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Review of Arbitration Decisions in England, France & Bermuda

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editor's comments

Tom Stillman

In the previous issue of this magazine, we discussed the opinion of the infamously lexiphanic Judge Bruce Selya of the First Circuit, in the case of *First State Insurance Company v. National Casualty Company*, 781 F.3d 7 (lst Cir. 2015). The decision involves an issue which arises in every single dispute which goes to final award: What, if any, are the constraints of a panel in fashioning relief? In this issue we thank several of the lawyers from the firm which represented First State Insurance Company in both the underlying arbitration and the appeal, Amy Kallal and Andrea Fort, for their article discussing the importance of the decision.

One cannot have arbitrations without arbitrators so we are pleased to give the ARIAS Arbitrators Committee a well-deserved voice in this edition of the *Quarterly*. Jim Sporleder, Tom Daly and Connie O'Mara of the Arbitrators Committee offer arbitrators a toolkit filled with advice and helpful forms to assist them in their practice.

In the future we plan to offer additional features to make the *Quarterly* more relevant and of greater practical use to arbitrators. We'll be holding, and then publishing transcripts, of round-table discussions concerning issues that often arise during the course of an arbitration. Experienced arbitrators will also be sharing tips that they have found to be effective. We welcome suggestions from all ARIAS members for subjects they'd like to see included in our roundtables, and volunteers to submit their tips on arbitration.

As we all know, reinsurance is a global industry. Many of our members have had experience in dealing with arbitrations beyond our borders and as the world becomes more connected, we're likely to see more of them. In this issue we feature articles on the reviewability of arbitral awards in Bermuda, England and France by Rod Attride-Stirling and Cratonia Smith, Jonathan Sacher and David Parker, Christian Bouckaert and Romain Dupeyre, respectively.

It's important for arbitrators to keep up to date on the law. We're pleased to do our part by bringing you the Case Notes Column, a regular feature of the *Quarterly.* In this issue, Ron Gass warns of the dangers of deviating from contractually-agreed arbitrator and forum selection provisions. Illustrative is a recent 5th Circuit Case where the Court of Appeals granted a motion to vacate the award.

If you enjoyed reading this edition of the *Quarterly*, we're pleased. If you think we can do better, it's up to you, our members, not only to suggest topics, but to write the articles themselves. To fulfill our goal of including more arbitrator-directed content in the *Quarterly*, we're especially eager to publish articles that are of practical use to arbitrators. Even if you believe we're doing a fine job, we depend on your ideas and your articles. So in lieu of patting us on the back, take the easier route and write an article for us. In any event, send your articles, ideas, comments, etc. to tomstillman@aol.com.

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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.

Opinions and views expressed by the authors are not those of ARIAS•U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

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Letter from the ARIAS•U.S. Chairman, Eric Kobrick

Eric S. Kobrick

It has been a fast and furious eight months since I became Chairman of ARIAS•U.S. Since the November 2014 conference, we have successfully transitioned our operations to a new management company, added five new corporate and sixteen new individual members, and certified eight new arbitrators, one new umpire and one new mediator. We have also held a series of well-attended webinars and seminars, and enjoyed a return to the fabulous Breakers Hotel in Palm Beach for our Spring 2015 Conference. While the summer may be quiet on the event front for ARIAS, Coulter and the Board have been hard at work gathering information from the members, analyzing what is working and where there is room for improvement, and conducting strategic planning sessions to ensure the society continues to execute on its core mission and meet the needs of its constituencies.

I want to thank all of you who took the time to complete the membership survey. It is always good (and important!) to hear from the membership. Some of the common themes from the survey were as follows:

- Increase the number of networking and educational opportunities
- Add some new faces and a wider representation of ARIAS members at the in-person events
- Increase the number of insurance and reinsurance company representatives at events
- Raise awareness of the ARIAS Rules and expand the reach of ARIAS to other related arenas
- Provide additional ways for volunteers to get involved with the organization

Increasing the communication to our members is of paramount importance to the Board, so you will be hearing more from Coulter and the Board in the coming months as we strive to enhance the membership experience for all of you.

I also want to point out some significant, recent developments:

- The ARIAS Bylaws have been revised and the updated version can be found on the website.
- The much anticipated Neutral Rules, Application for Certification as Neutral Arbitrator, and Neutral Arbitrator Questionnaire have been finalized and can be found on the ARIAS website. While members who qualify are encouraged to apply for certification as neutral arbitrators, one can satisfy the criteria to serve as a neutral arbitrator in a particular matter without becoming a certified neutral. All members are encouraged to review these documents and raise any questions about the process with a Board member. As reflected in the discussions at the 2015 Spring Conference, representatives of several companies have strongly endorsed neutral arbitrations under these rules, so all the talk in recent years of neutral arbitrations is close to becoming a reality!
- I am very pleased at how active our committees have been this year. For just a few highlights, let's start with the newly formed Arbitrators Committee. The two tables set aside at the 2015 Spring Conference breakfast meeting proved to be insufficient for the highly attended and engaged group of members. The Committee has been a staunch advocate for the interests of the full-time arbitrators among our members, and has pushed for Board representation of a full-time arbitrator. In that regard, members should note that the Nominating Process Guidelines have been revised to expressly note that the Bylaws provide that former, as well as current, officers or executives of insurers, reinsurers and law firm partners are eligible to serve on the Board.

The Arbitrators Committee represents all arbitrators; however, the Board recognizes that most arbitrators are sole practitioners looking for resources to maintain, grow and improve their business. In response, the *Quarterly* Editorial Committee, the Fall Conference Co-Chairs, and the Education Committee have developed ways to address these needs. In addition to the new RFP process introduced for the Fall Conference, the *Quarterly* will have a new feature that provides tips and best practices for individual arbitrators, and the Education Committee will work with the Arbitrators Committee to host a series of Arbitrator Webinars.

The Forms & Procedures Committee has been working to update the Umpire Questionnaire, the Confidentiality Agreement and Hold Harmless Agreements. Be on the look out for these revised forms in the near future.

In addition to jointly planning the ethics session for the upcoming Fall Conference with the Arbitrators' Committee, the Ethics Committee is looking closely at the ethics issues raised by members in the membership survey. Stay tuned for more developments in this regard.

The Board continues to look at the various committees to determine how best to utilize the time of our volunteers to further the mission of

the organization. As just one example, the Law Committee will be looking at the idea of re-casting the committee's mission beyond its traditional focus on reinsurance case law to report on major industry events, important arbitration decisions, and emerging themes in arbitration.

Finally, the Technology Committee will begin working with Coulter to update the ARIAS website in the coming months. This is an important step in increasing ARIAS's visibility and value.

If you are looking to get more involved in ARIAS's committees, I encourage you to reach out to Sara Meier or one of the committee chairs to find out about the available opportunities.

- Finally, the Board has approved several steps to ease the financial burden on members while ensuring the continued financial strength of the organization.
- Membership dues and conference registration fees will not be raised for this fiscal year.
- ARIAS will be offering several advertising and sponsorship opportunities.
- The 3% fee when paying with a credit card will be eliminated. Fees will be the same regardless of the form of payment.
- The Ethics course is under review, both with an eye towards reducing the fee and making the course more meaningful.

It is an exciting time for ARIAS, and with all your involvement we can ensure that the organization continues to be the preeminent arbitration society for the insurance and reinsurance industries. Enjoy the last days of the summer. I look forward to seeing all of you at the Fall Conference, if not before.

Respectfully,

Eric S. Kobrick
Chairman, ARIAS·U.S. Board of Directors

Fall Back and Enjoy the Upcoming Educational Offerings in November!

November 11 Fall Seminars: The Basic Elements of Arbitration and Umpire Master Class

ARIAS·U.S. is offering two concurrent half-day seminars on Wednesday, November 11 prior to the 2015 Fall Conference and Annual Meeting at the New York Hilton Midtown hotel.

Choose between attending the Basic Elements of Arbitration, led by Seema Misra, AIG - American International Group, Inc. and Sean T. Keely, Hogan Lovells US LLP and explore the limits and application of arbitrator authority. Also choose from a more advanced course with the Umpire Master class: Lessons Learned from the Outside World, led by Marc Abrams, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and Bill O'Neil, Crowell & Moring LLP and participate in complex disputes with a panel of experienced judges and seasoned ARIAS·U.S. arbitrators.

The seminars will start from 1:00 p.m. until 5:00 p.m. with lunch at 12:00 Noon and participants can earn up to 4.5 CLE credits from NY. Credits for IL and PA will be applied for and offered when approved. Registration closes on November 4, 2015. Visit the ARIAS·U.S. website to register for a seminar today!

November 12 – 13 Fall Conference and Annual Meeting: *Let's Get Engaged!*

Get ready for this year's ARIAS • U.S. 2015 Fall Conference and Annual Meeting at the New York Hilton Midtown Hotel in New York, November 12 – 13, 2015! This year's Fall Conference theme: "Let's Get Engaged!" will highlight contributions made by the diverse membership constituencies comprising the organization. Led by a member-driven agenda, we trust that this year's conference sessions will reflect the diverse interests of members and cover a wide array of subjects that will be both stimulating and informative.

Take a peek at the 2015 fall conference highlights below:

- Kick off the conference with ARIAS·U.S. Board Members Eric Kobrick, Chairman and Elizabeth Mullins, President, with a discussion focused on new and exciting organizational updates.
- Hear from our Keynote Speaker the Honorable Judith Kaye, a former Chief Judge and the first woman ever appointed to serve on New York's highest court.
- Join us for six lively General Sessions ranging from a broad overview of legal trends (including SCOTUS decisions), market and regulatory developments, cyber security and major insurance risks and trends to nuts-and-bolts practice seminars – and of course, an ethics presentation.
- Choose from eight dynamic Breakout Sessions focused on topics including engaging technology, rescission and avoidance of reinsurance contracts, obtaining documents and depositions from abroad, an update on the ARIAS·U.S. Neutral Rules, and much more!
- Let's not forget about the ultimate engagement opportunity: a Speed Dating session and an opportunity to participate in the ARIAS • U.S. Annual Meeting and Board Elections.
- In addition to great sessions, there will be plenty of networking opportunities including the Women's Networking Luncheon, the Life/Health Group Luncheon, and an evening cocktail reception.

Participants can earn up to 9.0 CLE credits from NY. Credits for IL and PA will be applied for and offered when approved. Register by September 30, 2015 to receive the early bird registration rate. Visit the ARIAS·U.S. website to check out the full schedule of all sessions and events.

article

Honorable Engagement Clauses and the Powers of Arbitrators: Has *First State v. National Casualty* Changed the Landscape?

Some Suggested Takeaways for Parties and Arbitrators in Seeking and Awarding Relief[1]

Amy J. Kallal

Andrea Fort

By Amy J. Kallal and Andrea Fort

The recent decision handed down by the United States Court of Appeals for the First Circuit in *First State Insurance Company v. National Casualty Company*[2] has caused some buzz in the reinsurance industry. Has the decision enlarged upon what was already seen as broad powers of arbitrators, or is it simply a reaffirmation of established law? Will an honorable engagement provision – by long tradition found in most reinsurance arbitration agreements – now allow arbitrators to fashion any form of remedy they see fit, or are there still constraints to be observed?

Whatever one's view, *First State* leaves no doubt that, at least in the First Circuit, an honorable engagement clause may be construed to allow arbitrators powers of equity and the ability to grant relief to suit the particular circumstances of a case, provided, of course, that their decision has a basis in the contract they have been charged with interpreting. *First State* is also instructive in the guidance it may provide to parties and arbitrators in future disputes when it comes to the permissible boundaries of payment protocols and other "equitable" remedies.

Background

The *First State* case concerned an arbitration between cedents *First State* Insurance Company and New England Reinsurance Corporation (collectively, "*First State*") and reinsurer National Casualty Company ("National Casualty") under various reinsurance and retrocessional agreements. After the parties agreed to consolidate their disputes under the relevant agreements, the arbitrators were asked to consider certain contract interpretation questions first, with *First State* seeking declaratory relief on various issues, including (i) the amount of information it was required to provide National Casualty in order to trigger the latter's payment obligations and (ii) whether National Casualty could condition payment on its being able to exercise its contractual access-to-records rights.

The arbitrators issued a contract interpretation award that set out, among other things, that National Casualty's payment obligations would be triggered "upon its receipt of a billing supported by a Proof of Loss and Reinsurance Report(s) prepared by *First State* in a form and content generally as those introduced [in the parties' briefing to the arbitrators]."[3] Furthermore, the arbitrators ordered, National Casualty's payments could be "made subject to an appropriate reservation of rights ... where it has or does identify specific facts which create a reasonable question regarding coverage under the subject reinsurance agreement(s)" but "[p]ayment obligations on the part of [National Casualty] are not conditioned upon the exercise of its right to audit or the production of additional information or documents, other than those provided by *First State* ... as described above."[4]

First State sought to confirm this contract

Amy J. Kallal

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Andrea Fort

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interpretation award in the United States District Court for the Southern District of New York. National Casualty moved to dismiss *First State's* confirmation petition and, in the alternative, to transfer venue to the District of Massachusetts. Approximately eight months after the suit was commenced, the case was transferred to the District of Massachusetts, and National Casualty filed a cross-petition to vacate the contract interpretation award. By that time, the entire arbitration had been concluded with a final award, which *First State* also sought to confirm. The District of Massachusetts consolidated the proceedings regarding confirmation of the contract interpretation award and the final award and summarily confirmed both. National Casualty appealed.

The First Circuit's Decision

National Casualty's appeal concerned only the contract interpretation award. According to the Court, a basic obstacle was whether National Casualty's cross-petition to vacate the award was timely, as it had been filed more than 300 days after the award was issued. Nevertheless, the Court decided it need not address National Casualty's arguments that the statutory 90-day period to vacate awards under the Federal Arbitration Act should be deemed tolled as the result of National Casualty's filing of a motion to dismiss *First State*'s initial petition to confirm when the case was first commenced in the Southern District of New York. Rather, the appeal could be easily resolved on the merits.

Writing for the Court, the sesquipedalian Judge Bruce M. Selya[5] opined that a federal court's authority to "defenestrate"[6] an arbitration award is extremely limited and rejected National Casualty's argument that the arbitrators had exceeded the scope of their authority in issuing the contract interpretation award. National Casualty's position was that the award was "ultracrepidarian"[7] because it obligated National Casualty to pay billings that might not be within the terms and conditions of the applicable reinsurance agreements. National Casualty also claimed that the award infringed on its contractual access-to-records rights by making the exercise of such rights conditional upon National Casualty's issuing a reservation of rights together with its mandated payment. In National Casualty's view, this reservation-of-rights procedure was extra-contractual and had no basis in the parties' agreements. The Court decided that these arguments were "more cry than wool."[8]

Citing the United States Supreme Court's 2013 decision in *Oxford Health Plans LLC v. Sutter*,[9] the First Circuit emphasized that the sole relevant inquiry was whether the arbitrators had "even arguably" interpreted the reinsurance agreements and thereby acted within the scope of their contractual mandate. To decide if the arbitrators had "even arguably" construed the contracts, the Court would first look to the express text of the award, which on its face could suggest that the arbitrators were in fact interpreting the contracts.[10] In the case of the *First State* contract interpretation award, the arbitrators' explanation that their decision was "*based upon the terms* of the subject reinsurance agreements" and that they had inquired into National Casualty's payment obligations "*under* the subject reinsurance agreements" made it clear to the Court that the arbitrators had appreciated the task with which they had been charged.[11]

Moreover, the Court found, the award tracked the express language of the relevant provisions in the parties' contracts, such as the various loss settlement provisions requiring National Casualty to pay "at the same time ... as the reinsured may elect to pay" or "immediate[ly]" after receipt of "reasonable" or "satisfactory" evidence of the amount "due" or "to be paid."[12] Therefore, the award's direction that National Casualty issue payment upon receipt of a billing that was supported by the required information was "generally consistent" with the parties' contractual agreement.[13] And, as for National Casualty's access-to-records rights, the Court found it noteworthy that none of the loss settlement provisions expressly referred to the access-to-records provisions. Because the award mirrored this "separation" between National Casualty's payment obligations and its inspection rights, the Court was further convinced that the arbitrators had not gone beyond interpreting the contracts in deciding that National Casualty's payment obligations were independent of its exercise of its audit rights.[14] Per the standard applied by the courts in reviewing arbitration awards, whether the arbitrators' conclusions were correct was immaterial as long as they could be seen as having construed the contracts before them.

> Will an honorable engagement provision – by long tradition found in most reinsurance arbitration agreements – now allow arbitrators to fashion any form of remedy they see fit, or are there still constraints to be observed?

This left only National Casualty's claim that the reservation-of-rights procedure set out in the award did not draw its essence from the contracts and circumscribed National Casualty's contractual inspection and audit rights. Here, the Court, apparently *sua sponte*,[15] turned to the honorable engagement provisions of the subject contracts, under which the arbitrators were to consider each contract as "an honorable engagement rather than merely a legal obligation" and were "relieved of all judicial formalities and [could] abstain from following the strict rules of law."[16] As a matter of first impression in the First Circuit, the Court decided that an honorable engagement clause "empowers

arbitrators to grant forms of relief, such as equitable remedies, not explicitly mentioned in the underlying agreement," citing, *inter alia*, cases from the Second and Ninth Circuit Courts of Appeals.[17] According to the First Circuit, such powers increase the chances of a successful arbitration by giving arbitrators the flexibility to "custom-tailor" remedies to the circumstances.[18] As a result, the Court held: (i) the honorable engagement provisions in the *First State* reinsurance agreements gave the arbitrators the authority to grant equitable remedies and (ii) the reservation-of-rights procedure contained in the contract interpretation award was just such a remedy.

Finally, the Court summarized the effect of the award, which gave National Casualty three options when presented with a billing: "(i) reject the billing; (ii) pay the billing without comment, or (iii) pay the billing with a reservation or rights."[19] The Court stressed that even after exercising the second and third options National Casualty would still retain the right to inspect *First State*'s records, audit the claim(s), and seek the return of its payment via another arbitration if it turned out that the payments had been improperly made. The Court further noted that *First State* itself had agreed with this reading of the award and, as a result, the parade of horribles that National Casualty had argued might arise from the award (namely, *First State*'s later claiming that National Casualty was precluded from seeking repayment because it had failed to issue a reservation of rights or had issued an insufficient one) would not come to pass.[20]

National Casualty's appeal was denied and the lower court's confirmation of the contract interpretation award was affirmed.[21]

First State and Prior Case Law Regarding the Scope of Arbitrators' Powers Under Honorable Engagement Provisions

An argument can certainly be made that the *First State* decision, with its clear recognition of arbitrators' equity powers under an honorable engagement provision, follows from existing case law interpreting such provisions and arbitration awards in general.

An honorable engagement provision has been described as the "encapsulation" of the nature of the traditional reinsurance relationship: an honorable undertaking that requires a great degree of trust and confidence between the parties.[22] The typical honorable engagement provision will thus free the arbitrators from having to follow "judicial formalities" and the "strict rules of law" and allow them to resolve disputes in a fair and commercially reasonable manner. An honorable engagement provision may also direct the arbitrators to "effect the general purpose of the Agreement in a reasonable manner rather than in mere accordance with the literal interpretation of the language," or expressly allow the arbitrators to consider industry custom and practice in their decision-making.[23]

In the conduct of the arbitration proceeding itself, an honorable engagement provision gives the arbitrators considerable leeway. For example, it may be used to justify the admission of evidence that might be excluded in a court of law, such as parol evidence even in the case of unambiguous contract language,[24] or, in contrast, to exclude extrinsic evidence.[25] When it comes to the remedies that an arbitration panel may order, honorable engagement provisions have been relied on by the courts to uphold arbitration awards granting such forms of relief as pre-hearing security (for example, a letter of credit or payment of funds into an escrow account),[26] pre-payment of a portion of disputed claims,[27] and even the imposition of an "equitable 50/50 settlement."[28]

In *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, one of the cases relied on by the First Circuit, the United States Court of Appeals for the Second Circuit noted that courts have read honorable engagement clauses "generously" and "consistently [found] that arbitrators have wide discretion to order remedies they deem appropriate," as long as the arbitrators do not exceed the powers given to them in the contract itself.[29] Furthermore, other courts have explained, a specific remedy does not have to be articulated in a contract in order for it to be available.[30] Because arbitrators derive their powers from the contract, the contract need only "implicitly" grant them remedial powers where there is no explicit grant.[31]

In certain cases, arbitrators may also have the power to grant relief that has not been specifically requested by a party. In *Harper Indemnity v. Century Indemnity*, another case relied on by the First Circuit, a New York federal court opined that while it was clear that arbitrators may not decide an issue that has not been submitted to them, there is no "parallel per se rule" forbidding arbitrators to fashion a remedy to address a submitted issue unless the remedy has been requested by a party.[32] While the *Harper* court recognized there might be situations in which arbitrators would exceed their powers by granting unrequested relief, the case before it was not one of them given the presence of an honorable engagement provision directing the arbitrators to "[effect] the purpose of [the] Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language."[33] As a result, the *Harper* court found that the arbitrators' ordering of a prepayment

> In crafting any prospective or declaratory-type relief, a panel must take care not to cross what may be a fine line between "interpreting" the parties' contractual bargain and "re-writing" it.

mechanism did not violate any express provision of the contract and was a "legitimate interpretation" of the contract's "implied expectation that the claims would be paid promptly."[34]

However, arbitrators' powers are not limitless, and even an honorable engagement provision will not save an award if it is deemed an impermissible re-writing and not an interpretation of a contract. This was the case in *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*,[35] which vacated a reinsurance arbitration award on the ground that the arbitrators had exceeded their powers. In resolving the parties' dispute over the meaning of a deficit carry forward provision in a reinsurance agreement, the award directed a payment under the provision (even though the parties agreed that the contractual preconditions for such payment had not yet been met) and ordered all references to the provision "hereby removed" and extinguished any future rights or claims involving the disputed provision. In this type of scenario, the court felt pressed to underscore that an honorable engagement clause does not provide infinite powers and does not allow an arbitration panel "to reinvent the contract before them."[36]

In light of the cases construing honorable engagement provisions, the common characterization of these provisions as "equity" or "honor" clauses,[37] as well as the courts' recognition that "arbitrators enjoy broad discretion to create remedies"[38] and may fashion equitable relief[39] (even where there is no honorable engagement provision at issue), the *First State* decision's pronouncement regarding reinsurance arbitrators' equitable powers would appear to be a natural outgrowth of existing arbitration and reinsurance case law. Moreover, as seen throughout the decision and the questions posed by the judicial panel during oral argument, the Court took great pains to ensure that the award at issue was interpreted so as not to negate the parties' existing contractual rights, a touchstone in determining whether an award may stand. In this respect, the decision may provide valuable guidance to future panels in constructing payment protocols and other equitable relief.

Potential Significance of *First State* For Future Arbitrations

It is well-established that a party challenging an arbitration award must clear a high hurdle; yet, at the same time arbitration awards are not impregnable. In crafting any prospective or declaratory-type relief, a panel must take care not to cross what may be a fine line between "interpreting" the parties' contractual bargain and "re-writing" it. *First State* can be seen as providing the following guidance:

(1) *The award should "interpret" the contract(s) at issue*. While this point would seem intuitive, the significance the Court gave to the arbitrators' express statements in the award that their ruling was "based upon the terms" of the reinsurance agreements suggests that arbitrators should make clear their understanding of the nature of the task before them.

(2) *The award should reflect the relevant substantive provisions of the contract(s) at issue*. In deciding whether the arbitrators had "even arguably" interpreted the contracts, rather than simply imposed their own version of (extra-contractual) justice, the Court compared the underlying contract provisions and structure to the award. Because the award mirrored and was "generally consistent" with the contracts, it was not a case of the arbitrators' exceeding their mandate.

(3) *The award should not be capable of an interpretation that would negate a party's existing rights under the contract(s)*. Like the decision's explication of what the award meant in terms of the parties' existing rights and obligations, the oral argument in *First State* demonstrates that the Court took keen interest in making sure it was clear that the award did not undo the parties' contractual bargain. National Casualty's position was, among other things, that the reservation-of-rights procedure in the award wrote out of the contracts its audit rights, since it would be forced to make "specific" objections to payment before it had the opportunity to audit those claims. National Casualty also argued that if it did not (or could not) make such specific reservations of rights, there was a danger that it might later be precluded from seeking the return of payments improperly made. The court addressed these concerns head on:

> The *First State* decision makes clear that arbitrators may dispense equitable remedies to fit the unique circumstances of a particular case, especially when operating under an honorable engagement provision. The decision, however, does not change the basic rule that arbitrators' powers are limited to construing the contract before them.

JUSTICE SOUTER: Well [*First State*] say[s] it was not an obligation; it was an opportunity that in fact the strict contractual terms did not provide, but it took nothing away i.e. that [National Casualty] might have as a means to challenge [and] it simply gave [National Casualty] a new way to do it.[40]

JUDGE SELYA: [T]here's nothing in the arbitration award that says [National Casualty] wouldn't have the opportunity – couldn't attempt to avail [itself] of the opportunity to

get [its] money back later, whether or not [it] filed a reservation of rights. Justice Souter's question is ... wasn't the arbitration panel merely suggesting a device that would conveniently ... allow [National Casualty] to eliminate any question about attempting to get [its] money back later?[41]

Upon National Casualty's further pressing that the award required it to "meet a standard that effectively writes our inspection and access rights out of the contract" and posing future scenarios which it believed would occur if its reservations were "not specific enough,"[42] Judge Selya commented that there was "very little question in my mind [that in a] case with a payment protocol dispute like this one, ... a Court of equity could devise a procedure similar to the procedure that was devised here."[43] Judge Lipez then confirmed the operation of that part of the award with which National Casualty was concerned and noted:

JUDGE LIPEZ: . . . And if there's an ongoing dispute, you can go to arbitration to resolve that. So the notion that you will ultimately be without a way of recovering payments that you think were improperly made, is simply not what's at stake here. What we're really talking about is how promptly [National Casualty] has to pay. And that's really what the arbitrators were talking about. ...[44]

The Court's confirmation of its view of the award on the record during oral argument, as well as in its written opinion, foreclosed any possibility of the award's being interpreted as imposing extra-contractual obligations or negating existing contractual rights. Future arbitration panels, however, may decide to address such matters in their original award.

Conclusion

The *First State* decision makes clear that arbitrators may dispense equitable remedies to fit the unique circumstances of a particular case, especially when operating under an honorable engagement provision. The decision, however, does not change the basic rule that arbitrators' powers are limited to construing the contract before them. ▼

ENDNOTES

1. Lloyd A. Gura and Amy J. Kallal, of Mound Cotton Wollan & Greengrass LLP, represented *First State* in the underlying arbitration as well as in the appeal before the First Circuit. All facts and statements in this Article are drawn entirely from the First Circuit's decision, the transcript of the oral argument, and the parties' appellate briefs.
2. *First State Ins. Co. v. Nat'l Cas. Co.*, 781 F.3d 7 (1st Cir. 2015).
3. *Id.* at 9.
4. *Id.* at 9-10.
5. Over the course of his career, Judge Selya has earned a reputation as one of the "wittiest and wordiest" jurists. *See, e.g.,*http://www.boston.com/news/globe/ideas/articles/2006/12/10/the_sesquipedalian_septuagenarian/; http://www.nytimes.com/1992/03/27/news/bar-sustained-dictionaries-judge-rules-that-no-word-word-play-inadmissible.html.
6. *See* 781 F.3d at 11. Literally, "to defenestrate" means to throw an object (or a person) out a window. The term, from the Latin *fenestra* (window), is said to have been coined to describe the most famous historical defenestration of Prague in 1618, which lead to the Thirty Years War. Two imperial governors (Catholic) and their secretary were ejected by Protestants from a window in the Prague Castle and landed in a pile of manure. An earlier famous defenestration of Prague had taken place in the 1400s, with unfortunate city council members tossed out the windows of the town hall, whereupon they were killed by a Hussite mob gathered below. *See, e.g.,* https://en.wikipedia.org/wiki/Defenestrations_of_Prague. Declarations of "to defenestrate or not to defenestrate" famously permeate the written opinions of Judge Selya, the author of the *First State* opinion. Judge Selya appears to be so known for this penchant that it has been advised: "Don't walk past an open window if Selya is inside writing an opinion." *See* http://blogs.wsj.com/law/2008/02/04/the-linguistic-talents-of-judge-bruce-selya-2/ ("Items thrown out the window in Selya opinions include speedy trial claims, punitive damages awards, arbitral awards, claims of co-fiduciary liability and laws that unduly favor in-state interests.").
7. This particular Selya-ism means "to give an opinion beyond one's expertise" and derives from the Latin *ultra* (beyond) and *crepidam* (sole of a shoe, sandal). It was apparently invented in the 1800s as an allusion to a saying recorded by Pliny the Elder (23 AD–79 AD), "let the cobbler not judge above the sandal." *See, e.g.,* http://www.worldwidewords.org/weirdwords/ww-ult1.htm.
8. This expression is said to have been inspired by the practice of shearing sheep, as the ruminants may wail and bleat when their wool is being removed. It said that the earliest recorded usage was by a 15th century lawyer, John Fortescue, as "Moche Crye and no Wull." *See, e.g.,* http://www.wordsense.eu/more_cry_than_wool/.
9. 133 S. Ct. 2064, 2068 (2013).
10. *See* 781 F.3d at 11 (citing *BNSF Ry. v. Alstom Transp. Inc.*, 777 F.3d 785, 788 (5th Cir. 2015)).
11. *Id.* (emphases in original).
12. *Id.* at 11-12.
13. *Id.* at 12.
14. *Id.*
15. The publically available briefs filed in the First Circuit do not suggest that either party centered its arguments on the honorable engagement provisions. The oral argument transcript, however, reflects Judge Selya's interest in this particular reinsurance tradition (*see* March 4, 2015 Oral Arg. Tr., p. 8):... Courts seem to have interpreted that as saying that arbitrator's [sic] operating under that kind of honorable engagement clause in effect have powers like the powers of the chancery Courts [sic]. They have equity powers. And there is – is very little question in my mind the case with a payment protocol dispute like this one, that a Court of equity could devise a procedure similar to the procedure that was devised here.
16. 781 F.3d at 12.
17. *Id.* (citing *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003); *Pac. Reins. Mgt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1024-25 (9th Cir. 1991); *Harper Indemnity Ins. Ltd. v. Century Indem. Co.*, 819 F. Supp. 2d 270, 278 (S.D.N.Y. 2011)).
18. *Id.* (citing *Yasuda Fire & Marine Ins. Co. of Eur. v. Cont'l Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994)).
19. *Id.* at 13.
20. *Id.*
21. *Id.*
22. *See, e.g.*, Barry R. Ostrager and Mary Kay Vyskocil, Modern Reinsurance Law § 5:01 (2014 Ed.).
23. Many would likely argue that such an express grant of power is superfluous and is inherent in the concept of "honorable engagement."
24. *See Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 849 (6th Cir. 2003) (citing Schacht v. Beacon Ins. Co., 742 F.2d 386, 391 (7th Cir. 1984)).*
25. *See Century Indem. Co. v. Certain*

Save the Date!

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Underwriters at Lloyd's, London, subscribing to Retrocessional Agreement Nos. 950548, 950549, and 950646, 584 F.3d 513, 558 (3d Cir. 2009).

26. *Banco de Seguros*, 344 F.3d at 261; *Pac. Reins. Mgt. Corp.* , 935 F.2d at 1024-25; *Meadows Indemn. Co. v. Arkwright Mut. Ins. Co.*, No. MISC 88-0600, 1996 WL 557513, at *4 (E.D. Pa. Sept. 30, 1996).

27. Harper Indemnity, 819 F. Supp. 2d at 278.

28. Unigard Security Ins. Co. v. CIGNA Reinsurance Co., 82 F.3d 423 (9th Cir. 1996) (unpublished disposition) (reinsurance treaty providing that arbitration panel was to "make its decision with regard to the custom and usage of the insurance and reinsurance business" found to implicitly authorize equitable remedies).

29. *Banco de Seguros*, 344 F.3d at 261-62.

30. *Meadows Indemn.*, 1996 WL 557513, at *4 (following *Yasuda*, 37 F.3d at 351).

31. *Yasuda*, 37 F.3d at 351.

32. *Harper Indemnity*, 819 F. Supp. 2d at 277.

33. *Id.* at 278.

34. *Id.* at 280.

35. *PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd.*, 659 F. Supp. 2d 631, 636 (E.D. Pa. 2009), *aff'd* 400 Fed. Appx. 654 (3d Cir. 2010).

36. 400 Fed. Appx. at 656.

37. *See, e.g.*, Graydon S. Staring, Law of Reinsurance, § 22:5 (2015 Ed.); Barry R. Ostrager and Mary Kay Vyskocil, Modern Reinsurance Law § 5:01 (2014 Ed.).

38. *Stone v. Theatrical Inv. Corp., 64 F. Supp. 3d 527, 541 (S.D.N.Y. 2014) reconsideration denied, No. 14 CIV. 6494 PAE, 2015 WL 195848 (S.D.N.Y. Jan. 14, 2015) (internal citation omitted).*

39. *See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (arbitrators have powers to fashion equitable relief); Prostyakov v. Masco Corp., No. 1:1:05-cv-1430-SEB-VSS, 2006 WL 2850022, at *10 (S.D. Ind. Sept. 29, 2006), aff'd 513 F.3d 716 (7th Cir. 2008) ("An Arbitrator is generally free to order equitable relief within the bounds of statutory or contractual limitations."); Konkar Mar. Enterprises, S.A. v. Compagnie Belge D'Affretement, 668 F. Supp. 267, 271 (S.D.N.Y. 1987) ("Arbitrators have broad discretion in fashioning remedies and 'may grant equitable relief that a Court could not.'") (internal citation omitted).*

40. March 4, 2015 Oral Arg. Tr., p. 3. The First Circuit panel hearing the *First State* case also included Hon. David H. Souter (Ret.), former Associate Justice of the Supreme Court of United States, sitting by designation.

41. *Id.*, pp. 3-4.

42. *Id.*,. 6-7.

43. *Id.*, p. 8.

44. *Id.*, p. 10.

arbitrator's toolkit

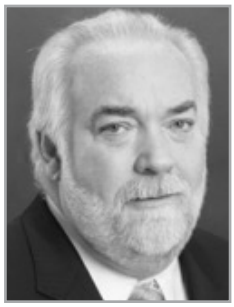
Welcome to the Arbitrator's Toolkit

By Jim Sporleder, Tom Daly and Connie O'Mara

The newly formed ARIAS Arbitrators' Committee formed a subcommittee with the mandate of "Improving the Process" and to that end, this article is establishing what we hope will be a regular column in the *ARIAS Quarterly* by and for arbitrators. In this article we describe some suggested "Best Practices" for the business of being an arbitrator. Whether you are an experienced arbitrator, a neophyte or a party/ lawyer with a stake in improving our corner of the justice system, we hope you will join us and give us your comments, suggestions and ideas.

Jim Sporleder

Tom Daly



Connie O'Mara

Record Keeping Is Critical

Among your first priorities in running your practice is to keep a list of all arbitrations in which you are appointed, chronologically by date. The information you maintain should include dates of appointment and case disposition, names of all arbitrators, lawyers/firms, full names of the parties — including their managing claim company, if there is one, parents/affiliates and witnesses. At the end of this article is a sample spreadsheet.

This chronological arbitration case file will be your best friend (in electronic or hard copy or both). Take it with you when you travel, as umpire questionnaires come in at odd times and often give a short response time. You can also use this document, or a variation of your choosing, to help complete and update your certified ARIAS arbitrator listing on the ARIAS website. That public interface helps you let the world know that your experience continues to grow, so it will be in your best interest to keep it up to date.

Arbitrator Case File

Any successful practice will also have a case filing system with an expandable yet distinct file for each arbitration that you accept, and separately, and a folder for those pending, such as umpire questionnaires that you have completed but are still waiting decision by the parties. Many arbitrators file alphabetically by the petitioner's first named company. You'll need to decide whether to maintain this in hard copy or on the computer. Some arbitrators create both. You should develop a specific place in this file for the most important information that you will keep even after you destroy other material in the hard/electronic copy of the file. In our view, the important documents to retain "forever" are:

- The panel hold harmless/ indemnification agreement.
- Your fee schedule and all billing and paid receipts. In addition, keep copies of checks received from the party or the counsel that appointed you.

Jim Sporleder

Jim Sporleder has been an ARIAS certified arbitrator since May, 2011. He is a former Vice President of Allstate Insurance Company, Law & Regulation Department, where he was involved in ceded and assumed reinsurance legal issues, including arbitrations and litigation matters. He is a member of the ARIAS Arbitrators Committee.

Tom Daly

Tom Daly is a senior consultant for Horseshoe Insurance Advisors US LLC. He is responsible for the development of the insurance and reinsurance claims consulting activities as well as litigation support and runoff management business. Tom has over 35 years' experience handling casualty and property insurance and reinsurance claims. He has a demonstrated track record of success and expertise in professional liability including Architects and Engineers, Lawyers E&O, Medical Malpractice, General Liability, Excess/Umbrella, Workers Compensation and oversight of Third Party Administrators. Tom is an ARIAS Certified Arbitrator, Umpire and Mediator.

Connie O'Mara

Connie O'Mara is an ARIAS•U.S. Certified Arbitrator. Formerly President and Chief Legal Officer of Brandywine Holdings (which included Century Indemnity, Century Re, and ACE American Re) a division of ACE Group of Companies. Ms. O'Mara's current practice includes arbitrations, mediations and serving as an expert witness on claims handling issues, claim allocations, and litigation risk. She is a member of the ARIAS Arbitrators Committee.

- The disclosure statement that you made (in writing or verbally) at the organizational meeting which will be included in the transcript.
- The arbitration's confidentiality agreement, if applicable.
- Your engagement letter with counsel, if you used one. If not, keep a record of your fee schedule agreed to by the parties.
- All interim awards and the final awards, if entered and any final disposition documents.

Billing System

Develop a billing system so that you can bill your time and expenses. Here are some suggestions. You may computerize the billing system or keep a hard copy to be typed and calculated later. At the end of this a sample spreadsheet that simplifies billing:

- Any billing system should state the date work is performed, a short but clear explanation of the work or task performed, and the time spent.
- It is important for you to record your time promptly after completion. Doing so will help you remember the specifics of what you did. You owe both honesty and accuracy to the parties that you are billing, and you can lose credibility if your records are not in good order and accurate.
- Maintain a record of the expenses that you have paid out of pocket such as hotel and flight receipts, dinners, cabs, etc. Keep them in a separate envelope in your master file. Even though you may decide not to send a copy of these receipts to the company with your final bill, you could possibly be asked by the company to produce them to obtain reimbursement. Some busy arbitrators send bills out monthly, but most send an interim bill after the organizational meeting, then a final bill at completion of the arbitration.
- Decide if you should ask for a retainer fee. This issue is a matter of your contract with whoever has engaged you. Some such fees are billed and used at the end of the case. Some may be retained if the arbitration settles early. It is most important to explain your retainer amount and terms at the very beginning of the appointment. Don't forget to account for these retainer fees in the final billing. Having a billing system that keeps track of these fees is critical.
- Maintain your billing and receipts for tax purposes. Be aware that as an independent contractor, you may have to make quarterly tax payments to the IRS according to your income earned. Consult with a professional accounting firm prior to engaging in your new business venture.
- Keep these billing records for at least 7 years.
- Develop a 30 or 60-day follow-up system after sending each bill, to keep track of payments and to identify any delinquent payments.

Maintain Multiple Diary Systems–a Must!

Many arbitrators keep multiple diary systems. Whether you use a hard copy daily calendar in which you can insert pages or reminders or an electronic calendar, consider whether it is advisable to have both. Also consider keeping a diary on your smart phone calendar. It is important to diary conference calls, hearing dates, status updates, brief/reply brief due dates, and dates to remind you to make travel arrangements.

Use your diary system to remind you of umpire questionnaire deadlines, ARIAS conferences, and ARIAS certification requirement dates. Most arbitrators find that the only way to keep track of due dates is to continually add these dates to their calendar(s). The busier you become as an arbitrator, the more important it will be for you to track every deadline or commitment, and do so with specificity, so that you are prompted by the diary entry to know why the date has been reserved. This practice also allows you to set aside time to prepare in advance of events by which you will need to have read briefs, motions and any communications among the panel members. The computer/smart phone calendar is an especially useful tool to use for a diary system.

One last suggestion: develop a habit of consulting your calendar 3 to 4 weeks in advance. Some deadlines have to be acted upon or prepared for weeks ahead of time.

Tips For Answering Umpire Questionnaires

- Keep the questionnaires that you received in chronological order in your computer files. Keep original questions as well as your answers in that file.
- Always err on the side of disclosures of relationships and company connections. While that suggestion could be taken to an extreme, it is in your best interest to identify your past relationships so there can be no question of bias in the future.
- Some companies ask questions about information that you do not maintain in your master chronological file. If so, if you have no recollection and no record, let them know that you do not keep such information. As new issues develop in the questionnaire, you may decide to add new areas of record maintenance in your master file. For example, the reinsurance industry today has an increased number of TPA or claim handling organizations, and therefore the data point about which such organization is involved is increasingly important to track and disclose.
- Remember you have a continuing duty of disclosure to notify the parties of new appointments. This obligation can be time-sensitive, particularly where the parties are still making a decision about umpire selection. Unfortunately some counsel fail to send notices to umpire candidates that inform them when another candidate has been selected. You may want to set up a diary date to send a reminder e-mail

to counsel and ask if an umpire has already been selected by the parties. Knowing that information will help you close your file and no longer be obligated to provide updated information. Understand that the umpire selection process can take months to resolve and diary accordingly.

- Some counsel do not use the standard ARIAS umpire questionnaire, or they make significant variations on it. Read the questionnaires carefully.
- There is another ARIAS Arbitrators sub-committee that has been charged with providing feedback to other ARIAS members working on improvements to the ARIAS form questionnaire.
- Remember if you accept an audit appointment or an expert witness appointment, you should keep these assignments in your arbitrator chronological file or a separate file, as those appointments can create the potential for conflict issues and are thus subject to disclosure.
- Some questionnaires ask you to commit to dates or to refuse future arbitrator assignments involving the parties to that case. Where you accept those responsibilities, you will need to track them, to help you comply with the commitments.
- Read the complete questionnaire before you start working on it and before developing answers. Often, some questions toward the end of the questionnaire will automatically disqualify you from needing to answer at all.

Some General Tips for the New Arbitrator:

- Keep your resume on file and updated to be able to attach to umpire questionnaires.
- Keep your fee schedule listed on each file. Will your fees be different as an umpire? Consider your marketing approach, and how you expect your fee structure to impact the number of assignments you get. Have an electronic signature on file for signing awards.
- Keep your electronically signed W-9 on file for use in sending companies your tax information.
- Keep your biography on file for use in speaking and workshop engagements.
- Keep a recent (preferably high-resolution) photo on file.
- Decide what type of computer operating system you will use (Gmail, etc.)
- Decide if you need a website. (We welcome input from others as to whether websites have been valuable to them, and if not, why not.)
- Business cards should identify you as ARIAS CERTIFIED ARBITRATOR and UMPIRE if applicable. Give them out to people as often as possible – they can be an effective and inexpensive form of advertising.
- Decide if you want to incorporate or create an LLC or some other type of legal entity. There are annual fees and income tax implications associated with each. Again, we recommend that you consult with a CPA and/or a commercial lawyer. They should be able to let you know if you will need to create a segregated bank account.
- Choose a name for your new company. Look at the names other ARIAS arbitrators use for your naming ideas. Consider filing your firm name with your local Secretary of State.
- Decide if you want to do reinsurance audits, expert work, mediations or whether your practice will be strictly as arbitrator. Some arbitrators further limit their practice to exclusively umpire work, perhaps because they prefer that type of work, but also perhaps because it helps them market themselves as "neutrals."
- Join industry committees and volunteer to write or speak at conferences. You cannot bill for these hours but the travel and entertainment expense may be a deductible item. This will be time well spent for your professional development and general marketing of your name.
- If you intend to be an umpire, consider where and whether you can attend company or law firm dinners or events. Your new occupation as an umpire will cause you to have to disclose such connections, and on a case-by-case basis, you will need to evaluate whether you will need to eliminate some social and business connections; your role as a neutral decision maker will call into question whether you have avoided an appearance of impropriety.

Arbitrator Master Case List

Petitioner	Respondent	Matter (subject of dispute)	Petitioner's TPA	Petitioner's Counsel	Petitoner's Arbitrator	Respondent's TPA

- Always be prepared. Read the documents given to you by counsel carefully. Counsel and your co-panelists can tell if you are not prepared for hearings or panel discussions.
- The ARIAS Intensive Arbitrator Training is designed to get you started and give you the background on the issues facing Arbitrators and arbitrator appointments; it is necessary for certification and an excellent starting point for this career.

Future Tool Kit Discussions

In future columns we hope to cover more operating issues such as the pros and cons of using an "engagement letter" (with samples), records retention, and how to keep track of lawyers changing firms, and books of business being transferred. Our end goal is to improve the process for the parties, the lawyers and the arbitrators so the participants can have confidence their cases are being resolved ethically, efficiently and justly. We hope you will join us in contributing to this effort. Please direct your concerns, comments and suggestions to a member of:

Improving the Process Subcommittee:

Jim Sporleder (sporleder.arbitrations@gmail.com), Tom Daly (tom@horseshoeadvisors.com), and Connie O'Mara (connie@cdomaraconsulting.com) are the "Improving the Process" subcommittee of the ARIAS Arbitrator Committee. They are currently planning a breakout session for the ARIAS 2015 Fall Conference dedicated to facilitating arbitrators' business practices. ▼

ARBITRATOR BILLING TEMPLATE:

NAME OF CASE					$0	Rate
Detail of Time and Billing		*By inserting hourly rate in yellow area, time and amount will automatically be calculated*				
Date	Time Spent (in minutes)	Hours	Amount	Description of Work		
		-	-			
		-	-			
		-	-			
		-	-			
		-	-			
		-	-			
		-	-			
			-			
		-	-			
		-	-			
		-				
Total	0	0	0			

	Respondent's Counsel	Respondent's Arbitrator	Umpire	Date Appointed	Fee/ Retainer	Date Completed	Underlying Insured	Issues

news and notices

ARIAS•U.S. Umpire/Neutral Requests & Inquiry Process Available on Website

As a free service to its members, to enable them to preserve anonymity in relation to umpire (or for a neutral role) or for availability and scheduling inquiries, the ARIAS•U.S. Ethics Committee has established a process for members to fulfill these requests. Requests can be processed using the ARIAS•U.S. Request Form - Umpire/Neutral Panel Member Availability and the ARIAS•U.S. Arbitration Scheduling Inquiry Letter which can be located on the ARIAS•U.S. website under the "Resources" tab on the FORMS section and submitted to the ARIAS•U.S. headquarters office to director@arias-us.org or faxed to 703-506-3266.

ARIAS•U.S. Rules Updated

The ARIAS•U.S. Rules have been updated. Updates include additional instructions for the parties to incorporate either the Standard ARIAS Rules with the Streamlined Rules for disputes worth less than $1,000,000 or for the parties to incorporate the Neutral Rules with the Streamlined Rules for disputes worth less than $1,000,000. This information can now be found on the website, under the ARIAS•U.S Rules tab.

Second 2015 Webinar Hosted on April 22 Drew 25 Attendees

ARIAS·U.S hosted the second webinar of the year, Asbestos - A Perspective from the Direct Side: Current Trends and Future Predictions, on April 22. The webinar, which drew in a total of 25 attendees, was moderated by Leslie A. Davis, Crowell & Moring LLP and led by two industry experts Stephanie Niehaus, Squire Patton Boggs (US) LLP and Shannon Hall, San Francisco Re/Allianz, both with extensive experience defending claims and managing asbestos litigations.

During the webinar, panelists discussed the Garlock bankruptcy case and its potential impact on underlying litigation. As a focus of the webinar topic, panelists also looked at current trends which indicate that the law on employees' ability to file lawsuits against their employers is changing, and varies by jurisdiction. Also coming down the pike is the Furthering Asbestos Claim Transparency (FACT) Act, which will require Asbestos Trusts to produce quarterly reports identifying plaintiffs who have filed claims, been paid, and information regarding the basis for payment. To view the full webinar, visit the ARIAS·U.S website calendar and access the presentation On-Demand.

September 30th Webinar Will Offer CLE for the First Time

For the first time since webinars have been offered, ARIAS·U.S. will offer attendees 1.5 NY CLE credits for the upcoming September 30 webinar, Traditional Life Insurance: Claim and Arbitration Issues. This webinar will familiarize participants with several key claim handling and investigation issues that are unique to life insurance claims, and offer insight and guidance into areas where life insurance arbitrations can, and often do, differ from property and casualty arbitrations. During this webinar, three industry leaders; Stephanie Dunn, Vice President & Associate General Counsel, SCOR Global Life Americas, Marlon Fearon, Vice President and Claim Expert, Global Life & Health Claims, Swiss Re America Holding Corporation, and Michael Carolan, Crowell & Moring, will address these issues. Stacey Schwartz, Senior Vice President & Senior Counsel, Swiss Re America Holding Corporation will facilitate the discussion. Registration will close on September 29.▼

article

Judicial Review / Appeals of Arbitration Decisions in Bermuda

By Rod S. Attride-Stirling and Cratonia Smith

Introduction

Arbitrations in Bermuda fall under one of two legislative regimes, depending primarily on the jurisdictional nature of the arbitration agreement:

1. the Bermuda Arbitration Act 1986 ("1986 Act"); or
2. the Bermuda International Conciliation and Arbitration Act 1993 ("1993 Act").

The 1986 Act was modeled on the Hong Kong Arbitration Ordinance then in force, and the majority of its provisions derive from the English Arbitration Acts 1950-1979. The 1986 Act governs domestic arbitrations. International commercial arbitrations are governed by the 1993 Act. In theory parties may opt out of the 1993 Act, and arbitrate under the 1986 Act (section 29 of the 1993 Act) although it would be highly unusual to see both parties to an international commercial arbitration agree to opt out of the more modern arbitration regime which was specifically designed for arbitrations which were both international and commercial.

The 1993 Act adopts the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration (the "Model Law") in its entirety. The Model Law was drafted by a working group of representatives from over forty states with the intent to produce a uniform law governing arbitral procedure designed specifically for international commercial arbitration. It looked to place emphasis on party autonomy, restricting the interference by the courts to an absolute minimum. As such, the process for international commercial arbitrations in Bermuda closely mirrors the process applied in other Model Law jurisdictions.

A key distinguishing factor between the two Bermudian legislative regimes is the appeal and judicial review process under each regime. For the purposes of this discussion, we will focus on appeals and judicial review under the 1993 Act, applicable to international commercial arbitrations, which would govern modern reinsurance disputes.

Appeals/Judicial Review under the 1993 Act

Under the Model Law, the powers of the Court to interfere with the arbitral process are reduced to a minimum. The arbitral tribunal is competent to rule on a challenge to its jurisdiction (Model Law, Article 16(1)). If the tribunal finds that it has jurisdiction, there is a single right of recourse to the Supreme Court of Bermuda[1] under section 25(1)(a) of the 1993 Act. Applications must be made within 30 days of receipt of the arbitral tribunal's ruling (Model Article 16(3)). Section 25(1)(a) of the 1993 Act permits an application to be made to the Supreme Court of Bermuda seeking the following relief: (i) appointment of an arbitrator in default of the appointment procedure in the arbitration clause (Model Law Article 11(3),(4)); or (ii) failure or impossibility of an arbitrator to act (Model Law Article 14). There is no right of appeal from a decision of the Supreme Court of Bermuda in respect of any of these matters.

There is no appeal against an arbitral award under the Model Law based on error of law or fact. Instead there is only a very limited ability to set the award aside. It should be stated that the issue of appeals of arbitration awards is one of the areas where Bermuda law and English law differ substantially, as England retains the limited right to appeal arbitration awards based on errors of law.

Setting aside an arbitral award is within the exclusive jurisdiction of the Court of Appeal of Bermuda, from which there is no further appeal (section 25(1)(b) of the 1993 Act).[2] Applications to set aside an arbitral award must be made not more than three months from the date of the award. The grounds upon which an award may be set

Rod S. Attride-Stirling

Cratonia Smith

Rod S. Attride-Stirling

Rod S. Attride-Stirling is Chairman of ASW Law Limited and has extensive experience acting as counsel in reinsurance arbitrations. He is listed in the Euromoney Expert Guide to the World's Leading Insurance and Reinsurance Lawyers (www.expertguides.com), is a member of the Bermuda Government Insurance Advisory Committee and the US/Bermuda Tax Convention Advisory Committee, as well as chairman of the Insurance Act Appeals Committee. He is a former President of the Bermuda Bar Association.

Cratonia Smith

Cratonia Smith is an Associate in the Litigation Department at ASW Law Limited, which advises in all areas of corporate and commercial law and specifically in contentious cross-border litigation, arbitrations and commercial insolvency. She has been a member of the Bermuda Bar for 5 years.

aside under the Model law are very limited and are derived from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

The 1993 Act is wholly unlike the 1986 Act, which earlier legislation adopted the system of judicial review in the English Arbitration Act 1979, permitting challenges to an award on the ground of error of law. While this may be seen as a disadvantage to the 1993 Act, most parties enjoy the 'finality' offered by the Model Law and are keen to avoid the time and cost of an appeal process. The finality of this process is one of its most valued features.

The only grounds upon which an award may be set aside by the Court of Appeal under the Model Law are set out in Article 34, and are summarized as follows:

1. Incapacity of a party to the arbitration agreement;
2. Invalidity of the arbitration agreement;
3. Improper notice of the appointment of an arbitrator;
4. The award entertains a dispute outside of the scope of the contemplated terms of the submissions to arbitration;
5. Improper composition of the tribunal, or the arbitral procedure is contrary to the agreement of the parties;
6. The subject matter of the dispute is not capable of resolve by arbitration under the laws of Bermuda;
7. The award is irreconcilable with the public policy of Bermuda.

As to the public policy ground of Article 34 (Article 34(2)(b)(ii)), the 1993 Act expands on this in section 27 of the 1993 Act, which provides that "*an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption*."

Article 36 of the Model Law provides the grounds upon which recognition and enforcement of an arbitral award may be refused. These grounds closely mirror the grounds upon which an award may be set aside under Article 34 of the Model Law, differing only in that Article 36 includes a ground which allows recognition or enforcement of an award to be refused if the award has not yet become binding on the parties, has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. The grounds in Article 36 of the Model Law mirror the grounds in the New York Convention. However, Article 36 goes further than the New York Convention in that it not only applies to arbitral awards issued outside the state in which enforcement or recognition is sought, but also to awards that are issued in international commercial arbitrations taking place within the enforcing or recognizing state. Although Article 34 and 36 are derived from the New York Convention, the New York Conventions deals only with the recognition and enforcement of foreign arbitral awards. The 1993 Act however, deals with both recognition and enforcement of an arbitral award as well as applications seeking to set an arbitral award aside.

Article 34 of the Model Law in practice

Given that applications to set aside arbitral awards are rare in Bermuda, insight into the Bermuda court's application of Article 34 of the Model Law in accordance with section 25(1) of the 1993 Act is limited.

In an application to the Supreme Court of Bermuda in *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd*., the applicant, Montpelier Reinsurance Ltd., applied for an order appointing a third arbitrator. Although the application was made pursuant to Article 11(4) of the Model Law and as such did not consider Article 34, the court in its Ruling briefly referred to the ability to set aside an award under Article 34(2)(a)(iv) where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties noting "*this is perhaps the most powerful sanction for either party seeking to deviate in any material way from the contractually agreed arbitration procedure in general terms*."[3]

> In practice, applications to set aside an arbitral award in Bermuda are rare because neither errors of law or fact can give rise to the setting aside of an award. This narrow scope offers finality to parties who are willing to trust the arbitral process.

Reference was also made to the ability to set aside an award under Article 34 in *Skandia International Insurance Co. and others v Al Amana Insurance and Reinsurance Company Limited* ("*Skandia*"), an application which considered the validity and effect of an arbitration clause in determining whether or not an interlocutory injunction restraining foreign proceedings should be granted. The court's Ruling in Skandia confirmed the following: (i) questions regarding an arbitral tribunal's jurisdiction to hear a dispute may be determined by the Supreme Court[4]; (ii) decisions of the Supreme Court are final[5]; and (iii) an arbitral award may be set aside in circumstances where an arbitration agreement is found to be invalid.[6]

The only reported ruling in Bermuda in connection with an application to set aside an award under Article 34 is from *Christian Mutual Life Insurance Company and others v ACE Bermuda Insurance Ltd*. ("*Christian Mutual*"). However, given that the Court of Appeal ultimately adjourned the application, and it was not pursued further, *Christian Mutual*, a decision which turned on unusual facts, offers very little assistance as an authority on the Bermuda Court of Appeal's interpretation of the Article 34.

Christian Mutual involved two prin-

...the process for international commercial arbitrations in Bermuda closely mirrors the process applied in other Model Law jurisdictions.

cipal applications following a ruling of an arbitral tribunal in an arbitration dispute, one which challenged the arbitral tribunal's jurisdiction to hear the dispute and was made to the Supreme Court of Bermuda pursuant to section 25(1)(a) of the 1993 Act (Model Law Article 16(3)), and a second application seeking to set aside the arbitral tribunal's award pursuant to Article 34 of the Model Law, which was made to the Court of Appeal. The second application was made before the determination of the first application to preserve the time limits set out in Article 34(3), namely that the application to set aside an award must be made within 3 months of the date of the award. At the hearing of the application to set aside the arbitral tribunal's award in the Court of Appeal, the application challenging the tribunal's jurisdiction remained pending in the Supreme Court. The Court of Appeal stayed the proceedings in the lower court and then adjourned the application to set aside the award. Following this, neither application was pursued further in the Courts.

Other Model Law States

Although decisions of fellow member Model Law States are not binding in Bermuda, in the absence of Bermuda authority on Article 34 the Bermuda court would consider decisions of other Model Law States, particularly within the Commonwealth (of which Bermuda is a part) to be of some persuasive value.

We have seen from such decisions confirmation that arbitral awards cannot be set aside for errors of law or fact under the Model Law, and additionally that Article 34(2)(b)(ii) (public policy ground) should not be construed to enlarge the scope of intervention to set aside errors of law or fact.[7] The scope of public policy under the Model Law should be construed narrowly[8] but would include conduct of an arbitral tribunal that is marked by corruption, bribery or fraud, or otherwise been contrary to essential morality[9]. We note that courts are keen to recognise arbitral autonomy[10] and that a setting aside application is not a process whereby facts which have already been established in the arbitration are being reassessed[11]. A reviewing court should never review the merits of an arbitral award.[12] Additionally, an arbitral tribunal's jurisdiction to interpret an arbitration agreement may be construed broadly.[13] We also see the importance of filing a complete application, which includes all of the grounds upon which it is sought to set aside the award[14], as amended applications may not be considered[15]. Further, such applications must be made within the time period outlined in the Model Law given that there is no provision within the Model Law for an extension of time.[16] Lastly, we see the court's willingness to set aside an award on the basis that an arbitral tribunal has exceeded the scope of their submission or its mandate, as well as the importance of a party being heard.[17]

Conclusion

In summary, appeals and judicial review under the 1993 Act fall under the exclusive jurisdiction of the Court of Appeal, from which there is no further appeal, and is limited to the ability to set aside an arbitral award on the limited grounds available in Article 34 of the Model Law (section 25(1)(b) of the 1993 Act.) In practice, applications to set aside an arbitral award in Bermuda are rare because neither errors of law or fact can give rise to the setting aside of an award. This narrow scope offers finality to parties who are willing to trust the arbitral process. ▼

Although decisions of fellow member Model Law States are not binding in Bermuda, in the absence of Bermuda authority on Article 34 the Bermuda court would consider decisions of other Model Law States, particularly within the Commonwealth (of which Bermuda is a part) to be of some persuasive value.

ENDNOTES

1. *The Supreme Court of Bermuda is the main trial court. Appeals from this court lie to the Court of Appeal, but not in relation to this type of application.*
2. *Normally, decisions of the Bermuda Court of Appeal may be appealed to the Privy Council in England, but not in relation to this type of application.*
3. *[2008] Bda LR 2; p. 14, para 44*
4. *[1994] Bda LR 30; p. 37*
5. *Ibid; p. 39*
6. *Ibid; p. 40*
7. *PT Asuransi Jasa Indonesia (Persero) v Dextia Bank SA [2006] SGCA 41; Bayview Irrigation District #11 v United Mexican States [2008] O.J. No. 1858; Cargill International SA v Peabody Australia Mining Ltd. [2010] NSWSC 887*
8. *PT Asuransi Jasa Indonesia (Persero) v Dextia Bank SA [2006] SGCA 41*
9. *Bayview Irrigation District #11 v United Mexican States [2008] O.J. No. 1858*
10. *Endoceutics Inc. c. Philippon [2013 QCCS 1742]*
11. *ABC Co v XYZ Co Ltd. [2003] 3 SLR 546*
12. *Nearctic Nickel Mines Inc. c. Canadian Royalties Inc. [2012 QCCA 385]*
13. *Endoceutics Inc. c. Philippon [2013 QCCS 1742]; Nearctic Nickel Mines Inc. c. Canadian Royalties Inc. [2012 QCCA 385]*
14. *ABC Co v XYZ Co Ltd. [2003] 3 SLR 546*
15. *Downer-Hill Joint Venture v the Government of Fiji [2005] 1 NZLR 554*
16. *ABC Co v XYZ Co Ltd. [2003] 3 SLR 546*
17. *PT Asuransi Jasa Indonesia (Persero) v Dextia Bank SA [2006] SGCA 41; Louis Dreyfus, s.a.s. (SA Louise Dreyfus & Cie) c. Holding Tusculum, b.c. 2008 QCCS 5903*

article

The English Court's Role in the Arbitration Process

By Jonathan Sacher and David Parker

Jonathan Sacher

David Parker

Many jurisdictions continue to flirt with the arbitration "tourist".

Whilst the weather tends not to bring tourists flocking to England, the same cannot be said of its established arbitration laws and procedural framework, all of which are embodied in dedicated legislation, the English Arbitration Act 1996 ("the Act").

Those companies that choose to settle commercial disputes by arbitration rather than in court would probably list a number of reasons for their decision. High up on any such list is likely to be achieving binding, efficient resolution to disputes under a procedure and rules to which the parties themselves agree and that are tailored to a particular dispute.

Whilst resolving a dispute through arbitration is sound in theory, an unwelcome result can be a party having no recourse when it feels that the arbitration was flawed. Whilst arbitration is designed to be a flexible forum for parties to use and tailor to their particular circumstances, without fairness or rights of challenge/appeal, the standing of awards would soon diminish in the event of "rogue" awards.

Consequently, ensuring that fairness resonates throughout the process and that there are safeguards enshrined in the arbitration framework is important in attracting insurance companies to arbitrate in England. This is what the Act tries to do by giving the English court jurisdiction to exercise a power of review in certain, but quite limited, circumstances.

That said, the English court has, increasingly, taken the view that interference in arbitrations should be kept to an absolute minimum. This upholds the sanctity of arbitration awards and is enshrined within the legislation itself as a "general principle"[1]:

> "in matters governed by [the Act] the court should not intervene except as provided [in the Act]..."

The Act makes provision for judicial review of arbitration awards in three ways. English arbitration awards can be challenged for an alleged lack of jurisdiction on the part of the tribunal[2], for serious irregularity[3] and/or on a point of law[4]. Importantly, the parties are free to agree to exclude the right of appeal on a point of law.

There are statutory hurdles to overcome before getting to the challenge stage. First, the party must have exhausted all available arbitral processes of review and appeal[5]. Secondly, upon finding out the result of any final appeal of the award from the tribunal, a party must issue an application to court within 28 days or face being barred from appealing/raising a challenge[6]. Also, should a party have become aware of a head of challenge during the arbitral proceedings and not raise an objection; it cannot later raise that objection before the court.

Challenge to the award: substantive jurisdiction of the Tribunal

A challenge under Section 67 of the Act is an application challenging the jurisdiction of a Tribunal (whether the Tribunal itself has determined that it has jurisdiction, or not). A party may apply to the court either to challenge an award of a Tribunal as to its substantive jurisdiction or to request the court declare part or the whole of an award on the merits to be of no effect.

The section is mandatory and, unlike other parts of the Act, the parties cannot agree that it will not apply. Either party to an arbitration can make an application to the court challenging the arbitrators' substantive jurisdiction without needing to request permission from the Tribunal or the other party to make such an application.

Any challenge to the substantive jurisdiction of a Tribunal is usually based on one of the following grounds:

1. whether there is a valid arbitration agreement; and/or
2. whether the tribunal was properly

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Whilst arbitration is designed to be a flexible forum for parties to use and tailor to their particular circumstances, without fairness or rights of challenge/appeal, the standing of awards would soon diminish.

constituted.

Whilst the court remains committed to exercising its power under this section in a limited sense, the court recently confirmed its view that jurisdiction of arbitral tribunals remains an important issue to be resolved in court[7]:

> "the consistent practice of the courts in England is that they will examine and re-examine for themselves the jurisdiction of arbitrators".

Statistics demonstrate that very few challenges to a Tribunal's jurisdiction come before the courts, however of six challenges made under this section in 2014 (arbitrations of all types of dispute, not limited to reinsurance), only one succeeded[8].

The costs involved in challenging an arbitration award tend to be prohibitive and as such only those challenges with the greatest chance of success tend to be advanced – however, an applicant's chance of success has been looked at as a preliminary issue by the courts recently in an attempt to make challenges of this nature more user friendly.

Despite it being used rarely (it would be unusual for parties to proceed to an award on the merits if there were any issues concerning a Tribunal's jurisdiction to make the award), the court's power to review this aspect of arbitration is of fundamental importance and bolsters parties' decisions to settle their disputes by arbitration. This avenue for review mitigates against the risk of parties being subject to decisions of a Tribunal/arbitrator who the parties never intended would be able to determine a dispute.

Challenge to the award: serious irregularity

A party to arbitral proceedings may apply to the court under Section 68 of the Act challenging an award on the grounds of "serious irregularity" affecting the Tribunal, the proceedings or the award.

As with challenges related to jurisdiction, the section is mandatory and parties cannot opt out of it. Any challenge in court should be made on notice to the Tribunal and other parties but, like Section 67, Section 68 does not require "permission".

On the face of it, this section could provide carte blanche to parties to apply to court if they are unhappy with an award citing spurious reasons as to why an award should be set aside. On receiving any such applications, an interventionist court might seize upon this section as giving it license to become involved and override arbitration decisions. This might be extremely damaging to arbitrations in England, significantly devaluing an award if it was open to challenge with little foundation.

However, the Act then narrows the scope of what can constitute a "serious irregularity" to a list of issues that the court considers has caused or will cause substantial injustice to the applicant.

It is not sufficient for an applicant challenging under one of these listed grounds to simply assert an "irregularity". Basic though this sounds, the applicant must show how the serious irregularity has or will cause it "substantial injustice". The nature of Section 68 therefore is to provide a "long-stop", available only in the most extreme cases of irregularity.

A legislative committee in England (the Departmental Advisory Committee or "DAC") reviewed the law in this area prior to the Act being finalized.

It is extremely rare for appeals on points of law to be successful in the reinsurance context.

The DAC declared this right of challenge to apply where:

> "the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

As with challenges to jurisdiction, this power of judicial review is, therefore, an important safeguard in the English arbitration framework.

As with section 67, very few challenges under section 68 have succeeded demonstrating the court's reluctance to intervene, unless the circumstances are exceptional.

A recent challenge alleging a Tribunal acted in breach of its general duties raised the question of what a Tribunal should do in circumstances where one of the parties simply decides not to participate in a particular hearing. The Tribunal has a duty: (a) to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; and (b) to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined[9]. The Tribunal's decision to refuse to adjourn proceedings in this case was upheld by the court and ruled as not constituting a serious irregularity[10]. However, a Tribunal that makes an award on the basis of points not advanced by the parties or in respect of which they were not given a fair opportunity to comment, will amount to a breach of section 33 of the Act and constitute a serious irregularity under s68(2)(a)[11].

There is a particular danger of serious irregularity where an arbitration takes place on paper. The English court recently considered that, where

an arbitration had been conducted on paper without an oral hearing and the claimant and the respondent had each sought a particular form of relief, where the Tribunal adopted a "half-way house" which had not been raised by either party, this was a serious irregularity[12].

Appeal on a point of law

On the DAC's recommendation, the Act includes provision that, unless otherwise agreed, an arbitration award must contain reasons[13]. The DAC considered that[14]:

> "... it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision..."

From having a reasoned, written award flows the possibility of an appeal (indeed, a reasoned award would appear to be a necessary prerequisite for an appeal on a point of law).

A restricted right of appeal on a point of law had been present in English law for many years prior to the Act. When the Act was being prepared, the DAC considered that a right of appeal to English courts should remain in the legislation (albeit one that the parties can contract out of)[15]. Appeal of an award is restricted to questions of English law so an arbitration under English procedural rules but applying foreign law cannot be appealed. There can be no appeal to the English courts on a question of fact (whether an issue is one of "law" or "fact" is, of course, sometimes open to debate but the courts will be as restrictive as possible on this distinction).

Perhaps the most challenging hurdle for a potential appellant to overcome is the requirement to first obtain leave to appeal from the court. Unless the parties to an arbitration agreement agree that an appeal should be brought, leave is required to bring an appeal. An English court will only grant leave if the statutory criteria laid down in the Act are satisfied[16]:

1. the determination of the question will substantially affect the rights of one or more of the parties;
2. the question is one which the tribunal was asked to determine;
3. on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt;
4. despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The DAC considered it desirable for the court to expressly consider whether granting permission to appeal was "just and proper" in each case. In doing so, the DAC emphasized the necessity to pay attention to the parties' decision to arbitrate when the court is exercising this power of judicial review[17]:

> "... the court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor..."

Practitioners in many jurisdictions find a right of appeal on a point of law to the courts to be inconsistent with and contrary to the rationale behind choosing arbitrators to decide disputes. Because the right of appeal is not mandatory in England, parties can decide not to confer this power on the court if they do not wish to do so. In any event, it is extremely rare for appeals on points of law to be successful in the reinsurance context. In the 18 years since the Act came into force there has only been one successful appeal of an English Reinsurance Arbitration Award, where a Tribunal's decision that a reinsurer's liability under a reinsurance policy was to be decided by applying Iowa law despite the reinsurer admitting before the Tribunal that English law was the proper law was successfully appealed under this section of the Act[18].

In the 18 years since the Act came into force there has only been one successful appeal of an English Reinsurance Arbitration Award.

Conclusion

The arbitration framework under the Act bestows upon the English court a number of powers which can be exercised to review arbitration proceedings/awards.

Far from these powers being inconsistent with resolution of disputes by arbitration, they provide an important safeguard to parties who know that they are not at the mercy of a "rogue" decision, one that their original agreement to arbitrate could not possibly be said to encompass.▼

ENDNOTES

1. Section 1(c) of the Act
2. Section 67 of the Act
3. Section 68 of the Act
4. Section 69 of the Act
5. Section 70(2) of the Act
6. Section 70(3) of the Act
7. Dallah Real Estate v Government of Pakistan [2010] UKSC 46
8. PEC v Asia Golden Rice Co [2014] EWHC 1583
9. Section 33 of the Act
10. Konkola Copper Mines Plc v U&M Mining Zambia Ltd [2014] 2 Lloyd's Rep. 649
11. London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749
12. Lorand Shipping Ltd v Davof Trading (Africa) [2014] EWHC 3521
13. Section 52(4) Arbitration Act 1996
14. Paragraph 247, DAC report on the arbitration Bill, February 1995
15. Paragraph 285, DAC report on the arbitration Bill, February 1995
16. Section 69(3) Arbitration Act 1996
17. Paragraph 290, DAC report on the Arbitration Bill, February 1995
18. CGU International Insurance plc v Astrazeneca Insurance Co Ltd [2005] EWHC 2755

article

Judicial Review of Arbitration Awards: France Current Situation

By Christian Bouckaert and Romain Dupeyré

In 2011, the French system of arbitration was reformed in order to renew its legal framework and to embed French courts' decisions since 1981.[1] This reform brought to French law harmonized arbitration rules, allowing an easier system of control. As a result, the efficiency of arbitral awards was reinforced; for instance, because recourses against the awards are no longer suspensive.[2]

According to Article 1518 of the Code of Civil Procedure (**CPC**), "*the award rendered in France in international matters can only be the subject of an action for annulment*." Article 1522 CPC adds that "*by special agreement, the parties may, at any time, expressly waive the annulment*".

Judicial recourses, rather than review, against arbitral awards therefore take the form of annulment recourses. A very large majority of these recourses are heard by a chamber of the Paris court of appeal specialized in arbitration and international law matters. One of the fundamental principles which apply to these recourses is the prohibition of the review of the merits of the award. The recourse for annulment is a case against an act, the award, and judges cannot assess the merits of the dispute or determine whether the arbitrators disregarded, manifestly or otherwise, the law.

Article 1520 CPC enumerates five limited grounds on the basis of which party may file a recourse against an arbitral award. Pursuant to this article, an award may only be set aside where:

1. the arbitral tribunal wrongly upheld or declined jurisdiction; or
2. the arbitral tribunal was not properly constituted; or
3. the arbitral tribunal ruled without complying with the mandate conferred upon it; or
4. due process was violated; or
5. recognition or enforcement of the award is contrary to international public policy.

These five grounds are similar to the grounds of the 1958 New York Convention,[3] even though the CPC is more limitative since some of the grounds provided in the New York Convention do not apply in France. For instance, the annulment of the award at the seat of the arbitration does not prohibit its recognition and enforcement in France.[4]

The jurisdiction of the arbitral tribunal

The first ground of annulment of arbitral awards in France pertains to the arbitral tribunal jurisdiction. In this respect, the French Supreme Court ruled that the control of the arbitrators' decision on jurisdiction must be "*total*." As a result, "*judges control the decision of the arbitral tribunal on its jurisdiction, by searching all elements of law or facts to assess the scope of the arbitration agreement.*"[5]

In this regard, an often litigated issue is whether the arbitrators properly extended or refused to extend the effect of an arbitration agreement to non-signatories. The French Supreme Court allows such an extension when a link exists between several contracts which form a contractual unit that creates a presumption of knowledge of the arbitration agreement by the parties.[6] In the *Abela* case, the Paris court of appeal has, for instance, held, on the basis of a thorough review of the file, that the arbitrators erred in refusing to extend the arbitration clause included in the bylaws of a family trust and, therefore, to exercise jurisdiction over non-signatories.[7]

The question of the extension of the arbitration clause has also arisen in the *Dallah* case.[8] In this case, English judges adopted a conflict-of-laws approach and concluded that the law applicable to the arbitration clause was French law. On this basis, the English court of appeals refused to enforce an ICC award made against the state of Pakistan on the grounds that the latter was not a signatory of the arbitration clause, whereas Paris court of appeal, ruling on the very same case and also applying French law, upheld this extension.[9]

In a recent reinsurance case, the French

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Supreme Court has, however, set the limits of the extension of arbitration agreements. It ruled that the arbitration clause contained in a reinsurance contract is manifestly inapplicable when the insured brings an action in tort against the reinsurer.

This case was brought in the aftermath of the explosion of the AZF plant in Toulouse in 2001, as a result of which a number of nearby industrial sites were damaged. Sanofi, which operated one of these sites through one of its subsidiaries, had underwritten an insurance policy covering such damage for its benefit and the benefit of its subsidiaries. After the loss, Sanofi and its insurer concluded an agreement to settle their dispute over the coverage of the loss suffered by Sanofi's subsidiary.[10]

After having merged with a foreign group, this subsidiary complained that its former mother company and the insurer did not perform the settlement agreement. It also alleged that the reinsured induced them in violating the terms of the settlement agreement. As a result, the subsidiary filed an action against its former mother company, the insurer and the reinsurer before the Paris commercial court for breach of the settlement agreement.[11] The insurer and the reinsurer challenged the jurisdiction of the court by invoking the arbitration clauses included, under different terms, in the insurance policy and reinsurance treaty. The commercial court and the Paris court of appeal upheld the challenge and dismissed the case for lack of jurisdiction.[12]

The French Supreme Court quashed these judgments. It recognized that the insurance contract was "*the foundation*" of the settlement agreement and, therefore, that the arbitration clause contained in the insurance policy extended to claims between the insurer and the beneficiary of the policy arising out of the settlement agreement. It, however, refused to establish a link between the settlement agreement and the reinsurance treaty. The Court noted that the insured was not a party to the reinsurance treaty and that its claim against the reinsurer was in tort. As a result, it held that the reinsurer could not claim the benefit of the arbitration clause included in the reinsurance treaty to defeat the jurisdiction of the commercial court.

The proper constitution of the arbitral tribunal

The second ground of annulment deals with the proper constitution of the arbitral tribunal. The tribunal's composition must comply with the conditions provided by the parties in the arbitration clause. In addition, fairness and equality of parties in the appointment of arbitrators must be respected.

The litigation relating to this second ground mainly focuses on issues relating to the arbitrators' alleged lack of intendance and impartiality, which may affect the proper constitution of the arbitral tribunal. Cases in this respect are legions. Over the last year, French courts have heard a dozen of cases in relation to the scope of arbitrators' duty of disclosure. French courts have applied a stringent standard pursuant to which an arbitrator must reveal "*all circumstances that are of such nature as to affect his or her judgment and to cause a reasonable doubt in the minds of the parties as to his or her impartiality and independence*."

In *Tecso*, the Paris Court of Appeal held that the arbitrator's obligation of disclosure was not limited to his or her relationship with the parties: the arbitrator must also disclose his or her relationship with the parties' counsel.[13] In that case, one of the parties contended that it had doubts as to the chairman of the arbitral tribunal's independence since the latter was a friend on Facebook with the adverse party's counsel. The court considered the matter in details.

It underlined that the arbitrator and the counsel only became friends on Facebook after the award had been rendered. It also noted that the arbitrator's Facebook profile had been created as part of the arbitrator's campaign for professional elections. As a consequence, the court concluded that, in this specific case, the relationship was too remote to justify

> In France, recourses against arbitral awards can be lodged on the basis of 5 limited grounds, which are more limited than the ones provided in the New York Convention.

reasonable doubts as to the arbitrator's independence and impartiality.

The decision nevertheless casts doubts on the implication that a Facebook relationship could have in relation to the independence and impartiality of arbitrators. As drafted, the court's judgement suggests that the "Facebook friendship" could have justified the existence of reasonable doubts as to the arbitrator's independence and impartiality if the relationship existed before the award was rendered or if the relationship did not arose out of specific circumstances such as professional elections, which necessarily supposed to widen the scope of one's friendship.

The respect of the arbitrators' mission

The third ground of annulment refers to the failure by the arbitral tribunal to comply with the terms of its mandate. If terms of reference were concluded, the court will check whether the arbitrators' activity has complied with the one that was assigned to them by the parties.

If the arbitrators have been vested with the power to rule in *amiable composition* or *ex aequo et bono*, they must, as part of their mission, confront their ruling with equity. If, on the face of the award, the court finds no element to justify that this was the case, the award must be annulled on the basis of the violation of their mission by the arbitrators.

On the other side, arbitrators who rule *ex aequo et bono* without having been

In a recent reinsurance case, French courts have set the limits of the extension of arbitration agreements to non-signatories.

expressly authorized to do so also violate their mission. It has, however, been ruled, in a recent reinsurance case, that the mere reference, in the award, to the "*reasonable understanding of a professional*" and "*a reasonable interpretation of the reinsurance treaty on the basis of the contract's general structure*" does not amount to rule in equity.[14] It has also been held, again in a reinsurance context, that the arbitrators violate the terms of their mission if they rule in a single award on claims based several reinsurance treaties, some providing they should rule *ex aequo et bono*, other in law.[15]

Due process

The fourth ground for annulment relates to the failure to comply with the principle of fair and adversarial procedure. The principle is that every party must be informed of the existence of the arbitration proceedings and be put in a position to make its case. Due process must also be respected during the arbitration proceedings. As a result, the arbitrators cannot rule *ex officio* on a legal basis without having first submitted the argument to the discussion of the parties. This principle, however, does not apply to general principles of law, such as the application of interest, which are always part of the debate.[16]

Respect of international public policy

Article 1520-5 CCP provides that "*an award may only be set aside where ... recognition or enforcement of the award is contrary to international public policy*." As a result, French courts do not consider whether the content of the award would contain provisions which would contradict international public policy. They only review whether the enforcement of the arbitral award would create a situation contrary to international public policy.

Since the decisions rendered in the *Thales* case by the Paris Court of Appeal[17] and in the Cytec case by the French Supreme Court,[18] the setting aside of arbitration awards can only be obtained if the proof is brought that, by its actual effect in practice, the decision of the arbitrators violates international public policy in a manifest, effective and concrete way.

These three requirements have been applied in many subsequent cases. In the Linde[19] case, the Paris court of appeal has, for instance, rejected an annulment recourse because the party seeking the annulment did not bring a proof of a blatant, concrete and manifest violation of international public order. The Paris court of appeal noted that, in order to determine if the arbitrators' decision affected the competition, it would have to define the markets, analyze the parties' respective economic position, look for the existence of other competitors . . . As a result, it considered that the alleged violation of international public policy was not "obvious" and, therefore, refused to annul the award.

The triple requirement of a "*concrete, effective and blatant*" breach has, however, triggered many debates between scholars. The requirement of a "manifest" breached has faced the most abundant criticisms. Scholars were numerous to wonder if a concrete breach of international public policy could be left unsanctioned for the mere fact that it was not *"blatant."*[20]

As a result, the Paris court of appeal applied only two of these criteria (*"effective and concrete"*) in some of its recent cases.[21] In *Sprecher*, for instance, the court reviewed a claim for the annulment based on an alleged violation of the international public order without referring to the standard of a "manifest" breach.[22]

In 2014, a number of cases have dealt with issues of fraud and corruption.[23] For these cases, the Paris court of appeal reinforced its control over the award in order to investigate in details whether the allegations of fraud were actually substantiated.[24] In these cases, the court held that: *"the mission of the judge is to seek in fact and in law all the elements necessary to rule on the alleged illegality of the litigious transaction and to determine if the recognition of the award violate in a concrete and effective way the international public order."*

All in all, Paris is, therefore, no place for the arbitration tourist, but rather an arbitration-friendly venue in which courts take due care in respecting the arbitrators' prerogatives to rule on the merits of the case while carefully reviewing the proper conduct of the arbitration proceeding. As a result, they make sure, on the basis of a thorough review of the facts and the law, that the arbitrators properly exercised or refused to exercise jurisdiction, respected due process and their mission and did not render an award which would create a situation which would concretely violate international public policy. ▼

ENDNOTES

1. Decree No 2011-48, 13 Jan. 2011. For an insurance oriented commentary, see Ch. Bouckaert, R. Dupeyré, "Le nouveau droit français de l'arbitrage et ses implications en matière d'assurance et de réassurance", *RGDA* 2011.361.
2. Article 1526 CPC.
3. France ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
4. Paris Ct App., 24 Nov. 2011, No 10/16525, *EGPC*.
5. D. Mouralis, "Examen approfondi de la compétence de l'arbitre par le juge contrôlant la sentence: quelques précisions et illustrations", *Paris J. Int. Arb.,* 2012, n° 1, p. 167.
6. Supreme Court: Cass. 1st civ. div., 30 Oct. 2006, No 04.11-629.
7. Supreme Court: Cass. 1st civ. div., 6 Oct. 2010; *JCP G* 2010, 1028, note P. Chevalier, *Rev. arb* 2010.813, note F.-X. Train; *Paris J. Int. Arb.* 2011-2, p. 443, note J.B. Racine.
8. *Dallah v. Pakistan*, J. Grierson, M. Taok, "Comment on Dallah v Pakistan: Refusal of Enforcement of an ICC Arbitration Award against a Non-Signatory", 26 *J. Int. Arb.* 6, p. 903; A. Savage, P. Angénieux, "Primacy of

the seat: First and Last Tango in Paris", *The European and Middle Eastern Arb. Rev.* 2010, pp. 23-26.
9. Paris Ct App., 17 Feb. 2011, No 09/8533, *Dallah*, *JCP G* 2011, doctr. 1432, n° 2, note Ch. Seraglini.
10. Supreme Court: Cass. 1st civ. div., 9 July 2014; note V. Mazeaud, *Dalloz*, 23 Oct. 2014, No 36.
11. Paris Commercial Ct, No 2012-10-03.
12. Paris Ct App. 12 March 2013, No 12/19982.
13. Paris Ct App., 10 March 2011, No 09/28537, *Paris. J. Int. Arb.*, 2011.787, note Henry.
14. Paris Ct App., 27 May 2014, No 13/05087.
15. Paris Ct App, 5 Nov. 2009, No 08/12816.
16. Paris Ct App., 18 Feb. 2014, *Dounia*, No 12/11849.
17. Paris Ct App., 18 Nov. 2004, *Thales*, *J. Int. Arb.* 2005.239, note D. Bensaude.
18. Supreme Court: Cass. 1st civ. div., 4 June 2008, No 06-15.320, *Cytec, JDI*, 2008, p. 1107, note A. Mourre.
19. Paris Ct App., 22 Oct. 2009, *Docket*, No 08/21022. Supreme Court: Cass. 1st civ. div., 29 June 2011, Case No 10-16.680, *Pourpardine*, *Paris J. Int. Arb.*, 2012-2, p. 393, note A. Mourre.
20. Ch. Jarrosson, « *L'intensité du contrôle de l'ordre public* », *in* E. Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage*, LexisNexis 2014, p. 162 ; « *Faut-il modifier les règles de contrôle ?* », in E. Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage*, LexisNexis 2014, p. 223.
21. Paris Ct App, 17 Jan. 2012, No 10/21349, *Planor Afrique*, D. 2012. 2991, obs. T. Clay.
22. Paris Ct App., 26 Feb. 2013, *Sprecher*, *Int'l J. Arab Arb.*, 2014.57, note R. Dupeyré.
23. Paris Ct App., 8 Apr. 2014, *Nykcool AB*.
24. Paris Ct App., 4 March 2014, No 12/17681, *Gulf Leader*, D. 2014.1967, obs. S. Bollée; 14 Oct. 2014, No 13/03410, *Congo*; 4 Nov. 2014, No 13/10256, *Man Diesel*, *Global Arb. Rev.* 27 Nov. 2014, obs. A. Ross.

Recently Certified Arbitrators

Steven B. Najjar

Steven Najjar practiced law in the insurance corporate and regulatory group of Morris, Manning & Martin, LLP before joining Hannover Re, the world's third largest reinsurer. During his tenure with Hannover Re, Mr. Najjar has occupied various executive positions with Hannover Life Reassurance Company of America, the U.S. life & health reinsurance subsidiary of Hannover Re, as its General Counsel, Chief Operating Officer and Executive Vice President in charge of the Company's Health and Special Risk business unit. Mr. Najjar also served as the President and Chief Executive Officer of Clarendon Insurance Group and spent part of his career with Universal American Corp. and its health insurance subsidiaries as Chief Compliance Officer, General Counsel and Chief Operating Officer.

Mr. Najjar has 23 years of insurance and reinsurance legal practice and industry experience. He is a frequent speaker at insurance meetings and conferences, and serves as a member on several committees of leading life insurance industry associations. He received his undergraduate degree in Journalism from the University of Georgia, and his law degree from Georgia State University, College of Law. He is a former law clerk for US District Court Judge Marvin H. Shoob and retired Georgia Supreme Court Justice Leah Ward-Sears.

Carlos A. Romero, Jr.

Carlos A. Romero, Jr., a partner of Post & Romero, has been practicing in a broad array of insurance matters since early 1980s (starting with captive insurance companies and IRS challenge of tax deductibility of premiums). Among his achievements, Mr. Romero is a Florida Certified Court Mediator, a certified arbitrator of Tribunal General de Justicia de Puerto Rico (a branch of the state court system of Puerto Rico) for cases referred by the courts in Puerto Rico, panel of arbitrators of American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR), and Distinguished Neutral of International Institute for Conflict Prevention & Resolution (CPR) for panels of insurance policyholder coverage, certified public accountants, Miami ADR, real estate, cross border, and taxation. He is also a Fellow Member of The Chartered Institute of Arbitrators. He is an inactive Certified Public Accountant.

Mr. Romero has participated in insurance related arbitrations as an advocate and as an arbitrator (and as a chairman). Mr. Romero received his law degree from Yale Law School and LLM from New York School of Law. He was featured among "South Florida's Top Rated Lawyers in 2014".

Loreto J. ("Larry") Ruzzo

Larry Ruzzo is a NY-licensed attorney with over thirty years of experience in government, private and in-house practice. Following service as an Army Judge Advocate, Mr. Ruzzo joined White & Case in Manhattan, where he worked on behalf of P&C companies resolving disputes over asbestos coverage, Superfund cleanup and insurer bad faith. Mr. Ruzzo subsequently joined Bryan Cave, LLP as Counsel. In 1995 Mr. Ruzzo moved to Willis Corroon Corp. to manage the company's self-insured broker E&O program. He returned to New York and has served as General Counsel and CAO for Willis Re., Inc., FOJP Service Corporation, and as General Counsel for Hospitals Insurance Company, a NY-admitted malpractice carrier that also acted as a cedent and a reinsurer for other entities.

Mr. Ruzzo opened his consulting practice in 2013 and now advises insurance and reinsurance companies, brokers and policyholders in all areas of commercial P&C insurance, with an emphasis on professional and cyber liability, workers compensation and D&O / EPLI matters. He serves on the NYC Bar Association's Insurance Law Committee and authored "A Perfect Front – Securing the Ceding Insurer" (*ARIAS-US Quarterly Journal*, June 2014) Mr. Ruzzo holds a B.A. from St. Lawrence University and a J.D. and an M.B.A. from Vanderbilt.

case notes corner

Arbitrator's Failure to Follow Contractual Appointment Procedures and Forum Selection Clause

Results in Vacatur Of Award By Fifth Circuit

By Ronald S. Gass

Ronald S. Gass

In many instances, the rules governing reinsurance arbitrations are ad hoc, meaning that the parties' agreement does not provide for any specific body of procedural rules, leaving the parties free to fashion them anew for each arbitration. Of course, there are exceptions with some contracts referencing, for example, the American Arbitration Association's ("AAA") Commercial Arbitration Rules, the International Chamber of Commerce's ("ICC") Rules of Arbitration, or perhaps the recently promulgated ARIAS•U.S Neutral Rules for the Resolution of U.S. Insurance and Reinsurance Disputes (*see* Rachel Bernie, David M. Raim, Peter Rogan & Larry P. Schiffer, *The New ARIAS-U.S. Neutral Rules for the Resolution of U.S. Insurance and Reinsurance Disputes*, 22 ARIAS-U.S. Quarterly 10 (1st Quarter 2015)). If the parties' agreement does refer to a particular forum's rules, arbitrators would be well-advised to pay strict attention to them or else risk vacatur of the entire award as a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit held in a recent case.

In mid-2011, a technology professional services company, Organizational Strategies, Inc. ("OSI"), created three captive property and casualty insurance companies with the assistance of three related third-party alternative risk captive management and services companies known collectively as Capstone. Capstone also controlled a reinsurance pooling facility, PoolRe Insurance Corp. ("PoolRe"), domiciled in Anguilla, British West Indies ("BWI") for use by the OSI captive insurers' alternative risk program. Through a convoluted series of interlocking multi-year services contracts, OSI agreed to arbitrate any contract disputes with Capstone, subject to a few exceptions. The agreements referenced the AAA Commercial Arbitration Rules and provided for venue and jurisdiction in Delaware. Parallel to these services contracts, the OSI captives and PoolRe executed separate multi-year reinsurance agreements in which they selected the ICC Rules of Arbitration and included a venue clause providing that any arbitrations shall take place in Anguilla, BWI. The parties also agreed that the arbitrator would be selected by the "Anguilla, BWI Director of Insurance."

The Capstone/OSI business relationship soured after less than a year of operation. Following a mid-2012 accounting audit, OSI alleged that it was overpaying insurance premiums to Capstone. When Capstone refused to change certain accounting information for 2011 involving PoolRe and the three captives, OSI terminated the Capstone services contracts. PoolRe responded by canceling the captive reinsurance agreements and a dispute soon arose over whether it had properly refunded certain premium deposits to the OSI captives. In March 2013, Capstone filed an arbitration demand alleging breach of contract by OSI. For reasons not explained in the opinion, the demand was forwarded to a Houston, Texas arbitrator and former state court judge, Dion Ramos, who appointed himself as the arbitrator for this dispute. Apparently, PoolRe also filed an arbitration demand against the OSI captives and requested that the Anguilla, BWI Director of Insurance appoint the arbitrator for that dispute. The only problem was that Anguilla had no such insurance official bearing that title. When the Anguilla Director of its Financial Services Commission replied to PoolRe's demand, he explained this fact and designated Ramos and his dispute resolution company to select any such independent arbitrators and to administer the related arbitration proceedings.

Ronald S. Gass

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

When OSI first appeared in the Ramos arbitration, it objected to the proceeding on improper venue and other grounds. PoolRe also entered an appearance in that arbitration for the limited purpose of having Ramos appoint an Anguilla-based arbitrator. In April 2013, Ramos applied the AAA rules as specified in the Capstone/OSI services agreement and determined that he had jurisdiction over both Capstone's and PoolRe's claims. He held that PoolRe had waived its right to arbitration in Anguilla by intervening in the Texas arbitration, thereby defeating the parties' ICC forum selection clause in the reinsurance agreements. Meanwhile, OSI and its captives filed suit against Capstone in Delaware state court for breach of contract and to restrain the Ramos arbitration from proceeding. Capstone successfully removed that litigation to Delaware federal district court.

In June 2013, during the pendency of the Texas arbitration and Delaware litigation, Capstone filed a second arbitration demand with Ramos pursuant to another provision in the Capstone/OSI services agreements which specifically carved out disputes concerning Capstone's intellectual property rights and provided that the sole venue and jurisdiction for such claims were in the courts of Harris County, Texas. Ramos deferred consideration of the second arbitration demand until after he had decided the first one. In July 2013, Ramos ruled that PoolRe was properly joined in the first arbitration, that OSI had materially breached the contracts, that OSI's counterclaims were denied, and that Capstone, PoolRe, and a Capstone-related law firm providing legal services to the OSI alternative risk program should share in an award of $451,244 for attorneys' fees, expenses, and costs to be "divided among themselves as they see fit."

Capstone and PoolRe immediately sought to confirm Ramos's award in Texas federal district court and to compel OSI to join the second arbitration. In deference to the pending Delaware federal district court proceeding, the Texas court stayed the motion to compel until after the Delaware court ruled on the OSI lawsuit. In February 2014, the Delaware district court found that the parties' services agreements were unambiguous and that all disputes except for those involving Capstone's intellectual property claims and certain fee disputes were to be resolved by arbitration with Delaware being the proper venue and jurisdiction. OSI promptly initiated a Delaware arbitration and then successfully moved before the district court to compel Capstone to join it. Given that the Capstone/OSI agreements mandated arbitration, the Delaware district court dismissed the case for lack of subject matter jurisdiction so that the arbitration could proceed. Although Capstone appealed the district court's decision to the Third Circuit, the ruling was subsequently affirmed.

In March 2014, the Texas federal district court took up the pending Capstone/PoolRe motion to compel. It found that the arbitrator had exceeded his authority in violation of the Federal Arbitration Act ("FAA") § 10(a)(4) (a federal district court may make an order vacating the award upon the application of any party to the arbitration "where the arbitrators exceeded their powers") by exercising jurisdiction over and applying AAA rules to the disputes between PoolRe and the OSI captives. Because this "tainted the entire process," the court vacated the Ramos award, denied the pending motion to confirm, and denied Capstone/PoolRe's motion to compel OSI to join the second arbitration. Dissatisfied with this decision, both Capstone and PoolRe appealed to the Fifth Circuit.

Noting that arbitration agreements are a "matter of consent, not coercion" and that parties are free to structure their agreements as they see fit, the Fifth Circuit addressed two key legal issues arising from the PoolRe/OSI captives reinsurance agreements: (1) Was the arbitrator properly selected in accordance with the contracts' arbitration clauses; and (2) were the parties' forum selection clauses properly applied by him? Regarding the first question, the court observed that the arbitration clause specifically required that all disputes be submitted to ICC arbitration before an arbitrator selected by the Anguilla, BWI Director of Insurance. Because no such official existed, it concluded that Ramos was not properly selected as the arbitrator. Citing FAA § 5, the court acknowledged that the parties' agreed method of appointment could not be followed but found that the FAA provided an adequate remedy, i.e., a party may apply to the district court for the appointment of an arbitrator if for any "reason there shall be a lapse in the naming of an arbitrator," with a "lapse" encompassing a mechanical breakdown in the arbitrator selection process as in this case. That process was a "material contract term," according to the Fifth Circuit, and when there are "irregularities" in it, vacatur is the appropriate remedy. Ramos was appointed pursuant to the Capstone/OSI services agreements and not those between the PoolRe and OSI captives. When he decided the PoolRe/OSI captives' dispute, he had not been selected in accordance with the contract-specified method.

> The designation of a nonexistent BWI insurance official to appoint the arbitrator to resolve any reinsurance disputes certainly did not promote arbitral efficiency.

As for the forum selection clause question, Ramos applied the AAA rules called for in the Capstone/OSI services contracts, but the PoolRe/OSI captives reinsurance agreements unambiguously provided that all disputes were to be submitted to binding, final, and non-appealable arbitration to the ICC under its prevailing rules. Describing the parties' forum selection clause as an "important" and "integral" part of their agreements, the court found that Ramos's application of the AAA rules was contrary to the parties' ex-

press forum selection clause. Because he decided to exercise jurisdiction over PoolRe in proceedings conducted under the authority of the separate Capstone/OSI services contracts and not the reinsurance agreements, his application of the AAA rules "tainted" the entire process. Thus, Ramos had exceeded his authority in violation of FAA § 10(a)(4), and the district court's vacation of the entire arbitration award did not constitute reversible error. Because the first arbitration award was vacated in its entirety, the Fifth Circuit concluded that it was also appropriate to deny Capstone/PoolRe's motion to compel OSI to join in the pending second arbitration, which sought to enforce the relief Ramos had granted in the first tainted arbitration.

While the parties may have had sound business reasons for drafting the arbitrator appointment and forum selection clauses in the multiple interlocking contracts they executed, this case highlights some of the costly pitfalls that can arise due to a lack of coordination – multi-jurisdiction arbitrations and litigation, disputes over what forum's rules apply to which parties, and uncertainty over the arbitrator selection procedure – all problems that fundamentally undermine the conduct of a cost-efficient and expedient commercial arbitration. It also reinforces the need to vet the preferred arbitrator selection process carefully to ensure that it is and remains viable for the life of the parties' contractual relationship. Here, the designation of a nonexistent BWI insurance official to appoint the arbitrator to resolve any reinsurance disputes certainly did not promote arbitral efficiency. ▼

PoolRe Ins. Corp. v. Organizational Strategies, Inc., 783 F.3d 256 (5th Cir. Apr. 7, 2015), aff'g Civ. Action H-13-1857, 2014 U.S. Dist. LEXIS 42805 (S.D. Tex. Mar. 31, 2014).

members on the move

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

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.

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

Recent Moves and Announcements

Steve M. Kessler, Steve Kessler Consulting, LLC

Steve M. Kessler has retired from Liberty International Underwriters effective July 21, 2015 and will be a Member of Steve Kessler Consulting, LLC based in Carmel, IN. He will specialize in Arbitration, Appraisals under first party property policies, Mediation and Expert Testimony.

Steve can be reached at:
14097 Trueblood Lane
Carmel, IN 46033
Tel # 832-472-5764

Mitchell L. Lathrop

Mitchell L. Lathrop has updated his contact information, he can be reached at:
Phone: +1.619.955.5951
Fax: +1.619.566.4034
Email: mllathrop@earthlink.net
Web: www.MLathropLaw.com

Susan E. Mack Joins Adams and Reese

Susan E. Mack shared that she has recently joined Adams and Reese as Special Counsel in the Jacksonville office. For more than 30 years, Mack has served as a senior executive and general counsel of insurance and reinsurance entities in both the life/health and property/casualty sectors, including leadership positions with Aetna and Transamerica Reinsurance (predecessor to SCOR Global Life). Susan can be reached at her new office at susan.mack@arlaw.com or 904.493.3310.

Milbank, Tweed, Hadley & McCloy

Please note that Milbank, Tweed, Hadley & McCloy's New York office address has changed from One Chase Manhattan Plaza to:
Milbank, Tweed, Hadley & McCloy LLP
28 Liberty Street
New York, NY 10005-1413

Note that this is simply a change of address, the firm's offices are still at the same physical location.

Registration Information

Conference Registration Fees:

ARIAS•U.S. 2015 Fall Conference Registration Fees

Registrant Type	Early (due by September 30)	Regular (due November 4)	Late (Onsite)
Member*	$1,025.00	$1,075.00	$1,175.00
Non-member**	$1,275.00	$1,325.00	$1,425.00

**Members include designated corporate representatives and individual members.*

***Non-members may apply for membership and receive member rates. Application is available online through the Membership section of the website.*

Member/Non-member fee includes: *Meeting costs, program materials, coat check, two breakfasts, one luncheon, and one cocktail reception.*

Spouse/guest fee includes: *Receptions and food events, not the conference sessions.*

Not included in registration fee: *Travel and lodging.*

All registrants will be provided a name badge to wear during the conference. For security purposes, you will be required to wear your name badge at all times during conference activities.

Conference Preparation Materials:

Attendees who register by September 30th will be able to request advance materials to be sent by email, mail, or both. Attendees who register between September 30 and November 4 will receive advance materials by email only. All international attendees will receive materials by email only.

Final Conference Registration Deadline: November 4, 2015

After November 4, 2015, registrations will be accepted onsite at the conference at the onsite fee, and conference preparation materials will be available at check-in.

Direct any inquiries to: Sara Meier, ARIAS•U.S. Executive Director, director@arias-us.org, phone: 703-574-4087, fax: 703-506-3266. ARIAS•U.S., 7918 Jones Branch Drive, Suite 300, McLean, VA 22102

Cancellation Policy: The cutoff date for a full refund of the Conference Registration fee is September 30th. Anyone who cancels between that date and November 4th will receive a refund, less a $100 administrative fee. Notification must be received in writing by email, fax, or postal mail. Refund will be issued by check. Failure to cancel by November 4th will result in forfeiture of the entire registration fee.

Financial Hardship Policy Statement: As required by the New York and Illinois CLE Boards, if a member of the state's bar would like to attend an ARIAS•U.S. conference, but finds that he or she would incur a financial hardship by doing so, an application for waiver of the attendance fee may be made to the Board of Directors of ARIAS•U.S. Such application would be held in strict confidence.

ARIAS•U.S. 2015 Fall Conference

November 12-13 New York City

ARIAS•U.S. 2015 Fall Conference
November 12-13

Registration Form

(a separate form is required for each attendee or activity participant)

First Name:_____ Last Name:_____

Badge Name (ie, Bob for Robert):_____ ☐ I am a First-Time Attendee ☐ I am an Arbitrator/Umpire

Title: _____ Firm Name: _____

Address: _____

City: _____ State/Province: _____ Postal Code: _____ Country: _____

Phone: _____ Email: _____

How would you like to receive advance materials: ☐Email only ☐Mail only ☐Both email and mail

Mailing Address for Advance Materials:_____

City: _____ State/Province: _____ Postal Code: _____

I would like to earn CLE credits for the following state (mark all that apply): ☐ IL ☐ NY ☐ PA

ADA or Special Needs: _____

Dietary Restrictions: ☐ Vegetarian ☐ Vegan ☐ Kosher ☐ Gluten-Free

Food Allergies: _____

Emergency Contact Name: _____ Phone:_____

Do you plan to participate in the speed dating session at the conference on Thursday, November 12th from 3:45-4:50pm? ☐Yes ☐No

ARIAS•U.S. will have a headshot booth at the conference this year, do you plan to have your profile photograph taken during the conference? ☐Yes ☐No

ARIAS•U.S. 2015 Fall Conference Registration Fees (please circle your fee):

Registrant Type	Early (due by September 30)	Regular (due November 4)	Late (Onsite)
Member*	$1,025.00	$1,075.00	$1,175.00
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**Members include designated corporate representatives and individual members.*

***Non-members may apply for membership and receive member rates. Application is available online through the Membership section of the website.*

***Members** include designated corporate representatives and individual members.

CALCULATE YOUR TOTAL DUE:

CONFERENCE REGISTRATION FEE: $_____

$200 Guest – All Meals: $_____

$45 Guest Breakfast Ticket – Thursday, 11/12: $_____

$55 Guest Lunch Ticket – Thursday, 11/12: $_____

$65 Guest Reception Ticket – Thursday, 11/12: $_____

$45 Guest Breakfast Ticket – Friday, 11/13: $_____

TOTAL DUE: $_____

***Guest names for conference badges will be collected at a later date.**

****Non-members** may apply for membership and receive member rates. Application is available online through the Membership section of the website.

Member/Non-member registration fee includes: Meeting costs, program materials, coat check, two breakfasts, one luncheon, and one cocktail reception.

Not included in registration fee: Travel and lodging. ***Only conference attendees and guests registered in advance may attend the meals and reception.***

PAYMENT INFORMATION

You may register for the ARIAS•U.S. Fall 2015 Conference online at www.arias-us.org/index.cfm?a=87 or complete the following credit card information and submit the form to: ARIAS•U.S., 7918 Jones Branch Drive, Suite 300, McLean, VA 22102 or via fax 703-506-3266 or via email info@arias-us.org. For payment by check, please make the check payable to ARIAS•U.S. (Fed ID #13-3804860) and send to: *By First Class mail:* ARIAS•U.S., 6599 Solutions Center, Chicago, IL 60677-6005; *By Overnight mail:* ARIAS•U.S., Lockbox #776599, 350 E. Devon Ave., Itasca, IL 60143

TOTAL DUE: $_____ ☐ Check (payable to ARIAS•U.S.) #_____ ☐ AMEX ☐ DISC ☐ MC ☐ VISA

Credit Card #:_____ Expiration Date: _____ Sec Code: _____

Name as it appears on card:_____ Billing Zip Code: _____

Signature: _____ Date: _____

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