.
8 *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, cited with approval in *IRB Brasil v CX Re*

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

Is Everything Clear (and Unambiguous)?



Eugene Wollan

Today's Bonus Question: what three characteristics do all of these phrases have in common?

- Each and every
- Null and void
- Separate and apart
- Due and payable
- Clear and unambiguous
- Custom and practice

You have probably figured it out:

- Each phrase consists of three words;
- Each phrase is a cliché;
- Each phrase is redundant.

I should really add a fourth quality these phrases share: they are beloved by lawyers who want whatever they're writing to sound learned and "lawyerly" instead of just —- heaven forbid — sounding like good old ordinary, everyday English.

The first four of these phrases are bad enough, and all too common in lawyer-generated writings, but for the moment I'd like to zero in on the last two.

The phrase "clear and unambiguous" arises with alarming (and depressing) frequency in the context of construction of insurance policies and reinsurance contracts. A party arguing for a particular interpretation of the wording will almost inevitably, at some point, contend that the meaning it advocates is "clear and unambiguous". The most common reason for the debate is that a word or phrase or sentence or paragraph can be held to have a "clear and unambiguous" meaning as a matter of law, whereas a finding of ambiguity leads to certain consequences. Primary among these are the conclusion that the language presents a question of fact for trial, and that parol evidence is admissible to assist in ascertaining the intent of the parties. And the most reasonant of all: if the language is ambiguous, it is construed against the draftsman of the language.

[Brief digression: I have always had some doubts about judicial efforts to determine "the intent of the parties." It seems to me that the reason the question arises is that the parties had no intent at all on the particular issue before the court; if they an intent, they would have expressed it in specific terms. What really happened was that it never occurred to them that this exact question would arise. What the courts are really seeking to resolve is not what the parties intended as the answer to the immediate question, but what resolution would be most consistent with the overall intent of the parties as embodied in the document as a whole.]

The courts too seem to be in love with the phrase "clear and unambiguous." Perhaps they view it simply as a more emphatic way of saying that there's really no question about what the words mean. In their search for the "clear and unambiguous" meaning of contracts, including of course insurance contracts, the courts have developed certain guidelines, a/k/a "rules of construction". For instance: the mere fact that a differing interpretation has been advanced does not ipso facto mean that there's an ambiguity. And: an ambiguity exists only if the language is reasonably and fairly susceptible to more than one meaning.

This brings me (at last!) to my real point: the phrase, "clear and unambiguous," seemingly cast in stone in the writings of litigators and judges alike, is pure redundancy (or, as William Safire might have said, it's a candidate for the Department of Redundancy Department).

Can a word or phrase possibly be clear but ambiguous? Can it be unambiguous but also unclear? I think not. The concept sought to

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The phrase "clear and unambiguous" arises with alarming (and depressing) frequency in the context of construction of insurance policies and reinsurance contracts.

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.

Many of the same thoughts apply to "custom and practice," a phrase particularly familiar to practitioners of reinsurance law. Many, if not most, arbitration clauses in reinsurance contracts require the arbitrators to give due consideration (or some such words) to "industry custom and practice".

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be conveyed would be conveyed just as readily by either of those words standing alone. Why, then, is the whole phrase still the locution of choice, instead of either of the adjectives alone? Presumably because of the notion that disturbs the dreams of anyone proselytizing for precision and clarity in language: simply (and unthinkingly) because "it's always been done that way." To my mind, that justification for grammatical solecism or stylistic awkwardness is simply an unpersuasive and defensive cop-out.

Many of the same thoughts apply to "custom and practice," a phrase particularly familiar to practitioners of reinsurance law. Many, if not most, arbitration clauses in reinsurance contracts require the arbitrators to give due consideration (or some such words) to "industry custom and practice". The intention is clearly salutary: to remind the arbitrators that they are being asked to prescribe a business solution to a business problem, and that the folks engaged in that business have probably already worked out ways and means of dealing with those or similar problems.

[Another digression: the invocation of "custom and practice" is usually preceded by the admission that the duties imposed by the contract are not "merely a legal obligation." I have yet to have anyone explain satisfactorily to me what is "mere" about a legal obligation. Wouldn't it be more accurate to say "solely a legal obligation?" But of course that wouldn't be the way "it's always been done.."]

If any proof is required of the redundancy of this phrase: my online dictionary offers, as the very first definition of "custom" —

> "A habitual practice"

and as the first definition of "practice" —

> "habitual or customary performance"

So the words are, for all practical purposes, interchangeable. On the question of redundancy: QED.

I doubt whether anyone could seriously contend that a single result in a single reinsurance arbitration since Edward Lloyd first opened his London coffee house in 1688 would have been a whit different if the arbitrators had only been instructed to consider "industry custom" or "industry practice" instead of both. But the redundant phrase has been universally used, and will no doubt continue to be used, because no one would think of tampering with it.

The phrase "industry custom and practice" also, by the way, frequently shows up as the subject matter of expert testimony in litigations in which the trier of fact needs a quick indoctrination into the finer points of our industry. (This educational imperative usually applies just as much to judges as to juries.) It is occasionally too the subject of expert testimony in a reinsurance arbitration, although frankly it escapes me why a panel of experienced reinsurance professionals should require that kind of education unless the specific subject is particularly arcane or esoteric (to someone as mathematically challenged as I am, actuarial analysis might fall into that category). The problem with that kind of testimony, at least in my experience, is that it tends to be either too superficial, leading to oversimplification, or too detailed, leading to a glazing over of the eyes of the listeners. Some experienced expert witnesses are capable of achieving a happy medium, but they are a rare breed indeed.

The other phrases on my list are equally redundant, but I'll save that for another day. I hope this discussion has been clear and unambiguous and has enabled you to form your own conclusions about industry custom and practice.▼

case notes corner

Panel Limits On Depositions and Hearing Testimony Did Not Amount to Arbitral Misconduct

Ronald S. Gass

Deposition discovery disputes seem to abound in arbitrations these days, and there are often times when panels must rein in the parties to preserve both the efficiency and cost-effectiveness of the process. Likewise, there are occasions when parties seek to introduce fact and expert testimony that the panel deems to be beyond the scope of a witness's direct knowledge or expertise. The question of when such limitations amount to arbitral misconduct thwarting a party's right to a full and fair hearing was addressed in a recent Massachusetts federal district court decision, which offers some timely insights into the practical boundaries of deposition discovery and hearing testimony.

In this case, OneBeacon America Insurance Co. ("OneBeacon") filed a motion to vacate an arbitration award in favor of Swiss Reinsurance America Corp. ("Swiss Re") alleging that the arbitrators were guilty of misconduct for refusing to allow certain deposition discovery and limiting the testimony of a fact and an expert witness during the hearing. The underlying dispute concerned whether OneBeacon had met its per occurrence retention under a reinsurance treaty with Swiss Re when it aggregated as a single occurrence various losses arising under several OneBeacon policies on which it had paid, or would be paying, non-products asbestos and silica bodily injury liability claims on behalf of six different policyholders. The treaty defined "occurrence" to include "injuries to one or more than one person resulting from infection, contagion, poisoning or contamination proceeding from or traceable to the same causative agency." If OneBeacon's aggregation and cession of these non-products bodily injury losses were allowed under the treaty, Swiss Re would be liable for a $9 million recovery. The panel denied the relief sought by OneBeacon on the ground that the insureds' asbestos and silica non-products bodily injury losses could not be aggregated on the basis that the mere presence of asbestos or silica is the "same causative agency." It was during the arbitration proceedings leading up to that award that the panel made two significant evidentiary rulings – one involving the scope of OneBeacon's deposition discovery and the other limiting its fact and expert witness testimony at the hearing.

During discovery, OneBeacon sought to take depositions from former and current Swiss Re employees, insurance agents, reinsurance brokers, and others to prove that industry custom and practice supported its position that non-product asbestos and silica bodily injury liability claims can be aggregated into a single occurrence to meet the treaty's per occurrence retention. It argued that such broad discovery was necessary because "industry members often use technical vocabulary and shorthand when entering agreements, which permit parties to leave their intentions unexpressed." Swiss Re objected primarily on the ground that such depositions were unnecessary because the central issue was a matter of contract interpretation for the panel to decide.

In responding to these contentions, the panel chose a creative middle ground. It permitted limited discovery on industry custom and practice during the summary disposition phase of the arbitration by requiring the parties to designate one corporate representative as the "person most knowledgeable" with regard to industry custom and practice concerning causative agency and aggregation and the parties' course of dealings under the treaty. OneBeacon identified a group of six Swiss Re employees from which Swiss Re selected one

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Deposition discovery disputes seem to abound in arbitrations these days, and there are often times when panels must rein in the parties to preserve both the efficiency and cost-effectiveness of the process.

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

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– an Asbestos Pollution and Health Hazard Unit claims handler – as the person most knowledgeable, and he was the witness subsequently deposed by OneBeacon. The Swiss Re claims handler testified that he was unaware of any industry custom or practice with respect to applying the "causative agency" provision to non-products asbestos claims. Significantly, the testimony of OneBeacon's own corporate representative turned out to be consistent with that of Swiss Re's as were several articles it had submitted and a comment appearing in its SEC Form 10-K. The panel found that there was no course of dealing between the parties or industry custom with respect to the cession of asbestos *non-products* bodily injury claims and that the parties' course of dealing and industry custom and practice regarding *asbestos products* bodily injury claims versus asbestos *non-products* claims could not be "conflated." In the absence of any course of dealing or custom or practice, the panel denied further discovery by OneBeacon on these topics.

Moving to vacate the panel's adverse award, OneBeacon contended that it was denied a full and fair hearing when the panel limited its deposition discovery and refused to allow it to develop evidence proving that its interpretation of the treaty was consistent with industry custom and practice. Specifically, the cedent alleged that the single corporate representative deposition was inadequate, that the Swiss Re employee had no personal knowledge about industry custom and practice for billing asbestos losses, and that he had failed to educate himself on the topic by reference to documents or interviews of other Swiss Re employees. In ruling against OneBeacon on this point, the district court found that the Swiss Re employee had indeed reviewed documents in anticipation of his deposition and had ten-plus years of experience in asbestos claims handling and relevant continuing education. Hence, the claims handler's alleged lack of awareness, according to the court, was more likely attributable to the fact that no such industry custom and practice existed. Mindful of the exceedingly narrow standard for judicial review ("The standard for reviewing an arbitration decision is extremely deferential to the arbitrator, embodying 'one of the narrowest standards of judicial review in all of American jurisprudence.'"), the court agreed that any further discovery on the subject would have been "little more than a fishing expedition." In analyzing the merits of OneBeacon's arbitrator misconduct allegation, the judge considered whether the panel's actions showed a "neglectful disregard" for the evidence or acted so as to "grossly and totally block" OneBeacon's right to be heard. Concluding that the panel's action did not rise to the level of misconduct, the court held that the panel's ruling was within its broad procedural discretion.

OneBeacon's second misconduct allegation was leveled at the panel's limitations on the testimony of one of its fact witnesses and an expert witness. The panel allowed OneBeacon's fact witness to testify about only what he saw and heard regarding the issues and not about his understanding of the treaty. Its expert witness was precluded from testifying about underwriting intent and industry custom and practice, although the panel did accept into evidence the written reports offered by both parties' experts. In its motion to vacate, OneBeacon contended that the panel's testimony limitations, again, blocked its right to a full and fair hearing. Distinguishing the precedents cited by OneBeacon in support of its position (generally involving arbitrations in which one party was entirely precluded by a panel from presenting any evidence at all), the court found that OneBeacon had "plentiful" opportunities to present extensive testimony and other evidence over the course of the three-day hearing. The panel's limitation of the fact witness's testimony to what he saw and heard and exclusion of his opinions was appropriate as was its restriction of the expert's testimony to her experience with a similar treaty but not on underwriting intent, an area in which she admitted that she lacked expertise.

As panels are increasingly embroiled in time-consuming and costly discovery disputes such as the scope of the parties' depositions and hearing testimony, it is reassuring to know that the federal courts, at least, are inclined to give panels fairly wide latitude to impose reasonable limits so long as they do not "grossly and totally block" a party's right to a full and fair hearing. In this case, the panel clearly sought to strike an equitable balance so that reasonable deposition discovery and hearing testimony were permitted consistent with preserving two important benefits of arbitration over litigation, its efficiency and cost-effectiveness.

OneBeacon America Insurance Co. v. Swiss Reinsurance America Corp., Civil Action No. 09-CV-11495-PBS, 2010 U.S. Dist. LEXIS 136039 (D. Mass. Dec. 23, 2010).▼

Its expert witness was precluded from testifying about underwriting intent and industry custom and practice, although the panel did accept into evidence the written reports offered by both parties' experts.

Recently Certified Arbitrators

Raja Bhagavatula

Raja Bhagavatula has more than 30 years' experience in the insurance and reinsurance industry. In her current position as Principal and Consulting Actuary at Milliman, Inc., Ms. Bhagavatula advises clients in the areas of mergers and acquisitions, pricing, reserving, strategic planning, and general management. She is most recognized for her work in the evaluation of asbestos, pollution and other latent injury liabilities for insurance/reinsurance companies and insureds. She has served as the managing partner on many large global reserving and due diligence assignments.

Ms. Bhagavatula has assisted many insurance and reinsurance companies in dispute resolution. She was the managing principal for Winterthur/Credit Suisse in their $1 billion baseball arbitration with XL Capital involving the sale of Winterthur International, which Winterthur won. As part of this assignment she had to tackle complex/challenging issues involving quality of data, currency fluctuations, reserves, settlement/case reserve setting for claims, reinsurance collections and unclear contract provisions. She assisted Winterthur in all aspects of the arbitration including actuarial, claims, expert testimony, and strategy.

Ms. Bhagavatula is a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries. She has served on many committees of these organizations and is a frequent speaker at actuarial and insurance industry meetings. She is currently serving as the Chair of the Reserving Subcommittee of the Actuarial Standards Board's Casualty Committee. Under her leadership, this subcommittee has reviewed many Actuarial Standards of Practice including Actuarial Standard of Practice No. 43, which governs a significant amount of work that actuaries perform during the normal course of their jobs.

Ms. Bhagavatula began her insurance career in 1978 as an actuarial student with Aetna Insurance Company. Prior to joining Milliman, Inc. in 1990, she spent eight years at Cologne Life Reinsurance Company, rising to the position of Vice President and Actuary. She has a Masters degree in Pure Mathematics from Osmania University where she graduated with highest distinction.

Louis A. Ontanon

Louis Ontanon has more than 30 years of experience in the insurance and reinsurance industry. He has held senior executive positions in the areas of brokerage, underwriting and claims. Moreover, he also has extensive experience in the management of both ceded and assumed reinsurance portfolios, as well as the administration of run-offs and receiverships.

Mr. Ontanon received a Bachelor of Arts degree from California State University, Northridge, and also attended Pepperdine University Graduate School of Business. Mr. Ontanon is fluent in Spanish, and conversant in Italian.

Mr. Ontanon began his insurance career with Safeco Insurance Company as a multi-line field adjustor. He then progressed to senior management and corporate officer positions with several companies including Transamerica Insurance Company, Mercury Casualty Insurance Company, RFC Intermediaries and California Reinsurance Management.

Mr. Ontanon was employed by Transit Casualty in receivership as Vice President of Reinsurance, where he assisted the Special Deputy Receiver with the collection of assets. In addition, he also served on numerous Committees of Inspections dealing with the management of liquidations both in London and Bermuda. Mr. Ontanon is also very familiar with Latin American business, having negotiated commutations and traveled extensively in the area.

In his capacity as a reinsurance consultant, Mr. Ontanon has acted on behalf of numerous companies worldwide, including KWEM Management Services in London, and Munich Re in Germany. Most recently as a Senior Consultant with Buxbaum Loggia, Mr. Ontanon functions as a team leader on contract compliance inspections, provides commutation and settlement strategy assistance, as well as arbitration management support to clients.

Raja Bhagavatula

Louis A. Ontanon

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

ARIAS U.S.

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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 February 2011, ARIAS•U.S. was comprised of 380 individual members and 122 corporate memberships, totaling 1033 individual members and designated corporate representatives, of which 255 are certified as arbitrators.

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

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

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

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

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

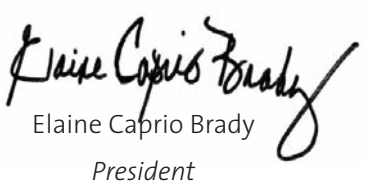
If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Bill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

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

Sincerely,

Daniel L. FitzMaurice

Chairman



Elaine Caprio Brady

President

ARIAS U.S. Membership Application

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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
Email: info@arias-us.org

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