VOLUME 19 NUMBER 1

ARIAS U.S.

QUARTERLY
FIRST QUARTER 2012

Let's Break the Mold... or at Least Reshape It a Bit

INSIDE...

Full Disclosure Is Not Always a Panacea

The Standards for a Reasoned Award: Emerging Lessons from the Case Law

OFF THE CUFF: Word Games

CASE NOTES CORNER

Recently Certified Arbitrators

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VOL. 19 NO. 1
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ARIAS•U.S.
P.O. Box 9001
Mt. Vernon, NY 10552
914.966.3180, x112
914.966.3264 fax
info@arias-us.org
www.arias-us.org

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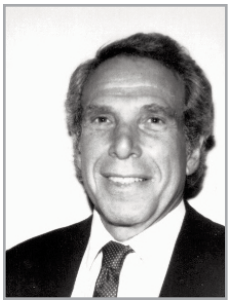

Eugene Wollan

Reams of paper and thousands of words have been devoted in recent years to discussing what's wrong with the reinsurance arbitration process and what can be done about it. Peter Scarpato has now submitted his own very interesting proposals for changes in the methodology of reinsurance arbitrations. Some of his ideas are familiar; others are quite novel and, in some instances, startling. Some would, if adopted, be easily absorbed; others would entail major changes. We have highlighted this as our lead article precisely because some of its contents are controversial. We hope that it will generate thought, discussion, and debate. We would particularly like to see reactions, both pro and con, in the form of letters to the editor or – even better – responsive articles. Anything publishable will be happily received.

Cliff Schoenberg and Brian O'Sullivan have checked in again, focusing this time on situations in which even full disclosure by an actual or potential umpire can leave an award in jeopardy under later judicial scrutiny. We wonder how many of our readers were even aware of this.

Once upon a time, years ago, when reinsurance arbitrations were still in their infancy and before the procedures had been even partially formalized, the original cadre of popular arbitrators – old hands, each one – bristled with indignation at the very notion that it might be a good idea, let alone mandatory, for them to explain the reasoning behind their results. By now, of course, this discussion has morphed into the ongoing debate about the need for, or utility of, "reasoned awards." Derek Ho has furnished an analysis of where the courts stand on this subject. The next question, presumably, would be where the courts, and the industry, should stand on the subject. Here, too, we would like to encourage debate and discussion, especially in publishable form.

In his Case Notes Corner Ron Gass has, as usual, given us an interesting and cogent analysis of a complicated situation, this time involving resignation of a party arbitrator at the instance of the party that appointed him. And I am back to my old trick of playing with words.

Are you familiar with those print ads that urge the reader not to let old family jewelry sit around uselessly, but to put it to use by cashing it in? Along somewhat similar lines, we urge all you litigators out there not to let old research or legal arguments sit around uselessly, but to put them to use by converting them to articles for the Quarterly. The slight adaptation required should be child's play for you, and the dividends great in terms of both PR and personal satisfaction.

See you at The Breakers!

contents

VOLUME 19 NUMBER 1

Editor's Comments — Inside Front Cover

Table of Contents — Page 1

FEATURE: Let's Break the Mold...or at Least Reshape It a Bit
BY PETER SCARPATO — Page 2

News and Notices — Page 6

FEATURE: Full Disclosure Is Not Always a Panacea
BY CLIFFORD H. SCHOENBERG AND BRIAN O'SULLIVAN — Page 7

Members on the Move — Page 15

FEATURE: The Standards for a Reasoned Award: Emerging Lessons from the Case Law
BY DEREK T. HO — Page 16

OFF THE CUFF: Word Games
BY EUGENE WOLLAN — Page 20

CASE NOTES CORNER
BY RONALD S. GASS — Page 22

IN FOCUS: Recently Certified Arbitrators — Page 25

Invitation to Join ARIAS•U.S. — Page 26

Membership Application — Page 27

ARIAS•U.S. Board of Directors — Back Cover

Editorial Policy

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

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

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

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

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feature

Let's Break the Mold...or at Least Reshape It a Bit

Peter Scarpato

President, Conflict Resolved, LLC

Peter Scarpato

Let's face it: companies, counsel, and even some arbitrators want the system to change in a big way. If you didn't think so before the November 2011 meeting, you should now be a believer. Criticism of the process on the street has grown exponentially. Just ask any lawyer or company involved in the process and you'll get an earful: unpredictability, damaging non-disclosures, unfair collaboration among certain panel members, outright monetary greed... and the list goes on and on.

Recently, decisions criticizing and reversing previously sacrosanct awards, and chastising and sanctioning lawyers and arbitrators, have multiplied like vengeful rabbits.

Of late, even traditionally deferential courts have placed arbitrators and lawyers under the microscope. Recently, decisions criticizing and reversing previously sacrosanct awards, and chastising and sanctioning lawyers and arbitrators, have multiplied like vengeful rabbits. Why is this happening? Was this conduct previously under the radar? Is it new? To current naysayers of arbitration, the answers are irrelevant. The resulting cause and effect, however, are patent: lawyers are recommending that clients omit arbitration clauses from new reinsurance agreements, and adversaries opt out of arbitration despite clauses in existing agreements, preferring the more predictable, rule-friendly and appealable (in a legal way) court system.

To its credit, ARIAS•U.S. seized the opportunity and market momentum to fashion a very topical and necessary agenda for this past November's meeting. The wrap-up of topics discussed during breakout sessions was illuminating, including many suggestions for improving the process: more on-the-papers decisions, more panel questioning, development of best practices, more active use of discovery limits, justification requirements for experts and depositions, use of active company-umpires who never act as arbitrators, use of a non-judicial body to select the umpire if the parties can't agree, earlier cutoff of ex parte communications, and published feedback on panel/panelists' performance (to name a few).

Mediation garnered serious attention. In general, introduction of mediation into the process was broadly accepted. The issue was timing: should it be before discovery, after discovery, just before the hearing? Though mediation is often misjudged as solely a tactical weapon, breakout attendees recognized its many benefits, including evaluation of the strengths/weaknesses of your case, your opponent's case, and even of the parties' respective lawyers and witnesses. And while ARIAS arbitrators may serve as mediators, the groups felt that some would need "re-engineering" and specialized training in mediation techniques. Many felt the broker community should do more to open the dialogue and ultimately introduce refurbished arbitration/mediation clauses into new treaties.

All fine ideas; all useful suggestions. But can we do more? Should we do more to face the "hue and cry"?

What follows are suggestions - some aggressive and unique; some vaguely familiar - designed to generate more dialogue and suggestions for improving the process.

Lest there be any misunderstanding, this is not "arbitration bashing." I am and will continue to be an ARIAS member, an avid supporter of arbitration, and ready, willing, and able panelist. Like my colleagues, I believe in the process ***and*** the positive power of change.

Umpire/Mediator Pre-Dispute Selection

Instead of trudging through the often frustrating, quixotic attempt to agree on an umpire mid-dispute, the parties should mutually agree upon an umpire and one alternate in advance, even when the treaty is executed, to expedite the panel appointment

process later. Similarly, to resolve issues quickly and less expensively, the parties could also designate a standing and alternate mediator, available quickly to help the parties resolve smaller disputes without the need for arbitration.

At what point are the parties most agreeable? Most of the time, it's when they successfully negotiate the terms and execute the signature page of an agreement. Why not seize the moment and have the parties discuss and agree upon a person whom they trust to act as a fair and impartial umpire (plus at least one alternate of similar reputation)?

This serves several purposes: first, it eliminates the typical, multi-month wrangling and gnashing of teeth to arrive at what many feel is the lopsided selection of one party's candidate for umpire. Once the parties select their arbitrators, the panel can immediately proceed with a qualified, acceptable umpire. Second, it avoids potential "jury rigging" of the umpire selection process. And finally, the selected umpire and alternate must disclose any subsequently accepted, potential conflicts to the contracting parties, keeping them up to date on their candidates' qualifications to serve in any future dispute.

If, after disclosure of additional appointments, a standing umpire crosses the parties' comfort line, they may move the alternate up and choose another alternate. Even if the parties must obtain a replacement standing umpire, the very act of recognizing the conflict and agreeing upon a replacement, keeps the parties in discussion mode, not aggression mode. In fact, the parties may trust their nominee enough to have him or her serve solo in any subsequent dispute, especially if the amount at issue is small.

The parties could also designate a standing (and alternate) mediator. This serves many important goals: first, once again, the mediator is easily selected at the beginning of the business relationship when all is sweet. Second, he or she is quickly available by email or phone to help the parties address any issue, large or small, before it festers and boils over into full-blown, "in-the-trenches" warfare. Third, the mediator's role is designed to maintain the standing umpire's strict neutrality, shielding him/her from the candid, sometimes damaging, disclosures parties make in private caucuses. And, last but certainly not least, the mediator can prevent the unnecessary time and expense of arbitrations that should never have been filed.

Pre-Organizational Meeting Disclosures, Panel Approval, and Hold Harmless.

Panelists should make their disclosures, and parties should accept and hold the panel harmless, immediately after the umpire is selected and before the organizational meeting.

The weeks and months between umpire selection and organizational meeting are the "no man's land" of the arbitration process. Little if anything is accomplished, other than the parties' submissions of position statements, and discussion and occasional approval of a case schedule. The as yet unapproved and unprotected panel logically leaves the drab and difficult issues for the organizational meeting, typically conducted in person regardless of the amount in dispute, often at significant time and expense for parties, counsel, and arbitrators.

With the help of a standing, qualified panel, the parties can agree upon and eliminate much of the organizational meeting agenda in advance, making telephonic meetings (or even no meeting) the rule, not the exception. The fully functioning, indemnified panel can be available by phone to conduct status conferences and even entertain on the spot oral arguments to resolve logjams in the parties' search for a mutually acceptable schedule. And if early motion practice is necessary (e.g., motion for pre-hearing security), a fully functioning panel can help the parties set a pre-OM briefing schedule. If an in-person organizational meeting is unnecessary, the panel can rule on the papers; if needed, they are ready to hear oral argument and rule on the spot or soon thereafter, saving the usual post-OM time to brief and entertain the motion, accelerating the schedule even more.

Make the Schedule Fit the Dispute

Panels must affirmatively and proportionately streamline the length and scope of the proceedings to the amounts in dispute.

Starting with communications with counsel before the OM, the panel should affirmatively announce that the parties, armed with as comprehensive an evaluation of their case as possible, must develop a schedule that fits the amount in dispute. Does a $250,000 case require eight depositions? Must the hearing in this case be two years away? Like the rule about running water following the course and filling the space available, the more time it takes to get to hearings, the more that can be plugged into the schedule, resulting in less focused, more costly, discovery.

The parties and their lawyers are smart, analytical problem solvers — if the panel says "absent (really) good cause shown, you're doing this in twelve months with three deps," they will figure out how to do it. If discovery reveals evidence that breaks the small case open, the panel can address any necessary schedule adjustments at the time. And a reduction in depositions (which are not, by the way, as of right) can still be accommodated: for example, the direct testimony of less important witnesses can be submitted in written form, subject to cross-examination at the hearing, eliminating any "trial by ambush" arguments and allowing opposing counsel to "pick their spots" and decide whether and to what extent they wish to cross the witness at all.

From the beginning, ask the parties to ultimately prepare and agree upon stipulations of fact. This avoids the mindless repetition of duplicate information in future filings and makes the parties focus and agree on certain items in the record, further streamlining future discovery and arguments to a more limited set of factual issues. If the parties can agree to the authenticity of

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The parties and their lawyers are smart, analytical problem solvers — if the panel says "absent (really) good cause shown, you're doing this in twelve months with three deps," they will figure out how to do it.

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CONTINUED FROM PAGE 3

documents one of them produced, depositions solely to authenticate such documents become unnecessary.

Separate Discovery Master Arbitrator

Either the panel or the parties can appoint one Discovery Master Arbitrator to decide all non-dispositive, discovery motions.

- A perennial harangue is that discovery in arbitration is out of control. How many times in how many conferences have we discussed this topic?
- But wherever your case falls on the "out-of-control" meter, simple non-dispositive discovery motions often cause complex problems:
- Even though submissions must follow approved motion protocols, some counsel fall prey to the addictive "last word" email syndrome, continuing to sur-surreply to the last surreply to the original reply — despite the fact that such exchanges require panel approval;
- If oral argument is required and the potential evidence is critical and time sensitive, you now must undo the Gordian knot of coordinating the schedules of three panelists, two lawyers, and possibly two (or more) client representatives;
- A complex motion (e.g., over e-discovery) can redirect the panel and parties' attention for weeks away from other items on the often tight discovery calendar;
- Deliberations on motions involving arguably privileged and confidential, sometimes prejudicial, documents could poison the umpire and/or arbitrators' view of the case, even if the documents are ultimately excluded.

An independent Discovery Master Arbiter can:

- reduce the schedule coordination problem by two arbitrators. In fact, if the parties agree, the one Discovery Master Arbiter can be freely and informally available for on the spot conference calls to resolve minor discovery-related issues;
- shield the entire panel from the potential prejudice of reviewing disputed privileged documents;
- free up the panel and counsel to handle other, non-discovery matters, especially if counsel can delegate non-dispositive discovery work to other lawyers in their firms;
- come down harder than the panel on "last-word-email syndrome" abusers, giving them a second chance to mend their ways without aggravating the panel;
- report to the panel, as necessary, on the progress and resolution of discovery issues and coordination of the remaining discovery schedule.

Simultaneous Depositions and Questioning of Experts

Truncate and expedite the deposition schedule by simultaneously deposing competing experts.

In addition to the occasional questionable need for them, expert witnesses seriously complicate and extend the discovery schedule, which must accommodate the identification of affirmative experts, filing of their initial reports, depositions, identification of rebuttal experts, filing of their rebuttal reports, depositions, and testimony. Counsel must prepare for, take, and defend separate depositions for each of them — if you have more than one affirmative/rebuttal expert in the case, good luck! At the hearing, the availability of experts often complicates the hearing schedule. Who goes on when, who has to wait until tomorrow, who has been hanging around all day in the hall, etc. Also, given the length of an expert's direct and cross-examination and the occasional need to take them out of order, the panel may hear petitioner's expert on Monday and respondent's on Thursday, making it harder to compare the substance and credibility of their respective testimony.

One answer: allow the two opposing experts to testify at the same time, whether in depositions or at the hearing. With counsels' input, the panel can develop a protocol for this procedure in advance. The process is simple: place opposing experts on the stand simultaneously, ask them the same questions and have them respond to each other's answers (subject to either a determined limit or the umpire's discretion), followed up by panel questions similarly handled.

If this is properly controlled, you now have a

reasoned debate (monitored by the panel if done at the hearing stage) and a record of the experts' competing arguments in one section of the transcript. One major benefit is that the panel can explore critical issues without waiting days between opposing expert's testimonies. The consolidated record reduces the time and cost of finding and comparing the experts' opinions. Simultaneous direct and cross of the experts avoids any actual or perceived unfairness to the party whose expert testifies first. Since the parties had the benefit of analyzing and reacting to their opponents' experts' reports in advance, they don't need it again at the hearing. And finally, though experienced counsel generally conduct effective cross-examinations, this procedure affords the parties' experts — the true specialists — the opportunity to ask the questions most important to them and the opinion they seek to defend.

Permit the Panel to Suggest Mediation

Since panels are dispute resolution experts with a seasoned sense for the good and bad case, allow either the umpire or the entire panel to suggest mediation to the parties at any point in the case.

First and foremost, panelists are dispute resolution experts. In some cases, they have collectively participated in hundreds of arbitrations, seen the rise and fall of parties' cases, and judged the probative/putative value of evidence and solid/sinking credibility of dozens of witnesses. They have a "gut" sense for where a case may be heading. In fact, more and more arbiters are also trained, experienced mediators who can see the right vs. wrong case for mediation a mile away, regardless of any prediction of an ultimate winner or loser at trial.

Why isn't it in the parties' best interests to allow the very panel that may decide their fate to open the discussion and even recommend mediation? Judges do it all the time. True, the settlement judge is usually not the trial judge, but not always. And what is better for the parties — knowing or not knowing before hearings that the three people to whom you will hand over your case recommend mediation? Isn't the answer obvious?

Protections can be built into the process to avoid unfairness. For example:

- parties can agree in advance to allow discussion of the "M" word ***only if all panelists agree***. A unanimous recommendation is a pretty strong, very valuable hint to the parties (not necessarily both of them) that a mediated settlement offers better options for proper relief than an arbitrated award;
- following the panel's recommendation, the case can be referred to a third party mediator selected either by the parties or the panel ***in advance***. This allows the parties to be more candid to the mediator and shields the panel from confidential disclosures made at the mediation, especially if it proves unsuccessful and the disputants return.
- ***in advance of the organizational meeting***, parties and the panel can insert dates into the schedule to discuss mediation, avoiding inferences or fears of panel prejudgment when the topic is raised later in the case;
- draft the mediation process into the arbitration clause for new contracts or amend the clause to include it in existing contracts;

Conclusion

ARIAS's November 2011 meetings have set an excellent tone for improvements in the arbitration process. Collectively, arbitrators, counsel, and parties have the opportunity to work together to address the rising tide of complaints — some unique, some long-standing — with all phases of the process. The trick is not to hold on to the past for the past's sake, but to keep what works and fix what's broken for the future.

This article hopes to open a dialogue with suggested changes to certain elements of the process — but there are more ideas and better suggestions out there. Advance selection of umpires, mediators, and the panel, making the case schedule fit the amount in dispute, using independent discovery arbiters, conducting simultaneous expert testimony, and using mediation where appropriate — all of these have the capacity to make arbitration more efficient; it still is, and always will be, arbitration.▼

DID YOU KNOW...?

...THAT SENDING A CHANGE OF ADDRESS TO ARIAS•U.S. FOR THE MEMBER DATABASE AND QUARTERLY DOES NOT CHANGE AN ARBITRATOR'S PROFILE? THE YELLOW BUTTON ON THE HOME PAGE LABELED "LOG IN TO ARBITRATOR PROFILE DATA ENTRY SYSTEM" ALLOWS ARBITRATORS TO MAKE CHANGES TO ALL DATA IN THE PROFILE, INCLUDING CONTACT INFORMATION. THE ARIAS WEBSITE IS AT WWW.ARIAS-US.ORG.

news and notices

ARIAS Announces Enhanced Umpire Selection Program

ARIAS has initiated a new approach to selecting an umpire by building upon and enhancing the features of the Umpire Selection Procedure that was introduced in 2000. The enhanced program allows parties to draw randomly selected candidate names from a subset of the list of ARIAS Certified Arbitrators.

The core difference in the new program is that parties can define parameters that filter the full list so that the universe from which the random selection is drawn includes only those arbitrators who have the insurance or reinsurance experience that is relevant to the nature of the dispute. A full description of the program is in the **Selecting an Umpire** section of the website.▼

Board Approves Three New Certified Arbitrators

At its meeting on January 18, the Board of Directors approved certification of the following new arbitrators. Their sponsors are indicated in parentheses. **Steven M. Kessler** (Stephen Rogers, Gerald McElroy, James Oskandy), **William A. Ray** (Jeremy Wallis, John Sullivan, Clifford English), and **P. Kevin Thompson** (Hon. John Martin, Elizabeth Thompson, Paul Dassenko, Charles Cook, Katherine Billingham).▼

David Robb is Certified Umpire

At the same meeting, the Board named **David R. Robb** as an ARIAS•U.S. Certified Umpire, bringing the total number to 54.▼

2012 Spring Conference Will Focus on Arbitration vs. Litigation

This year's ARIAS-U.S. Spring Conference will be held on May 9-11, 2012 at The Breakers in Palm Beach, Florida. With controversy swirling over whether arbitration is preferable to litigation for resolving reinsurance disputes, "**Survey Says . . . Arbitration Beats Litigation**" will compare and contrast the arbitration process against litigation.

This conference will complement the investigation to be performed by the Arbitration Task Force, and will focus on ways of improving the arbitration process to better reflect the goals of the process as defined when it was first adopted by the industry. Additional details are on the website **calendar**; full details were sent to all members by mail in late February and are posted on the website home page, along with online registration.

The Co-Chairs of this year's conference are **Elaine Caprio Brady** of Liberty Mutual, **David Attisani** of Choate Hall, **Michele Jacobson** of Stroock, and **Amy Kline** of Saul Ewing.▼

Affinia Manhattan Hotel is Site of March Seminar

The Education Committee is preparing to present the next Educational Seminar on March 30. It will take place at the Affinia Manhattan Hotel on Seventh Avenue, across from Penn Station. This hotel is the result of a $25-million renovation of the historic Pennsylvania Hotel. The seminar and lunch will be located in the Ballroom.

This location offers members in the Northeast a significant transportation advantage. Amtrak, New Jersey Transit, and Long Island Railroad all come into Penn Station, and several subway lines have stops there. The Port Authority Bus Terminal and the Lincoln Tunnel exit are a few blocks away.

The program will focus on substantive developments in the law of reinsurance and will be co-chaired by **Cynthia Koehler** of Liberty Mutual and veteran ARIAS•U.S. Certified Arbitrator **Mary Ellen Burns**. Full details are on the website **calendar**; and were sent to all members by email at the end of January.

Registration began on February 15; it will end on March 16, so if you are reading the website or emailed version of this Quarterly, you may still have time.▼

Daly is ARIAS•U.S. Qualified Mediator

At its meeting on September 22, the Board of Directors approved **Thomas M. Daly** as an ARIAS•U.S. Qualified Mediator.

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

Intensive Workshop Being Planned for September

There will only be one Intensive Arbitrator Workshop in 2012; it has a planning date of September 11.

As certification applications from new arbitrators have declined in the past few years, demand for the workshop has fallen. The most recent event had just seven student participants; it is not practical to support the workshop for fewer than nine registrants.

Details of the September event will be on the website calendar as plans develop.▼

feature

Full Disclosure Is Not Always a Panacea

Clifford H. Schoenberg
Brian O'Sullivan

Introduction

In recent years, there has been a spate of litigation involving challenges to umpires or umpire candidates based on undisclosed or only partially disclosed relationships with one of the parties to the arbitration or that party's counsel or party-appointed arbitrator. But, despite the importance of the issue, there is a paucity of case law addressing when an arbitration award can be vacated on such grounds despite a *fully* disclosed relationship. This article analyzes that issue, both from the perspective of the FAA (see Section A below), which governs arbitrations under contracts involving interstate commerce, and California state arbitration law (see Section B below), which, unlike the FAA, contains specific provisions setting forth when a neutral arbitrator is disqualified from serving because of a relationship with one of the parties, its counsel, or its party-appointed arbitrator.

Before embarking on that analysis, it is important to note that the FAA does not provide any mechanism for pre-award challenges to arbitrators. *See* 9 U.S.C. § 1 *et seq*. "[I]t is well established that prior to issuance of an award, a court may not make inquiry into an arbitrator's capacity to serve based on a challenge that a given arbitrator is biased." *Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.*, 304 F.3d 476, 490 (5th Cir. 2002); *accord Avian, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 895 (2ndCir. 1997); *see also Smith v. American Arbitration Assn.*, 233 F.3d 502, 506 (7th Cir. 2000) ("[t]he time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered").[1] Instead, a party can only challenge an arbitrator's alleged bias only through a motion to vacate a final arbitration award for "evident partiality." 9 U.S.C. § 10(a)(2); *see Gulf Guaranty*, 304 F.3d at 489-90; *Trustmark Ins. Co. v. Clarendon Nat'l Ins. Co.*, Case No. 09-C-6169 (N.D. Ill. February 1, 2010); *Global Reins. Corp. v. Certain Underwriters at Lloyd's*, 465 F.Supp.2d 308, 311-12 (S.D.N.Y. 2006); *Certain Underwriters at Lloyd's v. Argonaut Ins. Co.*, 264 F.Supp.2d 926, 936- 37 (N.D. Cal. 2003). In other words, a court will not even consider the question of whether an umpire is biased until after the parties go through the entire arbitration process and the panel issues its final award.[2]

The fact that challenges to an arbitrator's bias are deferred until the end of the day makes it all the more important that an umpire or umpire candidate, and the party that proposes him or her, must be especially vigilant to ensure that any final award will not be vulnerable to a *bona fide* motion to vacate for evident partiality on the basis of a relationship between the umpire and one of the parties, its counsel, or its party-appointed arbitrator. The prospect of a party investing significant time and money in pursuing an arbitration through to conclusion, only to see the final award vacated or being forced to consider settling the dispute on much less favorable terms than those contained in the final award because of the specter of vacatur, is harrowing

A. The FAA's Evident Partiality Standard

Any analysis of what constitutes evident partiality under the FAA must begin with the United States Supreme Court's decision in *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968). There, the supposedly neutral arbitrator had failed to disclose a "close," "repeated and significant" business relationship that he had with one of the parties to the arbitration (because, according to the dissent, "the [neutral] arbitrator was not asked about business connections with either party"). 393 U.S. at 146, 153.[3] The Supreme Court held that the

CONTINUED ON PAGE 8

Clifford H. Schoenberg

Brian O'Sullivan

But, despite the importance of the issue, there is a paucity of case law addressing when an arbitration award can be vacated on such grounds despite a fully disclosed relationship.

Brian O'Sullivan is a partner in the New York office of Mayer Brown LLP, where he specializes in complex reinsurance and insurance disputes. Cliff Schoenberg is a recently retired partner in the New York office of Mayer Brown LLP and is now an arbitrator and reinsurance consultant.

CONTINUED FROM PAGE 7

arbitration award should be vacated for evident partiality. As courts have frequently noted over the past three decades, the teaching of *Commonwealth Coatings* is uncertain and has been the subject of considerable debate, because there was no majority opinion and the rationale set forth in the two opinions supporting vacatur are materially at odds with each other. *See, e.g., Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 281-82 (5th Cir. 2007); *Morelite Construction Corp. v. New York Dist. Council Carpenter Benefit Funds*, 748 F.2d 79, 82-83 (2nd Cir. 1984).

Justice Black, writing for a plurality of four justices, sought to impose upon arbitrators ethical standards comparable to those that govern federal court judges. See id. at 147-48. In fact, Justice Black wrote that courts "should be more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts, and are not subject to appellate review." *Id.* at 149. According to Justice Black, "any tribunal permitted by law to try cases and controversies not only must be unbiased, *but also must avoid even the appearance of bias.*" *Id.* at 150 (emphasis added).

Justice White, writing for himself and one other justice, concurred in the result, but wrote separately to make clear that "[t]he 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.* at 150.

> It is often because they are men of affairs, not apart from, but of, the marketplace that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial....

Id.

The majority of courts that have considered the issue have held that the opinions of Justice Black and Justice White are irreconcilable and, accordingly, Justice White's concurring opinion constitutes "the Court's effective *ratio decidendi*" because it was based upon narrower grounds than Justice Black's plurality opinion. *Positive Software*, 476 F.3d at 282; *see Morelite*, 748 F.2d at 82-83; *Nationwide Mutual Insurance Co. v. Home Ins. Co.*, 429 F.3d 640, 644-45 (6th Cir. 2005); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 306 (6th Cir. 2008). Indeed, an overwhelming majority of courts have held that arbitrators are not bound by the same ethical considerations as judges, and thus an arbitration award cannot be vacated for an "appearance of bias." *See Morelite*, 748 F.2d at 83-84; *Sphere Drake*, 307 F.3d at 621 ("Arbitration differs from adjudication, among many other ways, because the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award") (emphasis in original). Rather, courts will vacate arbitration awards for *evident* partiality only where "a reasonable person, considering all of the circumstances, would have to conclude that an arbitrator was partial to one side." *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret ve Sanayi, A.S.*, 492 F.3d. 132 (2d Cir. 2007); see *JCI Communications, Inc. v. Netversant-New England*, 324 F.3d 42 (1st Cir. 2003); *ANR Coal Co. v. Congentrix of North Carolina, Inc.*, 173 F.3d 493, 498-99 (4th Cir. 1999); *Uhl*, 512 F.3d at 306-07.

In a non-disclosure case, an arbitration award will generally be vacated where a neutral arbitrator fails to disclose a "material" or "significant" relationship that he or she has with a party to the arbitration. *See, e.g., Applied Indus.*, 492 F.3d. at 137; *Positive Software*, 476 F.3d at 284- 85. An individual is not automatically disqualified from serving as an umpire even if he or she has a material or significant relationship with a party, as long as that relationship is fully disclosed to the parties.

> An arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite's* evident partiality standard: A reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side.

Applied Indus., 492 F.3d. at 137; see *Schmitz v. Zilvetti*, 20 F.3d 1043, 1047 (9th Cir. 1994) ("In arbitration ... only disclosure and not recusal is required").[4] In other words, it is the nondisclosure of the relationship that supports a finding of evident partiality, not the relationship itself.

The Second Circuit's decision in *Morelite* is one of the few cases in which a court has addressed the issue of when an arbitration award should be vacated for evident partiality in the face of a fully disclosed relationship between an arbitrator and a party. In Morelite, the single arbitrator in a dispute between an employer and a local union was the son of a vice president of the international union that was essentially the "parent" of the party to the arbitration. The employer party asked the arbitrator to step down because of that relationship, but he refused. The employer thereafter moved in federal court to disqualify the arbitrator, but the court denied that motion on the ground that it had no authority to entertain an attack on an arbitrator's partiality until after the final award was issued. After a favorable award was issued in favor of the union, the employer moved to vacate the award for evident partiality. The district court denied that motion, even though it noted in its decision that it "remain[ed] troubled by the relationship" between the arbitrator and the union. *Morelite*, 748 F.2d at 81-82.

The Second Circuit reversed, holding that the award should be vacated because a reasonable person would have to conclude that an arbitrator was partial to the local union. "[W]e are bound by our strong feeling that sons

are more often than not loyal to their fathers, partial to their fathers, and biased in behalf of their fathers." *Id*. at 84. The court declined, however, "to set forth a list of familial or other relationships that will result in the per se vacation of an arbitration award," but did "suggest" that "such a list would most likely be very short." *Id*. at 85. [5]

> [P]arties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute. Familiarity with a discipline often comes at the expense of complete impartiality. Some commercial fields are quite narrow, and a given expert may be expected to have formed strong views on certain topics, published articles in the field and so forth. Moreover, specific areas tend to breed tightly knit professional communities. Key members are known to one another, and in fact may work with, or for, one another, from time to time.
>
> * * *
>
> In assessing a given relationship, courts must remain cognizant of peculiar commercial practices and factual variances. Thus, the small size and population of an industry might require a relaxation of judicial scrutiny, while a totally unnecessary relationship between arbitrator and party may heighten it. In this way, we believe that the courts may refrain from threatening the valuable role of private arbitration in the settlement of commercial disputes, and at the same time uphold their responsibility to ensure that fair treatment is afforded those who come before them.

Id. at 83-84 (citations omitted).

The discussion in *Morelite* regarding "tightly knit professional communities" is plainly applicable to reinsurance arbitrations. Arbitration clauses in reinsurance contracts typically require that the arbitrators be active or retired officers of insurance or reinsurance companies, and thus mandate that the arbitrators be selected from a quite limited universe. As one court stated in a decision involving an attack on a reinsurance arbitration award:

> Industry arbitration, the modern law merchant, often uses panels composed of industry insiders, the better to understand the trade's norms of doing business and the consequences of proposed lines of decision. The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties.

Sphere Drake, 307 F.3d at 620. Stated differently, because of the nature of reinsurance arbitrations, "some degree of overlapping representation and interest inevitably results." *Nationwide*, 429 F.3d at 646 (*quoting International Prod., Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2nd Cir. 1981); *see also Uhl*, 512 F.3d at 308 ("Arbitrators are often chosen for their expertise and community involvement, so to disqualify any arbitrator who had professional dealings with one of the parties ... would make it impossible, in some circumstances, to find a qualified arbitrator at all").

In sum, the case law makes clear that an arbitration award will not be vacated for evident partiality merely because the umpire previously had a professional relationship with one of the parties, but it will be vacated where the relationship falls outside the realm of those relationships inherent in being an industry insider (such as the father/son relationship in *Morelite*). This is so even where that relationship has been fully disclosed.

These axioms, gleaned from the case law (which, again, consist mostly of non-disclosure cases[6]), put more flesh on the bones of the rule as to when even a fully disclosed relationship may warrant the vacatur of an arbitration award for evident partiality.

1. ***An umpire candidate should not be disqualified if a federal judge having the same relationship would not be disqualified***. Courts have held that "the standards for disqualification of arbitrators [are] less stringent than those for federal judges." E.g., *Morelite*, 748 F.2d at 83-84; *Sphere Drake*, 307 F.3d at 621 ("Arbitration differs from adjudication, among many other ways, because the 'appearance of partiality' ground of disqualification for

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The discussion in Morelite regarding "tightly knit professional communities" is plainly applicable to reinsurance arbitrations. Arbitration clauses in reinsurance contracts typically require that the arbitrators be active or retired officers of insurance or reinsurance companies, and thus mandate that the arbitrators be selected from a quite limited universe.

An umpire candidate should likewise not be disqualified on the ground that he or she had previously served on a panel that had decided precisely the same issue in the context of another arbitration. Indeed, federal judges frequently decide factual and/or legal issues that are substantively identical to those that they previously decided in the context of other cases.

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> judges does not apply to arbitrators; only *evident* partiality, not appearances or risks, spoils an award"). Accordingly, an arbitration award should not be vacated for evident partiality where a federal judge in the same situation would be permitted to hear that same case.

For example, an umpire candidate who is an attorney would not be disqualified where he had previously represented one of the parties in an unrelated dispute. As the Seventh Circuit stated in *Sphere Drake*:

> Let us suppose that the district judge's inferences are sound; that [the arbitrator] spent two months of equivalent full-time service as counsel for Sphere Drake in an international insurance arbitration, four years before the unrelated arbitration with All American. Even if Jacks had been the umpire, this would not have implied "evident partiality." Indeed, Jacks could have served as a federal judge in this case without challenge on grounds of partiality, and the scope of disqualification under § 10(a)(2) is considerably more confined than the rule applicable to judges....
>
> Nothing in the Code of Conduct for federal judges makes prior representation of a litigant a disqualifying event. The norm among new appointees to the bench that once two years passed, perhaps even earlier, a judge is free to sit in controversies involving former clients.

Sphere Drake, 307 F.3d at 621-22 (citations omitted). Accordingly, an individual who had represented a party can serve as an umpire in an unrelated arbitration involving that party once a reasonable time has passed *following the conclusion of a representation*.

Similarly, in *Positive Software*, the Fifth Circuit Court of Appeals reversed the lower court's decision vacating an arbitration award because his law firm had acted as co-counsel with counsel representing one of the parties to the arbitration. "Had this same relationship occurred between an Article III judge and the same lawyer, neither disclosure nor disqualification would have been forced or even suggested." *Positive Software*, 476 F.3d at 285.

An umpire candidate should likewise not be disqualified on the ground that he or she had previously served on a panel that had decided precisely the same issue in the context of another arbitration. Indeed, federal judges frequently decide factual and/or legal issues that are substantively identical to those that they previously decided in the context of other cases. *See Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 861, 873 (7th Cir. 2011). Accordingly, a litigant would have no realistic chance of succeeding if it sought to disqualify a judge because the judge had previously decided the dispositive issue in another case involving similar (if not identical) facts. *See id*. Because the standards for the disqualification of arbitrators are less stringent than those for judges, an umpire candidate should also not be disqualified simply because he had previously decided the same issue in another arbitration. As recently noted by the Second Circuit Court of Appeals, vacatur for evident partiality requires "facts bearing on *partiality* — namely, a relationship with a party, a lawyer, or another arbitrator," and is not satisfied by facts bearing on an "alleged *predisposition*" on a particular issue. *See STMicroelectronics, N. V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 74 (2nd Cir. 2011) (emphasis in original; brackets omitted).[7]

Finally, because a judge would be permitted to hear such a case, an umpire candidate should not be disqualified even if he had served on another panel that was privy to confidential information involving the same parties.

> Arbitration need not follow the pattern of jury trials, in which a factfinder's ignorance is a prime desideratum. Nothing in the parties' contract requires arbitrators to arrive with empty heads. Federal judges, of all people, should not confuse knowledge with a disqualifying "interest." For judges regularly hear multiple suits arising from the same controversy.... Knowledge acquired in a judicial capacity does not require disqualification. Likewise with knowledge acquired in arbitration.

Trustmark, 631 F.3d at 873.

2. ***An umpire candidate should be disqualified if he or she has a financial or other personal stake in its outcome.*** An arbitrator will be found to be "evidently partial" if he or she

> has a financial or other personal stake in the outcome of the arbitration. *See Pitta v. Hotel Assoc. of New York City, Inc.*, 806 F.2d 419 (2d Cir. 1986).

In *Pittna*, a collective bargaining agreement between a hotel association and its unionized employees contained an arbitration clause, which provided for the resolution of disputes by "a permanent umpire to be known as the Impartial Chairman." The CBA did not identify the "Impartial Chairman." Instead, the parties subsequently entered into an Employment Agreement, under which they appointed Millard Cass as the Impartial Chairman under the CBA. The Employment Agreement provided that it was to "continue for the duration of the [CBA] unless terminated sooner by either party, upon notice to the other of not less than sixty (60) days." In 1986, the hotel association notified the union that it was terminating the Employment Agreement and requested that the parties discuss the appointment of a successor Impartial Chairman. The union refused, and instead submitted to Cass the issue of whether the Employment Agreement had been validly terminated. The hotel association moved to enjoin the arbitration. The court denied that motion on the ground that the hotel association would not sustain any irreparable injury if the arbitration went forward. Cass then decided the issue, finding (somewhat predictably) that "the [CBA] required joint action by the Association and the [Union] to terminate his employment. *Id*. at 421.

The Second Circuit affirmed the district court's vacatur of Cass's award, inter alia, for evident partiality.

> *It is axiomatic that a neutral decision-maker may not decide disputes in which he or she has a personal stake....*
>
> *Because the subject of the arbitrable grievance directly concerns the arbitrator's own employment for what may be an extended period of time, impermissible self-interest requires his disqualification.* In assessing "evident partiality," we need not inquire into whether Cass showed actual rather than merely apparent bias. The relationship between a party and the arbitrator may, in some circumstances, create a risk of unfairness so inconsistent with basic principles of justice that the arbitration award must be automatically vacated.

Pittna, 806 F.2d at 423-24 (emphasis added).

3. ***An umpire candidate should not be disqualified on the basis of relationships that have ceased a reasonable time before the arbitration.*** The courts that have vacated arbitration awards for non-disclosure of a relationship between an arbitrator and a party have done so in instances where the relationship could be considered ongoing. *See, e.g., Applied Industrial*, 492 F.3d. at 135-36, 139; *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995); *Schmitz*, 20 F.3d at 1046-47.[8] In contrast, courts are unlikely to vacate an award where the arbitrator failed to disclose a relationship that was unquestionably over. We have already discussed this principle in the context of an umpire candidate's prior representation (as counsel) of a party to the arbitration in an unrelated dispute. But the principle applies more broadly. See, e.g., Monetz v. Prudential Securities, Inc., 260 F.3d 980 (8th Cir. 2001); Positive Software, 476 F.3d at 284.

In *Merit Insurance Company v. Leatherby Insurance Company*, 714 F.2d 673 (7th Cir. 1983), the Seventh Circuit reversed a decision vacating an arbitration award because of the failure of the umpire (Clifford) to disclose that, while employed by another insurance company, he had worked directly for the principal (Stem) of a party to the arbitration. The Seventh Circuit reasoned that vacatur was not appropriate because "[Stern's and Clifford's] relationship had ended fourteen years before, Clifford had no possible financial stake in the outcome of the arbitration, and his relationship with Stern during their period together at [the other insurance company] had been distant and impersonal." Id. at 680.

The Eleventh Circuit's decision in *University Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002), further illustrates the distinction that courts draw between current and former relationships. In that case, the losing party in an arbitration moved to vacate the award for evident partiality because the neutral arbitrator (who was a practicing attorney) had failed to disclose that he had been involved as counsel in several litigations and arbitrations in which counsel for the prevailing party was also involved. The court found that the timing of those interactions — i.e., whether they occurred prior to or concurrently with the arbitration — was significant.

To illustrate, we first consider those occasions on which [the umpire] and [respondent's counsel] participated in the same arbitrations, mediations, and litigations prior to the arbitration in this case. At first blush, a large number of such encounters would seem to imply an inappropriately close association between arbitrator and counsel. Closer inspection reveals, however, that frequent interactions between [the umpire] and [respondent's counsel] may simply be the result of the fact that both specialize in construction law in Birmingham, Alabama. Such familiarity due to confluent areas of expertise does not indicate bias....

> On the other hand, a reasonable person might envision a potential conflict if an arbitrator, *concurrently with the arbitration*, partakes in a proceeding in which counsel for one of the parties to the arbitration is also participating. Whether he acts as co-counsel or opposing counsel in a mediation, litigation or other arbitration, the arbitrator could seem biased, and his ruling in the arbitration could be seen as a way to curry favor in the other matter.

University Commons, 304 F.3d at 1339-40 (emphasis in original).[9]

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As discussed, umpire candidates should not be disqualified on the basis of relationships that had terminated prior to the arbitration. This would necessarily include service as a party-appointed arbitrator in unrelated matters. The more difficult question is whether an umpire candidate can be disqualified if he is concurrently serving as a party-appointed arbitrator for one of the parties to the arbitration.

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4. ***An umpire candidate should not be disqualified if he or she has previously served on other panels with the same party-appointed arbitrator(s).*** Courts are very unlikely to find that there is "evident partiality" where the umpire has served on other panels with one of the party-appointed arbitrators. *See Andros Compania Maritima, S.A. v. Marc Rich & Co.*, A. G., 579 F.2d 691 (2d Cir. 1978); *see also Arrowood Indem. Co. v. Trustmark Ins. Co.*, Case No. 3:03- CV-1000 (PCD) (D. Conn. February 2, 2010); *Trustmark*, 631 F.3d at 873.

The leading case on this issue is *Andros*. There, the losing party in an arbitration arising out of a charter party contract involving an oil tanker moved to vacate the award for "evident partiality" because the umpire had failed to disclose that he had served on nineteen different arbitration panels with the principal of the company that had operated the oil tanker. The court held that such a relationship does not support a finding of "evident partiality" on the part of the umpire.

> From the papers presented, it can fairly be concluded that the relationship between [the umpire] and [the principal] was a professional one, growing out of their services as arbitrators. There was no "business relationship" in the ordinary sense between them or between their employers.

Andros, 579 F.2d at 701. A fully disclosed relationship of this ilk should thus not be problematic at all.

5. ***An umpire candidate should not be disqualified if he or she has previously served as the party-appointed arbitrator for one of the parties.*** As discussed, umpire candidates should not be disqualified on the basis of relationships that had terminated prior to the arbitration. This would necessarily include service as a party-appointed arbitrator in unrelated matters. The more difficult question is whether an umpire candidate can be disqualified if he is concurrently serving as a party-appointed arbitrator for one of the parties to the arbitration.

On the one hand, in *Arrowood*, a district court recently denied a reinsurer's motion to vacate an award for "evident partiality" where, after the panel was constituted, the ceding company appointed the umpire as its party-appointed arbitrator in six unrelated arbitrations.

> The Umpire is neither an advocate for Plaintiff, nor on its payroll. Plaintiff s choice of the Umpire as a party-appointed arbitrator in unrelated cases does not show bias or evidence an improper relationship between a party and an arbitrator in this proceeding. Service as a party-appointed arbitrator is not in and of itself evidence of partiality. According to the [ARIAS] Practical Guide to Reinsurance Arbitration Procedure, even a party-appointed arbitrator is to remain disinterested and may not have a financial interest in the outcome of the proceeding. Once appointed, the party has no control over the arbitrator.

Arrowood, slip op. at 2.

On the other hand, in *Crow Construction Co. v. Jeffrey M. Brown Assoc.*, 264 F.Supp.2d 217, 222 (E.D. Pa. 2003), another district court vacated an award for evident partiality where two neutral arbitrators had failed to disclose that they were acting as either party-appointed arbitrators or umpires in other arbitrations involving the adverse party. In *Crow Construction*, the court emphasized that the parties had influence over the arbitrator selection process. "The parties are the best judge of bias and in order to be able to choose intelligently, they must be made aware of all of the facts showing potential bias[;] ... when an arbitrator is selected by the parties after having failed to disclose a fact which might create the appearance of bias, the selection process is prone to failure." *Id.*, 264 F.Supp.2d at 222-23 (citations omitted). Because *Arrowood* was *not* a non-disclosure case, *Arrowood* and *Crow Construction* can to some extent be reconciled with each other. In any event, in light of the distinction that courts have drawn between current and former relationships, it is unclear whether another court, analyzing the same facts that were present in *Arrowood*, would have reached the same result. After all, it would seem that a court could easily find that a reasonable person, considering all of the circumstances, would have to conclude that an umpire was likely to be partial to the party that had appointed him as its party-appointed arbitrator on six separate

occasions concurrently with or subsequent to his or her umpire selection.

B. California State Arbitration Law

Most states have .adopted variations of the Uniform Arbitration Act, which is substantively identical to the FAA as respects the issue of when an umpire candidate is disqualified from serving in an arbitration.[10] The one notable exception is California law, which specifies those circumstances in which a proposed neutral arbitrator is obligated to refuse an appointment on the basis of his or her relationship with a party, its counsel, and/or its party-appointed arbitrator.

In 2002, the California Judicial Counsel promulgated the "Ethics Standards for Neutral Arbitrators in Contractual Arbitration," which "establish[es] the minimum standards of conduct for neutral arbitrators who are subject to these standards." The California Standards apply on their face to any arbitration where (a) the arbitration agreement "is subject to" the California state arbitration rules, or (b) the arbitration hearing is to be conducted in California. California Standard 3(a). An arbitration has been held to be subject to California arbitration rules where the contract contains a California choice-of-law provision. *See Security Insurance Company of Hartford v. TIG Insurance Company,* 360 F.3d 322 (2d Cir. 2004) (California choice of law provision in reinsurance agreement incorporated California state arbitration laws that did not restrict the party's arbitration rights or limit the authority of arbitrators).

> The California Standards require that a neutral arbitrator disclose, *inter alia*:
>
> (a) any significant personal relationship between the arbitrator (or any member of his immediate family) and any party or lawyer for a party,
>
> (b) service as a party-appointed or neutral arbitrator for a party or lawyer for a party *within the preceding five years*,
>
> (c) service as an umpire *within the preceding five years* in another arbitration "in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration;" and
>
> (d) "any attorney-client relationship the arbitrator has or has had with a party or lawyer for a party."

Cal. Civil Code, § 1281.9(a); California Standard 7(d)(3), (4) & (7).11 A party to an arbitration has an unfettered right to disqualify an umpire candidate because of such a relationship by serving a "notice of disqualification" within 15 days of the required disclosure. Cal. Civil Code, § 1281.91(b); California Standard 10. If the neutral arbitrator fails to step down upon receipt of a timely notice of disqualification, a court is obligated to vacate the award.

In short, under California state arbitration law, unless the parties waive the conflict, an individual is disqualified from serving as an umpire who has had numerous relationships that would not warrant disqualification in an arbitration under the FAA.

Conclusion

In sum, umpire candidates will rarely be disqualified under the FAA from serving on the basis of a fully disclosed relationship with one of the parties, its counsel, or party-appointed arbitrator. In contrast, if the arbitration is governed by the California state arbitration rules, final arbitration awards are much more susceptible to being vacated because of existing relationships, even fully disclosed ones, between the umpire and a party, its counsel, or party-appointed arbitrator.▼

1 Parties have tried, but generally failed, to accelerate the judicial review process by framing their challenge, not in terms of the arbitrator's bias, but his or her failure to satisfy the criteria sometimes set forth in arbitration clauses that the arbitrator be "disinterested." The courts have typically defined "disinterested" to mean "lacking a financial or other personal stake in the outcome." *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 872-73 (7th Cir.), *cert. denied*, 131 S.Ct. 2465 (2011). Because "bias" under the FAA encompasses "disinterested" as so defined, the vast majority of courts has rejected these pre-arbitration challenges as inconsistent with the FAA. *See id.; Aviall*, 110 F.3d at 895 *but see First State Ins. Co. v. Employers Ins. of Wausau*, No. 99-12478-RWZ (D. Mass. February 23 2000) (granting pre-arbitration motion to disqualify party-appointed arbitrator on the ground that the arbitrator, who had previously acted as counsel for that party with respect to the same matter, was not "disinterested").

2 For ease of reference, we will refer to an individual who would be considered to be "evidently partial" under the FAA to be "disqualified" from serving as umpire in the

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In short, under California state arbitration law, unless the parties waive the conflict, an individual is disqualified from serving as an umpire who has had numerous relationships that would not warrant disqualification in an arbitration under the FAA.

In sum, umpire candidates will rarely be disqualified under the FAA from serving on the basis of a fully disclosed relationship with one of the parties, its counsel, or party-appointed arbitrator. In contrast, if the arbitration is governed by the California state arbitration rules, final arbitration awards are much more susceptible to being vacated because of existing relationships, even fully disclosed ones, between the umpire and a party, its counsel, or party-appointed arbitrator.

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arbitration.

3 The dissent also noted that the umpire was "a leading and respected consulting engineer who ha[d] performed services for 'most of the contractors in Puerto Rico'" and, in addition, was "personal friends" with counsel for the party that lost the arbitration (i.e., the party seeking to vacate the award on the ground of evident partiality). *Id.* at 152-53. According to the dissent, "[p]etitioner's counsel candidly admitted that, if he had been told about the arbitrator's prior relationship "I don't think I would have objected, because I know [the arbitrator]." *Id.* at 153.

4 In a recent decision, the Ninth Circuit Court of Appeals stated that, where an umpire had fully disclosed his or her relationship with the parties, a party seeking to vacate an arbitration award for evident partiality must demonstrate "actual bias toward or against [it]." *Langstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010) ("To show 'evident partiality' in an arbitrator, Lloyd's either must establish specific facts indicating actual bias toward or against a party or show that [the arbitrator] failed to disclose to the parties information that creates 'a reasonable impression of bias'") (citation omitted).

5 In *Consolidated Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125 (4th Cir. 1995), the Fourth Circuit Court of Appeals reversed a decision vacating an arbitration award that was based upon the fact that the arbitrator's brother was a member of the union party. The court distinguished *Morelite* on the ground that there, the arbitrator's father was a vice president of the international union, whereas in *Consolidated Coal*, the brother merely worked for the union in another state and did not have any interest in the outcome of the arbitration.

6 Some of the non-disclosure cases can also be distinguished because they involve motions to vacate based upon the evident partiality of a party-appointed arbitrator, not an umpire. Numerous courts have recognized that party-appointed arbitrators are not required to be impartial to the same extent as umpires or other neutral arbitrators. *See, e.g., Sphere Drake*, 307 F.3d at 620; *Nationwide Mutual Insurance Co. v. First State Ins. Co.*, 213 F.Supp.2d 10, 18 (D. Mass. 2002).

7 That said, the district court in *Dealer Computer Serv., Inc. v. Michael Motor Co.*, Civ. Action No. H-10-2132 (S. D. Tex. December 29, 2010), reached the opposite result. In that case, a court granted the losing party's motion to vacate an arbitration award because a neutral arbitrator had failed to disclose that she "was *personally involved* in a prior arbitration that involved the *same issues* of contractual interpretation and damages calculations, as well as related witnesses." (Emphasis in original.) The court held that the award should be vacated for evident partiality because, "[t]aken as a whole, "[the arbitrator's] prior exposure to the legal issues and witnesses involved in the [prior] arbitration creates a reasonable impression that she had prejudged at least some of the issues in the arbitration." This decision is on appeal to the Fifth Circuit. Because a federal judge would not be disqualified under the identical circumstances, we believe the Fifth Circuit is unlikely to hold that a neutral arbitrator is automatically disqualified where he had decided the same issues in another arbitration. *See Positive Software*, 476 F.3d at 285 (holding that arbitrators cannot be held to higher standards than federal judges). Accordingly, to the extent that *Dealer Computer* is affirmed, it should be on the narrow ground that the neutral arbitrator had failed *to disclose* that he had previously decided the same issues in the context of another arbitration.

8 For example, in *Schmitz*, the umpire's law firm had represented a party's parent company "in at least nineteen cases during a period of 35 years; the most recent representation ended approximately 21 months before the arbitration," *Schmitz*, 20 F.3d at 1044. Given the number of cases and overall length of the representation, it is perhaps not surprising that the court treated the relationship as ongoing, even though the firm had not represented the parent for nearly two years. Similarly, in *Commonwealth Coatings*, the Supreme Court described the relationship between the umpire and the party as "regular," even though the Court also noted that it was, "in a sense, sporadic, in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration." *Commonwealth Coatings*, 393 U.S. at 146.

9 The issue on appeal in *University Commons* was not whether an arbitration award should be vacated for "evident partiality," but rather whether petitioner's allegations were sufficient to warrant an evidentiary hearing on het issue. The Eleventh Circuit found that the allegations involving the "concurrent legal interactions" were sufficient to warrant an evidentiary hearing on the issue of "evident partiality." *University Commons,* 304 F.3d at 1341-42.

10 One significant difference between the FAA and the Uniform Arbitration Act is that, under the Uniform Arbitration. Act, a court is not authorized to vacate an arbitration award for the "evident partiality" of a party-appointed arbitrator (although courts can vacate an award for the "corruption" or "misconduct" of a party appointed arbitrator). See Uniform Arbitration Act § 23(a)(2)(A); *id.*, Comment A ("The reason 'evident partiality' is grounds for vacatur only for a neutral arbitrator is because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators").

11 An umpire must disclose more than the mere fact that he or she has served as an arbitrator in such a dispute. He or she is also required to disclose "[t]he results of each prior case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, [and] the amount of monetary damages awarded, if any." California Standard 7(d)(4)(A). Assuming that the prior arbitration was governed by a confidentiality agreement, the umpire would be unable to make the disclosures required under California law unless he or she obtains the consent of the parties and/or the award(s) in the prior arbitration(s) has been confirmed (and not under seal). If the umpire is unable to disclose such information, any award would be subject to *vacatur* under the California state arbitration rules unless the parties waive their right to the disclosure of such information.

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.

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 at director@arias-us.org.

Do not forget to notify us when your address changes. Also, **if we missed your change below, please let us know,** so that it can be included in the next Quarterly.

Recent Moves and Announcements

Robert A. Whitney has changed jobs. He is now Deputy Commissioner and General Counsel of the Massachusetts Division of Insurance. He can be contacted there at 1000 Washington Street, Suite 810, Boston, Massachusetts 02118, phone 617-521-7308, fax 617-521-7475, email robert.a.whitney@state.ma.us.

John P. Allare has a new location and email address. His phone number has not changed, but it is here, anyway...9400 Morrow Woodville Road, Pleasant Plain, OH 45162, 513-608-9620, email johnpallare@gmail.com.

Mitchell W. Gibson is now Vice President, Claims, Accounting & Liability Management, Swiss Reinsurance America Corporation, 175 King Street, Armonk 10504, phone 914-828-4140, fax 914-828-3140, email mitchell_gibson@swissre.com.

Constance O'Mara has moved to O'Mara Consulting LLC, 349 Station Avenue, Haddonfield, NJ 08033, phone 609-502-8607,email connie@cdomaraconsulting.com

Liberty Mutual's new name is **Liberty Mutual Insurance**.

feature

The Standards for a Reasoned Award: Emerging Lessons from the Case Law


Derek T. Ho

Now, however, American arbitration agreements and rules increasingly call for arbitrators to provide "reasoned awards." This article traces that trend and the emerging case law defining the standards by which courts will review the sufficiency of a "reasoned award."

Derek T. Ho is a partner in Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC., a 50-lawyer litigation firm in Washington, DC. Mr. Ho focuses on appellate litigation and complex commercial disputes involving insurer and reinsurer clients.

By Derek T. Ho

I. Introduction

Under American law, it long has been settled that "[a]rbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Now, however, American arbitration agreements and rules increasingly call for arbitrators to provide "reasoned awards." This article traces that trend and the emerging case law defining the standards by which courts will review the sufficiency of a "reasoned award." As this case law indicates, consistently with the Federal Arbitration Act ("FAA"), courts are very reluctant to overturn arbitral awards for failure to provide sufficient reasons.

II. The Requirement of a Reasoned Award in American and International Arbitration

A. The American Default Rule

The American bias in favor of non-reasoned awards is expressed in what might be termed the prevailing "American" default rule — namely, absent a request by the parties, arbitral panels need not provide a reasoned award. Most of the American Arbitration Association's rules, for example, adopt this principle. AAA Commercial Arbitration Rule R-42 provides that "[t]he arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."[1] Rule R-42 of AAA's Supplementary Procedures for Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes contains identical language.[2]

The National Arbitration Forum's ("NAF") Code of Procedure contains a variation on the "American" default rule. Rule 37(H) provides that awards are to be "summary" awards unless "a Written notice is filed by a Party seeking reasons, findings of fact or conclusions of law, or a prior Written agreement of the Parties requires reasons, findings of fact, or conclusions of law and at least one Party files a Written notice requesting reasons, findings or conclusions."[3] The written agreement or notice "must be filed with [NAF] within ten (10) days of the date of the Notice of Selection of an Arbitrator."[4] The NAF's approach is different from the AAA's in three respects. First, it permits one party unilaterally to request a reasoned award. Second, absent agreement or a pre-hearing request by one party, the rule appears to preclude the arbitral panel from issuing a reasoned award. Third, under the NAF rules, the request for a reasoned award can be made after the arbitrators are selected; under the AAA rule, the request must be made before the arbitrators are appointed.

Not all American arbitration rules embrace the "American" rule. In contrast to AAA and NAF, the JAMS Comprehensive Arbitration Rules provide that, "[u]nless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award."[5]

B. The International Default Rule

In contrast to the prevailing "American" default rule, international arbitration rules reflect a strong bias toward reasoned awards.[6] Many European countries' arbitration statutes provide for the opposite of the American default rule by requiring that arbitrators render reasoned awards absent the parties' consent otherwise.[7] The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Commercial Arbitration, which has been adopted in more than sixty-five countries,[8] provides: "The award shall state the reasons upon which it is based, unless the parties

have agreed that no reasons are to be given or the award is an award on agreed terms."[9]

Most international arbitration rules contain similar provisions. For example, the UNCITRAL Arbitration Rules provide that "[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."[10] The AAA's rules for international arbitration adopt the same default rule as UNCITRAL.[11] So, too, do JAMS's international arbitration rules.[12]

Other international arbitration rules go even further, creating a mandatory rule that, notwithstanding any contrary agreement of the parties, the arbitrators must render a reasoned award. The International Chamber of Commerce ("ICC") Rules of Arbitration unequivocally provide, for example, that "the Award shall state the reasons upon which it is based."[13]

C. The Increasing Prevalence of Reasoned Awards in Domestic Arbitration

Despite the American rule, arbitration agreements increasingly provide that the arbitrators shall provide the parties with a "reasoned award."[14] Thus, in this regard, U.S. arbitration is being Europeanized by contract.[15] This increase in reasoned awards can be attributed to a number of causes.

First, especially in certain industries, parties increasingly expect some explanation for the arbitrators' decision.[16] A reasoned award provides a measure of transparency to the parties.

Second, especially in consumer arbitration, where there are concerns about the bargaining power of the parties, a reasoned award is perceived as being part of the minimum standard of procedural fairness and due process.[17]

Third, writing a reasoned award tends to provide a level of formality that increases the quality of arbitral opinions. A major rationale for requiring reasoned awards is that the discipline of explaining the decision will encourage more reflective, carefully considered decisions by arbitrators.[18]

Fourth, increasing calls for "precedent" in arbitration have prompted increased demand for arbitrators to explain their decisions, not just for the parties involved, but also for parties in future arbitrations.[19] This body of arbitral precedent provides not only guidance for future arbitrations raising similar issues, but also, for example, information about potential arbitrators and their views.[20]

III. Judicial Standards for a Reasoned Award

Despite the growing importance of reasoned awards, the criteria for determining what constitutes a "reasoned award" remain sparse and ill-defined. A handful of judicial decisions over the past decade provides some guideposts for determining the necessary elements of a "reasoned award." The issue has been litigated only a handful of times, generating fewer than ten reported cases. Nevertheless, these admittedly limited judicial decisions over the past decade provide important guideposts for arbitrators who are subject to a "reasoned award" standard.

These cases indicate that, at its core, a reasoned award requires more than a decision that merely states who wins and who loses but less than a full-blown judicial-style opinion with findings of fact and conclusions of law. In *Arch Dev. Corp. v. Biomet, Inc.*, Nos. 02 C 9013, 03 C 2185, 2003 WL 21697742, at *4-*5 (N.D. Ill. July 30, 2003), the court highlighted an AAA scheduling form that listed three award options — standard award, reasoned award, and findings of fact and conclusions of law — to represent a range of increasingly reasoned awards. Within this broad spectrum, the court explained, the standard award option involved the least amount of reasoning; the findings of fact and conclusions of law option, the most; and the reasoned award option fell somewhere in between. *Id.* at *4. The court thus concluded that a "reasoned award" is "something short of findings and conclusions but more than a simple result." *Id.* The general standard articulated in *Arch Development* has been adopted by both the Fifth Circuit in the *Sarofim* case[21] and, just last year, by the Eleventh Circuit in the *Cat Charter* case.[22]

The *Arch Development* standard sounds straightforward enough, but there are many shades of gray between a simple result and full-fledged findings of fact. Insofar as the cases have addressed where a "reasoned

CONTINUED ON PAGE 18

The issue has been litigated only a handful of times, generating fewer than ten reported cases. Nevertheless, these admittedly limited judicial decisions over the past decade provide important guideposts for arbitrators who are subject to a "reasoned award" standard.

For arbitrators, the case law emphasizes that arbitrators' core responsibility when required to write a "reasoned award" is to provide more than just a "bare result", but, instead to provide at least a brief explanation for each element of the award. For parties, the case law illustrates that a "reasoned award" provides arbitrators with considerable flexibility as to the degree of detail to include in their award.

CONTINUED FROM PAGE 17

award" lies on this spectrum, they have generally been highly deferential to the arbitrators, consistently with the Federal Arbitration Act's lenient approach to judicial review of arbitral awards.

This is best illustrated by the *Cat Charter* case. The case concerned $2 million paid by plaintiffs for a custom yacht that was never delivered. The plaintiffs had submitted five claims for arbitration: 1) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), 2) breach of contract, 3) fraud, 4) rescission, and 5) breach of fiduciary duty. The award issued by the panel found for the plaintiffs on two of those claims — FDUTPA and breach of contract. In support of that conclusion, the arbitral panel stated simply that the plaintiffs had proven them "by the greater weight of evidence." *Cat. Charter, LLC v. Schurtenberger*, 691 F. Supp. 2d 1339, 1344 (S.D. Fla. 2010). The remaining claims were denied without explanation.

The district court agreed with defendants' challenge to the award on the ground that it was not a "reasoned award" as required by the parties' arbitration agreement and therefore had to be vacated. *Id.* The court rejected the plaintiffs' argument that a finding of proof "by the greater weight of evidence" constituted a "reason", adding that even if it were, the panel's summary denial of the remaining claims amounted to nothing more than a "bare result" and therefore couldn't be considered "reasoned." *Id.* at 1344.

The Eleventh Circuit reversed. After adopting the general principle that a "reasoned award" is "something short of findings and conclusions but more than a simple result," *Cat Charter*, 646 F.3d at 844 (internal quotation marks omitted), the court provided "further guidance" by resorting to the dictionary definition of "reasoned." According to the court of appeals, a "reason" is "an expression or statement offered as an explanation . . . or as a justification of an act or procedure." *Id.* Thus, the court held, a "reasoned award" merely requires that the arbitrators provide a "detailed listing or mention of expressions or statements offered as a justification" for the award. Id. The court gave a lenient reading of the term "reasoned" because it "decline[d] to narrowly interpret what constitutes a reasoned award to overturn an otherwise apparently seamless proceeding" that would "insufficiently respect the value of arbitration." *Id.* at 846.

Applying that standard to the arbitrators' award, the court determined that the award's explanation that the plaintiffs' FDUTPA and contract claims were proved "by the greater weight of the evidence" had "plainly provided" "the reason for the Plaintiffs' victory" since, in the context of the arbitration, it meant that the Plaintiffs' witnesses were deemed more credible. The reference in the award to "the greater weight of the evidence," the court said, "is greater than what is required in a 'standard award,' and that is all we need decide." Id. at 845. If the parties desired "a greater explanation, they could have requested ... findings of fact and conclusions of law ...." *Id.*

The *Cat Charter* case comports with the Sixth Circuit's decision in *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000), which raised a similar issue. There, the arbitration agreement required the arbitrators to "explain" his decision. The court of appeals reversed the district court's vacatur of the arbitration award, deeming it sufficient that the arbitrator "set forth facts pertaining to the dispute and a brief discussion of each of the three claims." *Id.* at 976. The arbitrator's discussion, albeit brief, touched on each of the three claims and explained his reasons for his decision on each one. See *id.*

Additional guidance can be gleaned from five lower court decisions.

First, the award in *Arch Development* was a mere three pages long. Nevertheless, the court held that it was "reasoned" because the arbitrator provided more than just a "bare" result; instead, he cited relevant contractual provisions and definitions and listed various findings and conclusions. 2003 WL 21697742, at *4.

Second, in *Holden*, the plaintiffs sought to have an arbitration award vacated because it failed to provide a "concise statement" of the reasons for the disposition of their claims as required by the arbitration agreement. 390 F. Supp. 2d at 780. The court refused to do so. Relying on the reasoning in *Arch Development*, the court explained that the award, though only ten pages long, did more than simply state who won and who lost because it provided a four-page section articulating the panel's reasons for its decision. *Id.*

Third, in *Demott v. McDonald*, No. 266301, 2007 WL 486750 (Mich. Ct. App. Feb. 15, 2007), a Michigan appeals court rejected the defendants' contention that an arbitration award was not "reasoned" because it lacked

detailed explanations for the arbitrator's findings. The court concluded. From its reading of the award that the arbitrator had adequately stated the factual and legal bases for the decision, adding that even if the award were not as detailed as the defendants expected, it still qualified as "reasoned" because none of the allegedly missing details was so material that the award would have been "substantially otherwise" had it been provided. *Id*, at *3.

Fourth, the award in *R & Q Reinsurance Co. v. Am. Motorist Ins. Co., No.* 10 C 2825, 2010 WL 4052178 (N.D. Ill. Oct. 14, 2010), was also brief but was deemed "reasoned." The award consisted of eight paragraphs and was just over one single-spaced page. The court found the award sufficient because it included the pertinent contractual clause and factual finding that drove the panel's decision. *Id*. at *5. Arbitrators may find it helpful to follow an approach taken by the *R & Q* arbitration panel, where the parties each submitted a proposed final award detailing the specific relief they were seeking. The proposed award submitted by the respondents consisted of six paragraphs and was slightly more than one single-spaced page. The petitioners' proposed award consisted of eighteen paragraphs and was three single-spaced pages. The panel's award closely resembled the proposed award submitted by the respondents, coming in at just over a page and consisting of eight paragraphs.

Fifth, in *Rain CII Carbon, LLC v. ConocoPhillips Co*., No. 09-cv-4169, 2011 WL 2565345 (E. D. La. June 27, 2011), the parties' agreement called for "baseball arbitration" where both sides submit proposals for an arbitrator to choose one. The case involved price formulas for a product. In addition to receiving the price formula proposals, the arbitrator requested and received proposed awards from each party. The award to Rain CII of $17 million was based on Rain CII' s price formula, but the award was the same length (eight pages), the same structure (six issues), and much of the same wording and reasoning as ConocoPhillips' proposed award. *See id*. at *2. Agreeing that a "reasoned award" is one in which "some reasons are given," *id* at *6, *8, the court determined that the award was sufficient because its decision as to the price formula was supported by "three and a half pages of background and discussion, including a three paragraph discussion of the proposed price formulas of both parties." *Id* at *6.

IV. Conclusion

The case law provides two core lessons, one for arbitrators and one for parties. For arbitrators, the case law emphasizes that arbitrators' core responsibility when required to write a "reasoned award" is to provide more than just a "bare result," but instead to provide at least a brief explanation for each element of the award. For parties, the case law illustrates that a "reasoned award" provides arbitrators with considerable flexibility as to the degree of detail to include in their award. Parties desiring to ensure a greater degree of specificity should heed the advice of the Sixth Circuit: "If parties to an arbitration agreement wish a more detailed arbitral opinion, they should clearly state in the agreement the degree of specificity required." *Green*, 200 F.3d at 976.▼

1 AAA, Commercial Arbitration Rule R-42(b) (2009).

2 *See* AAA, Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes Supplementary Procedures Rule R-42 (2005). Many, but not all, of the AAA's other specific domestic arbitration rules contain the same default presumption. A prominent exception is that the AAA's class arbitration rules provide that the arbitrators must render a reasoned award. AAA, Supplementary Rules for Class Arbitration, Rule 7 (2003).

3 National Arbitration Forum, Code of Procedure Rule 37(H) (2008).

4 *Id.*

5 JAMS Comprehensive Arbitration Rules and Procedures, Rule 24(h) (2010). Likewise, the CPR Institute's Rules for Non-Administered Arbitration Rule 15.2 (2007) provide that "[a]ll awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise." CPR Institute, Rules for Non-Administered Arbitration Rule 15.2 (2007).

6 *See* John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 Am. Rev. of Int'l Arb. I, 109 n.289 (2000) ("[R]easoned awards are the norm in international commercial arbitration.").

7 *See, e.g.*, Art. 52(4) English Arbitration Act 1996; Art. 32(2) Ley 36/1988, de 5 Diciembre, De Arbitraje (Spain); Art. 823(3) Codice di Procedura Civile (Titolo VIII - dell'Arbitro) (Italy); Art. 1471 Code de Procedure Civile (France); Art. 1701 Code Judiciaire (Belgium); Art. 1057(4)(e) Wetboek van Burgerlijke Rechtsvordering (The Netherlands).

8 *See* http ://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status. html .

9 UNCITRAL, Model Law on Commercial Arbitration Art. 31(2) (rev. ed. 2006), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

10 UNCITRAL Arbitration Rules Art. 34(3) (2010).

11 AAA, Rules for Inter-American Commercial Arbitration § 29(c) (2002) (`The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."); AAA, International Dispute Resolution Procedures Art. 27(2) (2009) ("The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given.").

12 *See* JAMS International Arbitration Rule 32.2 (2011) ("The Tribunal will state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.").

13 ICC Rules of Arbitration Art. 25(2) (2010).

14 *See* Alain Frecon, *Delaying Tactics in Arbitration*, 792 PLI/Lit 239, 251-52 (2009) (citing anecdotal evidence).

15 *See* E. van Ginkel, *Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal v. Vacatur*, 3 Pepp. Disp. Resol. L.J., 157, 214 & nn.294-95 (2003).

16 *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 Geo. Wash. L. Rev. 443, 444 n.3 (1998) ("Labor arbitrators write reasoned awards because the parties to the labor arbitration process expect them to do so. Over the fifty-odd years of labor arbitration in the United States, those substantive written awards have become an integral part and a primary dimension of the process.").

17 *See* JAMS, Consumer Arbitration Policy: Minimum Standards of Procedural Fairness 3 (2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf ("The award will also provide a concise written statement of the essential findings and conclusions on which the award is based.").

18 *See* Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 Nev. L.J. 251, 259 (2007).

19 *See* W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 Wm. & Mary L. Rev. 1895, 1903 (2010).

20 Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1085 (2000) (noting benefits to parties and arbitrators of reasoned awards).

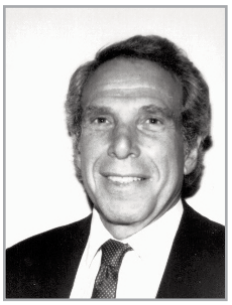
21 *See*, *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 215 n.1 (5th Cir. 2006) ("IA] reasoned award is something short of findings and conclusions but more than a simple result.'") (quoting *Holden v. Deloitte & Touche LLP*, 390 F. Supp. 2d 752 (N.D. III. 2005)).

22 *See Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).

off the cuff

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

Word Games



Eugene Wollan

Frequenters of these pages will have become aware that I really enjoy word games. I find the bi-weekly Sunday Times Acrostic Puzzle particularly gripping, and even my grandchildren have learned to tread lightly while I'm working on the Sunday Crossword.

One linguistic oddity that I have recently been turning over in my mind is the presence in our extraordinary language of words that convey clearly negative connotations but do not have any positive counterparts. For example:

- Inert. Is something that moves ert?
- Distraught. Is a focused person traught?
- Dissemble. Does a truthful person semble?
- Innocuous. Is something significant ocuous?
- Discrepancy. Is an agreement a crepancy?
- Unnerved. Is an unafraid person nerved?
- Discombobulated. Is someone in complete control combobulated?
- Intransigent. Is a pliable person transigent?
- Inept. Is a competent person ept?
- Inane. Is something sensible ane?
- Indigent. Is a prosperous person digent?
- Infamy. Was V-J Day a "date that will live in" famy?

One linguistic oddity that I have recently been turning over in my mind is the presence in our extraordinary language of words that convey clearly negative connotations but do not have any positive counterparts.

It occurs to me that some of my readers might also enjoy word games, so I am providing them with an opportunity to participate.

1. The most overused word in New York is "gourmet," applied indiscriminately to restaurants, greengrocers, diners, and B-B-Q joints. The most overused words in reinsurance are:
   a. Follow the fortunes
   b. Honorable engagement
   c. Merely a legal obligation
   d. All of the above
2. "GAAP" stands for:
   a. A low-price clothing chain
   b. Genially Accommodating Accounting Principles
   c. Guidelines that may or may not be followed
   d. Whatever your accountants think you can get away with.
3. The frequently encountered phrase "drop down" means:
   a. The 101st Airborne Division will welcome you
   b. Give me twenty push-ups
   c. Chug-a-lug
   d. Your coverage starts at a lower level than you thought it did
4. Among the most ubiquitous commercials on local TV are the ones advertising "cash now" if "you have an annuity or a structured settlement." Those last two words refer to:
   a. A building with a sinking foundation slab
   b. The fort built by the pilgrims at Plymouth Rock
   c. A device to underestimate the time value of money
   d. A trade off between present and future penury
5. We New Yorkers have a market at Hunter's Point, luxurious homes at Orient Point, and a residential community at Breezy Point. But what is an Attachment Point?
   a. The chemistry between Cyrano and Roxanne
   b. An umbilical cord
   c. The tip of an epee

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.

d. Devotion to a particular reinsurer

6. Astronauts, military planners, and drivers in New York City traffic like to identify and define the risks they are undertaking. Hence the phrase "finite risk," which is:

a. The perils encountered in navigating the entire length of the FDR Drive

b. An oxymoron

c. A form of underwriter self-delusion

d. A triumph of nomenclature over reality

7. A reinsurance relationship is supposed to be based on something called "utmost good faith," which really means

a. A religious concept, if not an actual observance

b. Going through the motions

c. Relying on the other guy's deviation from the truth to balance out your own

d. Whatever counsel in a reinsurance arbitration chooses it to mean

8. Most of the household products we buy come with a warranty, which often turns out to be incomprehensible, very limited, and inapplicable if you fail to return the registration card within ten minutes after the purchase. In the world of insurance and reinsurance, that term means:

a. Caveat emptor

b. The consummation devoutly to be wished

c. I didn't realize this is stronger than a condition subsequent

d. The draftsman lost his head

9. Sportscasters and columnists delight in predicting how many games a particular team will win or lose, but they have never, to my knowledge, used the term "maximum probable loss." We know it to signify:

a. An underwriter over-eager to cement the account

b. An actuary looking through the wrong end of his telescope

c. The fate of San Francisco when "the big one" finally hits

d. Enron

10. We have heard a lot in recent years about all sorts of quotas - educational, ethnic, immigration, and so on - but the phrase we focus on is "quota share," which refers to:

a. The percentage of Ivy League students admitted to college as legacies

b. The illegal immigrants who still survive in Arizona

c. The New Math run amok

d. Each underwriter relying on the other's expertise

11. When we hear the phrase "incurred but not reported" we think of:

a. income tax evasion

b. unpaid bills

c.a foul not caught by the officials

d. your guess is as good as mine

12. We have supermarkets, specialty markets, and even mini-markets, but what is a soft market?

a. an Excedrin headache for underwriters

b. a Sleepy's mattress emporium

c.the Dow Jones on a bad day

d. undecided voters

13. The phrase "stop loss" was, sadly, in the news not very long ago to describe the Army's policy that kept certain troops in Iraq or Afghanistan after their deployment was supposed to end. In our domestic world, it means:

a. a summons for jumping a red light

b. a tourniquet

c.abandoning a diet

d. Mayday! Mayday!

14. The word "captive" has a truly menacing sound. It could mean:

a. a Guantanamo detainee

b. an audience stuck with no escape

c.a prisoner of love

d. a prisoner of the parent company

15. "Setoff" is a strange word because it reverses the components of "offset" but really means much the same thing. The possible meanings are:

a. the trigger for a temper tantrum

b. mismatched flatware

c. zoning requirements for distance from the curb

d. a zero sum game

Bonus Question: What does "Errors and Omissions" describe?

a. The ritual in a confessional

b. Something brokers do every day

c. What the other guy does, but never us

d. A livelihood for certain members of the legal profession

These questions are for superficial consumption only. Any effort to submit actual answers will be absolutely (albeit courteously) rejected.▼

DID YOU KNOW...?

THAT THE MEMBERSHIP DIRECTORY ON THE ARIAS•U.S. WEBSITE CONTAINS COMPLETE CONTACT INFORMATION FOR ALL MEMBERS? ACCESS IS THROUGH THE LEFT-SIDE NAVIGATION BUTTONS. JUST USE YOUR EMAIL ADDRESS TO REQUEST A PASSWORD THAT WILL BE SENT TO YOUR INBOX, THEN LOG IN. THE WEBSITE IS AT WWW.ARIAS-US.ORG.

case notes corner

Ronald S. Gass

Federal Court Relutantly Permits Replacement of Arbitrator by Appointing Party Who Solicited His Resignation Prior to Umpire Selection

Ronald S. Gass*

Some of the most difficult and vexing ethical and procedural issues threatening the integrity of the arbitral process and the speedy resolution of disputes can arise in these situations, particularly when the party-arbitrator's resignation is requested by the appointing party.

Over the past decade, there have been several interesting cases involving the resignation or death of party-arbitrators under various circumstances and at different times during an arbitration. *E.g.*, Gass, Ronald S., *When Arbitrators Resign: Second Circuit Affirms New Rule that a Substitute Arbitrator Should be Appointed Instead of Starting Arbitration Anew*, 17 *ARIAS•U.S. Quarterly* 25 (3rd Quarter 2010); Gass, Ronald S., *Federal Court Rules that Party-Arbitrator's Resignation Due to Illness and Subsequent Recovery Does not Require Arbitration to Start Anew*, 16 *ARIAS•U.S. Quarterly* 26 (3rd Quarter 2009); Gass, Ronald S., *When an Arbitrator Dies: Federal Court Rules that Arbitration Must "Begin Afresh"*, 11 *ARIAS•U.S. Quarterly* 30 (4th Quarter 2004). Some of the most difficult and vexing ethical and procedural issues threatening the integrity of the arbitral process and the speedy resolution of disputes can arise in these situations, particularly when the party-arbitrator's resignation is requested by the appointing party. In a recent New York federal district court decision, the tension between a party's right to appoint the arbitrator of its choice versus the potential manipulation and attendant disruption of the arbitral process was addressed in the context of a cedent's efforts to consolidate two arbitrations arising from a single reinsurance loss.

In this case, the reinsurer, National Indemnity Company ("NICO"), issued two contracts to the cedent, **IRB-Brasil Resseguros S.A. ("IRB")** – one effective for three months from November 21, 2007 to February 21, 2008 and the other for one year from February 21, 2008 to February 21, 2009. During the terms of these agreements, IRB sustained almost a $250 million loss, and a claim payment dispute arose between the parties. Initially, NICO simultaneously commenced two arbitrations at year-end 2008 – one in London under the first three-month contract and the other in New York under the second one-year contract. Nearly two years after the London panel dismissed the first contract dispute on the ground that it lacked jurisdiction, NICO commenced a third arbitration in New York to address the dispute under the three-month contract. Meanwhile, in the second one-year contract arbitration, the parties selected their party-arbitrators, and each nominated slates of two umpire candidates, one of whom was to be struck by the other party and the umpire chosen by drawing lots, all in accordance with the arbitration clause. Although the parties agreed to postpone umpire selection in the second arbitration for several months while they discussed possible settlement, their negotiations ultimately proved unsuccessful, and no umpire was ever selected.

In the third arbitration NICO commenced in New York, IRB named the same party-arbitrator it had appointed in the second arbitration. Several months later, NICO, in a surprising move, appointed one of the two umpire candidates previously nominated *by the cedent* in the second arbitration. This appointment provoked a federal court petition by IRB seeking the disqualification of NICO's new party-arbitrator and the consolidation of the two New York arbitrations. IRB believed that NICO or its counsel had had *ex parte* contact with its erstwhile umpire candidate. NICO countered with a cross-petition claiming that IRB had defaulted in selecting an umpire in the third arbitration and sought a court-appointed umpire because IRB's party-arbitrator had refused to discuss umpire selection with NICO's newly appointed arbitrator, who was now the subject of IRB's disqualification

Mr. Gass is an ARIAS-U.S. Certified Umpire and Arbitrator. He can be reached via e-mail at rgass@gassco.com or through his Web site at www.gassco.com.

challenge.

In the first of two decisions issued within a couple months of each other by the New York federal district court, the relief sought by both parties was denied. First, the court concluded that neither Section 5 of the Federal Arbitration Act ("FAA"), which authorizes court appointment of arbitrators if a party fails to follow the contractual selection process or there is a lapse in their selection, nor any other FAA provision permitted the pre-award disqualification of an arbitrator duly selected in accordance with the parties' arbitration clause, as NICO had done in the third arbitration. Absent conduct giving rise to an appearance of impropriety, NICO's party-arbitrator had done nothing to raise concerns about his ability or qualifications to act in this capacity. The fact that he had previously indicated his willingness to serve as IRB's umpire candidate in the second arbitration a year earlier was not a disqualifying event. It simply meant that he had removed himself from consideration as an umpire candidate in that other arbitration and that NICO had effectively exercised its option to strike him.

With regard to the cedent's consolidation request, the court followed U.S. Supreme Court precedent holding that contract interpretation issues, such as whether two arbitrations should be consolidated, were best left to the arbitrators in the second arbitration to decide once the umpire was selected and the panel fully constituted. Lastly, NICO's claim that the court should appoint the umpire in the third arbitration because IRB's party-arbitrator had refused to accept NICO's newly appointed arbitrator was also dismissed. The court expressed its expectation that its ruling not to disqualify NICO's party-arbitrator in the third arbitration would now enable the parties to move forward with umpire selection while the second arbitration panel decided whether the two matters should be consolidated.

Notwithstanding the court's optimism, umpire selection in the two New York arbitrations quickly derailed again. After IRB struck one of the two NICO candidates in the second arbitration and tried to move forward with umpire selection, NICO refused to draw lots until IRB's remaining nominee completed an umpire questionnaire. Soon thereafter, NICO's party-arbitrator in the second arbitration "abruptly" informed the parties that he was resigning, as it turned out, at NICO's request. In his place, NICO appointed the umpire candidate IRB had nominated in the second arbitration who was now serving as its party-arbitrator in the third arbitration, i.e., the *same* arbitrator was appointed by NICO as its party-arbitrator in both arbitrations.

Having reached a new impasse, the parties swiftly returned to federal district court. This time IRB petitioned to (1) prohibit NICO from changing the party-arbitrator it had originally designated in the second arbitration or, alternatively, permit IRB to choose a default party-arbitrator for NICO; (2) prohibit NICO from requiring the submission of an umpire questionnaire from IRB's party-arbitrator prior to the random draw; and (3) stay the third arbitration pending the second arbitration panel's consolidation decision. NICO cross-petitioned to disqualify IRB's umpire candidate in the second arbitration for allegedly being under the control of IRB or, alternatively, to require him to complete an umpire questionnaire.

With regard to NICO soliciting the resignation of its party-arbitrator in the second arbitration, the court, citing "thin" case law on the subject, reluctantly permitted the substitution of the same party-arbitrator NICO had appointed in the third arbitration (i.e., the same person the court had previously declined to disqualify) in the second arbitration. Citing Southern District of New York precedent, the judge concurred with the principle that striking a replacement arbitrator when a party's initial arbitrator resigns was inconsistent with the underlying goal of arbitration, "which is to provide for a balanced deliberation that produces an outcome that both parties are willing to accept." The parties are entitled to a party-arbitrator of their choice to advocate for their position. However, the court was clearly troubled by the fact that NICO had directly solicited its party-arbitrator's resignation two years after his appointment in the second arbitration. The judge expressed concerns about the risk of manipulation and potential delay and was "wary of creating an unfettered right to alter the composition of an arbitration panel" that would "inject an intolerable level of uncertainty into the arbitration system." However, there were two important extenuating factors in this case that persuaded the court not to intervene: (1) the second arbitration panel had not yet taken any action in the matter before it because the panel had not yet been fully constituted; and (2) having the same party-arbitrators in both of the New York arbitrations would seemingly bolster IRB's case for the desired consolidation of these two proceedings.

NICO's argument that IRB's umpire candidate in the second arbitration must be disqualified because he was under the cedent's control was based on the fact that IRB's party-arbitrator had spoken with both of the IRB-nominated umpire candidates and "confirmed their interest, ability, and willingness to serve as IRB's Umpire candidates" in the second arbitration. NICO contended that this was an improper *ex parte* communication with the umpire candidates and that the reference to their willingness to serve as "IRB's Umpire candidates" was tantamount to the remaining candidate agreeing to act as the cedent's agent in the second arbitration. IRB countered that such *ex parte* communications were not uncommon in *ad hoc* arbitrations. The court found that the *ex parte* communication between IRB's party-arbitrator and its umpire candidate did not render him "under its control" as a matter of law and observed that NICO was essentially challenging him, pre-award, for alleged bias. Under well-established Second Circuit precedent, it refused to disqualify the cedent's candidate because evident partiality attacks cannot be raised until *after* an award is issued.

The umpire selection stalemate over the questionnaire in the second arbitration was also quickly dispatched. Noting that the arbitration agreement made no

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mention of an umpire questionnaire requirement, the court found that counsel for the parties had agreed that the umpire candidates would be required to complete questionnaires on the basis of an e-mail IRB's counsel sent to opposing counsel mentioning them.

Consequently, the court held that there was an agreement to modify the arbitration clause and to require the candidates in the second arbitration to submit umpire questionnaires. Therefore, it ordered IRB's candidate to complete the same questionnaire that NICO's candidate had previously submitted to the parties. The court also expressed its expectation that, once the umpire questionnaire was received, the drawing of lots would proceed and any further pre-award evident partiality challenges of IRB's candidate would be "treated by this Court as not made in good faith." Lastly, the court granted IRB's request that the third arbitration be stayed until such time as the second arbitration panel could rule on the consolidation question.

There are several remarkable aspects of this case that warrant closer scrutiny. First, it raises serious questions about the timing and propriety of party-arbitrator resignations directly solicited by the appointing party. Here the likelihood of prejudice was minimal because the second arbitration, two years after its commencement, had not progressed beyond the parties' exchange of umpire slates, and there were no decisions made by or evidentiary hearings held before a fully constituted panel. However, the judge plainly signaled her discomfort with party-requested resignations and hinted that if the arbitrator had resigned *after* panel formation, the result might have been different because such resignations interfere with the speedy resolution of disputes in arbitration and can "inject an intolerable level of uncertainty" into the arbitral process.

Second, despite the court's finding that the IRB party-arbitrator's *ex parte* contact with its two umpire candidates did not result in disqualification, this is still a risky practice. *Cf.* ARIAS•U.S., *Practical Guide to Reinsurance Arbitration Procedure* § 2.3 Comment C (rev. ed. 2004) ("It is accepted practice that the parties will not meet with, or discuss anticipated issues with, umpire candidates prior to nomination or appointment. If the parties desire to determine whether umpire nominees have potential conflicts before selecting an umpire, the parties should consider circulating a questionnaire such as Sample Form 2.1., the ARIAS•U.S. *Arbitrator and Umpire Disclosure* Questionnaire."). At best, *ex parte* party-arbitrator contacts with potential umpire candidates needlessly provoke questions later about the neutral's impartiality and, at worst, trigger tedious and time-consuming organizational meeting voir dire about the nature and scope of such communications and, as in this case, arbitration delays and costly litigation.

Third, the court's recitation of the facts does not explain why IRB's umpire candidate in the second arbitration later agreed to accept NICO's appointment as its party-arbitrator in the third arbitration. He must have known that he was being considered as an umpire candidate by IRB because its party-arbitrator spoke with him, albeit nearly one-and-a-half years earlier, to determine his willingness to serve. Given the long hiatus in umpire selection, perhaps he may have assumed that he was no longer under consideration. In any case, it is certainly easy to understand why IRB was dismayed by his subsequent appointment by NICO.

Fourth, the judge's premise that umpire questionnaires may not be made a prerequisite for umpire selection if the arbitration clause does not require them seems out of step with current insurance and reinsurance arbitration practice. Parties typically rely on umpire questionnaires such as the ARIAS•U.S. form to flesh out the experience and qualifications of umpire candidates and to detect potential disqualifying conflicts. Although the judge in this case ordered IRB's party-arbitrator to complete a questionnaire prior to drawing lots, her comment that any further pre-award challenge to IRB's umpire candidate qualifications by NICO "that reflects another effort to question his impartiality will be treated by this Court as not made in good faith" is unfortunate. The whole point of these questionnaires is to assist the parties in assessing and, if necessary, challenging the candidates' impartiality *prior* to umpire selection. To suggest that a party's legitimate inquiries into a candidate's experience or qualification deficiencies or potential conflicts or bias based on questionnaire responses would not be in good faith diminishes the important role this tool plays in safeguarding the fairness and integrity of the arbitral process. Perhaps the judge's remark should be taken with a grain of salt when considered against the backdrop of this case. It may have been her way of signaling the court's palpable irritation over the parties' repeated umpire and party-arbitrator impartiality challenges and attendant arbitration delays when Second Circuit precedent so clearly frowns upon such pre-award evident partiality litigation.

IRB-Brasil Resseguros S.A. v. National Indemnity Co., Case No. Civ. 1965 (NRB), 2011 U.S. Dist. LEXIS 136640 (S.D.N.Y. Nov. 29, 2011); 2011 U.S. Dist. LEXIS 116664 (S.D.N.Y. Oct. 5, 2011).▼

Recently Certified Arbitrators

in focus

Steven M. Kessler

Steven Kessler has more than thirty-five years of experience in the commercial first-party insurance arena, primarily as a claims executive and consultant in the U.S. and Latin American marketplaces.

Mr. Kessler held several senior-level technical and management positions for Factory Mutual (now FM Global). In those capacities, he was responsible for proper application of policy coverage and management of a global work force of some 130 claims professionals, and he served on the Management Committee. His duties also included management of subrogation recoveries and litigation matters (including arbitrations and appraisals). He also held the title of "Director" at KPMG and PricewaterhouseCoopers, during which time he provided claims consulting advice to *Fortune 1000* clients that suffered significant physical damage and business interruption losses.

Mr. Kessler served as a Partner of the Houston, Texas office of Dempsey Partners LLC. His duties included managing a staff of forensic accountants, in addition to marketing, selling, and providing claims consulting advice to his clients that suffered large and complex physical damage and business interruption losses.

Mr. Kessler is currently the Sr. Vice President, Marine, Energy and Construction Claims for Liberty International Underwriters in their New York City office. In this capacity, he is primarily responsible for all first-party property (and third-party Marine) claims in the United States and Latin America, as well as managing a staff of professional claims adjusters.▼

William A. Ray

William Ray has thirty-five years of insurance and reinsurance experience. He spent the last twenty years as a broker with Towers Perrin Reinsurance, retiring as Senior Vice President and Principal.

During his career, Mr. Ray designed and placed international insurance programs for Fortune 500 companies, such as Smith Kline, and reinsurance contracts for major U.S. insurers, including CNA and Cincinnati Financial.

Mr. Ray is a graduate of the University of Virginia and the Harvard Executive Management Program. He served on the Board of Trustees of Hampden-Sydney College and the Board of Directors of Penn Millers Group.▼

P. Kevin Thompson

Kevin Thompson is currently of counsel to Plews Shadley Racher & Braun LLP and President of Insurance and Risk Management Services LLC. He has more than thirty years of experience in insurance, serving both as a senior-level insurance executive and Risk Manager for two U.S.-based corporations.

Prior to joining Plews Shadley Racher & Braun LLP, Mr. Thompson served as director of corporate risk management for pharmaceutical company Eli Lilly & Company at its corporate headquarters. Prior to Lilly, he served as Vice President Risk Management for Mayflower Group, Inc., a global transportation and forwarding company; Chief Financial Officer and Treasurer for Monroe Guaranty Insurance Company; and financial and budget analyst for Chrysler Corporation. While at Mayflower, Mr. Thompson was also responsible for oversight of claims adjudication for all Bodily Injury and Property Damage claims, as well as management of an in-house commercial insurance agency. In his previous Risk Management roles, he maintained global brokerage relationships to facilitate placement of all insurance, direct and reinsurance, covering all Transportation and Pharmaceutical risks for Mayflower Group, Inc. and Eli Lilly and Company. In these roles, he was also President and Chief Operating Officer of two Bermuda Captives.

As Founder and President of Insurance and Risk Management Services LLC, Mr. Thompson consults with clients on a variety of property and casualty insurance related issues, making recommendations to improve or otherwise enhance the property and casualty insurance coverage for his clients. He frequently speaks to various associations and is a contributor and speaker on insurance matters for the Indiana Continuing Legal Education Foundation.

Mr. Thompson is a member of the Indianapolis, Indiana, and American Bar Associations, and former Chair of the Indiana Insurance Institute Investment Committee.

He received his undergraduate and MBA degrees from Indiana University, and his Juris Doctorate from the Indiana University School of Law.▼

Steven M. Kessler

William A. Ray

P. Kevin Thompson

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

ARIAS U.S.

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

An Invitation…

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of December 2011, ARIAS•U.S. was comprised of 370 individual members and 118 corporate memberships, totaling 1,012 individual members and designated corporate representatives, of which 269 are certified as arbitrators.

The Society offers its *Umpire Appointment Procedure,* based on a unique software program created specifically for ARIAS, that randomly generates the names of umpire candidates from the list of ARIAS•U.S. 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.

The 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 *ARIAS•U.S. 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.

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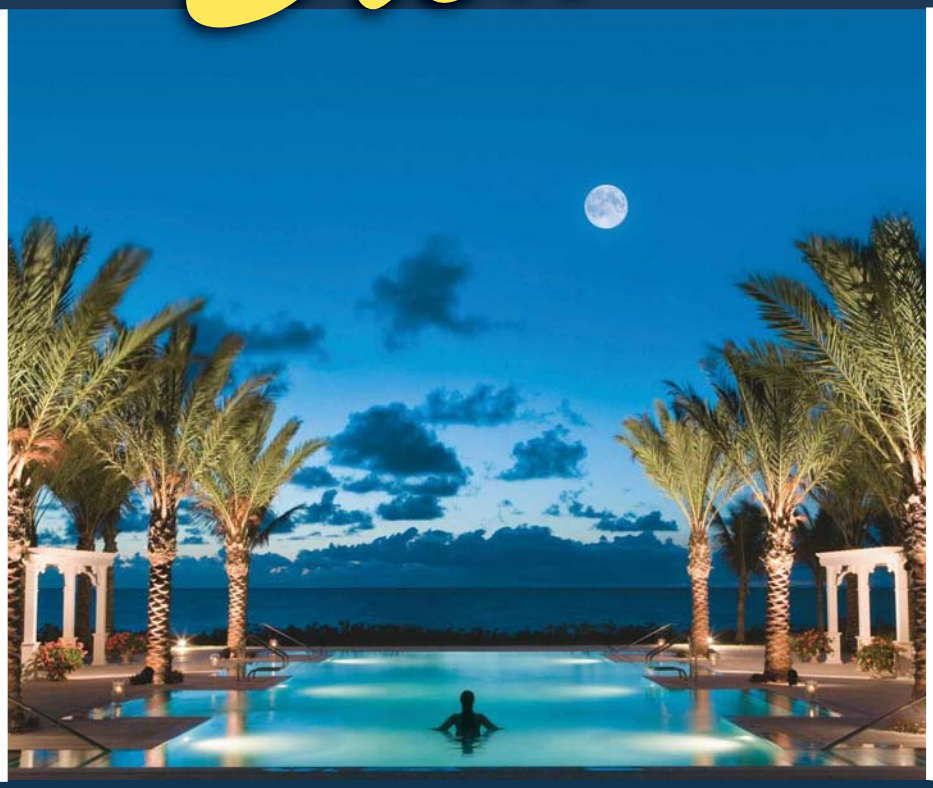

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