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Tom Stillman

editor's comments

ARIAS·U.S. is well recognized for its roster of knowledgeable and experienced arbitrators. While our articles are of interest to the entire membership, the ARIAS *Quarterly* hopes they will assist the arbitrator community to continue to remain at the top of its game. A year ago ARIAS·U.S. established an Arbitrators Committee, which enables arbitrators to express their particular concerns as a group. We open this issue of the *Quarterly* with Committee co-chairs, Sylvia Kaminsky and Mark Megaw, recounting their considerable accomplishments in the year since the Committee's formation. One such accomplishment was the development of a case-tracking form to enable arbitrators to steer clear of conflicts. That form and others are now available on the ARIAS·U.S. website.

Sometimes a situation arises where one of the parties fails to appoint an arbitrator within the time specified in the contract governing a dispute. Many reinsurance agreements grant the other party the right to appoint the defaulting party's arbitrator. Appointed and often paid by one party but duty-bound to represent the other, this situation presents the arbitrator with the potential for an ethical minefield. At the request of the Ethics Committee, Mark Schwartz and Jonathon Raffensperger have written an article that explains how to navigate it successfully.

Recognizing the savings in time and money, parties have increasingly opted to hold their organizational meetings telephonically. A member of our Editorial Board, Susan Grondine-Dauwer, points out that whether it is conducted in person or by phone, a well-run organizational meeting depends upon advance preparation and considered management by the arbitrators and umpire. In this edition of the *Quarterly*, she offers practical tips for managing a meeting.

The pages of this magazine have been no stranger to articles on the procedural aspects of arbitrations. In this edition of the *Quarterly* we decided to take a new approach by convening a symposium of experienced arbitrators, Katherine Billingham, Jamie Scrimgeour and Paul Thomson, moderated by Peter Chaffetz, to discuss procedural issues commonly arising in arbitrations. Under the theme of "How much process is due?" our panel considered such subjects as the role of possible vacatur in decision-making and the scope of discovery, including limitations on document requests and depositions. The participants also expressed their views on arbitrator receptivity to motions for summary judgment and claims of attorney-client privilege. In assessing the impact of the recently-revised Federal Rules of Civil Procedure emphasizing a cost-benefit and proportionality approach to document production, the panel recognized, as have many ARIAS·U.S. members, that reinsurance arbitrators have long been ahead of the court system in applying these concepts. We're publishing an edited transcript of the symposium that you can read in part in the printed edition of the *Quarterly*. We wish to acknowledge the generous contribution of Doug Winter of Winter Reporting who transcribed it free of charge.

You can access the transcript in its entirety in our online edition by visiting our ARIAS *Quarterly* Archive page on the ARIAS·U.S. website.

If you have comments on our foray into the symposium format, or about the symposium questions and answers, we'd like to hear them.

Faced with the repetition of an issue that it perceives to have been decided in a prior judicial or arbitral proceeding, a party may claim that the other party is precluded from having a "do over." Whether preclusion may be asserted successfully and whether the courts or arbitrators get to decide is the subject of an article by Everett Cygal and Catherine

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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. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to tomstillman@aol.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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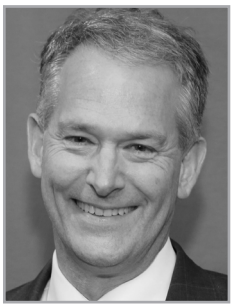
arbitrators' corner

Arbitrators' Committee – The Year in Review So What Has the Committee Been Up To?

Sylvia Kaminsky



Mark Megaw

I refuse to join any club that would have me as a member– Groucho Marx

Notwithstanding Groucho, over 150 full-time arbitrators have joined ARIAS. They have done so with great aspirations: for education, for training and to promote, improve and foster the arbitration process as a means for the efficient, economic and just resolution of insurance and reinsurance disputes. With their somewhat unheard voices in mind, this was the year that the Arbitrators Committee was formed. This Committee had the bold and immodest goal of providing a voice for all arbitrators in the ARIAS "club," and to discuss and address issues that specifically impact this segment of the ARIAS community.

With the encouragement of the Board of Directors, who created the Committee, the support from several other ARIAS committees, and an aggressive agenda in hand, the Arbitrators Committee hit the ground running. It has had a very productive and successful year in advancing the concerns of arbitrators and effectuating changes. The work of the Committee is highlighted below:

- In its efforts to obtain representation on the Board of full-time arbitrators, the Committee suggested and the Board acted to revise the Nominating Process Guidelines, so that they expressly clarify that full-time arbitrators are eligible to serve on the Board.
- In a related vein, the Committee has also made its voice clear on the topic of board representation. As we all now know from recent announcement, the Board is weighing changes to the Bylaws in order to create Board seats that are reserved for arbitrators who are not currently employed by companies, reinsurers or firms. When those changes come up for a vote of the membership, the Bylaws require a two-thirds approving vote; we ask all members – either for or against – to be sure to cast a vote! A vote is a succinct way to have your voice heard.
- As a separate matter, the Committee has also had steady input from various Board members. Of course, we have benefitted from Mark Megaw's Board liaison role. In addition, we have had guest participation at our meetings. For example, in one of the Committee early meetings, we invited Ann Field, the chair of the ARIAS Forms committee, as a guest participant. Ann's receptive ear – she has a part-time arbitrator role – was greatly welcomed. Thereafter, a subcommittee of the Arbitrators Committee (Aaron Stern, Peter Gentile and Marty Haber) provided an extensive review of the ARIAS Umpire Questionnaire form, and after getting input from the full Arbitrators Committee, we provided input and recommendations to the Forms Committee. While we recognize that not every change we suggest will become Board-approved, our comments are being considered by the Forms Committee and the Board, and they know where we are as other changes are considered.

Sylvia Kaminsky

Sylvia Kaminsky has been in the insurance/reinsurance industry for 30 years. For the first 15 years of her career, she was in private legal practice focusing on coverage, defense, insurance, and reinsurance arbitration and litigation matters. She then worked for Constitution Reinsurance Corporation as well as Sirius Reinsurance. Since 2002 she has served as a consultant and arbitrator to the industry in more than 100 arbitrations involving insurance, reinsurance, and security matters. Sylvia is an ARIAS • U.S. Certified Arbitrator and umpire.

Mark Megaw

Mark Megaw is the Director of Reinsurance Litigation for the ACE Group. He leads a group of lawyers that are responsible for ACE's ceded and assumed reinsurance disputes, worldwide. Previously, he was the General Counsel to the ACE Tempest Re Group, ACE's assumed reinsurance division which, at the time included their assumed property and casualty and life businesses. Mr. Megaw has been in the world of reinsurance arbitrations since 1989. Among his many industry roles, he was a co-chair of the 2006 ARIAS•U.S. Spring Conference (and now of the 2014 Spring Conference), was a member of the ARIAS•U.S. Long Range Planning Committee, and in 2012 was elected to the ARIAS•U.S. Board of Directors. Mr. Megaw is admitted to practice in Pennsylvania and is an ARIAS•U.S. Certified Arbitrator.

- In conjunction with the Ethics Committee, a subcommittee of the Arbitrators Committee (Andrew Rothseid, Mark Wigmore and Jim Sporleder) spearheaded a breakout session at the November conference to gain insight and feedback from the membership as to what changes, if any, should be recommended to the Ethics Committee for its consideration in fostering the integrity of the arbitration process. For example, we know that some arbitrators have expressed concerns with mandates from within the Code of Conduct, particularly within Canon I. They have also expressed concern about the absence of a concomitant applicability of the Code to the parties and firms in a dispute. That issue, however, is not universally viewed as problematic. The results from the breakout session are certain to be evaluated by the Committee and the Ethics Committee – which itself now includes two "full-time" arbitrators and some part-time arbitrators for further action.
- One of the Committee's goals focuses on "improving the process" – a broad category covering every aspect of arbitral procedures. For new arbitrators the act of "improving the process" includes mastering the first steps of maintaining records so as to make disclosures, as well as properly evaluating one's competency for a case, and communicating with the parties to advance the process and ultimately render just awards. Committee members (Connie O'Mara, Jim Sporleder and Tom Daly) seized upon the opportunity to supplement ARIAS's basic arbitrator training on practical advice for new arbitrators by providing some suggested practices for both inexperienced and seasoned arbitrators on "the business of the business" of arbitrating. To offer guidance and instruction in this regard, Committee members developed the concept of the "Arbitrator's Toolkit," which they hope will be a regular addition to the ARIAS *Quarterly* in offering suggestions and "how to's" for arbitrators in the practice of their business. The first Toolkit appeared in the 2015 Q3 *Quarterly* and resulted in significant positive feedback. The article includes recommendations on record keeping, billing and diary systems and tips on how to answer the umpire questionnaire. The article also includes billing and arbitrator master case list templates. These templates can be found in the forms section on the ARIAS website.
- Additionally, these Committee members led a November breakout session concerning operational issues and best practices for arbitrators addressing ways in which arbitrators can improve their business practices to promote the best quality of services. That task includes making sure that arbitrators are aware of resources that are now, or in the future could be made available by ARIAS. To facilitate this session, the Committee members spent considerable effort in preparing an arbitrator business practice survey that was distributed to all arbitrators in early September 2015. The Committee will use the information gathered at this session to continue its work on improving the process.
- Both at the May and November Conferences, the Committee's breakfast meetings were heavily attended and provided a welcome opportunity to discuss the Committee's activities and a forum to address arbitrator concerns. Committee members were present to listen to what arbitrators have to say in order to address the needs of this constituency and to be a voice in this club.
- In the upcoming year, the Committee will gather and provide input on the certification requirements and the Neutral Umpire Questionnaire.

When those changes come up for a vote of the membership, the Bylaws require a two-thirds approving vote; we ask all members – either for or against – to be sure to cast a vote! A vote is a succinct way to have your voice heard.

As our one year terms come to an end, we would especially like to thank Messrs. Rothseid, Gentile, Douglas, Haber and Daly for their hard work in making this a constructive inaugural year for the Committee. The five replacements for their seats have big and energetic shoes to fill. Sylvia notes, "I also want to thank Mark Megaw, who is stepping down as our inaugural Board liaison and Co-chair. His leadership has been a key part in the formation of this committee, and our achievements during this last year."

Speaking of replacements, we had a high level of interest in those seeking to fill the seats on the Committee. Thanks to all of the arbitrators who submitted their names to be placed into the draw. As before, the selection process was done randomly. The interest from all of the applicants suggests a vibrancy to the work of the committee to date and in the interesting issues that continue to challenge us as we seek to express the voice of the arbitrator community within ARIAS.

So who are they? We are pleased to announce that Lydia Kam Lew, Charles Ehrlich, Roger Moak, Fred Pickney and Fred Marziano will be joining the committee, and that Eric Kobrick will be the new co-chair and Board Liaison. We welcome these new voices and, in advance, thank them for the work they will be doing on behalf of all of the membership.

Finally, the Committee takes the sentiments expressed in Tom Stillman's editorial comments in the Q3 *Quarterly* and applies them to this Committee. Whether you think we're doing a good job or you think we're failing short, it's up to you to provide feedback, give us ideas, express concerns and tell us what this Committee should be focusing on. Please participate in this opportunity to address arbitrator concerns and issues so that together with counsel and the parties, we can meet the goals of ARIAS and promote improvements in the arbitral process.

Best regards, Sylvia Kaminsky and Mark Megaw, Arbitrators Committee Co-Chairs ◆

article

Best Practices for Maintaining Fairness and Integrity In Arbitration In the Context of a Lapse in Arbitrator Appointment

Mark A. Schwartz

Jonothon Raffensperger

By Mark S. Schwartz and Jonathon Raffensperger

Arbitration clauses in reinsurance contracts routinely include "adverse-selection" provisions pursuant to which a party is permitted to appoint an arbitrator for its opponent if the latter does not do so within a specified time period. In some instances, the party that has failed to timely appoint its arbitrator (the "defaulting party") appears and participates in the arbitration; in others, the defaulting party never shows up. Both scenarios can pose difficult ethical dilemmas for an adversely-selected arbitrator. What can the arbitrator discuss with the party that initially contacted him or her (the "selecting party")? What duties and obligations does the adversely-selected arbitrator owe to the defaulting party? After appointment, can that adversely-selected arbitrator communicate with the selecting party about the case? What should the adversely-selected arbitrator do if the defaulting party asks the arbitrator to withdraw? Can the arbitrator (and the other members of the panel) rely on a hold-harmless agreement where the defaulting party fails or refuses to sign? Can the arbitrator accept fees paid by the selecting party? And, finally, how should the panel conduct the proceedings if the defaulting party never appears to defend itself in the arbitration?

The ARIAS·U.S. Code of Conduct does not directly address most of these issues, but its Canons and Comments provide a useful resource for arbitrators who may be forced to confront them. Indeed, the Code of Conduct stresses, above all else, the requirement that arbitrators "uphold the integrity of the arbitration process" and "conduct the dispute resolution process in a fair manner."[1] By keeping these pronouncements in mind, an adversely-selected arbitrator can likely avoid the pitfalls that might arise when navigating appointment under an adverse-selection clause. Still, even with this general guidance, arbitrators may face difficult questions about how to perform their function in instances where one of the parties has failed to timely appoint its arbitrator, and/or where one of the parties fails to participate in the process. This article outlines what we believe to be the best practices for arbitrators to follow when confronted with these thorny issues.

Communications Regarding Appointment

When an arbitrator is contacted by a party and told that the party's opponent failed to appoint its arbitrator within the timeframe required by the parties' agreement, the candidate should recognize that ethical constraints govern her subsequent conduct. Beginning with that first contact, it is incumbent upon the candidate to act in a way that minimizes the risk of a subsequent challenge to her service or, worse, a motion to vacate an award based on arbitrator impropriety. Among other things, the candidate should, from the outset, maintain the fairness and integrity of the arbitral process by avoiding any discussion about the selecting party's (or its counsel's) view of the merits of the pending dispute, since her appointment, if she does choose to serve, will be on behalf of that party's opponent. At the same time, the arbitrator

candidate must be able to obtain sufficient information about the issues and the parties to make an informed decision about whether she can and should accept the appointment.

While the ARIAS·U.S. Code of Conduct does not speak directly to the issue of the appropriate topics for discussion between an arbitrator candidate and the selecting party in this context, its Canons and Comments do contain guidance on when a candidate should or must decline an appointment.[2] And because all arbitrators – including those nominated after a party invokes an adverse-selection clause – must carefully consider whether conflicts or other factors preclude or advise against service, an arbitrator candidate contacted pursuant to an adverse-selection clause must, at minimum, be permitted to learn certain basic facts about the dispute, and may properly do so by discussing the matter with the selecting party or its counsel.

For example, to confirm that there are no disqualifying conflicts, the potential arbitrator must ascertain the identity of the parties to the dispute, the identity of counsel representing such parties, and the identity of any other individuals or entities that have a substantial interest in the matter.[3] And, to ensure that the candidate believes she can "render a decision based on the evidence and legal arguments,"[4] she must also be permitted to obtain sufficient information about the subject matter of the dispute to make an informed decision about her ability to serve.[5] In addition, if the candidate has a strong view on a specific issue – and particularly if she has published articles or provided expert testimony on the topic – she must carefully consider whether she can serve as a party-appointed arbitrator in a case in which that precise issue is in dispute.[6] In short, to enable the adversely-selected candidate to consider the propriety of accepting the appointment, she should be given enough background information to enable her to make an informed decision.

But, at the same time, the candidate should avoid unnecessary discussion of the merits of the case with the selecting party (and its attorney), and limit *ex parte* communication to the minimum necessary to decide whether to accept the appointment. This is because, once the candidate accepts the appointment, she will proceed as if she had been appointed by the defaulting party. [7] To further limit the potential for a challenge later, the adversely-selected candidate should, where practicable, refrain from oral conversations, and maintain copies of written communications to substantiate, should it become necessary, that all communications regarding her possible appointment have been appropriate.

A properly invoked adverse-selection provision permits a selecting party to appoint the defaulting party's arbitrator, but it should not operate to enable the selecting party to reap additional benefits that might result from substantive communications about the merits of the parties' dispute. An arbitrator candidate who is contacted to serve pursuant to an adverse-selection provision should recognize that, from the moment of first contact by the selecting party, she might ultimately serve as the defaulting party's arbitrator. The arbitrator should obtain whatever information she needs in order to make an informed decision about whether she can and should serve. She should, however, limit her communications with the selecting party and its attorney to those necessary to obtain only that information, and she should refrain from delving any further than necessary into the merits of the parties' dispute.

Post-Appointment Conduct

Once a candidate accepts an appointment made pursuant to an adverse-selection clause, she should operate in all respects as if she had been appointed by the defaulting party. In other words, having accepted the appointment, the arbitrator should, consistent with the terms of the parties' arbitration agreement and any other agreements reached during the proceedings, conduct herself as she would in any other engagement. Thus, with respect to an adversely-selected arbitrator, references in the ARIAS·U.S. Code of Conduct to the "party who appointed" the arbitrator should be interpreted to mean the defaulting party, not the selecting party.[8]

> An arbitrator appointed pursuant to an adverse-selection clause will likely face unique issues not presented when each side selects its own party-appointed arbitrator.

Upon appointment, the adversely-selected arbitrator should promptly contact the defaulting party and inform it of her designation as the party's arbitrator. To avoid undue prejudice resulting from invocation of the adverse-selection procedure, the arbitrator should immediately advise the defaulting party of any upcoming deadlines, including those regarding umpire selection. If the defaulting party agrees to move forward with the arbitration, then the case should proceed as though the adverse-selection clause had not been triggered. However, if the defaulting party either objects to the arbitrator's service or fails to appear and participate in the proceedings, the arbitrator will likely face additional challenges in determining how to proceed. The following sections provide additional guidance for arbitrators faced with these circumstances.

Scenario 1: The Defaulting Party Asks the Arbitrator to Withdraw

A potentially difficult situation may arise if, upon receiving notice that the arbitrator has been appointed on its behalf, the defaulting party objects to the continued service of the adversely-selected arbitrator. Such a scenario can certainly place the arbitrator in an awkward position. Having accepted the appointment, the arbitrator will necessarily have satisfied herself that she is qualified to serve and that she will be able to conduct the proceeding in a fair manner. Nonetheless, the ar-

bitrator may feel uncomfortable continuing to act in the role of party-appointed arbitrator for a party that does not want her to serve and requests her resignation. Although an arbitrator nominally has an unqualified right to resign and cannot be compelled to serve against her will,[9] her acceptance of an appointment acknowledges a duty to see the arbitration through to its conclusion. Once appointed, and absent the existence of contractual or legal requirements to the contrary, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances making it impossible or impracticable to continue.[10]

Thus, absent independent and unforeseen reasons for withdrawal (such as disability, emergence of an unworkable conflict, etc.), an arbitrator who has accepted an appointment made pursuant to an adverse-selection provision should not withdraw simply because the defaulting party requests that she do so. Indeed, acceding to such a request would frustrate the parties' agreement by effectively nullifying the selecting party's contractual right to adverse selection. This conclusion finds support in the ARIAS·U.S. Code of Conduct. Under the Code, ARIAS·U.S. arbitrators undertake an ethical duty to "exert every reasonable effort to expedite the process,"[11] which includes avoiding conduct that would unnecessarily prolong panel selection. Moreover, the Code advises that, at least after the panel has been fully constituted and accepted by the parties, an arbitrator should withdraw in only limited circumstances.[12]

In addition, case law holds that, like other questions arising out of arbitration agreements, questions regarding arbitrator vacancies should be resolved by giving effect to the parties' intent as gleaned from their arbitration agreement.[13] Thus, where an arbitration provision contains an adverse-selection clause, the adversely-selected arbitrator should not take action that would nullify the effect of the parties' intent to permit the non-defaulting party to select its opponent's arbitrator when the clause is properly invoked. In *Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F. Supp. 2d 899 (N.D. Ill. 2008), *aff'd* 576 F.3d 643 (7th Cir. 2009), one of the parties procured the resignation of its party-appointed arbitrator *after* the panel had been constituted and *after* the arbitration had proceeded for several years. Although the opposing party contended that the resignation triggered an adverse-selection clause permitting it to select the resigning arbitrator's replacement, the umpire permitted the party that had asked its arbitrator to withdraw to name its own replacement, and the arbitration was tried to resolution. The objecting party then moved to vacate the award, arguing, among other things, that the panel lacked authority to issue the award because the replacement arbitrator had not been selected in accordance with the parties' arbitration agreement.

The district court disagreed. In its analysis, the district court first noted that the arbitration agreement did not "contain any provisions addressing what should occur if a duly appointed arbitrator resigns."[14] Thus, the court looked to the language of the contract to glean the parties' intent. Specifically, the court explained that the agreement permitted each side to choose its own arbitrator, with an adverse-selection mechanism kicking in only upon the failure of a party to name an arbitrator within twenty days of the arbitration demand. According to the court, the agreement "evidences the parties' intent that the arbitration proceed before a panel comprised of one arbitrator chosen by each party and a neutral umpire."[15] Because arbitrator selection was timely in the first instance and because the adverse-selection clause had not been invoked by its terms, the court held that the intent of the parties would be furthered by permitting the party whose arbitrator had withdrawn to select his replacement.[16]

Although *Wellpoint* does not directly address the propriety of the arbitrator's decision to resign at the request of the party that appointed her, the decision does provide some valuable insights on how an adversely-selected arbitrator should respond to a request to withdraw. Arbitration is a creature of contract, and the court's focus in *Wellpoint* was first and foremost on the parties' intent as gleaned from the agreement. As the court found, the clear intent of the parties was "that the arbitration proceed before a panel comprised of one arbitrator chose by each party and a neutral umpire."[17]

By contrast, where a party fails to timely select its arbitrator and one is appointed on its behalf by the opposing party pursuant to an adverse-selection clause, the clear intent of the parties as set forth in the arbitration agreement is for the arbitration to proceed before a panel comprised of two party arbitrators, both chosen by the non-defaulting party, and the neutral umpire they jointly select.[18] If an adversely-selected arbitrator agreed to withdraw for the sole reason that she was asked to do so by the defaulting party, she would frustrate the parties' intent and, specifically, would deny the selecting party its contractual right to select the defaulting party's arbitrator. She should therefore deny such a request and continue to serve despite the defaulting party's objection.

Scenario 2: The Defaulting Party Refuses to Execute a Hold-Harmless Agreement

The difficult issue discussed above can become trickier still if, following the arbitrator's denial of a request to withdraw, the defaulting party refuses to sign a hold-harmless agreement.[19] The parties in a reinsurance arbitration are typically asked to indemnify the arbitrators and hold them harmless for any act or omission in connection with the arbitration, and the arbitrators may require the parties to sign a separate hold harmless/indemnification agreement.[20] Indeed, courts have compelled execution of hold harmless agreements where arbitrators refused to proceed without signature by both parties.[21] However, for several reasons, an arbitrator may decide that she is adequately protected even absent a court order requiring execution of a hold-harmless agreement by both parties to a pending arbitration.

First, as a step less drastic (and less disruptive) than refusing to proceed unless and until both parties sign an agreement to indemnify and hold harmless, the arbitrator can instead require that the selecting party execute a hold-harmless agreement that protects the entire panel. The ARIAS·U.S.form hold-harmless agreement contains such language, providing that:

Both parties further agree *jointly and severally*, to protect, defend, indemnify and hold harmless any and all members of the Panel against any and all expenses, costs and fees of any kind incurred by the members of the Panel, and the payment of their reasonable hourly fees, in connection with any claim, action or lawsuit arising or resulting from or out of this Arbitration.[22]

Such language enables an arbitrator to pursue the party that executed the hold harmless agreement for *all* expenses, costs and fees associated with any lawsuit resulting from the arbitration, even where the other party has refused to sign.[23]

Second, a hold harmless agreement can be at least partially redundant to the extent it simply "codifies (or perhaps, more accurately, solidifies) the immunity accorded to arbitrators as a quasi-judicial body."[24] "Based primarily on the 'functional comparability' of the arbitrator's role in a contractually agreed upon arbitration proceeding to that of his judicial counterpart, the Courts of Appeals that have addressed the issue have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity."[25] Such immunity vests whether objectionable acts are intentional, negligent, or merely erroneous,[26] and applies to all acts done by an arbitrator, "whether proper or improper, unless he acted in the clear absence of jurisdiction."[27]

To be sure, hold harmless agreements can in some instances provide protection and benefits beyond those available based solely on arbitral immunity. Most notably, a properly worded hold harmless agreement not only insulates an arbitrator from liability arising out of his service, but also protects the arbitrator from the costs associated with defending an action against him arising out of that service.[28] Moreover, courts have recognized limits on arbitral immunity that, to some extent, may be contracted around in hold harmless agreements.[29] Thus, to maximize protection against the expense and potential liability arising out of claims stemming from alleged arbitral misconduct, arbitrators are best served by demanding that at least one party execute a hold harmless agreement, and that the executing party agree to be jointly and severally liable as set forth therein.

Scenario 3: The Defaulting Party Refuses to Pay Arbitrator Fees

A similar issue can arise when, following adverse-selection, the defaulting party refuses to pay the adversely-selected arbitrator's fees (or, as discussed below, the defaulting party never appears at all). Assuming the selecting party agrees to pay the adversely-selected arbitrator's fees in the first instance,[30] the arbitrator might question whether she can properly accept fees paid by the selecting party. Again, the Code does not directly address the issue, but its Canons and Comments make clear that all arbitrators, whether adversely-selected or not, must resolve arbitral disputes based on their merits, not based on who is paying their bills. In short, reinsurance arbitrators are to be paid for their service, not for guarantees of favorable awards.

For example, Comment 2 to CANON X provides that "[a]rbitrators shall not enter into a fee agreement that is contingent upon the outcome of the arbitration process."[31] Further, in order to maintain fairness and integrity in the arbitral process, several Canons and Comments prohibit arbitrators from guaranteeing favorable results for the parties that appoint them. CANON II provides that arbitrators shall "conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision."[32] Comment 2 to that Canon provides further guidance: "Arbitrators should refrain from offering any assurances, or predictions, as to how they will decide the dispute and should refrain from stating a definitive position on any particular issue."[33] In addition, "[a]rbitrators should advise the appointing party, when accepting an appointment, that they will ultimately decide issues presented in the arbitration objectively. . . . Party-appointed arbitrators are obligated to act in good faith and with integrity and fairness, should not allow their appointment to influence their decision on any matter before them, and should make all decisions justly."[34]

> A properly invoked adverse-selection provision permits a selecting party to appoint the defaulting party's arbitrator, but it should not operate to enable the selecting party to reap additional benefits that might result from substantive communications about the merits of the parties' dispute.

Of course, an adversely-selected arbitrator cannot allow the payment of fees by the selecting party to influence her resolution of the parties' dispute. But, so long as the arbitrator abides by the standards discussed above, payment of arbitrator fees by the selecting party should create no ethical issues for the adversely-selected arbitrator.

Scenario 4: The Defaulting Party Never Appears to Defend Itself in the Arbitration

As stated above, once an adversely-selected arbitrator accepts service, she should promptly attempt to contact

the defaulting party about the case. If the defaulting party does not initially respond, the adversely-selected arbitrator should make ongoing efforts, both to ensure that the party has received actual notice of the pending arbitration and to encourage the party to participate. For example, the adversely-selected arbitrator should make reasonable attempts throughout the umpire selection process to engage the defaulting party and encourage that party to provide opinions as to appropriate umpire candidates and strikes. Moreover, after it is constituted, the panel as a whole should take all reasonable steps to ensure that the defaulting party has received actual notice of the pending arbitration. Indeed, such efforts should be made throughout the proceedings. Among other things, the panel should reach out to the defaulting party before the organizational meeting and again before the hearing to advise the defaulting party of these upcoming events. Such efforts should be in writing or, where oral, confirmed in writing, to protect the panel should the defaulting party later claim that it was never notified of the proceedings.

There are, of course, instances in which a defaulting party simply fails or refuses to participate. In such circumstances, the entire panel must take steps to ensure that the arbitration proceeds fairly in the absence of the defaulting party.[35] To ensure fairness and integrity in this context and, more practically, to minimize the potential for a successful challenge later, the panel should not simply grant judgment in favor of the selecting party but should hold an evidentiary hearing in which the selecting party proves its entitlement to the relief being sought.

Indeed, depending on the jurisdiction and body of rules governing the arbitration, an evidentiary hearing might be required. For example, some courts have identified a general rule or principle that "an arbitrator may not issue an award solely on the basis of the default or absence of one of the parties, but must take sufficient evidence from the non-defaulting party to justify the award."[36] Courts have also found a requirement in applicable arbitration rules,[37] court rules,[38] and state insurance regulations that evidence be taken before an award is issued.[39] The Uniform Arbitration Act, to the extent it applies, also requires that an arbitration proceeding *ex parte* hear and decide the controversy "upon the evidence produced."[40] And at least one court has explained that it will not grant an unanswered petition to confirm an *ex parte* award based solely on the losing party's default, holding that the proper standard "is to treat that petition as an unopposed motion for summary judgment," which requires that the court find at least a "barely colorable justification for the outcome reached."[41]

In light of these authorities and, as a practical matter, to facilitate confirmation and avoid potential vacatur of default awards entered in the absence of an evidentiary hearing, the best practice is for the panel to proceed with an *ex parte* hearing in which the selecting party presents its case, even if the defaulting party does not participate. The panel should then issue its ruling based on the evidence presented, making clear in its decision that it invited the defaulting party to participate, that the defaulting party failed to appear, that the selecting party satisfied its burden of proof by presenting a prima facie case, and that the evidence supports the ruling.

Conclusion

An arbitrator appointed pursuant to an adverse-selection clause will likely face unique issues not presented when each side selects its own party-appointed arbitrator. Moreover, the entire arbitration panel will face additional hurdles when a defaulting party not only fails to timely appoint its arbitrator, but fails to participate in the arbitration. By considering the best practices discussed above, arbitrators facing such circumstances should be able to comply with the ARIAS·U.S. Code of Conduct's overarching goal of maintaining the fairness and integrity of the reinsurance arbitration process.

We welcome feedback on the foregoing best practices, so please write in if you have related tips, or contrary views, on how reinsurance arbitrators should conduct themselves in these types of situations.

End Notes

1. *ARIAS-U.S. Code of Conduct* (March 21, 2014), CANONS I and II.
2. Comments 3 and 4 to CANON I provide a non-exhaustive list of circumstances in which a candidate must or should decline an appointment.
3. *Id.,* CANON II, Cmt. 1.
4. *Id.*, CANON I, Cmt. 3.(b).
5. *See id.,* CANON II, Cmt. 1.
6. *See, e.g., id.,* CANON IV, Cmt. 2.(a) ("A candidate for appointment as arbitrator shall ... disclose relevant positions taken in published works or in expert testimony."); CANON II, Cmt. 2 ("Arbitrators ... should refrain from stating a definitive position on any particular issue," and must be able to "decide issues presented in the arbitration objectively.").
7. *See* ARIAS-U.S. Rules for the Resolution of U.S. Insurance and Reinsurance Disputes, § 6.4 ("In the event that either Party fails to appoint an arbitrator within thirty (30) days of commencement of the arbitration, the non-defaulting Party will appoint an arbitrator ***to act as the Party-appointed arbitrator for the defaulting Party.***") (Emphasis added.) *See also* Reinsurance Association of America, Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes, § 6.4 (same).
8. For example, Comment 2 to CANON II of the ARIAS-US Code of Conduct provides that "party-appointed arbitrators may be initially predisposed toward the position of the party who appointed them (unless prohibited by the contract)" but should "avoid reaching a judgment on any issues, whether procedural or substantive, until after both parties have had a full and fair opportunity to present their respective positions and the panel has fully deliberated on the issues." Where an arbitrator is appointed via an adverse-selection mechanism, this permissible initial "predisposition" should be understood to refer to the position of the defaulting party, not the selecting party. *ARIAS-U.S. Code of Conduct*, CANONS II, Cmt. 2.
9. 2 Domke on Com, Arb. § 24:1. *See also Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.,* 547 F.Supp.2d 899, (N.D. Ill. 2008) ("It is an arbitrator's prerogative to resign his post if he determines it is in the best interests of the parties to do so.").
10. *See ARIAS-U.S. Code of Conduct*, CANON IV, Cmt. 5.(b) ("In the event that an arbitrator is requested to withdraw by less than all of the parties, the arbitrator should withdraw only when ...the arbitrator, after carefully considering the matter, determines that the reason for the challenge is substantial and would inhibit the arbitrator's ability to act and decide the case fairly..."); JAMS Ethical Guideline VII (arbitrator should withdraw due to insufficient knowledge of relevant procedural or substantive issues, conflict of interest that has not or cannot be waived, inability to maintain impartiality, physical or mental disability, or if procedural or substantive unfairness appears to have irrevocably undermined the integrity of the proceeding; except where these reasons exist, arbitrator should continue to serve in the matter).
11. *ARIAS-U.S. Code of Conduct*, CANON VII.
12. *Id.*, CANON IV, Cmt. 5. Though Comment 5 to CANON IV is not directly on point (as it speaks to withdrawal *after* a panel has been constituted) the circumstances identified therein provide useful guidance for determining whether it is

appropriate for an adversely-selected arbitrator to withdraw even before the umpire is selected.

13. *See, e.g., Wellpoint Health Networks, Inc. v. John Hancock Life Ins. Co.*, 547 F. Supp. 2d 899, 916 (N.D. Ill. 2008) ("In the absence of an express term in the agreement governing the contingency involved in this case, the Court looks to the general intent of the parties, as evidenced by their agreement."), *aff'd* 576 F.3d 643 (7th Cir. 2009).

14. *Id*. at 914.

15. *Id*. at 916.

16. On appeal, the Seventh Circuit affirmed, holding that the objecting party forfeited any challenge to the replacement by failing to file a petition pursuant to Section 5 of the Federal Arbitration Act. 576 F.3d at 647-48.

17. 547 F. Supp. 2d at 916.

18. *See Universal Reinsurance Corp. v. Allstate Ins. Co.*, 16 F.3d 125 (7th Cir. 1994) (enforcing adverse-selection provision because a panel comprised of two arbitrators selected by the non-defaulting party and an umpire chosen by those two party arbitrators "is *exactly* what Universal agreed to when it signed off on the language permitting Allstate to select a second arbitrator if Universal failed to do so within thirty days.") (emphasis in original).

19. This issue also arises when the defaulting party simply fails to appear to defend itself in the arbitration. That scenario is discussed later in this article.

20. *See, e.g.,* American Arbitration Association, Supplementary Procedures for Resolution of Intra-Industry U.S. Reinsurance and Insurance Disputes, pg. 8 (No. 7).

21. *See Pacific Employers Insurance Co. v. Moglia*, 365 B.R. 863 (N. D. Ill. 2007) (appeal dismissed for want of jurisdiction in *Moglia v. Pacific Employers Ins. Co. of North America*, 547 F.3d 835 (2008)); *Indemnity Ins. Co. of North America v. Mandell,* 817 N.Y.S.2d 223 (N.Y. App. Div. 2006).

22. ARIAS-U.S. form Hold Harmless Stipulation (emphasis added).

23. *See Central Nat. Ins. Co. of Omaha v. Whitehall Construction*, 1988 WL 23789, at *5 (N.D. Ill. March 4, 1998) (where bonds provided for joint and several liability of the surety and the principal to the obligee, failure of principal to sign the bonds has no effect on the liability of the surety); *Tanco, Inc. v. Houston Gen. Ins. Co.*, 38 Colo. App. 133, 136 (Colo. Ct. App. 1976) (same).

24. *Moglia*, 365 B.R. at 866; *see also Mandell*, 30 A.D.3d at 1129 ("[T]he hold harmless agreement demanded by the arbitrators gives them no more protection than they are already entitled to under the prevailing rule that arbitrators are immune from liability for acts performed in their arbitral capacity...").

25. *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2d Cir. 1990).

26. *See Lundgren v. Freeman*, 307 F.2d 104, 117 (9th Cir, 1962).

27. *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 724 (E.D. Pa. 1982) (internal quotations omitted).

28. *See Moglia*, 547 F.3d at 836 ("a hold-harmless agreement ... not only forbids suit against the arbitrators (a contractual supplement to the immunity that arbitrators enjoy at common law) but also requires indemnification of arbitrators sued in the teeth of that immunity, should they incur legal expenses to defend themselves") (internal citations omitted).

29. *See generally* Robert M. Hall, Arbitral Immunity at Common Law, ARIAS Quarterly, Third Qtr. 2006.

30. We say "in the first instance" because, in all likelihood, the selecting party would seek to recover any fees it pays to the adversely-selected arbitrator, as well as half of the umpire's fee, as part of the ultimate award.

31. *ARIAS-U.S. Code of Conduct*, CANON X, Cmt. 2.

32. *Id.,* CANON II.

33. *Id.*, Cmt. 2.

34. *Id.*; *see also, e.g., id.,* CANON X ("Arbitrators should make decisions justly, exercise independent judgment and not permit outside pressure to affect decisions.").

35. There is no real question that a panel may hear and decide the case notwithstanding the failure of a party to appear as long as that party was duly notified and the arbitration agreement and/or applicable rules or statutes permit it. *See, e.g., Capozio v. American Arbitration Association,* 490 A.2d 611, 618 (D.D.C. 1985) (upholding arbitration award issued on an *ex parte* basis where the defaulting party was properly notified and the arbitration agreement incorporated the AAA rules.). And while Section 4 of the FAA provides that an aggrieved party may initiate court proceedings to compel a defaulting party to arbitrate, 9 U.S.C.A. § 4, courts have consistently held that this procedure is permissive and not mandatory. *See Amalgamated Meat Cutters and Butcher Workmen of N.A. v. Penobscot Poultry Co.*, 200 F. Supp. 879, 882-83 (D. Maine 1961) (citing multiple court of appeals decisions in which "the court held that the terms of Section 4 of the Arbitration Act were permissive and not mandatory, and that it was not necessary for the aggrieved party to initiate court proceedings under Section 4 before proceeding to arbitration in accordance with the terms of its contract.").

36. *See, e.g., Hernandez v. Gaucho*, 2013 WL 951145, at *3 (Mich. Ct. of App. Feb. 19, 2013).

37. *See, e.g., Medicine Shoppe Intern., Inc. v. Prescription Shoppes, LLC*, 2015 WL 901457, at * (E.D. Mo. Mar. 3, 2015) (holding that "under Rule 15 of the USA&M Arbitration rules, when one party defaults an award may be made in the absence of that party *provided the non-defaulting party submits evidence supporting its claims*.") (emphasis added); American Arbitration Association Commercial Arbitration Rules and Mediation Procedures, R-31 ("An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.").

38. *See, e.g., Harmer v. Reynaud*, 2004 WL 2223046, at *10 (Cal. Ct. App. Oct. 5, 2004) (noting that, pursuant to the California Rules of Court, "[i]n the event of a default by defendant, the arbitrator shall require the plaintiff to submit such evidence as may be appropriate for the making of an award.").

39. *See, e.g., Transamerica Ins. Co. v. Kemper Ins. Co.*, 79 A.D.2d 69, 72 (4th Dept. 1981) (holding that New York regulations governing mandatory arbitration "do not give the arbitrators authority to default a party...").

40. Unif. Arbitration Act (2000) § 15 (c).

41. *Trustees of New York City Dist. Council of Carpenters Pension Fund v. Metropolitan Fine Mill Work Corp.*, 2015 WL 2234466, at *3-4 (S.D.N.Y. May 12, 2015). *See also Trustees of New York City Dist. Council of Carpenters Pension Fund v. Anthony Rivara Contracting LLC*, 2014 WL 4369087, at *3 (S.D.N.Y. Sept. 3, 2014) (noting that "[t]he arbitrator's opinion reflects a considered judgment, reached after reviewing the substantial and credible evidence submitted by the petitioners.").

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practical tips

Susan Grondine-Dauwer

Practical Tips: Managing Telephonic Organizational Meetings

By Susan Grondine-Dauwer

An organizational meeting of the disputing parties, their counsel and the to be confirmed arbitration panel has long been an accepted practice in reinsurance arbitrations and the best collaborative tool for laying out the administration of a dispute. Balancing effectiveness with economy, however, many parties now forego the traditional in-person organizational meeting in favor of less costly telephonic proceeding. Everyone involved need not travel beyond their offices, saving both time and money, and as a result, makes for quicker agreement to a mutually acceptable date.

The benefits of telephonic meetings, however, can only be maximized through a well thought-out plan, and umpires and party arbitrators must offer a clear plan that will enable them to do their job. The plan should not only include the typical cadre of topics found in the ARIAS suggested format for in-person meetings, but take into consideration the subtle challenges that running a meeting via conference call presents.

While organizational meetings can vary in terms of length, the bespoke nature of the underlying disputes, contractual requirements and make-up of the panel, the standard ARIAS sample meeting agenda form (3.1) can easily be revised to suit case needs. Offered below is a modified format that may prove helpful to panels organizing a meeting by conference call.

Logistics

Add to the agenda the call details such as the time, dial-in information and individual contact information of those who will be in attendance, including the court reporter. (Having a record of the call is important not only for the parties, but for the overall administration of the case. The temptation to avoid further costs by skipping the reporting service is not recommended.) It should be noted that having the meeting by telephone is without prejudice to the contract(s) venue provision. It is also recommended that everyone who will be attending confirm that they will be in a "quiet" place for the call. Background noise disrupts any conference call and can make it particularly challenging for a reporter to follow what is being said. Along those lines, the umpire, in running the meeting should make sure that everyone clearly introduce themselves at the beginning of the meeting and restate their name for the reporter and the group whenever beginning to speak.

Disclosures

Rather than wait for the conference call to go through the panel's disclosures, advance written disclosures by the panel are recommended. The party's arbitrator can exchange drafts with the umpire and make sure they are as complete as possible. Counsel will have an opportunity to review and be prepared with questions and the panel can easily provide oral updates during the call if necessary. The written disclosures can then be incorporated into the record by the reporter.

Common Topics

After a formal acceptance of the panel, the parties and their counsel can work through the typical forms and issues addressed at organizational meetings such as the Hold Harmless Agreement, Confidentiality Agreement and Affida-

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vits, Ex Parte communications, and any other administrative points unique to the case.

For many disputes, a well-rounded and well-written Position Statement should cover much of what the Panel will need to know at the outset of the case. And while it is typical to spend time at the organizational meeting with counsel restating the Parties' positions, doing this by phone can lose things in translation. Suggesting a more robust, yet focused set of Position Statements may allow the Panel and the Parties to forego an extensive rehash of the statements and move the meeting along to case management issues such as the overall schedule, discovery plan, motion practice (if any), expectations for witness testimony, hearing date, length and location, etc. and the resolution of any known disputes regarding the same. That being said, reasonable "limits" on Position Statements are advised (i.e., 10 pages plus exhibits with a mutually agreed set of the subject contracts).

For telephonic meetings, the written agenda to be followed by those on the call should be as thorough and complete as possible. Topics and sub-topics should be listed so that the Panel ensures the discussion and consideration of all aspects of the case's schedule, activities and management. Having a detailed road map is critical to managing a conference call meeting with (many times) 8-10 people in attendance.

Substantive Motions

Should the matter involve preliminary motion(s) by one party or another, the Panel should consider whether it would be appropriate to handle the presentation of the motions by telephone. Requests for security, collateral estoppel, consolidation, etc. may require a more robust oral argument than paper submission. If there are substantive issues to be addressed by the Panel at the organizational meeting, it may be advisable to opt for an in-person meeting.

Either way, a successful and well-run in-person or telephonic organizational meeting depends upon the proper advance preparation and considered management of the Panel and Umpire. ◆

editor's comments, cont.

Masters, who review the case law. The short answer is: "It depends."

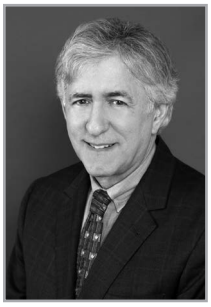
Wouldn't it be wonderful if there was a quick, easy and guaranteed means of bringing arbitrations to a swift conclusion? Dan Perry and Aluyah Imoisili challenge parties to consider achieving these goals by voluntarily agreeing to adopt procedures similar to "offer of judgment" statutes. As the authors explain in their very interesting article, one party, typically the defendant, proposes a pre-trial settlement offer called an "offer of judgment" to the other party. If the other party rejects the offer and it turns out to be more favorable to such party than the amount the court eventually awards, the proposing party is entitled to recover certain litigation expenses from the party to which the offer was made. In effect, offers of judgment give a court the ability to penalize a recalcitrant party for refusing to accept a good faith settlement offer and rewards an enterprising party for taking the initiative to attempt to settle the matter before trial. Some jurisdictions restrict the right to make an offer of judgment to the defendant, while others allow either party to do so. Interesting scenarios may arise when parties make competing offers. In an arbitration there are no rules regarding offers of judgment, leaving parties free to custom tailor them as they wish. Given that the adoption of an offer of judgment process requires the agreement of both parties, it remains to be seen whether many will opt to take up the authors' challenge.

Is a statute of limitations defense for a court or a panel of arbitrators to decide? For the answer we conclude this edition of the *Quarterly* with a column written by Robert DiUbaldo and Jeanne Kohler of the ARIAS Law Committee on the arbitrability of statutes of limitations in reinsurance disputes.

In this edition of the *Quarterly* we've been able to present an array of articles that I hope you will find to be interesting, informative and helpful. The *Quarterly* depends on articles written by its members. Not only would I like to thank those who have contributed to this edition but to strongly encourage others to contribute in the future. If you're interested in penning an article or have suggestions for topics for articles you'd like to see, please contact me at tomstillman@aol.com. ◆

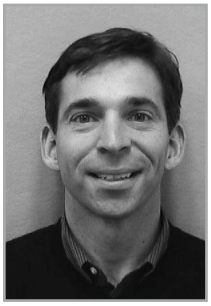
symposium

How Much Process Is Due? Procedural Issues In Arbitrations



Peter Chaffetz, Esq.

Paul C. Thomson, III



James Scrimgeour, Esq.

Katherine Lee Billingham, Esq.

By Katherine Billingham, Jamie Scrimgeour and Paul Thomson, moderated by Peter Chaffetz

MR. CHAFFETZ: Everyone will agree that arbitration should focus on the merits of the parties' disputes. Unavoidably though, arbitration is a process, and virtually every case also involves ongoing dispute over what the scope of that process should be. How much document discovery is reasonable? How many depositions will there be? How much scrutiny should the panel give to claims of privilege? Does the panel's concern to ensure that it allows due process sometimes lead to too much process relative to what is at issue?

These endemic procedural disputes can consume substantial attorney and arbitrator time and materially increase the cost of the proceeding. Counsel and parties frequently complain about this aspect of arbitration, even though they necessarily are a contributing source of the problem.

The ARIAS *Quarterly* Editorial Board thought that it would be useful to hear what arbitrators themselves think about the question, "How Much Process is Due" We therefore convened a panel of three arbitrators who have participated in reinsurance arbitrations in various roles and who come from different backgrounds to engage in a conversation about these issues. Our three panelists are Kathy Billingham, Jamie Scrimgeour and Paul Thomson. Peter Chaffetz of Chaffetz Lindsey agreed to moderate that discussion, which took place on October 20, 2015. We present an edited transcript here.

Does Arbitrators' Fear of Vacation Proceedings Affect Their Procedural Rulings?

MR. CHAFFETZ: The due process standard is embodied in Section 10.C of the FAA, which provides for vacation of an award:

> where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.

There is a feeling among some counsel that arbitrators have an exaggerated fear of being reversed under this statutory standard, and that this has led to an unnecessary escalation of proceedings. So to start our conversation, I will ask each of the panelists whether they agree with that proposition.

MR. THOMSON: Arbitrators are aware that their work may, under narrow circumstances, be reviewed and, like judges, they do not want to be reversed. That does not mean, however, that everything thing we do is motivated by, or factors into the prospect of, such a challenge. My philosophy is to abide by the parties' arbitration agreement, apply industry custom and practice as appropriate, and make decisions based on what I think is fair given the evidence presented. Based on the arbitrations that I have been involved in, the panel and the parties' counsel work

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cooperatively to assure that due process is afforded the parties and that the disputed issues are given a fair and full consideration, both in the presentation of the parties' competing positions and the consideration of everything presented to the panel.

MR. CHAFFETZ: I'm going to push back a little, Paul. My concern, and I have certainly heard others who share this view, is not that there is a problem with parties getting due process, but rather the opposite -- that the concern over due process has led to an undue expansion of the proceedings. I gather from what you just said that you don't think that's a real concern?

MR. THOMSON: Personally, I don't. We have to remember that arbitration is being done by agreement and the parties can agree to how much or little they want to make the arbitration look or feel like litigation. Assuming the parties cannot agree, experienced panels, acting affirmatively, should put in place and then require all to adhere to reasonable and detailed schedules that frame how the arbitration will be conducted. The panel must strongly communicate that expanding or delaying the process is not acceptable and address those process-related elements that might lead to problems later on up front and early in the process.

MR. SCRIMGEOUR: First off, I think that most arbitrators understand that the actual chances of a decision being overturned under the FAA rule that you cited, Peter, are very slim. I think that the bigger concern, from an arbitrator's perspective is a fear that these decisions are going to be made public if they are challenged.

And even if their decisions are entirely defensible and reasonable -- and they usually are -- they still are made public and sometimes without sufficient context to avoid creating misimpressions. And so what happens is that the arbitrator's opinions on a particular matter are now potentially open to the public, for use by future litigants. This could potentially cause arbitrators to lose appointments or be stricken from umpire slates in future arbitrations.

In addition, the umpire is going to suffer some injury to reputation, whether it's warranted or not, because there will be folks who are disgruntled. There's going to be the inner circle of law firms and companies that were on the receiving end of whatever the decision was. So I think that it's not really the fear of reversal. It's the fear of publicity.

But I do think the result is the same because a party is more likely to challenge an award if it is unhappy with the process. There is an escalation of proceedings. I may disagree with Paul here a bit, but my feeling is that some arbitrators tend to do more than they need to, to allow folks perhaps too much discovery, perhaps too many depositions, perhaps not enough effort to focus discovery, because in the back of their minds they are thinking this decision could become public and it may not be popular with everyone.

MR. THOMSON: I want to comment on what Jamie said. Rather than challenges brought on due process bases, there has been a fairly recent trend of prevailing parties rushing to court to enforce panel awards that results in the disclosure of private and confidential arbitration information, including awards and the identities of the parties, panel members and counsel. That development certainly adds an element of concern for the industry about whether it is any longer reasonable to assume that there will be confidentiality of the process. It's a given that when courts become involved, there is a strong competing interest to keep things that are in the public domain accessible and transparent. The end run around confidentiality orders and/or agreements is perhaps a larger and more prevalent problem as respects the "publicity" concerns that Jamie raises. Other than cases that we have all read recently, I cannot recall from personal experience where vacatur on due process grounds was a great concern. I think that's so because the parties and panel members work very well together and are committed to really get the process and results right.

MS. BILLINGHAM: I agree with Jamie that the panel is mindful not only of the possibility of being overturned, even though slim, but the potential for challenge itself, and also there is sometimes a concern about upsetting one law firm or another, and this tends to drive compromises on some level. Having said that, panels generally try to do the right thing, and to do the best they can to manage discovery issues fairly so that decisions are reasonably defensible. Panels do routinely set limits. Recently, I was the umpire in a case where a party was asking for records on claims unrelated to that party. The panel said no, especially since course of conduct and/or general claims guidelines had not been issues in the case.

Potential Impact of Revisions to the Federal Rules of Civil Procedure

MR. CHAFFETZ: When we were discussing among ourselves to get ready for this conversation, Jamie directed our attention to the revised Federal Rules of Civil Procedure which now move the requirement of "proportionality," which I take to mean cost-benefit analysis, into the definition of what is discoverable under Rule 26(b). Other changes in the amended rules appear to be aimed at reducing the burden of discovery.

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Katherine Lee Billingham, Esq.

Katherine Lee Billingham is Vice President and General Counsel of Scottish Re (a reinsurance company) and Principal of KB ReSolutions, Inc. She is an ARIAS-certified arbitrator and has had extensive experience as an arbitrator, umpire, and mediator in both reinsurance and direct insurance disputes, including both P&C and Life matters.

Do you think that arbitration panels will be receptive to the new emphasis on cost benefit analysis in discovery that the federal courts are going to be implementing on December 1?

MR. SCRIMGEOUR: Well, I hope so. In fact, we already have that type of guidance. If you look at the ARIAS Practical Guide, Chapter 4, Comment E, it reads very much like the new Federal Rules. It acknowledges that the arbitrator has great discretion but directs arbitrators to "exercise the discretion to strike an appropriate balance between the relevant discovery necessary to the respective cases and protecting the streamlined, cost-effective intent of the arbitration process." So this is what arbitrators should already be doing.

With respect to the Federal Rules of Civil Procedure changes, I have a couple of observations I would like to share. First, ceding companies, reinsurers and many corporations have signed onto letters in support of the proposed rules. They signed on to the stated purpose of the proposal as well – which was to reduce discovery costs and make discovery more efficient.

So in my opinion arbitrators should keep this in mind when approaching expensive discovery that is unlikely to lead to evidence that goes to a material issue in the case – especially when the amount in controversy is relatively small. It just makes sense. We need to figure out a way to resolve these smaller dollar issues without spending the same amount of money that's at issue in discovery costs.

MS. BILLINGHAM: I agree that arbitrators will take guidance from the Federal Rules. I also agree that the new Federal Rules should encourage panels to put limits on broad discovery requests, since they have done away with the broad "reasonably calculated to lead to the discovery of admissible evidence" standard. New Rule 26(B)(1) now authorizes discovery of "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... ."

MR. THOMSON: I find it interesting that we now look to the Federal Rules for guidance. As to the Federal Rule amendments that Jamie and Kathy mentioned regarding proportional discovery, I think that's where most arbitration panels that I've served on have been all along. I go back to the early '80s when I first was involved in arbitrations between ceding companies and reinsurers. At that time, there were not too many, maybe two or three or four arbitrations that I can recall throughout the '80s, that my company became involved in. And in those instances where it did, there was literally no discovery other than producing the documents that were accessible via the customary operation of the reinsurance contracts' access to records clauses. And there were no depositions. Documents were exchanged and reviewed, and the parties made competing presentations in one afternoon. Arbitrators listened to and questioned both sides, and decisions were made. Obviously, we have moved the process of arbitrating disputes into a very different environment over these past 30 years. In particular, I remember in 1990, when I first was serving on arbitration panels, the panel members were very much inclined to keep the process lean and to encourage that the parties adhere to schedules that kept the process efficient. And we weren't confronted by expansive privilege claims or extensive motion practice.

Even operating in today's environment, as a general matter, I think the panels have done a pretty good job -- in my experience -- of keeping the process focused and being diligent by not letting the process itself go to excesses.

This is dependent, however, on the composition of the panel. If you have experienced and confident and assertive individuals, the process can work pretty efficiently. Based on my experience, one could say that the new proportionality rule in the Federal Rules is a little late to the party.

Determining the Right Number of Depositions

MR. SCRIMGEOUR: I, too, am aware of the good old days where reinsurers only demanded access to privileged documents in very rare circumstances and ceding Companies were not overly aggressive in their claims of privilege. But nowadays, in light of the way discovery has escalated, do you still see parties asking or agreeing that there should be no depositions?

MR. THOMSON: Yes. Again, I go back to how the process gets joined initially. And I think that's a critical period for any arbitration. The panel can encourage that the parties meet and confer and address those process-related things that can lead to problems with efficiency. I'm seeing more and more, where one side might be targeting five to ten depositions, while the other side might be saying we only need one or two. Panels can say we are going to limit the number of depositions to two or three a side, and should there be a belief by one or both of the parties that additional depositions are needed, either may come to the panel and demonstrate why we should allow additional depositions. And in almost every instance, the parties just don't come back to the panel. And the documents that are going to be of interest to the panel and bear on the issues presented to witnesses are typically transactionally involved in, say, the handling of a claim or the underwriting of a risk. And we end up with a process where, instead of having 10 or 12 witnesses deposed, you have one or two or three from each side, and the process moves right along. But it all starts with the way in which the arbitration process is initially framed and a detailed and realistic schedule is formulated, agreed to and then enforced.

MS. BILLINGHAM: I agree with Paul. I too recall the arbitrations of the mid-80's when depositions were unheard of. There were very few (if any) live witnesses at hearings, and testimony was often introduced via affidavit. Hearings were a couple of days and results were still pretty fair. When issues are not fact-driven, parties should be able to agree to a deposition limit and the panel should set clear expectations during the organizational meeting, subject to reasonable modifications as things develop.

MR. CHAFFETZ: I'm going to take a step out of my role as moderator to respond

to the comments from Paul and the other panelists on the importance of firm leadership or guidance from the panel, and in particular from the umpire. I think most trial lawyers would agree that that is really the key to the parties' satisfaction with the process.

While that approach is not as common in arbitration, there are some arbitrators who have developed a reputation for providing strong guidance when they sit as umpire. And I think those arbitrators get a lot of calls to be umpire because that is really what we need. The bottom line is that arbitration is a product. And we have to make sure that the product is valuable to its users.

Rethinking e-Discovery

Now, I'm going to change the subject slightly. I think we should just have a word on e-discovery. And again, I'm prompted by the changes in the Federal Rules that are designed to address concerns about the burdens of discovery. This can be seen in the way Rule 37(e) approaches the subject of sanctions for failure to maintain electronic records. The new wording provides that in the event a party has failed to maintain electronic records that it should have maintained, the court is only authorized to impose that sanction which is adequate to compensate for the prejudice caused. Sanctions are not supposed to be punitive. However, if the court finds that a party acted with intent to deprive another party of the deleted information's use in litigation, sanctions may include a presumption that the information was unfavorable to the party that lost it, instructing the jury to draw a negative inference against the party, or dismissal of the action or entry of a default judgment.

Kathy, do you think that that standard is consistent with what presently occurs in arbitrations or not?

MS. BILLINGHAM: I agree that the remedy should not be punitive. Also, the problem caused by non-production can sometimes take care of itself, because when it appears that a party's failure to maintain or retain pertinent records is disingenuous, that can affect the party's credibility on all issues, even without any formal sanction or adverse inference ruling. That's the real harm to the recalcitrant party. I would also say that if there is a way to restore the missing data, but that solution drives up discovery costs for the other side, then the panel should consider some form of compensation, especially where the documents sought are clearly relevant. I would consider that type of cost award to be in the nature of a "make whole" remedy and not punitive.

MR. THOMSON: I agree with Kathy. I have served on panels where there have been some issues about e-document preservation and production. And if the manner by which documents are produced markedly increases the costs of the process, that's something that can be addressed by the panel by the way it crafts its award or, as you mentioned, making certain inferences when they deliberate.

MR. SCRIMGEOUR: I agree that the sanctions for failure to maintain electronic data generally shouldn't be punitive. But I also assume that even under the proposed Federal Rules, there has to be an exception to that principle where there was intentional spoliation or deletion of electronic data. Regardless, I think that it's usually within an arbitrator's discretion to award attorneys' fees, and I believe that could be considered where there has been intentional bad faith action to delete relevant records.

Summary Judgment in Arbitration

MR. CHAFFETZ: I'm going to turn our conversation to another topic on which I have heard criticisms from trial lawyers. It has become almost routine to set a pre-hearing schedule that leaves weeks of additional time between the close of discovery and the hearing to accommodate a briefing schedule for potential summary judgment motions. And yet, in my experience, summary judgment motions are rarely granted , certainly much less often in arbitration than in court. Do our panelists agree, and if so what is the reason?

MS. BILLINGHAM: Panels I've served on are seeing more motions for summary judgment. When they are appropriate, I like them, because if nothing else, the panel gets a pretty good preview of the relative positions. Also, even if the panel ultimately denies the motion, the process can assist everyone in focusing on the real issues. Further, I know that some arbitrators are reluctant to grant summary judgment because they think it is unfair not to permit both parties to present their witnesses at a hearing. However, if an umpire is comfortable that summary judgment is warranted by the facts and the controlling contractual language and legal or business principles, then it should be granted. It is unfair even to the losing party to allow it to incur more time and costs in a case the panel now knows it cannot win. Having said that, if it is clear before the briefing that there will be genuine factual issues and the motion will impose unnecessary cost and delay, then a party should refrain from bringing the motion. An astute panel will take a dim view of such a strategy and try to discourage it.

Finally, panels have an obligation to ensure that the process is fair and efficient. Certainly umpires should not be concerned about a reduction in fees due to a truncated case, but unfortunately, I have seen such a dynamic. There will always be more cases for a competent umpire. In a recent case where I served as umpire, there were oral arguments at the final hearing and pre-hearing briefs but no depositions and no live witnesses. That's an alternative approach that can work.

MR. THOMSON: I think there is little doubt that panels have the authority to grant summary adjudication, and in just the past four or five years, I would say that roughly half a dozen or maybe ten matters were decided via summary adjudication of either a particular issue or the entire case. The panel can signal that there may be an issue or that the whole case might be ripe for disposition by motion. I have never been on a panel that refused to hear a motion for summary adjudication. However I have been on panels where we have signaled to the parties that it might not be the most cost-efficient way of proceeding, because the likelihood that summary

adjudication will be granted is, in the panel's judgment, problematic.

MR. CHAFFETZ: I think it happens that when you have a summary judgment motion that the panel knows in advance is almost certain to be denied, this takes up weeks. It's a huge briefing exercise. It takes a lot of panel time. And then you will have to go back and re-brief everything in your pretrial briefs. While Paul has said that panels may discourage the filing of such a motion, why should they be reluctant to direct the parties to skip that phase?

MR. THOMSON: Well, again, it's my experience that in most instances where the panel indicates to the parties that a summary judgment motion might not gain traction with that particular panel on specific issues or a particular issue, the parties usually do not present dispositive motions to us. However, if it is the strong preference of one or both of the parties to present a matter for summary adjudication, it's my experience the panels will hear them.

MR. SCRIMGEOUR: I agree with Paul for the most part, and I also think that summary judgment isn't used quite often enough. I have rarely had the experience where someone has filed for summary judgment and the panel has just denied it and moved on to the hearing. In fact, I'm thinking about the last few years, and I have had six summary judgment motions, five of which were acted upon and resulted in a conclusion of the matter. Only one of them was pushed off to have a final hearing at a later date.

I also agree there's an uptick in the number of summary judgment motions and I think that we should continue to see an increase for the foreseeable future. In general, my view is that parties should do it more often, not less often. But they have to be strategic and smart about the way they do it and signal to the panel early that that's where they are going. I think you should put a marker down with your organizational meeting statement.

If the issue is strictly a contract interpretation question, then two counter-parties operating under the honorable engagement principle should want to have their issue resolved on summary judgment. And so, if you are the umpire and you get a sense that this is the only material dispute is the contract interpretation, then I think the view should be, "all right, let's get to the heart of that." In other circumstances, where there are genuine questions of underwriting intent and it would add something to the hearing to hear from the underwriters, then maybe we have to have their live testimony.

I think it's being used more. And I agree with Paul that most of the time it's being used, it's appropriate and the matter is either resolved or the issues are narrowed considerably for trial by the Panel's decision.

Motion Practice

MR. CHAFFETZ: Now I would like to ask for your views on how the principles of strong case management and cost-benefit analysis come to play in the specific context of discovery motion practice. Do you have any specific guidance for parties seeking to limit discovery?

MR. SCRIMGEOUR: I think part of what is needed is some guidance from the panel initially that discovery needs to be targeted to the issues in dispute. And there needs to be at least some justification provided by the proponent of the discovery as to why it's necessary for the case.

I think it is often more effective for the umpire to help by pushing the parties to address these scope of discovery issues early on. I think that parties are going to be a little more candid with the umpire than when they are negotiating with a counterparty about something. So I think that there is an early role for the panel in that process.

Finally, as far as effective arguments, the lawyer should try to keep the arguments focused on the material issues and whether the discovery that is sought is relevant to the material issues.

MR. THOMSON: I agree that panel has a great opportunity at the organizational meeting to set the tone. We'll have had a chance to review the parties' preliminary position statements. We have a rough idea of what's going to be at issue in the arbitration and what discovery may or may not help move the process along. The panel may signal, very directly, at the organizational meeting, that it is not going to entertain carpet bombing discovery requests. We want laser precision, if possible, in requests for documents and the requesting party should be required to explain why those documents are vital to moving the process forward. Making sure the parties understand that we are not going to accommodate a broad, turnover-every-stone approach to discovery, and that they will need to explain to us why they need certain discovery, dramatically improves the process.

When that tone is established early on and is reinforced throughout, things run efficiently. Along the same limes, I think panels should require monthly status reports that specifically comment on where the parties are with discovery and whether schedule deadlines are being met. The parties should also tell us whether and what categories of documents are or are not being timely produced. Panels should stay involved in the process. If all of a sudden, we are almost three-quarters of the way through the schedule and all sorts of things crop up that increase the costs of the process and cause delays, finger pointing may start at the party level, but blame for the breakdown and inefficiencies is shared by all.

MR. SCRIMGEOUR: And I think now, with the Federal Rules, we have an opportunity as umpires to cite to the principles underlying those rules. And it gives you additional support and confidence that if you exercise your discretion and you do a balancing test -- in a low dollar suit, for example -- that you are not going to be overturned and it's not going to be subject to any significant challenge.

So these rules that are going to be out in December of this year will hopefully be something that the Panels can get behind. They should be familiar with these

principles and put the lawyers on notice that, "we're going to be circumspect to discovery requests and we're going to expect that they are targeted, and that they meet the notions of relevance and proportionality in the new 26(b)(1) rule" which eliminates the "reasonably calculated" standard language. If arbitrators announce that they are aware of that and they intend to strongly support reduced discovery costs at the outset, this is definitely something that will make for a user friendly process.

MR. THOMSON: Just one more thought on that. For the most part, I just bring my business perspective and experience to the disputes, which is what I think the participants in arbitration are looking for. I know from that experience what type of documents and testimony is necessary so that the panel is positioned to make informed and fair decisions. And we'll take it from there, use and apply our collective industry experience and work to get it right.

MS. BILLINGHAM: Jamie made a good point about cases where the dollar value is small. The amount at issue should be taken into consideration when it comes to discovery matters. This is an opportunity for a panel to honor the spirit of why the reinsurance industry opts for arbitration. As Paul said, the panel is charged with bringing common business sense to the process.

MR. CHAFFETZ: I noted Paul's reference to his business perspective and applying business common sense in evaluating these disputes. This reminded me of my early experiences with reinsurance arbitration years ago, in which panels were almost disparaging and some counsel were disparaging of arguments based on the Federal Rules of Evidence or the Rules of Civil Procedure. My impression is that over the years, panels have become more receptive to the argument that these rules are the product of the courts' vast empirical experience with the same issues and that in most cases, their purpose is to reflect the same practical considerations that a businessman would apply.

Paul, are you turned off by an argument based on federal practice?

MR. THOMSON: Well, I think it's important to not lose sight of the fact that the reason we're on the panels is because we bring our business expertise and experience to a disputed issue between parties that are in our business. Many of us are long accustomed to making challenging decisions about cases that involve underlying legal disputes over insurance coverage triggers and viable defenses to potential liabilities. We expect that we will be presented with legal, procedural and factual elements of the at-issue dispute, but we should not lose sight of the fact that we are business people and we need to bring and apply our practical experiences to these matters. That's why we're serving on a panel in the first place. And many treaties contain an honorable engagement clause that relieves the panel from the strict rules of law which is instructive and evidences that the parties intended that any arbitration would be less formal than a court proceeding and run in a way that is informed by, and consistent with, industry custom and practice.

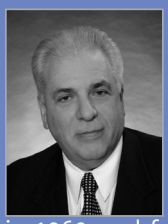
MR. SCRIMGEOUR: I just want to make one point about that. I was merely saying that the FRCP changes provide arbitrators some additional tools to get them to where their business intuition knows is the proper place. Company executives know that the whole purpose of arbitration is to provide a streamlined, cost-effective process for people to resolve their disputes. We see these discovery disputes develop and know through our business experience that the requested discovery is not going to present information material to the dispute, we should have the confidence to shut it down. A recent public example of discovery being severely limited in reinsurance arbitration is the widely discussed arbitration decision from last year where the umpire was retired federal judge John Martin.

So I agree we should be out in front – as arbitrators who know the business – of these efficiency concepts suggested in the revised Federal Rules of Civil Procedure because we're operating under an honorable engagement standard in most cases and are expected to apply our industry knowledge to help resolve disputes, especially discovery disputes. We're applying good faith business principles to resolve these disputes in a fair manner but also resolve them in an efficient manner. Efficiency is one of the major reasons that companies choose arbitration and companies are going to choose arbitrators who are able to provide the efficient process they bargained for. ◆

You won't want to miss the rest of this Symposium, particularly the lively discussion of the participants' viewpoints on privilege. You can read the complete transcript in the electronic version of the *Quarterly* by clicking on www.arias-us.org.

Recently Certified Arbitrators

Joseph M. Goldberg

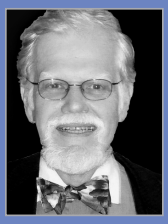


Joseph M. Goldberg is an Assistant Vice President and Assistant General Counsel of Sentry Insurance at its home office in Stevens Point, WI. Amongst his responsibilities are managing the Corporate Legal Department and advising the Reinsurance Department on disputed matters.

After graduating from the University of Michigan in 1969, and from law school at the University of Minnesota in 1974, he litigated insurance matters in private practice in Minneapolis, MN, until joining Sentry Insurance in 1993.

Joseph has frequently been on the faculty of continuing legal education presentations concerning insurance and reinsurance issues offered by the International Association of Defense Counsel (IADC), the Defense Research Institute, the Association of Corporate Counsel and the Minnesota Defense Lawyers Association. He is a past faculty member of the IADC Trial Academy and a past Insurance Vice President and member of the Board of Directors of the IADC.

Paul G. Huck



Paul G. Huck retired from MetLife in October of 2010 after over 22 years divided between the Law Department and U.S. Business during which time he was a trial attorney with over 100 insurance related trials. He represented MetLife on the International Claims Association's Law Committee along with 12 years in a business setting doing a variety of work including enterprise wide projects. Since retiring from MetLife Paul has solely acted as a neutral, including being an arbitrator in over 90 matters and a mediator for over 150 matters. In addition to being a Certified Arbitrator for ARIAS•U.S., Paul is a Fellow of the Chartered Institute of Arbitraors and is active with several domestic and international neutral organizations. He has also been active in training the new arbitration practitioners as well as new mediators. He discussed Alternate Dispute Resolution modes that can be used when dealing with Lloyd's during an ABA sponsored event entitled "A Day at Lloyds." Paul completed a Masters in Psychology.

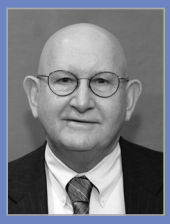
Richard W. Palczynski

Richard W. Palczynski, President & Founder of Seatower Consulting since 2007, provides services to the insurance and reinsurance industry in the areas of expert witness work, due diligence, operations improvement and actuarial consulting. Prior to founding Seatower, Dick was Senior Vice President with Towers Perrin Reinsurance, having joined that firm in March 2004 to offer brokerage and operations advice to Towers' largest clients. Dick served as Group Senior Vice President and Chief Actuary of The Hartford Financial Services Group from 1999- 2003. Prior to joining The Hartford, Dick's career spanned 28 years with the Travelers Property Casualty Corporation, leaving as Executive Vice President in the Claims Services Division. He was also responsible for guiding all aspects of Travelers' Workers' Compensation strategy across all markets and disciplines. Dick also created the Travelers' Alternative Markets Division. He also served as Chief Financial Officer and Chief Actuary of the Commercial Lines Division of Travelers.

Timothy Russell

Tim Russell is the founder and principal of RussellADR, LLC, a dispute resolution and consulting firm in Bryn Mawr, PA. Before founding RussellADR in 2013, Tim practiced law privately for approximately 40 years with several law firms in Philadelphia and in Washington, DC, including Drinker Biddle & Reath, Sonnenschein Nath & Rosenthal, and Spector, Gadon & Rosen; he also served in 1974 as a law clerk to the Honorable Arlin M. Adams on the U.S. Court of Appeals for the Third Circuit, and taught as an adjunct professor at the Georgetown University Law Center. His law practice was concentrated in the area of complex commercial and financial litigation, including extensive involvement in disputes involving commercial general liability insurance (especially disputes over coverage for "long-tail" claims), directors and officers liability, first-party property coverages, various types of errors and omissions policies, and third-party administrator controversies. He also counseled major insurance carriers on such matters as the handling of environmental pollution and toxic tort claims, life and health sales practices, reserving practices, and regulatory compliance.

Edward Zulkey



Ed Zulkey has been practicing insurance law with Baker & McKenzie for his entire career, including the arbitration of reinsurance disputes. He also became the Firm's first General Counsel in 1994. He is listed in *Euromoney Legal Group's Guide to the World's Leading Insurance & Reinsurance Lawyers, Illinois Super Lawyers* as well as *Naifeh and Smith's The Best Lawyers in America*. Ed is the author of "Litigating Insurance Disputes," now in its twelfth edition. He also serves as adjunct professor of law at Northwestern University School of Law. In addition to his certification by ARIAS, he is also certified as an arbitrator by the American Arbitration Association and FINRA. He is a graduate of Northwestern University (B.A.) and the University of Illinois (J.D. with Honors) which has named him as a distinguished alumnus.

ARIAS·U.S. also congratulates **Elaine Caprio,** Caprio Consulting LLC and **John Chaplin**, Compass Reinsurance Consulting, LLC on their recent certification as ARIAS·U.S. Certified Neutral Arbitrators.

news & notices

ARIAS·U.S. Fall 2015 Conference Draws More Than 400 Attendees!

The 2015 ARIAS·U.S. Fall Conference, entitled "Let's Get Engaged!" drew more than 400 attendees to New York's Hilton Midtown Hotel on November 12th and 13th. The Conference kicked off with an organizational update from outgoing Board Chair Eric Kobrick and President Elizabeth Mullins sharing news about the proposed change to the ARIAS Bylaws that would increase the total number of ARIAS Board of Directors from nine to eleven members. Mullins and Kobrick explained that similar to the current Bylaws, at the time of the election, three directors will be executives of ceding insurers, three directors will be executives of professional reinsurers, and three directors will be partners in private law practice. The additional two new directors will be, at the time of the election, ARIAS·U.S. Certified Arbitrators who are not employees of ceding insurers, professional reinsurers or partners in private law practice.

Open Forum Planned For Discussion of Proposed By-Laws Change

As many of you know, the Board announced a proposed amendment to the By-Laws which would add 2 seats to the Board for arbitrators unaffiliated with any company. A forum was held on December 8th and another is scheduled for January 12, 2016 for the purpose of gaining input and discussion from the membership on this change. It is anticipated that voting could begin soon after these forums are concluded. Two-thirds of the membership are required to pass this amendment. ARIAS strongly urges each member to cast a vote.

ARIAS•U.S. Congratulates Newly Elected and Re-elected Board of Directors and Officers

Elizabeth A. Mullins, Managing Director and head of Global Dispute Resolution & Litigation at Swiss Re America Holding Corporation (Swiss Re), was elected Chairwoman of ARIAS·U.S. at its 2015 Fall Conference in New York City, succeeding Eric Kobrick. James I. Rubin, Vice President, Butler Rubin Saltarelli & Boyd LLP was elected President, succeeding Ms. Mullins.

The Board welcomed Scott Birrell, Vice President and Associate Group General Counsel | Claim Legal (Reinsurance) Travelers, to the Board as its newest member and reelected Michael Frantz and Jim Rubin to their second three-year terms. In addition to Ms. Mullins as Chairwoman and Mr. Rubin as President, Ann Field, Director of the Reinsurance Claims and Legal Department, Zurich Insurance Group, and Brian Snover, Senior Vice President and General Counsel of the Reinsurance Division, Berkshire Hathaway Group will round out the Board Executive Committee as Vice Presidents. ◆


Elizabeth Mullins


James I. Rubin


Mike Franz


Scott Birrell

article

May a Court Enjoin Arbitration as Precluded by a Prior Confirmed Arbitration Award?

By Everett J. Cygal and Catherine M. Masters

Everett J. Cygal

Catherine M. Masters

Reinsurance treaties typically contain broad agreements to arbitrate all disputes, reinforced by a pro-arbitration rule of construction.[1] Once an arbitration award is issued, it may be presented to a court for confirmation and entry as a judgment. The Federal Arbitration Act ("FAA") specifies that such a "judgment shall be docketed as if it was rendered in an action," and

> [t]he judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.[2]

The status of a confirmed arbitration award as a judgment, with "the same force and effect" as any court-rendered judgment, presents interesting and important questions concerning judicial power in subsequent disputes between the parties to the arbitration agreement. If the parties have a subsequent dispute, must it be arbitrated? Does the prior judgment (the confirmed award) have preclusive force, under collateral estoppel or res judicata doctrines? Who decides — the court or arbitrators — whether or to what extent the prior judgment has preclusive force? May the court enforce its judgment by enjoining further arbitration as precluded?

The tension between the two operative rules — the rule requiring arbitration of all disputes when the parties have entered a broad arbitration agreement, and the rule that prior judgments have preclusive force — has been extensively addressed by the courts, yet continues to present controversies.

The Allocation of "Gateway" Issues Between Courts and Arbitrators

First, some background principles. Under a broad arbitration agreement, any dispute between the parties is arbitrable. When a dispute arises, a party may demand arbitration under the terms of the arbitration agreement, and if the counterparty does not agree to arbitrate, the first party may petition a court to compel arbitration under Section 4 of the FAA. Conversely, if one of the parties files a lawsuit to resolve a dispute, the other may timely ask the court to compel arbitration (under FAA § 4) and to halt the judicial proceedings (under FAA § 3[3]). In either case, as the Supreme Court made clear in *Howsam v. Dean Witter,*[4] the two "substantive" "gateway" arbitrability issues — (1) whether a valid arbitration agreement exists and (2) whether it encompasses the dispute — are for the court to decide (unless the parties expressly allocated these issues to the arbitrator).

Howsam makes clear that, under the strong pro-arbitration principles embodied in the FAA, all further gateway (or threshold) issues that must be addressed before arbitration begins — "procedural" questions, such as "waiver, delay, or a like defense to arbitrability"[5] and "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate"[6] — are for the arbitrator, rather than the court, to decide.[7]

The Preclusive Effect of a Prior Arbitration Award

The parties to a contract with an arbitration clause may have multiple disputes over time. The nature of reinsurance treaties — requiring a series of performance obligations — especially presents the possibility of such a series of disputes. In this scenario, the preclusive force of an earlier arbitration award may, and often does, become an issue. For example, a later dispute may present questions already considered in a prior arbitration, such as interpretation of a key contract term. A party that prevailed in the prior arbitration may resist further arbitration on the ground that the issue was already settled, and contend that it is entitled to prevail in all further disputes. On

the other hand, a party may contend that its current dispute presents issues that are not identical to those in the prior dispute. A party may even claim that the other party improperly withheld information in the prior arbitration, and that a new arbitration panel would reach a different result based on a fuller factual record. Some tribunal must decide the preclusive force, if any, of the prior arbitration.

Whether a prior arbitration award has preclusive force is a "gateway" issue, in the sense that it is a threshold question that should be answered before any subsequent arbitration commences. *Howsam* established that (unless the parties expressly agree otherwise) substantive gateway issues are for the court, and procedural gateway issues are for the arbitrators. Preclusion is not one of the two substantive gateway issues reserved to the court (whether a valid arbitration agreement exists and whether the substantive dispute is within the agreement's scope), but is more like the procedural gateway issues allocated to the arbitrator (such as estoppel).

The Preclusive Effect of a Prior Judicial Proceeding

The question "who decides preclusion" also arises when there are serial proceedings but not serial arbitrations — i.e., when there is first a court proceeding and judgment and then an arbitration — and courts have analyzed this situation differently. When there is a prior court judgment and a subsequent arbitration, courts have held that the preclusive effect of the judgment is for the court itself to decide. For example, in the *Y & A Group Securities Litigation,* an investor class action against an issuer of securities resulted in a consent judgment and release; subsequently the lead plaintiff asserted an arbitration claim against his broker.[8] When the arbitrator denied the broker's motion to dismiss the arbitration claim as released, the broker successfully asked the court that had entered the judgment to enjoin the arbitration. The Eighth Circuit affirmed, because "even when arbitration is involved, federal '[c]ourts should not have to stand by while parties re-assert claims that have already been resolved.' . . . No matter what, courts have the power to defend their judgments as res judicata, including the power to enjoin or stay subsequent arbitrations."[9] The Second Circuit reached a similar conclusion in *In re American Express Financial Advisors Securities Litigation*, holding that, after a class action settlement and judgment in court, "determining the scope of the [plaintiffs'] entitlement to arbitrate . . . is a question for judicial resolution."[10]

These cases' conclusion flows from the principle that the preclusive effect of a judgment is determined by the tribunal that rendered it.

The Preclusive Effect of a Prior Judgment Confirming an Arbitration Award

Assuming that it is for a rendering tribunal to determine the preclusive effect of its judgment, how does that principle apply to judgments entered under FAA § 13, when a court confirms an arbitration award? FAA § 13 says that such a judgment "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." And yet the court engages in little or no analysis when it confirms an arbitration award, and has no particular expertise, investment, or insight regarding its content. In the *Abu Dhabi Investment Authority* case, the Second Circuit analyzed this issue in depth, concluding that — despite FAA § 13's terms — a judgment confirming an arbitration award does not give the court authority to determine its preclusive effect:

> The district court's . . . judgment . . . simply confirmed the arbitration award . . . [in] a summary proceeding that merely ma[de] . . . a final arbitration award a judgment of the court. . . . [I]n confirming the award, the district court did not review the merits of any of [the] substantive claims or the context in which those claims arose. . . . Under these circumstances, a district court unfamiliar with the underlying circumstances, transactions, and claims, is not the best interpreter of what was decided in the arbitration proceedings, the result of which it merely confirmed.[11]

Other courts have used the same analysis of judgments that merely confirm arbitration awards.[12]

The tension between the two operative rules — the rule requiring arbitration of all disputes when the parties have entered a broad arbitration agreement, and the rule that prior judgments have preclusive force — has been extensively addressed by the courts, yet continues to present controversies.

Courts' Limited Power to Enjoin Arbitration Proceedings

As *Howsam* makes clear, a court has the authority, in considering the substantive gateway arbitrability issues, to determine that the parties did not enter a valid arbitration agreement, or that the agreement does not encompass the dispute at hand.[13] The FAA expressly provides that a court may compel arbitration if it determines that a dispute is arbitrable,[14] but it does not expressly provide that a court may enjoin arbitration if it determines that a dispute is not arbitrable. Nevertheless, courts have decided that they have power to effectuate the FAA by

The court may not nip an arbitration in the bud, and must defer until judicial review any arguments about whether the arbitrators should have found preclusion — even though such review is severely limited.

enjoining arbitration when they determine that a dispute is not arbitrable. As the Second Circuit has held, "[i]f the parties . . . have not consented to arbitrate a claim, the district court was not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right."[15] Other courts agree.[16] But this power to enjoin arbitration is limited to enforcement of a court's gateway decision regarding arbitrability.

Injunctions Under the All Writs Act

Courts have also enjoined arbitration in order to enforce their own prior judgments (such as in the Eighth Circuit's *Y & A Group* case, the Second Circuit's *In re American Express* case, and the Eleventh Circuit's *Kelly v. Merrill Lynch* case). They have done so under the All Writs Act, 28 U.S.C. § 1651, which allows courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions."[17] But this rationale (that a court may enjoin arbitration based on the preclusive force of its own prior judgment) may not apply as a basis to enjoin arbitration as precluded by a prior arbitration.

The Second Circuit's recent *Abu Dhabi* decision discussed the All Writs Act at length, and concluded that, when the only judgment at issue is a judgment confirming an arbitration award under FAA § 13, rather than a judgment resulting from a court's own adjudication, the All Writs Act does not allow the court to enjoin arbitration on preclusion grounds.[18]

The Second Circuit concluded that "[t]he FAA's policy favoring arbitration and our precedents interpreting that policy indicate that it is the arbitrators, not the federal courts, who ordinarily should determine the claim-preclusive effect of a federal judgment that confirms an arbitration award."[19] Thus, the court may not nip an arbitration in the bud, and must defer until judicial review any arguments about whether the arbitrators should have found preclusion — even though such review is severely limited.[20]

The full version of this article can be found in the electronic version of the* Quarterly*, by visiting ARIAS·U.S.' website, www.arias-us.org.

End Notes

1. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").
2. 9 U.S.C. § 13.
3. The circuits are split on whether, if *all* issues are referred to arbitration, the court must stay the litigation or may dismiss the case.
4. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).
5. *Id.* at 84.
6. *Id.* at 85.
7. *See also Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452-53 (2003) (plurality opinion) (any "procedural gateway matter" is for the arbitrator to decide).
8. *In re Y & A Group Sec. Litig.*, 38 F.3d 380, 381-82 (8th Cir. 1994).
9. *Id.* at 382.
10. *In re Am. Express. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 131 (2d Cir. 2011). *See also Kelly v. Merrill Lynch, Pierce, Fenner & Smith*, 985 F.2d 1067, 1069 (11th Cir. 1993) (same).
11. *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d at 132-33 (citations, internal quotation marks, and footnotes omitted).
12. *See Emp'rs Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.,* 744 F.3d 25, 28-29 (1st Cir. 2014) (since a federal judgment confirming an arbitration award "does not address the steps leading to the decision on the merits," the judgment does not "give the federal court the exclusive power to determine the preclusive effect of the arbitration"); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.,* 207 F.3d 1126, 1133-34 (9th Cir. 2000) (since "the district court merely confirmed the decision issued by another entity, the arbitrator," it "was not uniquely qualified to ascertain [the decision's] scope and preclusive effect").
13. *Howsam,* 537 U.S. at 84.
14. 9 U.S.C. § 3.
15. *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 141 (2d Cir. 2011) (citing .
16. *See, e.g., Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.,* 643 F.2d 863, 868 (1st Cir. 1981) ; *Paine-Webber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)
17. *See, e.g., In re Y & A Group Sec. Litig.*, 38 F.3d at 382-83 ("The All Writs Act makes plain that each federal court is the sole arbiter of how to protect its own judgments: federal courts 'may issue all writs necessary . . . in aid of their respective jurisdictions. . . .' 28 U.S.C. § 1651(a).").
18. Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d at 131-32.
19. *Id.* at 131.
20. *Id.* at 132 & n.4. *Cf. Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 720, 722 (6th Cir. 2014) (error to entertain interlocutory challenge to arbitration; arguments about partiality must await review after arbitration is complete).

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Everett J. Cygal

Everett Cygal is a partner in the Chicago law firm of Schiff Hardin LLP and the leader of the firm's Insurance and Reinsurance Practice Group. He is a graduate of the University of Chicago and Northwestern University School of Law (cum laude, Order of the Coif) and a member of the bars of Illinois, New York and numerous federal courts. Domestic and global insurance and reinsurance companies (cedents and reinsurers) have hired Everett to try exceptionally complex, high-exposure cases before trial courts and arbitration panels. Everett's trials for these clients have included a vast array of property and casualty and life and health issues.

Catherine M. Masters

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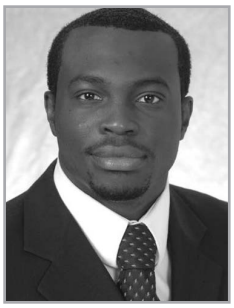
article

Applying Cost-Shifting "Offers of Judgment" in ARIAS Arbitrations

Daniel M. Perry



Aluyah I. Imoisili

By Daniel M. Perry and Aluyah I. Imoisili

Insurers and reinsurers typically choose arbitration believing it to be a cheaper dispute resolution alternative to conventional litigation. But, in our experience, arbitrations are often now just as expensive as litigation. With the parties' insistence on expansive discovery, their more frequent use of paid expert witnesses, and the inability to secure speedy resolution of non-meritorious cases, the costs of arbitrating disputes to finality are often far in excess of what the parties anticipated when they inserted mandatory arbitration provisions in their contracts. Arbitrators themselves have no real ability to effectively urge parties to avoid these costs by resolving disputes prior to the arbitration hearing. And unless the parties' contract entitles the prevailing party to recoup its legal costs, many arbitrators remain reluctant to award them to either party, especially when they do not believe that either side has engaged in bad faith.[1] The result is an arbitration process that does not serve the parties' interest in creating a more cost-effective substitute to litigation.

One solution to reduce arbitration costs and to encourage settlement is to adopt "offer of judgment" settlement procedures utilized in federal and many state courts. Most courts, unlike arbitration providers, have the ability to, in effect, punish a recalcitrant plaintiff for refusing to accept a good faith settlement offer from a defendant and reward an enterprising defendant for taking the initiative to attempt to settle the matter before trial. This procedural tool is known as an "offer of judgment" or "offer to compromise." "Offer of judgment" statutes authorize a defendant to propose to a plaintiff a pre-trial settlement offer that, if the plaintiff rejects and the offer turns out to be better (more beneficial to the plaintiff) than the damages the court eventually awards, entitles the defendant to recover from the plaintiff certain litigation expenses that the defendant incurs after the time that it made the offer. As one court put it, these rules:

> encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer. [] This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.[2]

In federal courts, under Rule 68 of the Federal Rules of Civil Procedure, an "offer of judgment" works as follows. At least fourteen days prior to the commencement of trial, a defendant may serve on the plaintiff, but not file with the court, a written settlement proposal that contemplates a judgment will be entered against it.[3] The plaintiff may either accept the offer as-is or reject it. If the plaintiff accepts the offer, the parties then file with the court a notice of the offer and acceptance in the form of an "offer of judgment" that the court enters as the judgment in the case.[4] If the plaintiff rejects the offer, the outcome depends on the ultimate trial result. If the plaintiff wins the trial, and the amount of the judgment exceeds the amount the defendant offered as a compromise, neither side suffers a penalty. If, on the other hand, the amount of the judgment is less than the amount of the defendant offered the plaintiff (whether or not the plaintiff actually prevails at trial) then the plaintiff incurs a penalty for declining the offer. The plaintiff must pay the costs the defendant incurred after it made the offer of judgment. Costs

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Aluyah I. Imoisili

Aluyah Imoisili is a senior associate in the Los Angeles office of Milbank, Tweed, Hadley & McCloy and a member of the firm's Litigation & Arbitration Group. Aluyah's practice focuses on general commercial litigation. He has worked on a variety of litigation matters including bankruptcy litigation, reinsurance arbitrations, and other commercial disputes.

One solution to reduce arbitration costs and to encourage settlement is to adopt "offer of judgment" settlement procedures utilized in federal and many state courts.

are limited to: court filing and other fees, trial and hearing transcripts, certain printing costs (including for copies of documentary exhibits used at trial), witness (subpoena) fees, and compensation of court-appointed experts and certain other professionals (such as interpreters).[5]

State statutes work the same way but often include additional penalties for the party that refuses the offer and sweeteners for the offeror. For instance, in New York, under Rule 3221 of the New York Civil Practice Law Rules, the plaintiff loses its right to recover as a prevailing party any costs it incurs from the time of the "offer to compromise."[6] In California, under California Civil Procedure Code Section 998, not only does the plaintiff lose its right to recover its own prevailing party costs, it may be liable for the defendant's expert witness fees as well as the defendant's attorneys' fees if the defendant ultimately prevails at trial.[7] In addition, a California plaintiff itself may initiate an offer and if it obtains a judgment that is more favorable than the judgment be entitled to recover from defendants its costs, including its expert witness fees that normally are not recoverable by a prevailing party under California law.

Critics of these fee-shifting penalties question their fairness and effectiveness. Indeed, these penalties create an opportunity for gamesmanship. What makes this cost-shifting penalty unique is that the court could theoretically award the defendant its litigation expenses even in situations where the defendant essentially losses at trial both on issues of liability and the quantum of damages. In rare instances, defendants are able to employ these fee-shifting rules strategically either to coax plaintiffs to accept low-ball offers or to limit their own liability.[8]

The advantages of offer of judgment procedures can present in ARIAS arbitrations, where the participants are typically sophisticated and represented by good counsel, are tangible. In the right cases, where the parties can readily ascertain their likelihood of success on the merits and the potential financial outcome, these penalties can provide a strong incentive to the parties to initiate and consider realistic settlement offers. Indeed, one could make the case that adopting the approach of jurisdictions that allow defendants to recoup as offer of judgment expenses high-dollar attorneys' fees and expert witness compensation is appropriate in the context of ARIAS arbitrations where both parties tend to have the financial wherewithal to consider and weigh the benefits of an offer of judgment with the potential for substantial cost-shifting. Moreover, if parties implement "offer of judgment" procedures, they can effectively take off the arbiter's plate the decision of whether to award litigation costs to either side.

A carefully tailored set of rules could make "offers of judgment" appealing to parties in arbitration seeking another means of recovering their costs or encouraging settlement. This article offers some suggestions on parameters for an ARIAS "offer of judgment" procedure for parties to consider adopting in their arbitrations.

(i) Parties Must Agree To Adopt "Offer of Judgment" Procedure

As a practical matter, most parties cannot automatically take advantage of existing "offers of judgment" rules in federal and state court now without first entering into fresh agreements among themselves to do so. For arbitrations governed by federal law, the parties need to have adopted Rule 68 of the Federal Rules of Civil Procedure into their arbitration since (as courts have long decided) federal court rules do not apply in arbitration.[9]

Similarly, state courts that have considered whether their "offer of judgment" statutes are available in arbitrations have determined that they do not unless expressly authorized in the statute. In *Lane v. Williams*, for instance, the Wisconsin court of appeals vacated an arbitration award that incorporated "offer of judgment" costs.[10] The court reasoned that Wisconsin's "offer of judgment" statute could not apply in arbitrations even where the parties' contract had expressly indicated that Wisconsin's law would govern the arbitration. The court explained that because the Wisconsin statute did not mention "arbitration," it only applied to "trials."

Some states, including California, do however allow parties to make "offer of judgment" in arbitration.[11] And parties for whom those state statutes govern their proceedings can take advantage of them already—although we are unaware of this practice being used with any regularity in California-based arbitrations.

For parties that cannot employ such state provisions, they must agree in writing, in their reinsurance contracts or in a subsequent agreement, to adopt a specific, spelled-out "offer of judgment" procedure. Alternatively, ARIAS could develop its own "offer of judgment" procedure. The parties can agree to bind themselves either to ARIAS's "offer of judgment" process alone or all ARIAS arbitration rules or procedures (which would include the "offer of judgment" procedure, if adopted).

(ii) "Offer of Judgment" Should Be Available To Either Party

Like the California system, both sides should be able to make "offers of judgment" with penalties and rewards applying to both sides. This prevents parties from engaging in one-sided stratagem in the arbitration and places incentives on both sides to propose and pursue settlements, which we believe is consistent with one of the primary goals of the arbitration process.

(iii) Final Arbitration Award Should Incorporate "Offer of Judgment" Penalties

The parties must not share the offer with the arbitrators prior to the time that the arbitrators issue their award on the merits of the arbitration. Keeping secret the existence of the offer and its substance eliminates the risk that an arbitrator would be improperly influenced in reaching his or her merits decision.

Concomitantly, the arbitration panel should not make its award "final" until it clarifies with the parties the existence of an "offer of judgment" and how, if at all, it would affect the final amount of the award and to whom it is owed. The panel may have to wait for the parties to compute the final amount of the arbitration award after deducting costs due as a result of the implementation of the relevant "offer of judgment" penalties. The panel should also have an opportunity to evaluate challenges to the applicability of the penalties (discussed below).

(iv) "Offer of Judgment" Should Be Subject To Reasonableness Requirement

To address the gamesmanship concern that parties may submit low-ball bad faith offers just to be entitled to recoup their costs without any downside, the "offer of judgment" should be subject to a reasonableness requirement. Indeed, courts often subject the "offer of judgment" to a requirement that it is not nominal and is made in good faith.[2] In evaluating the reasonableness of the offer, courts will consider whether the party rejecting the offer had available to it information that rendered the offer reasonable.[13]

In an ARIAS arbitration, if "offer of judgment" penalties are applicable, and a party challenges the good faith of the offer, the arbitration panel should be able to review the reasonableness of the offer in light of their understanding of the merits of the case. The arbitration panel would be able to strike in truly egregious cases where it is obvious that a party sought to abuse the system (for example, if a defendant made the offer, and the plaintiff rejected it while defendant improperly withheld production of evidence that was unavailable to the plaintiff and that was dispositive of the plaintiff's claims).

(v) "Offer of Judgment" Should Be Limited To Claims At Issue In Arbitration

Any ARIAS procedure should require the parties to limit the scope of the offer only to those claims at issue in the arbitration before the arbitration panel. If the parties seek a global settlement of all of their existing and future claims against one another, the panel would not have had an opportunity to evaluate the merits of those claims. In fact, some of those claims may not even be subject to arbitration at all and the panel may be overstepping its jurisdiction (and expertise) in assessing the reasonableness of a proposed settlement of claims whose merits are not before it.

(vi) "Offer of Judgment" Penalties Must Be Significant

The "offer of judgment" penalties need to be "meaningful" to be effective in enticing the parties to settle. Given the level of sophistication of most participants in an ARIAS process, the penalties must be in a material amount that will force the parties to consider their options seriously. Thus, we believe that the penalties should include as many litigation expenses as possible, including arbitrator fees, discovery costs, attorneys' fees, and expert witness compensation, so that the parties are incentivized to settle.

* * *

The ultimate end goal of arbitration should not be to pursue the case to a final hearing at all costs. In our experience, dispute resolution systems operate more efficiently when parties (particularly sophisticated commercial institutions) are incentivized to resolve their differences before hearing or trial. If the parties that use the ARIAS process are serious about reducing the costs of resolving their disputes, a tailored "offer of judgment" system—properly designed to eliminate inappropriate gamesmanship but with enough "teeth" to force parties to come to the settlement table—will help achieve this goal.

In our experience, dispute resolution systems operate more efficiently when parties (particularly sophisticated commercial institutions) are incentivized to resolve their differences before hearing or trial.

End Notes

1. *See, e.g., Reliastar Life Ins. Co. v. EMC Nat'l Life Co.*, 564 F.3d 81, 89 (2d Cir. 2009) (holding that although arbitrators would exceed their authority by awarding attorneys' fees and costs where a contract provides that each party shall bear its own litigation costs, arbitrators may award attorneys' fees and costs as a sanction for bad faith conduct).
2. *Bank of San Pedro v. Superior Court*, 3 Cal. 4th 797, 804 (1992).
3. *See* Fed. R. Civ. P. 68.
4. *Id.*
5. *See* 28 U.S.C. § 1920.
6. *See* N.Y. C.P.L.R. § 3221.
7. *See* Cal. Code Civ. Pro. § 998.
8. In *Scott Co. of California v. Blount, Inc.*, for instance, the defendant made an offer of judgment wherein the defendant would pay the plaintiff $900,000. *See* 20 Cal. 4th 1103, 1116 (1999). The plaintiff rejected the offer. At trial, the plaintiff prevailed and received an award of $668,866 ($442,054 in damages and $226,812 in attorneys' fees and costs). Because the plaintiff's award was less than the defendant's offer of judgment, the plaintiff owed the defendant its attorneys' fees and costs, totaling $881,635.60. The upshot was that although the plaintiff actually prevailed at trial, it owed the defendant more than $200,000.
9. *See* Fed. R. Civ. P. 81(a)(6) ("These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide

other procedures: [...] (B) 9.U.S.C., relating to arbitration [(the Federal Arbitration Act)]"); *see also Foremost Yarn Mills, Inc. v. Rose Mills, Inc.*, 25 F.R.D. 9, 11 (E.D. Pa. 1960) (holding that the Federal Rules of Civil Procedure do not apply in arbitrations); *Great Scott Supermarkets, Inc. v. Local Union No. 337*, 363 F. Supp. 1351, 1354 (E.D. Mich. 1973) (citing *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964)) ("The parties did not provide in their agreement that the Fed. R. Civ. P. would apply to the arbitration proceedings. Absent such a provision, the Fed. R. Civ. P. do not apply."); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957) ("By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations.").

10. 621 N.W. 2d 922, 925-926 (Wisc. App. 2000).

11. *See* Cal. Civ. Pro. Code § 998(b); *see also Pilimai v. Farmers Ins. Exchange Co.* 39 Cal.4th 133, 150-51 (2006) (California Civil Procedure Code Section 998 "puts the arbitration plaintiff on the same footing as the plaintiff to a civil action vis-à-vis costs when the plaintiff has made an offer that the defendant has refused and obtains a judgment more favorable than the offer. Furthermore, nothing in the . . . legislative history [of section 998] indicates that the Legislature specifically intended costs to be unavailable to arbitration plaintiffs.").

12. *See, e.g., Wear v. Calderon*, 121 Cal. App. 3d 818, 820-21 (1981) (rejecting $1 offer of judgment because "the pretrial offer of settlement required under [California Code of Civil Procedure] 998 must be realistically reasonably under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement..."); *Pineda v. Los Angeles Turf Club, Inc.*, 112 Cal. App. 3d 53, 63 (1980) (rejecting $2,500 offer in $10 million personal injury case).

13. *See, e.g., Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal. App. 3d 692, 698-70 (1987) (reasonableness depends on whether the adverse party the adverse party knows or reasonably should know the information that makes it reasonable).

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ARIAS•U.S. Members on the Move

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

Although we will continue to highlight changes and moves here, remember that the ARIAS•U.S. Membership Directory on the website is updated frequently; you can always find there the most current information that we have on file. If you see any errors in that directory, please notify us at director@arias-us.org.

RECENT MOVES & ANNOUNCEMENTS

Chuck Ehrlich

Chuck has been appointed by the State Bar of California to its statewide 21 member Committee On Alternative Dispute Resolution.

James Engel

James, formerly with Liberty International Underwriters, is now with Endurance Specialty Holdings as their Global Chief Claims Officer. Please note James' new contact information:

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Suzanne Fetter

Suzanne wrote to share that she has recently returned to the U.S. from Grand Cayman to start her own Consulting and Arbitration practice. She was formerly employed as a Claims Executive with Greenlight Re in Grand Cayman and will now be working in Chester, CT as she begins her new Arbitration practice. Suzanne is also a U.S. based partner and Reinsurance Consultant for Aurigon Advisors in Switzerland. She can now be reached at the following address.

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Chester, CT 06412
(860) 322-3148 (direct)
(860) 306-2346 (cell)
(860) 322-4765 (fax)
e-mail: suzanne@fettercompany.com

Lydia B. Kam Lyew

Lydia recently made the move from the East coast out West. She can now be reach at the following address:

REnamics LLC
1048 Alexandria Drive
San Diego, CA 92107-4115
Cell 201-918-3195
lkamlyew@gmail.com

Dick White

During December 2015, the Liquidator of Integrity Insurance Company will file a motion with the Liquidation Court closing this estate after some 28 plus years of operation. Dick happily observes that his friends at ARIAS•U.S. will no longer have him to kick around. He plans to relax in Florida during February and March reflecting on what to do next.

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

The Arbitrability of Statutes of Limitations in Reinsurance Disputes

article

By Robert W. DiUbaldo and Jeanne M. Kohler

Whether a particular jurisdiction's statute of limitations provides a reinsurer with a valid basis to deny payment of a cedent's claim is sometimes a hotly-contested issue. Where a dispute is litigated in state or federal court, the reinsurer may argue that the relevant limitations period of that jurisdiction relieves the reinsurer of its indemnity obligations for a claim. By contrast, where a reinsurance agreement mandates that the parties resolve their claim-related disputes in arbitration, a cedent may assert that the panel is not bound to apply the statute of limitations law of any particular state, particularly where the agreement contains an "honorable engagement" clause or similar language. Other provisions, such as "governing law" or "choice of law" clauses, may also factor into the applicability of a time-bar defense in arbitration.

But even aside from the merits of a defense founded upon statute of limitations, a threshold question remains: is that an issue left for arbitrators to address or one that must be decided by a court of competent jurisdiction? A relatively recent New York state court decision – *Matter of Rom Reinsurance Mgt. Co., Inc., et al. v. Continental Ins. Co.*, 115 A.D.3d 480 (1st Dep't 2014) ("*Matter of Rom*") – is instructive in this regard.[1] Indeed, despite the fact that the reinsurance agreements involved in that case required the parties to arbitrate claim-related disputes, a New York appellate court construed the operative contract wording as mandating that the reinsurers' statute of limitations defense be resolved in court, and not before the panel.[2] Although, for the reasons discussed below, the issue was ultimately left for arbitration, the analysis that underlies the *Matter of Rom* decision is relevant for all reinsurance professionals, whether involved in dispute resolution, claims handling or underwriting.

I. Who Decides Statute of Limitations or Timeliness Issues

Certain states have enacted laws that bar a claim from being brought in arbitration if that claim would be time-barred under the operative jurisdiction's statute of limitations.[3] For example, Section 7502(b) of the New York Civil Practice Law and Rules ("CPLR") provides, in pertinent part:

> If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court...[4]

CPLR 7503 further states:

> Where there is no substantial question whether a valid agreement [to arbitrate] was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court...
>
> [a] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.[5]

See also GA Code Ann. § 9-9-5 (providing that a party may seek to stay arbitration of a particular claim where that claim would be barred by the applicable limitations period had it been asserted in court).[6] In arbitrations governed by laws of this kind, and depending on the particular contract wording involved, a party may contend that the applicability of a statute of limitations or timeliness defense be determined by a court of appropriate jurisdiction, and seek to stay the arbitration proceeding on this basis.

State law that treats statute of limitations in this fashion differs from the general view

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Jeanne M. Kohler

Jeanne M. Kohler is a Shareholder in Carlton Fields Jorden Burt's Financial Services and Insurance Litigation Department, and a resident in its New York office. She has over twenty years of experience in all aspects of reinsurance litigation and arbitrations, as well as complex direct insurance coverage disputes. She regularly represents and counsels clients on claims, coverage and regulatory issues across all lines of business.

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that timeliness issues are to be resolved in arbitration, assuming of course that the relevant contract contains a binding arbitration agreement.[7] As noted by the United State Supreme Court, "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are [generally] for the arbitrators to decide."[8] Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA"), which applies to many reinsurance disputes, statute of limitations is presumptively reserved for arbitrators.[9] This is consistent with the liberal policy favoring the enforcement of arbitration agreements, as well as the FAA's stated purpose of moving parties "out of court and into arbitration as quickly and easily as possible."[10]

However, contracting parties, in the reinsurance context or otherwise, are typically free to include provisions which mandate that the law of a particular jurisdiction governs or applies to their agreement (or portions thereof), including the agreement to arbitrate. Where the arbitrations clause is broadly worded with respect to the issues to be arbitrated, disagreements may arise as to whether the proper forum for addressing a statute of limitations or time-bar defense is in arbitration or court. Under those circumstances, the resolution of this question – that is, the question of arbitrability – is a threshold matter for courts to decide.[11]

II. The Importance of Contract Wording to the Arbitrability Question

Case law interpreting the arbitrability of a statute of limitations or time-bar defense reflects the significance of contract wording on the determination of this issue.

Approximately 9 years before the decision in *Matter of Rom*, New York's highest court, the Court of Appeals, addressed whether a court or arbitrator should resolve a statute of limitations defense asserted in a commercial dispute between a cooperative and contractor emanating from the September 11, 2001 terrorist attacks.[12] In that case – *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247 (2005) – the subject agreement provided that "[a]ny controversy or Claim arising out of or related to the Contract" would be submitted to arbitration, and further stated that the agreement "shall be governed by the law of the place where the Project is located", which was New York.[13] After the cooperative demanded arbitration, asserting claims of breach of contract and negligence, the contractor filed a petition in court to stay the arbitration on the grounds that the claims were time-barred under the applicable New York limitations period.[14] The cooperative cross-moved to dismiss the petition, arguing that, under the FAA (which governed the dispute), the timeliness issue was reserved for the arbitrator to determine.[15]

The Court of Appeals began its analysis by noting the general view that statute of limitations is presumptively an issue to be decided by arbitrators under the FAA, absent explicit language to the contrary.[16] Focusing on the operative wording in the contract at issue – the arbitration and choice of law provisions – the court held that the latter failed to expressly adopt New York's rule that timeliness questions be determined outside of arbitration, given the absence of clear language indicating that the subject agreement would be *enforced* pursuant to New York law.[17] Without such language, the court found that the applicability of the statute of limitations defense was to be decided by the arbitrators, consistent with the parties agreement that "any controversy" between them "arising out of or related to" the operative contract be resolved in that forum.[18] The fact that the choice of law provision stated that the agreement "shall be governed" by New York law was insufficient, in the Court of Appeals' view, to rebut the presumption of arbitrability afforded to timeliness issues under the FAA.[19]

Other state and federal courts have addressed the interplay between choice of law provisions and arbitration clauses with different wording, yet reached the same result as the court in *Matter of Diamond Waterproofing*.[20] For example, in *N.J.R. Associates*, a dispute arising under a partnership agreement, the court held that the following provision was insufficient to remove statute of limitations from the arbitration proceeding: "This Agreement shall be governed by, and construed in accordance with, the laws and decisions of the State of New York."[21] The court found that this specific language lacked the critical "enforcement" element necessary to manifest a clear intent by the parties to decide timeliness issues in court, as opposed to the arbitral forum.

Moreover, even where an agreement is ambiguous on the arbitrability of statute of limitations or time-bar issues, courts have shown a willingness to resolve any such ambiguities in favor of arbitration. In one federal court case, for instance, the relevant arbitration clause provided that "[a]ny dispute, controversy, or claim arising out of or relating to the Contract, or the breach, termination or validity thereof ... shall be finally settled by arbitration" and further stated that "[a]ny arbitration proceeding or award rendered hereunder and the validity, effect and interpretation of this agreement to arbitrate shall be governed by the laws of the state of New York."[22] The subject agreements also contained governing

and procedural law provisions which stated:

> The law which is to apply to the Contract and under which the Contract is to be construed is the law of the state of New York without regard to the jurisdiction's conflicts of law rules...
>
> The law governing the procedure and administration of any arbitration...is the law of the State of New York.[23]

Reading these provisions together, the court found that the subject contracts were ambiguous as to the proper forum in which to resolve timeliness issues related to disputes and claims arising under the contracts.[24] In light of that ambiguity, and relying on Supreme Court precedent, the court held that the statute of limitations defense must be resolved by the arbitrators.[25]

III. The Matter of Rom Decision and its Significance

In *Matter of Rom*, the cedent commenced arbitration proceedings to recover unpaid balances purportedly due under various reinsurance agreements.[26] In addition to addressing panel selection, the arbitration clauses in the agreements expressly stated that the arbitration was governed by the laws of New York state.[27]

The reinsurers moved to stay the arbitration on the grounds that New York's six-year statute of limitations operated to bar the cedent's breach of contract claims. The cedent opposed the stay application and cross-moved to dismiss the petition and compel arbitration under the FAA, which indisputably governed the dispute. The cedent further argued that, under the FAA, the statute of limitations defense must be determined by the panel.[28] The trial court ruled in the cedent's favor, finding that the arbitration clauses did not express intent to have New York law – and specifically sections 7502(b) and 7503 of the CPLR – govern the enforcement of timeliness issues.[29] Accordingly, the court held that "all issues regarding the application of the statute of limitations shall be determined by the arbitrators."[30]

On appeal, the New York Appellate Division, First Department, reversed the trial court's decision in full.[31] Significantly, the court interpreted the subject arbitration clauses as providing that 'the arbitration laws of New York State' shall govern the parties' arbitration'", which it found constituted "critical language" concerning the enforcement and application of New York law on the arbitrability of the statute of limitations issue.[32] Therefore, the court held that the reinsurer's time-bar defense was properly before the court.[33] The cedent's motion for reargument of the issue was denied without further explanation.

The *Matter of Rom* case was then remanded to the trial court, which ultimately denied the reinsurers' petition to stay the arbitration, finding that their participation in the arbitrator selection process precluded them from seeking a stay on statute of limitations grounds, pursuant to CPLR 7503(b), or from having that issue resolved outside of arbitration.[34] On appeal, the New York Appellate Division, First Department, affirmed the trial court's decision, but noted that although the reinsurers waived their right to have the court decide the statute of limitations defense; the issue was open for determination by the arbitration panel.[35]

The *Matter of Rom* case involved a scenario that arises from time to time in reinsurance and other business disputes. It is not uncommon for reinsurance and other commercial agreements to contain, on the one hand, arbitration clauses with honorable engagement language that relieves the arbitrators from following strict rules of law, but also contain, on the other, provisions that provide that the operative agreement and/or the arbitration be governed by the law of particular jurisdiction (in many cases, New York). As those in the reinsurance community well know, the precise wording used in a reinsurance contract may vary. Thus, in these situations, it is crucial for the reinsurance professionals involved to understand the impact of the specific contract wording on the arbitrability of an issue like statute of limitations or time-bar.

End Notes

1. *Matter of Rom Reinsurance Mgt. Co., Inc., et al. v. Continental Ins. Co.*, 115 A.D.3d 480 (1st Dep't 2014) ("*Matter of Rom*").
2. *Id.* at 481-82.
3. N.Y. C.P.L.R. §§ 7502(b), 7503(a)-(b); GA CODE ANN. § 9-9-5. *See also* Lara K. Richards & Jason W. Burge, *Analyzing the Applicability of Statutes of Limitations in Arbitration*, 49 Gonz. L. Rev. 214, 225-27 (2014); Craig P. Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 Franchise L.J. 26, 27-28 (Summer 2012).
4. § 7502(b).
5. § 7503(a)-(b).
6. GA Code Ann. § 9-9-5.
7. *See, e.g.*, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002); *Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005).
8. *Howsam*, 537 U.S. at 85 (citation omitted).
9. *N.J.R. Assoc. v. Tausend*, 19 N.Y.3d 597, 601-02 (2012); *Matter of Rom*, 115 A.D.3d at 481.
10. *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24. *See also* Miller & Danysh, 32 Franchise L.J. at 26-27.
11. *Howsam*, 537 U.S. at 83.
12. *Matter of Diamond Waterproofing Sys., Inc.*, 4 N.Y.3d at 252-53.
13. *Id.* at 250.
14. *Id.* at 250-51.
15. *Id.* at 251.
16. *Id.* at 252.
17. *Id.* at 253.
18. *Id.*
19. *Id.*
20. *N.J.R. Assoc.*, 19 N.Y.3d at 601-02 (collecting cases); *Bechtel Do Brasil Construcoes Ltda, et al v. UEG Araucaria Ltda*, 638 F.3d 150, 156-58 (2d Cir. 2011).
21. *N.J.R. Assoc.*, 19 N.Y.3d at 602.
22. *Bechtel*, 638 F.3d at 152.
23. *Id.*
24. *Id.* at 156-58
25. *Id.* at 158.
26. *In the Matter of ROM Reins. Mgt. Co., et al. v. Continental Ins. Co.*, No. 654480/12, at **1-2 (Sup. Ct., N.Y. Cty, Apr. 22, 2013).
27. *Id.* at *2.
28. *Id.*
29. *Id.* at **2-3.
30. *Id.* at *3.
31. *Matter of Rom*, 115 A.D.3d at 481-82.
32. *Id.*
33. *Id.* at 482.
34. 128 A.D.3d 570 (1st Dep't 2015).
35. *Id.*

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ARIAS•U.S. 2015 Fall Conference

November 12-13 New York City

Conference RECAP

Let's Get Engaged!

The 2015 ARIAS·U.S. Fall Conference, entitled "***Let's Get Engaged!"*** drew more than 400 attendees to New York's Hilton Midtown Hotel on November 12th and 13th. On Thursday, the conference kicked off with a warm welcome from conference co-chairs ***Scott P. Birrell***, the Travelers Companies, Inc., ***Michael A. Frantz***, Munich Re America and ***Susan A. Stone***, Esq., Sidley Austin, LLP. The introduction was followed by an organizational update from Board Chair ***Eric Kobrick*** and President ***Elizabeth Mullins*** sharing news about the proposed change to the ARIAS Bylaws that would increase the total number of ARIAS Board of Directors from nine to eleven members. Mullins and Kobrick explained that similar to the current Bylaws, at the time of the election, three directors will be executives of ceding insurers, three directors will be executives of professional reinsurers, and three directors will be partners in private law practice. The additional two new directors will be, at the time of the election, ARIAS•U.S. Certified Arbitrators who are not employees of ceding insurers, professional reinsurers or partners in private law practice. Forums will be held in December and January to discuss any questions to the proposed changes and a vote will take place in early 2016. The organizational update also provided information on the work of the various ARIAS Committees and urged members to get involved and join one of the groups moving forward in growing the society's reach and impact within the greater (re)insurance community. Lastly Mullins and Kobrick spoke about the most recent updates to the Neutral Rules and the fact that arbitrator applications have been approved and several companies have committed to using the Neutral process.

The conference keynote speaker, the ***Honorable Judith Kaye***, took the Neutral ball and ran with it, adding a bit of humor and inspiration to her talk. In addition to speaking about her experience during her 15-year tenure as chief judge of the State of New York and chief judge of the New York Court of Appeals, Judge Kaye spoke candidly about the party-appointed arbitrator advocate system. Several conference attendees noted that the judge was a highlight of the conference who provided a very informative and interesting perspective on current issues.

From there, ***Matt Furton*** and ***Julie Young*** from Locke Lord LLP shared a look at the Supreme Court's recent arbitration-related rulings as well as some thoughts on the possible rulings in arbitration disputes currently brewing in the lower courts. Next up, opening to the tune of "For the Love of Money" by the O'Jays (Trump style), **Scott Seaman**, despite industry professionals' reluctance to discuss the subject publicly, led a large panel that spoke about the impact of industry consolidation on the arbitration process. Removing the cone of silence and discussing the impact of consolidation were ***John DeLascio***, Hinshaw & Culbertson LLP, ***Susan Grondine-Dauwer***, SEG-D Consulting LLC, ***Wendy Taylor,*** Chubb, ***Steve Agosta***, XL Re America, ***Nicholas Scott***, QBE North America and ***Wendy Schapps***, FTI Consulting.

Following lunch, where the engagement continued with ample networking and great discussions, attendees started the second half of the day with a series of breakout sessions on various topics. As one could imagine, conducting a Request for Proposal (RFP) for the Fall 2015 conference brought in more proposals than the already time-constricted agenda would allow, but inserting some fresh content and new speakers within and outside the ARIAS membership seemed to appeal to the attendees and get the audience excited to talk shop and engage. Topics included how to engage technology to further the arbitration process, presented by ***Michael Menapace,*** Wiggin and Dana LLP, ***Nasri Barakat,*** II&RCS, ***Brad Rosen,*** Berkshire Hathaway Reinsurance Division and ***Tom McNeff,*** Vision Point LLC, to a Neutral Rules update from ***Eric S. Kobrick,*** American International Group, Inc. ***and James I. Rubin,*** Butler Rubin Saltarelli & Boyd LLP, to ways in which team engagement can improve the arbitral process presented by ***Robert E. Sweeney, Jr.,*** CNA Insurance, ***Steven C. Schwartz,*** Chaffetz Lindsey LLP and ***Sylvia Kaminsky,*** Arbitrator / Reinsurance Consultant as well as ***Jan Woloniecki,*** ASW Law Limited, ***Peter Chaffetz,*** Chaffetz Lindsey LLP and ***Gavin Kealey,*** 7 King's Bench Walk, discussing contract avoidance under U.S., UK and Bermuda Law.

Judge Judith Kaye

Taking their recent article in the ARIAS *Quarterly* one step further, ***James G. Sporleder,*** ARIAS·U.S. Certified Arbitrator, ***Tom Daly,*** Horseshoe Insurance Advisors US LLC and ***Connie O'Mara,*** O'Mara Consulting, LLC presented on improving the operational issues and business practices for arbitrators throughout the arbitration process.

Peter Rogan and ***Kiran Soar*** from **Ince & Co LLP** provided practical advice on obtaining documents and depositions from abroad during their breakout session and ***John L. Jacobus,*** Steptoe & Johnson LLP, ***Deidre B. Derrig,*** Allstate Insurance Company and ***David A. Thirkill,*** The Thirkill Group, Inc. addressed the "functus officio" doctrine and the ability of an arbitration Panel to act following the issuance of a final award. ***Larry P. Schiffer,*** Squire Patton Boggs (US) LLP, ***Myra E. Lobel,*** Guy Carpenter & Company LLC, ***Elaine A. Caprio,*** Caprio Consulting LLC, ***Joseph L. Pulvirenti,*** Partner Reinsurance and ***John H. Phillips,*** General Reinsurance Corporation, focused on the recent changes in contract wording during their breakout session. While the many choices for breakout sessions kept everyone engaged and wanting to network, the refreshment breaks, breakfasts, luncheons and speed dating were once again opportunities for everyone to engage casually and catch up.

Retiring Board Director Mark Megaw receives award from Betty Mullins & Eric Kobrick

As his last official duty as Chairman, Eric Kobrick conducted the Annual Membership Meeting where he called for an official vote of the new board member, Scott Birrell and the returning board members, Mike Frantz and Jim Rubin. Peter Gentile, ARIAS's Treasurer, provided an update on the 2015 financials and the fact that ARIAS is projecting a break even budget this year. Incoming Chairwoman, Betty Mullins presented Mark Megaw with a plaque in gratitude of his service on the Board of Directors during the last three years. Ms. Mullins also presented an award to Eric Kobrick for his leadership as Chairman of the Board during the last year and congratulated him on a very successful year in which ARIAS transitioned to a new management company,

Marty Haber, Dick White, Chuck Ehrlich, Mark Megaw & Rob Buechel

many of the committees were reinvigorated and the Neutral Rules were launched and utilized.

Closing out an incredibly eventful day, ARIAS hosted a lively reception with food, drinks and networking for the more than 400 attendees.

The conference festivities continued bright and early Friday morning with the Strategic Planning, Member Services, Mediation, Arbitrators and Technology Committee meetings taking place over breakfast with exciting plans (and plenty of opportunities to engage) in store for 2016.

Andrew Rothsied, RunOff Re.Solve LLC, ***James G. Sporleder,*** ARIAS·U.S. Certified Arbitrator, ***Mark S. Gurevitz,*** MG Re Arbitrator and Mediator Services LLC, and ***Susan E. Mack,*** Adams and Reese LLP kicked off the general session on Friday with an Ethics discussion led by members of the Ethics and Arbitrator Committee. ***Scott Corzine,*** FTI Consulting, ***Ryan Gibney,*** Lockton Companies LLC, ***Caroline Kennedy*** ACE North America, and Stuart A. Panensky, Esq., Traub Lieberman Strauss & Shrewsberry LLP kept everyone on their toes as they spoke about the major insurance issues and trends they are seeing with Cybersecurity. Just before a mid-morning coffee break, ***Brian Snover,*** Berkshire Hathaway Reinsurance Division and ***Deirdre Johnson,*** Crowell & Moring LLP spoke about some upcoming opportunities surrounding the Neutral Rules and the commitment a number of major companies are making to engage in the process. More to come at the Spring 2016 Conference at the Breakers in West Palm Beach, FL!

Dipping outside the ARIAS membership arena and into the regulatory field, ***Robert A. Whitney,*** Sparhawk Advisors, ***Elizabeth Kelleher Dwyer,*** RI Department of Business Regulation, ***Daniel Schelp, National Association of Insurance Commissioners***, ***Tracey Laws,*** Reinsurance Association of America and ***Robert Alan Wake,*** Maine Bureau of Insurance, joined the conference to share key legislative and regulatory developments concerning reinsurance now and what will likely impact the industry in the near future.

And finally, closing out the conference, ***Everett J. Cygal,*** Shiff Hardin LLP, ***Cindy R. Koehler,*** Resolute Management, Inc. ***Thomas M. Zurek,*** OneAmerica Financial Partners, Inc, and ***Christine G. Russell,*** Brandywine Group, discussed confidentiality and whether it has become an anachronism to modern reinsurance disputes. Newly appointed chairwoman ***Betty Mullins,*** thanked everyone for coming and encouraged participants to get engaged, stay engaged and spread the opportunities for engagement as ARIAS moves into 2016. ◆

Let's Get Engaged!

General Session on Consolidation in the Industry - A full house!

Larry Schiffer & Myra E. Lobel

Enjoying the evening with colleagues

Evening Reception

Jonathan Sacher

Tom Daly, Connie O'Mara and Jim Sporleder lead an Arbitrator's breakout session

Speed Dating!

ARIAS•U.S. 2015 Fall Conference

November 12-13 New York City

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