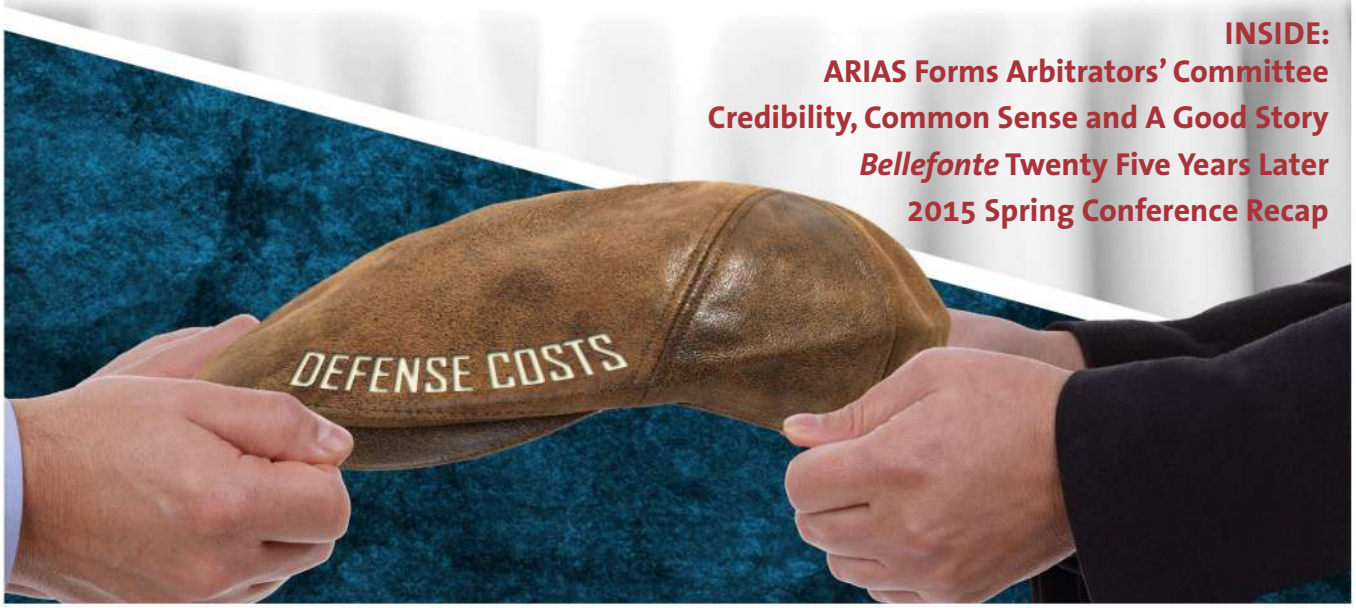
ARIAS U.S.
QUARTERLY
SECOND QUARTER 2015

Caps on Defense Costs:
The Ongoing Tug of War



ARIAS U.S.
VOL. 22 NO. 2
SECOND QTR. 2015

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The ARIAS • US *Quarterly* (ISSN 7132–698X) is published quarterly, 4 times a year by ARIAS US, 7918 Jones Branch Road, Suite 300, McLean, VA 22102. Periodicals postage pending at McLean, VA and additional mailing offices.

POSTMASTER send address changes to ARIAS US 7918 Jones Branch Drive, Suite 300, McLean, VA 22102.

Tom P. Stillman

editor's comments

Reinsurance arbitration awards are traditionally confidential. Not so in litigation where judicial opinions are laid bare for all to see. Some cases stand out for their importance but others are memorable for their amusement value.

Only in a published decision could one read the trenchant opinion in *First State Insurance Co. v. National Casualty Co.*, No. 14-1644, 2015 WL 1263147 (1st Cir. Mar. 20, 2015), authored by Judge Bruce M. Selya. A jurist known for his penchant for esoteric words and expressions, Judge Selya considered the authority of courts to "defenestrate" arbitration awards. Spoiler alert: the way for arbitrators to protect their awards from defenestration is not to draft them in windowless rooms. In analyzing the reasons the appellant "asseverates" that the panel exceeded its authority, he characterizes the appellant's view of the award as "ultracrepidarian," a word the spell check software on my computer refused to recognize. On the other hand, the software had no trouble with "asseverate" even though I would have, but for the context of the sentence in which it was used. In holding that both the award and the district court's decision were hunky dory, my expression, not Judge Selya's, he dismissed the appellant's arguments as "more cry than wool." For those few of you unfamiliar with the expression, according to the website "Wiktionary," it "derived from the practice of shearing sheep in which the sheep may 'cry' as their wool is removed." Believe it or not, the expression is a legal one, as it was first used by a lawyer – in 1470, no less. Upon translating Judge Selya's opinion, the losing party undoubtedly cried again. And what did it cry? "Baaa Humbug."

From taking a judge to task for his use of esoteric language we move to an opinion, *Indiana Lumbermens Mutal Insurance Co. v. Reinsurance Results, Inc.*, 513 F.3d 652 (7th Cir. 2008) in which a judge, Richard Posner, took reinsurance lawyers to task for doing the same. Illustrating why reinsurance disputes are best left to experienced industry professionals rather than the courts, Judge Posner observed that, "Reinsurance is a dauntingly complex esoteric field of business and the briefs in this case are correspondingly complex and esoteric" rife with "the forbidding jargon of reinsurance." He went on to complain that the briefs "were difficult for us judges to understand because of the density of the reinsurance jargon in them." In an admonition to lawyers to express themselves in "ordinary English" he explained that: "We hear very few cases involving reinsurance and cannot possibly achieve expertise in reinsurance practice except by the happenstance of having practiced in that area before becoming a judge as none of us has."

While some may find the above quotes from Judge Posner amusing, others may not. All would agree, however, that the following passages from his opinion guarantee its place on any list of the most amusing cases:

> If while you are sitting on your porch sipping Magaritas a trio of itinerant musicians serenades you with mandolin, lute and hautboy, you have no obligation, in the absence of a contract, to pay them for their performance no matter how much you enjoyed it; and likewise if they were gardeners whom you had hired and on a break from their gardening they took up their musical instruments to serenade you.

Other than taking Judge Posner to task for himself using esoteric language to describe an equally esoteric musical instrument, I say no more.

Enough frivolity. Well, not quite. Our first piece in this edition of the *ARIAS•U.S. Quarterly* begins with a quotation from that well-respected and insightful commentator on the law, Julius Henry Marx. Who? The more learned among you might recognize him by his nom de plume: Groucho. With an apt quotation from Mr. Marx, Connie O'Mara

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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. The text supplied must contain all editorial revisions. Please include also a brief biographical statement and a portrait-style photograph in electronic form.

Manuscripts should be submitted as email attachments to tomstillman@aol.com .

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

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article

ARIAS Forms Arbitrators Committee

By Connie O'Mara


Connie O'Mara

An Arbitrators' Committee has been formed within ARIAS. The committee's purpose is to promote discussion of issues that are important to the arbitrator community and to provide a forum for debate, education, and communication of the discrete (and sometimes diverse) views that arbitrators have on issues such as educational content, ethical stewardship, certification, membership outreach, how to run an arbitral business, and the forms used to provide umpire disclosure.

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When committee co-chairs Mark Megaw (Board liaison) and Sylvia Kaminsky raised the call for volunteers, the overwhelming response necessitated the use of a random number generator (as buried within the capabilities of Excel) to select the committee. (No actuaries were harmed to produce this product). The committee has 12 members and a staggered membership length, so that hereafter every new member will have a two-year term, and each year will bring an opportunity for new participation, though re-selection is not prohibited. The members with an initial one-year term are: Andrew Rothseid, Peter Gentile, Andy Douglas, Marty Haber, and Tom Daly. The members with an initial two-year term are: Jim Sporleder, Connie O'Mara, Aaron Stern, Susan Grondine, and Mark Wigmore.

After only two meetings and roughly 3 months of existence the committee has, among other steps, met with Ann Field, who heads the forms committee, to begin to coordinate arbitrator suggestions for use in the ARIAS Umpire Questionnaire. That input is likely to highlight some of the ethical and practical concerns of the Arbitrator community when they are faced with information needs of the parties and counsel.

The committee has a similar outreach to the ARIAS ethics committee, to help ensure that they are hearing the arbitrator's voice on myriad ethics issues. Other deliverables from the committee are focused on providing resource material to arbitrators in developing and marketing their practices.

A subcommittee headed by Tom Daly is charged with finding ways to improve the arbitration process including the selection of arbitrators and managing the arbitration process efficiently. Jim Sporleder is masterminding an article for the *Quarterly* on how to operate an arbitrator practice.

The committee also plans to meet at upcoming conferences, and hopes to produce a regular column in the *ARIAS Quarterly* to update the membership on its initiatives. On behalf of the committee members, we hope that all ARIAS members will feel free to express their views, issues, and ideas to members of the Arbitrators' Committee.

One point was clear from the first meetings: ARIAS will benefit from having greater arbitrator involvement in each of its committees, and to the extent this "Arbitrators Committee" can facilitate that involvement, we will consider ourselves a success. ARIAS is a dynamic organization, with plenty of work being done to keep it in step with modern arbitration challenges and the Arbitrators' committee intends to demonstrate its enthusiasm to be part of that work. Let us hear from you. ▼

I have a mind to join a club and beat you over the head with it. – Groucho Marx

Connie O'Mara

Constance 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. [connie@cdomaraconsulting.com]

article

Bellefonte Twenty-Five Years Later: Developments in the Law of Reinsurers' Liability for Expenses in Excess of Certificate Limits

By Amy S. Kline, Amy L. Piccola, and James D. Scrimgeour[1]


Amy S. Kline


Amy L. Piccola


James D. Scrimgeour

Twenty-five years ago, the United States Court of Appeals for the Second Circuit decided *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*,[1] setting forth the controversial rule that reinsurers may cap their losses under facultative certificates at the stated amount on the face of a certificate. Despite widespread industry criticism, this rule – often referred to as the "*Bellefonte* Rule" – has been followed by the majority of courts to consider the issue, citing Bellefonte as persuasive, if not dispositive authority. Contrast this with the commonly held perception that arbitration panels do not follow the *Bellefonte* Rule - choosing instead to consider extrinsic evidence, including industry custom and practice from the time of contract formation - and there exists the phenomenon of potentially large discrepancies in the value of same share facultative reinsurance issued by competing carriers solely because one carrier's certificate included an arbitration clause.

While *Bellefonte* remains important to analysis of this issue under any certificate without an arbitration clause, recent decisions, including one by the Second Circuit, hint that courts may be increasingly agreeable to arguments that soften the inflexible application of the *Bellefonte* Rule. These cases signal a willingness to differentiate based upon examination of specific language of the certificate at issue, to find that a certificate is ambiguous, and to allow the parties to rely upon extrinsic evidence such as custom and practice to prove the meaning of the parties' agreement. Perhaps these cases signal a bridging of the value gap referenced above.

Thus, the debate about the so-called *Bellefonte* Rule continues. This article reviews *Bellefonte* and the cases that have followed, and discusses recent decisions that address the law of reinsurers' liability for expenses in excess of certificate limits. The article concludes by providing key takeaways from these cases.

Bellefonte

Bellefonte's roots are in the Dalkon Shield litigation. In settling that litigation (which included a dispute about whether Aetna's underlying policies were cost-inclusive), Aetna agreed to pay an amount substantially in excess of its position as to the amount of limits available under the underlying policies. Aetna then sought reimbursement from its reinsurers, including Bellefonte Insurance Company, for their respective shares of the settlement.

The reinsurance certificates at issue in *Bellefonte* provided, in relevant part:

> [Provision 1] [Reinsurer] . . . [d]oes hereby reinsure Aetna . . . (herein called the Company) in respect of the Company's contract hereinafter described, in

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> consideration of the payment of the premium and subject to the terms, conditions and amount of liability set forth herein, as follows . . . .
>
> [Provision 2] Reinsurance Accepted $500,000 part of $5,000,000 excess of $10,000,000 excess of underlying limits . . . .
>
> [Provision 3] The Company warrants to retain for its own account . . . the amount of liability specified . . . above, and the liability of the Reinsurer specified . . . above [i.e., amount of reinsurance accepted] shall follow that of the Company . . . .
>
> [Provision 4] All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, which shall be bound to pay its proportion of such settlements, and in addition thereto, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment, its proportion of expenses . . . incurred by the Company in the investigation and settlement of claims or suits . . . .

The District Court framed the issue as follows: "The parties do not dispute the underlying facts nor do plaintiffs dispute their obligation to pay Aetna for approximately $31 million in liability on the policies. The central question is whether plaintiffs are obligated to pay additional monies for defense costs and claim expenses over and above the reinsurance policy limitations."[2] On cross-motions for summary judgment, the District Court entered judgment in favor of the plaintiff reinsurers, holding that they were not obligated to pay Aetna any additional sums for defense costs over and above the limits of liability stated in the reinsurance certificates.[3]

The Second Circuit affirmed. The Court noted, "[w]e are mindful that in interpreting the agreements, as with all contracts, they should be construed, if possible, so as to give effect to all of their material provisions." Applying these principles, the court concluded that:

> [T]he reinsurers' entire obligation is quantitatively limited by the dollar amount the reinsurers agreed to reinsure. Once the reinsurers have paid up to the certificate limits, they have no additional liability to Aetna for defense expenses or settlement contributions. Any other construction of the reinsurance certificates would negate the phrase "the reinsurer does hereby reinsure Aetna . . . *subject to the . . . amount of liability set forth herein*." (emphasis in original).

Aetna contended that that the certificates obligated the reinsurers to "follow the fortunes" and indemnify it for the excess defense costs it paid to the underlying insured. The Court rejected this argument, stating that "[t]he 'follow the fortunes' clauses in the certificates are structured so that they coexist with, rather than supplant, the liability cap. To construe the certificates otherwise would effectively eliminate the limitation on the reinsurers' liability to the stated amounts." Therefore, "the limitation is to be a cap on all payments by the reinsurer," and the 'follow the fortunes' doctrine does not allow Aetna to recover defense costs beyond the express cap stated in the certificates.

Aetna also argued that the phrase "in addition thereto" set forth in Provision 4 indicates that liability for defense costs is separate for liability from underlying losses. The Court disagreed:

> We read the phrase 'in addition thereto' merely to differentiate the obligations for losses and for expenses. The phrase in no way exempts defense costs from the overall monetary limitation in the certificate. This monetary limitation is a cap on all payments under the certificate. In our view, the 'in addition thereto' provision merely outlines the different components of potential liability under the certificate. It does not indicate that either component is not within the overall limitation.

In reaching its decision, the Court distinguished *Penn Re, Inc. v. Aetna Casualty & Surety* Co.,[4] a decision from the Eastern District of North Carolina that found the reinsurers liable for defense costs in excess of the face amount of the reinsurance certificates. The court held that the certificate addressed the reinsurer's "obligation for 'costs' incurred in settling claims brought by a third person alleging to have been injured by the insured's product covered by the reinsurance certificate" and therefore it "requires that, in addition [to indemnity], plaintiffs pay their proportion of suit costs and expenses."

The *Bellefonte* court noted that "[w]e are aware of the unreported opinion to the contrary in *Penn Re* . . . . There, the court read virtually identical reinsurance certificates to bind two reinsurers for an amount which exceeded the face amount of the reinsurance certificates. We decline to follow the reasoning of that opinion. There, the court did not consider the 'subject to' clause of the first provision, which makes the 'in addition thereto' language 'subject to' the cap on liability in the second provision."

Bellefonte's Progeny

Notwithstanding industry amicus briefing, the Second Circuit reconfirmed, and expanded, the *Bellefonte* analysis in *Unigard Security Insurance Co. v. North River Insurance Co.*[5] The Court began its analysis by summarizing its ruling in *Bellefonte* and noting that it "held that a virtually identical follow the fortunes clause did not 'override the limitation on liability' and that therefore the reinsurer was not liable for expenses in excess of the liability limit."

The Court then examined the impact of the certificate's follow the form clause, an issue that did not arise in *Bellefonte* (because there was uncertainty as to whether the reinsured policies provided supplemental expenses). The clause stated, in relevant part, that the liability of the reinsurers, "except as otherwise provided by this Certificate, shall be subject in all respects to all the terms and conditions of [XS–3672]." Notwithstanding this provision, the Court found that "Provision 1 of the Certificate, like the certificate in *Bellefonte*, provides that Unigard agreed to reinsure North

River 'in consideration of the payment of the reinsurance premium and subject to the terms, conditions, *limits of liability*, and Certificate provisions set forth herein.'" (emphasis in original). Therefore, the Court held that the limit of liability provision caps liability under the certificate.

The Court also rejected North River's argument that past practices demonstrate that Unigard expected to pay expenses under the Certificate, holding that "*Bellefonte*'s gloss upon the written agreement is conclusive. The efficiency of the reinsurance industry would not be enhanced by giving different meanings to identical standard contract provisions depending upon idiosyncratic factors in particular lawsuits. The meaning of such provisions is not an issue of fact to be litigated anew each time a dispute goes to court."

Bellefonte's impact continued to resonate throughout the 1990s and 2000s. In *Pacific Employers Ins. Co. v. Global Reinsurance Corp. of America*,[6] on the parties' cross-motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania held that the "Reinsurance Accepted" in the certificate is indisputably "some type" of cap and that "[t]he Court finds that this broad and unambiguous language clearly encompasses expenses because it defines Global's maximum exposure under the Facultative Certificate."

PEIC also contended that language in the certificate created separate obligations and excluded the payment of expenses from the liability limit.[7] The court rejected this position, finding instead that it did not "outline limits of liability, but merely outline[d] the two separate proportions of losses and expenses that Global is obligated to pay pursuant to the Facultative Certificate." The court also looked to the preamble, which stated that "'In consideration . . . of the premium, and subject to the terms, conditions and limits of liability set forth herein and in the Declarations made apart thereof, the Reinsurer does hereby reinsure the ceding company named in the Declarations . . . in respect of the company's policy(ies) as follows.'" According to the court, "[t]his sentence makes clear that Global's reinsurance obligations, including those outlined in Paragraph E, are 'subject to' the 'terms, conditions, and ***limits of liability***' contained in the Declarations and on the 'Reinsuring Agreements and Conditions' page." (emphasis in original).

Finally, the court addressed *Bellefonte* directly. The court noted that while the contractual language of each certificate is different, *Bellefonte* and its progeny "are well-reasoned, persuasive authority." On that basis, the court also rejected the views of the "various commentators" who have criticized Bellefonte, stating instead that "the Court finds these secondary authorities unconvincing and agrees with the sound reasoning of the decision as described above."

Bellefonte: Now

Disputes over a reinsurer's liability for defense costs in excess of limits continue, and, twenty-five years later, the dispute over *Bellefonte* continues as well. As described below, courts continue to find *Bellefonte* to be at least persuasive, and reach the conclusion that expenses in excess of certificate limits are not recoverable. Three courts recently, however, have distinguished and declined to follow *Bellefonte* on the basis of the specific language of the certificate at issue.

The Illinois Court of Appeals, in *Continental Casualty Co. v. MidStates Reinsurance Corp.*,[8] found *Bellefonte* to be persuasive in holding that the certificate before it unambiguously limited both losses and expenses to the limits stated in the certificate. Applying the "four corners" approach, which presumes that the document speaks for itself and the intentions of the parties must be determined from the language used in drafting the agreement – the court held that "the certificates provided a clear policy limit, inclusive of expenses . . . ." Because the certificate was unambiguous, extrinsic evidence was not appropriate to be considered. The court also found that the contract terms in *Bellefonte* were similar to those before it and held that neither the follow the form nor the follow the fortunes clauses could be said to remove expenses from the overall liability cap in the reinsurance assumed.

The United States District Court for the Northern District of New York also addressed *Bellefonte* in *Utica Mutual Insurance Co. v. Clearwater Insurance Co.*[9] There, Clearwater reinsured certain umbrella policies issued by Utica. The court articulated the "sole issue" as "whether

Disputes over a reinsurer's liability for defense costs in excess of limits continue, and, twenty-five years later, the dispute over *Bellefonte* continues as well.

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Utica can recover defense costs and/or other expense payments in excess of the sums stated in the Liability Clauses in the 1978 and 1979 Certificates -- $5 million and $2.5 million, respectively." The certificates at issue provided, in relevant part:

> [Preamble] [Clearwater], 2 in consideration of the payment of premiums, statements contained in the declarations, and subject to the terms and General Conditions of this certificate does hereby reinsure [Utica as follows]
>
> General Conditions
>
> Section D [Clearwater]'s Liability and Basis of Acceptance (the "Liability Clause"), which identifies the portion of Utica's exposure that Clearwater agreed to reinsure.

Utica contended that *Bellefonte* and its progeny were distinguishable because the certificates used the phrase "[Clearwater]'s Liability and Basis of Acceptance" and describe Clearwater's liability as a "share," rather than using the word "limit," as was the case in the certificates in *Bellefonte*, *Unigard* and *Excess Insurance Co., Ltd. v. Factory Mutual Insurance*.[10] Utica contended, in the alternative, that the court should deny or defer ruling on the motion pending further discovery, including introduction of custom and practice evidence.

The Court rejected Utica's arguments. With respect to the absence of the word "limit," the Court found that "Clearwater's liability is described as a percentage share *of the underlying policy limit*. Thus, it logically follows that a percentage share of a policy limit is itself a limit on liability, despite the absence of the word 'limit.'" (emphasis in original). With respect to extrinsic evidence, the Court noted that "when a contract is unambiguous, as the Certificates are here, extrinsic evidence generally cannot be considered in its interpretation." The Court continued by stating that "*Bellefonte*, *Unigard II*, and *Excess Insurance* did not consider evidence of custom or practice, thereby suggesting that, at least with respect to a limit-of-liability provision silent as to its coverage of expenses, such evidence should not be relied upon."

The Court further reasoned that "Utica's customs and practice evidence . . . purports to demonstrate that *Bellefonte*, *Unigard II*, and *Excess Insurance* were erroneously decided, because they established a presumption of cost-inclusiveness at odds with the reinsurance industry's customs and practices," but that "it is this court's obligation to follow, not second-guess, controlling precedent, which *Bellefonte*, *Unigard II*, and *Excess Insurance* undoubtedly are."[11]

On the other hand, the Second Circuit addressed *Bellefonte* in *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.* and, for the first time, distinguished its holding.[12] There, Munich Re reinsured Utica for certain asbestos-related losses. Utica contended that Munich Re's liability for expenses was not subject to the certificate's liability limit. Following discovery, Munich Re moved for summary judgment, and Utica cross-moved to continue discovery asserting that Munich Re had failed to produce discovery related to choice of law and the interpretation of the certificate. The district court granted Munich Re's motion and denied Utica's motion. Utica appealed.

The certificate provided, in relevant part:

> [Paragraph 1] The Reinsurer [Munich] agrees to indemnify the Company [Utica] against losses or damages which the Company is legally obligated to pay under the policy reinsured, resulting from occurrences taking place during the period this Certificate is in effect, subject to the reinsurance limits shown in the Declarations. . . .
>
> [Paragraph 2] The Company shall settle all claims under its policy in accordance with the terms and conditions thereof. If the reinsurance hereunder is pro rata, the Reinsurer shall be liable for its pro rata proportion of settlements made by the Company. If the reinsurance hereunder is excess, the Reinsurer shall be liable for its excess proportion of settlements made by the Company after deduction of any recoveries from pro rata reinsurance inuring to the benefit of the Reinsurer.
>
> [Paragraph 3] The Reinsurer shall be liable for its proportion of allocated loss expenses incurred by the Company in the same ratio that the Reinsurer's share of the settlement or judgment bears to the total amount of each settlement or judgment under the policy reinsured. . . .

The "declarations" section of the certificate

provided, among other things, that the "limit of liability ceded to and accepted by" Munich Re is $5 million in excess of $5 million of Utica's liability under the underlying policy.

On appeal, Utica argued that the certificate could be read to exclude expenses from the limit of liability. On this, the Court stated that "[t]he fact that Munich's obligation to indemnify Utica against 'losses or damages' is expressly made 'subject to' the Certificate's limit of liability suggests that the parties intended to exclude Munich's liability for expenses -- which is not expressly made 'subject to' the limit of liability -- from that limit." However, the Court also stated that "Utica's interpretation is not obviously correct" because Munich Re's "liability for settlement payments is not expressly made 'subject to' the Certificate's $5 million limit of liability, yet Utica does not argue that the limit of liability excludes settlements."

Notably, the Second Circuit concluded that the certificate was "ambiguous as to whether its limit of liability includes expenses:"

> Paragraph 1 *could* "operate as a general provision that limits *all* of Munich's liability under the Certificate to $5 million, whereas the subsequent paragraphs describe Munich's obligations more specifically, without removing them from the limit. Although this latter reading is certainly plausible, we do not think the absence of 'subject to' language in the paragraphs describing settlements and expenses is fatal to Utica's position. If settlement payments are 'losses or damages,' then Munich's liability for settlements is separately limited to $5 million by virtue of the first paragraph's 'subject to' clause. The Certificate defines 'loss expenses' separately, so it is possible that settlements are 'losses or damages' while expenses are not."

In reaching its decision, the Court distinguished *Bellefonte*. According to the Second Circuit, *Bellefonte* and *Unigard* "turned on a provision in the policies at issue that expressly made all of the reinsurers' obligations 'subject to' the limit of liability; they did not hold that a limit of liability, without such 'subject to' language, is presumptively expense-inclusive." The Court also distinguished *Excess*. There, the Court stated that it did not read it "as holding that any presumption of expense-inclusiveness can be rebutted only through express language or a separate limit for expenses." Rather:

> [T]he Certificate's statement that 'losses or damages' are 'subject to' the limit of liability reasonably implies that expenses are not. Although this negative implication is not strong enough—in the context of the Certificate as a whole -- to demonstrate that expenses are unambiguously excluded from the limit of liability, we think it is sufficient to render the Certificate ambiguous, even in light of Excess."

The Court remanded the matter to the district court with the direction that extrinsic evidence must be considered in construing the certificate, and that further development of the record may be necessary.

Citing the Second Circuit's *Utica v. Munich Re* opinion as "instructive," the Northern District of New York concluded in *Utica Mutual Insurance Co. v. R&Q Reinsurance Co "R&Q"*).,[13] that the certificate before it was ambiguous. In *R&Q*, the Certificate provided that the reinsurer "in consideration of the payment of the premium and subject to the terms hereon and the general conditions set forth on the reverse side hereof, does hereby reinsure [Utica]." The court found this language to be "virtually identical" to that at issue in *Utica v. Munich Re*, and that like that case, the preamble "does not expressly make the reinsurer's obligations 'subject to' the reinsurer's 'amount of liability.'" Therefore, the "subject to" clause did not unambiguously cap R&Q's liability for expenses to that policy limit because it did not expressly refer to the liability limit.

The court also held that certain conditions in the certificate could be read to support the claim that R&Q is liable for expenses in excess of the policy limit. Condition 1 stated that "the Reinsurer agrees to indemnify the Company against loss or damage which the Company is legally obligated to pay under the Company's policy reinsured, . . . subject to the Reinsurance Accepted limits shown in the Declarations." The court found this provision to be "nearly identical" to that in *Utica v. Munich Re*, and that "R&Q's agreement to indemnify against 'loss or damage . . . subject to the Reinsurance Accepted limits' reasonably implies that expenses are not subject to those limits."[14] The court further held that because the certificate was ambiguous, interpreting it required the consideration of extrinsic evidence.

Extrinsic evidence was also permitted to be considered in *Century Indemnity Co. v. OneBeacon Ins. Co.*,[15] a recent decision from a Pennsylvania trial court. There, OneBeacon moved for summary judgment on the ground that the "Reinsurance Accepted" limit in the certificates placed a total cap on the reinsurers' liability, including expenses. The court noted that this was a case of first impression in Pennsylvania and that the principle rule of contract interpretation is to ascertain and give effect to the intent of the contracting parties. The court then went on to analyze, and reject, *Bellefonte*. Citing to the Second Circuit's decision in *Utica*, the court found that *Bellefonte* did not establish a blanket rule that all limits of liability are presumptively expense-inclusive. The court continued that the "Subject to" language is key in creating such a presumption, but that presumption can be overcome. Moreover, even if a condition mirrors the language used in *Bellefonte*, "a court must still analyze the certificate as a whole in order to discern its meaning and conclude whether expenses are included, or in addition, to the limit of liability."

In analyzing the certificates, the court found that there were variations from the certificate in *Bellefonte*. Here, the reinsurance accepted provision stated: "In consideration of the payment of the net premium and subject to the general conditions set forth on the reverse side hereof, the reinsurer does hereby reinsure [Name of Company's Insured]." According to the court:

> Instead of the terms being subject to the liability as in *Bellefonte*, the

> liability is subject to the terms and conditions. This places greater emphasis on the conditions themselves, which may trump other aspects of the certificates. As a result, a condition that excludes expenses in calculating the total loss limit holds more weight than the amount of 'Reinsurance Accepted' when interpreting these certificates.

This was a difference that "cannot be ignored." The court further stated that "*Bellefonte* highlighted the importance of the 'subject to' clause, and *Utica* demonstrated the ability of a court to reach a different interpretation. If anything, the terms of the certificates may have created a presumption of expense-*exclusiveness*." The court opined that even if the certificates were analogous to *Bellefonte*, the Court would still have denied the motions on the grounds that a latent ambiguity exists.

Finally, the court held that extrinsic evidence was necessary to construe the terms of the contract in its entirety. "The application of industry custom and usage influences the meaning of the certificates, and highlights the existence of genuine issues of material fact which are to be determined by the finder of fact."[16]

Bellefonte: Where Are We Now?

The *Bellefonte* debate continues with courts reaching different conclusions on the issue. Those courts that follow *Bellefonte* have held, to some degree notwithstanding variations in the certificate language, that the certificates at issue were unambiguous. As such, extrinsic evidence has not been considered, or permitted to be considered, in interpreting the certificates.

Other courts, however, have shown a willingness to break from *Bellefonte*. Those courts that have distinguished *Bellefonte* have done so largely on the basis of the certificate language, finding them to be ambiguous, missing or inverting the critical "subject to" provision, and/or holding that the "subject to" language is not necessarily dispositive. Both *Utica v. Munich Re* and *Utica v. R&Q* directed the consideration of extrinsic evidence to ascertain the parties' intent. *OneBeacon* also identified the significance of custom and practice evidence to this analysis.

Therefore, when faced with *Bellefonte*-related issues, the following bear consideration in determining the value of facultative reinsurance:

> The existence of an arbitration clause;
>
> The language of the certificate at issue: To the extent that *Bellefonte* has not been followed, it has been because the language was distinguishable from the critical "subject to" language contained in the Bellefonte certificate;
>
> The applicable law: Although it has not yet been the basis for a reported *Bellefonte* decision, some jurisdictions allow extrinsic evidence even without a showing of ambiguity; and
>
> The types of extrinsic evidence considered: Where a certificate is determined to be ambiguous, courts look to extrinsic evidence, including evidence of the parties' intent at underwriting and evidence of industry custom and practice.

Recent decisions may signal a willingness of courts to soften, or even distinguish, the *Bellefonte* Rule. Of note to this analysis will be the resolution of the *Clearwater* case which may present the Second Circuit with another opportunity to address this issue. Regardless of that result, however, further parsing of certificate language is expected as cedents continue to assault the *Bellefonte* Rule in the courts. ▼

ENDNOTES

1. 903 F.2d 910 (2d Cir. 1990).
2. *Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co.*, No. 85 CIV 2706 (JFK), 1989 WL 106469 (S.D.N.Y. Sept. 5, 1989).
3. Interestingly, both parties argued that the facultative certificates were unambiguous and therefore neither attempted to introduce custom and practice evidence at this stage of the proceedings.
4. No. 85–385–Civ.–5 (E.D.N.C. June 24, 1987).
5. 4 F.3d 1049 (2d Cir. July 31, 1993).
6. No. 09-6055, 2010 WL 1659760 (E.D. Pa. Apr. 23, 2010).
7. The certificate provided:
8. E. All loss settlements made by the Company, provided they are within the terms and conditions of this Certificate of Reinsurance, shall be binding on the Reinsurer. *Upon receipt of a definitive statement of loss, the Reinsurer shall promptly pay its proportion of such loss as set forth in the Declarations. In addition thereto, the Reinsurer shall pay its proportion of expenses (other than office expenses and payments to any salaried employee) incurred by the Company in the investigation and its proportion of court costs and interest on any judgment or award, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment* **....** (emphasis in original).
9. 24 N.E.3d 122 (Ill. App. Ct. 2014).
10. No. 6:13–cv–1178, 2014 WL 6610915 (N.D.N.Y. Nov. 20, 2014).
11. 3 N.Y.3d 577 (N.Y. Ct. App. 2004) (following *Bellefonte* and *Unigard* and holding "that "[o]nce the reinsurers have paid the maximum amount stated in the policy, they have no further obligation to pay Factory Mutual any costs related to loss adjustment expenses" and that reinsurers "cannot be required to pay loss adjustment expenses in excess of the stated limit in the reinsurance policy").
12. On April 20, 2015, Utica filed a Motion for Reconsideration arguing that, in light of the Second Circuit's decision in *Utica Mutual Insurance Co. v. Munich Reinsurance America, Inc.*, No. 13-4170-CV, 2014 WL 6804553 (2d Cir. Dec. 4, 2014), the certificates were ambiguous. The United States District Court for the Southern District of New York recently denied a similar motion for reconsideration filed by the cedent in *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 13 Civ. 06577 (LGS) (S.D.N.Y. Apr. 15, 2015). The court had held, on Global's motion for summary judgment, that *Bellefonte* and *Unigard* were controlling and that the dollar amount indicated on the certificates was the maximum that Global could be obligated to pay for loss and expenses combined. 2014 WL 4054260 at *6-7. On the motion for reconsideration, the court rejected the argument that Utica constituted an intervening change in controlling law and held that, in any event, the language of the certificates was such that Utica did not counsel a different result.
13. No. 13-4170-CV, 2014 WL 6804553 (2d Cir. Dec. 4, 2014).
14. No. 6:13-cv-1332 (BKS/ATB) (N.D.N.Y. June 4, 2015).

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news and notices

Caprio, McCarthy and Starr add designations



At its meeting on March 19th, the Board of Directors approved Elaine A. Caprio as a Qualified Mediator, Stephen McCarthy as a Certified Umpire and Jeremy Starr as a Certified Arbitrator. Their biographies are on page 24; their profiles are available on the ARIAS•U.S. website.

2015 Spring Education Seminar a Success!

The 2015 Spring Education Seminar took place on April 1st, 2015 from 1:00 p.m. to 5:00 p.m. at the office of Choate, Hall & Stewart in Boston, MA and was co-chaired by David Attisani of Choate, Hall & Stewart and Alexandra Furth of Resolute Management, Inc. With a total of 42 people in attendance, including faculty, the seminar explored the opportunities and challenges created by the legal rules and customary practices around the sharing, use, and exchange of information. Seminar participants noted that the presentations were informative and discussions surrounding the various topics were engaging with a good mix of industry counsel, arbitrators, and practicing litigators. The seminar closed out with an evening reception where attendees had an opportunity to wind down, continue discussions, and network. Seminar attendees had an opportunity to earn up to 4.5 NY CLE credits, 4.0 PA CLE credits, and/or fulfill the ARIAS•U.S. certification or renewal requirements.







More Webinars to Come!

Join us in the coming months to hear about Life Insurance Issues and Directors & Officers Insurance Issues. The ARIAS•U.S. webinars will return this fall with relevant topics and opportunities for professional development. To register, visit the ARIAS•U.S. website at www.arias-us.org. ▼

article

Judicial Review of Arbitration Decisions

By Timothy Russell and Daryn Rush

Timothy Russell

Daryn Rush

Timothy Russell

Timothy Russell is a commercial and insurance arbitrator and mediator, and is the founder and principal of RussellADR, LLC, an alternative dispute resolution firm in Bryn Mawr, Pennsylvania. He is a graduate of Dartmouth College and of the University of Pennsylvania Law School, and practiced commercial litigation and business law from 1973 to 2013 with several major law firms in Philadelphia and Washington, DC.

Daryn Rush

Daryn Rush chairs the Reinsurance Group of White and Williams LLP. He has extensive experience in complex insurance and reinsurance matters, representing domestic and foreign insurers in arbitration, mediation and litigation. He has tried dozens of reinsurance arbitrations and lawsuits to final award or verdict. He is a graduate of the University of Maryland and the Georgetown University Law Center.

Most reinsurance contracts provide for arbitration rather than litigation to resolve contractual disputes between the parties. As in many other commercial contexts, the benefits generally claimed for reinsurance arbitration – expedition and relative efficiency, relaxation of procedural formalities, a decision maker familiar with the pertinent subject matter, and confidentiality – go hand in hand with the recognition that judicial intervention in the arbitral process, if any, should be extremely limited. Thus, once the arbitrability of a dispute is established by the parties' consent or, if necessary, by judicial action under Section 3 or 4 of the Federal Arbitration Act ("FAA"),[1] further judicial involvement is, for the most part, restricted to proceedings under Sections 9 or 10 of the FAA to confirm or vacate an arbitration award.[2] In keeping with the goals thought to be served by resort to arbitration rather than litigation, review under these sections is strictly confined to the handful of "narrow grounds" set forth expressly in Section 10, and ordinarily even an arbitrator's serious error of law or fact will not warrant vacation of an award or forestall its confirmation. *See, e.g.*, *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2068 (2013). These substantial restrictions on the scope of judicial intervention help to assure that the goals of economy, expedition and expert decision making are served, and that arbitration does not become "merely a prelude to a more cumbersome and time-consuming judicial review process." Id. (internal quotations omitted).

Courts have generally acknowledged that restrictions on the timing of judicial involvement in the arbitral process – the point or points at which confirmation or vacatur of an arbitrator's rulings may properly be sought – is equally critical in preserving the benefits of arbitration. The language of the FAA itself is largely silent on the issue: Sections 9 and 10 provide for judicial scrutiny of "awards," but the statutory language offers little or no guidance as to the meaning of that term, or on the question whether and when review of interim or partial awards or other arbitral rulings or orders may be had. The lack of clarity in the language of the statute has, unfortunately, spawned a body of judicial decisions that is itself less than clear, that at points appears internally divergent or inconsistent, and that tends to raise as many questions as it answers concerning the proper timing of judicial review.

Review of "Final" Decisions

One line of cases, possibly on the basis of an unspoken analogy to the statutory limitation on appellate jurisdiction to review "final" decisions of the federal district courts,[3] has concluded that the limitation on judicial scrutiny in Sections 9 and 10 to "awards" connotes that review under those sections is authorized only with respect to awards that can aptly be characterized as "final." Under this view, review of an arbitration proceeding "comes at the beginning [in a motion to compel or enjoin arbitration] or the end [on a motion to confirm or vacate a final award under Section 9 or 10], but not in the middle." *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011); *accord*, *Smith v. American Arbitration Ass'n*, 233 F.3d 502, 506 (7th Cir. 2000) ("The time to challenge an arbitration, on whatever grounds . . . is when the arbitration is completed and an award rendered."). While the word "final" does not appear in Sections 9 or 10 as a modifier of the term "award" and a finality limitation is not otherwise expressly set forth in the FAA, a number of courts have purported to find the finality principle to be implicit in the purpose and structure of the statute. For example, some have found that the absence of statutory language expressly permitting interlocutory judicial review of non-final rulings necessarily connotes a lack of any statutory authority to conduct such review. *See Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486-87 (5th Cir. 2002). Others have reasoned that a rule of finality is effectively dictated by the purposes underlying the FAA. As the U.S. Court of Appeals for the Second Circuit has put it in this regard, "a district court

should not hold itself open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the interruption of the arbitration proceeding, and delaying tactics in a proceeding that is supposed to produce a speedy decision." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (internal quotations omitted).

Whatever particular rationale is offered to support the finality principle, the principle itself appears simple and straightforward: once an arbitration proceeding has begun, judicial intervention to confirm or vacate any of the arbitrators' rulings is not available until the arbitration is finally, and completely, concluded, and nothing remains for arbitral resolution. The principle is thus sometimes referred to as the "complete arbitration rule," under which judicial confirmation or vacatur of arbitrators' rulings, orders, or partial or interim awards may only be had when the arbitrators have issued what they "intended" as "their complete determination of all claims submitted to them." *Michaels*, 624 F.2d at 413. Accordingly, a partial award or other interim ruling is not final and reviewable if an arbitrator retains jurisdiction to decide any unresolved issues, or if "the arbitrator does not believe the assignment is completed . . . ." *McKinney Restoration Co. v. Illinois Dist. Council No. 1, Intern. Union of Bricklayers and Allied Craftworkers*, 392 F.3d 867, 872 (7th Cir. 2004).[4] The complete arbitration rule thus appears to have the virtue of ease in application: if anything at all remains for arbitral decision, none of the arbitrators' procedural or substantive rulings, orders, or partial or interim awards is yet a proper subject of review for purposes of confirmation or vacatur. Strict application of the completeness rule, and its foundational principle of true finality, thus would seem to comport well with the ostensible purposes of arbitration. Moreover, in many circumstances, application of the completeness/finality principle to preclude interlocutory judicial review seems salutary and reasonable, if not entirely noncontroversial. Thus, for example, it is widely acknowledged that an arbitrator's procedural rulings are not final and subject to interlocutory review under Section 9 or 10 because, by their nature, they contemplate further proceedings before the arbitrator, and procedural flexibility is generally held up as a desirable characteristic of arbitration. *See Accenture LLP v. Spreng*, 647 F.3d 72, 77 (2d Cir. 2011) (holding court lacked jurisdiction to review arbitrator's decision denying motion to add fraud claim because decision was "an interim procedural ruling, not an arbitration award."); *Bailey Shipping Ltd. v. American Bureau of Shipping*, 12 Civ. 5959, 2014 WL 1282504, *8 (S.D.N.Y. Sept. 13, 2013) (dismissing motion to vacate arbitrators' interim ruling denying party's attempt to withdraw claim, finding that it lacked jurisdiction to review a "nonfinal procedural order.") Even claims of arbitrator partiality, an express ground for vacatur under Section 10(a)(2) of the FAA, have been held to be non-final and thus not subject to interlocutory review. *See Sussex*, 2015 WL 1379852, at *4-7; *Marc Rich & Co., A.G. v. Transmarine Seaways Corp. of Monrovia*, 443 F. Supp. 386, 387-88 (S.D.N.Y. 1978). Similarly, an arbitral decision as to the appropriate venue for an arbitration has been held to be non-final. *See Aeroject-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973).

It may be argued, of course, that interlocutory judicial review and confirmation or vacation of at least some non-final arbitrator decisions in these categories would, in certain circumstances, be conducive to efficiency and, in the longer run at least, to expeditious completion of the arbitration. For example, interlocutory review of an arbitrator's ruling refusing to recuse herself for evident partiality, were the challenge meritorious, might obviate the expense and delay of a lengthy hearing that inevitably would result in vacatur of a final award and the necessity of starting the arbitration over.[5] The same is true of any number of challenges that might be made to interim, non-final rulings or orders. Strict application of the principle of finality and the complete arbitration rule, however, appears to foreclose any weighing of relative advantages that, in particular circumstances, might flow from interlocutory review under Sections 9 or 10. Thus, where reviewability turns on finality, any "delays and expenses" that might result from deferral of judicial review are said to be "manifestly inadequate to justify a mid-arbitration intervention by a court, regardless of the size and early stage of the arbitration." *Sussex*, 2015 WL 1379852, at *7.[6]

There is no real question that adherence to the finality principle and the complete arbitration rule has the virtue of relative

By focusing on the doctrine of ripeness rather than the traditional completeness/finality rule or an ad hoc approach creating exceptions to that rule, courts, exercising caution and appropriate deference to established notions of limited involvement under the FAA, may find a principled approach that strikes the right balance.

ease of application and, at least in many cases, will serve to expedite arbitration and assure that parties cannot rely on piecemeal invocation of Sections 9 or 10 to inject delay or for other purely tactical reasons. At the same time, application of the finality principle – a strict insistence that judicial involvement in the arbitration process is permissible only after the arbitrators have entered a "complete determination of all claims submitted to them" – would foreclose access to a court in certain instances, hopefully few in number, where midstream review might be called for by practical or policy considerations. And, in contexts where the stakes of arbitrated disputes and the expense of resolving those disputes are often extremely high – reinsurance is often one such context, but certainly not the only one – a more flexible limitation on the timing of judicial review seems desirable. This may be especially so in light of the growing tendency of parties to request, and arbitrators to issue, "partial" awards that, by their very nature, do not effect complete resolution of a dispute, but interlocutory review of which may nonetheless bring about the benefits arbitration is thought to provide. And, indeed, the opportunity to secure review of such less-than-final rulings, orders and awards may serve to make arbitration a more attractive method of dispute resolution, by affording contracting parties a hand in structuring a method of dispute resolution that best serves their particularized needs.

Review of Non-Final Rulings

A significant number of courts have permitted review of what were, plainly, non-final arbitration rulings or awards, although some of the opinions suggest a reluctance to concede non-finality. The Seventh Circuit's decision in *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994) is illustrative. There, a cedent, CNA, initiated an arbitration against its reinsurer for an alleged failure to pay a reinsured loss. At a preliminary hearing, the panel ordered the reinsurer to post a letter of credit as security for a partial award in CNA's favor. Despite its characterization of the panel's order as "interim relief pending final arbitration" – in other words, as distinctly non-final and incomplete – the Seventh Circuit found the interim order to be reviewable by the district court under Section 10(a)(4) of the FAA. Id. at 351. The Seventh Circuit offered no discussion of the finality principle at all, but held the order subject to confirmation for purely practical reasons: it "protect[ed] a possible final award in favor of CNA," and resolved certain of the parties' current rights and obligations. Id. at 348. Accordingly, a flexible approach that permitted interlocutory review under Section 10 made good sense, even if that approach could not be squared with the finality principle or the "complete arbitration rule."

Other decisions, including at least one from the same federal circuit as *Yasuda*, appear less willing than *Yasuda* to let go of the completeness/finality concept as a necessary precondition of reviewability, while nonetheless exhibiting a readiness to abandon finality in practice. Six years after *Yasuda*, in *Publicis Communication v. True North Communications Inc.*, 206 F.3d 725, 729 (7th Cir. 2000), the Seventh Circuit held a plainly non-final, partial award to be final and reviewable because it resolved a "time-sensitive" issue that was largely "unrelated" to other issues that remained subject to arbitral decision. In so doing, the court characterized *Yasuda* as somehow involving a "final" order, although the opinion in that case had not used the word in connection with the Section 10 reviewability issue, and the order at issue had been undeniably non-final.[7]

Other cases reflect similar ad hoc approaches to reviewability, and a similar willingness to relax or eliminate any rigid insistence on true finality, in favor of a more pragmatic, case-by-case approach to judicial review. *See, e.g., Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991) (award of temporary, interim equitable relief requiring reinsurers to contribute to escrow pending final decision subject to interlocutory review under Section 10 in order to preserve opportunity for "meaningful" final award); *Island Creek Coal Sales Co. v. Gainesville*, 729 F.2d 1046 (6th Cir. 1984) (arbitrators' interim order requiring continuing contractual performance pending final award characterized as "final" disposition of "separate independent claim"); *Sperry Int'l Trade, Inc. v. Israel,* 689 F.2d 301, 304 at n.3 (2d Cir. 1982) (interim arbitral decision requiring posting of letter of credit subject to review because it was "a final decision as to the severable issues regarding the letter of credit").

Review in Bifurcated Cases

Another line of cases that has substantially relaxed or abandoned strict insistence on finality as a predicate of reviewability – and a line that may be particularly suited to application in the reinsurance context – involves the increasingly common practice of bifurcating arbitrated disputes into liability and damages phases. The federal court of appeals for the First Circuit appears particularly hospitable to interlocutory review of partial awards treating bifurcated issues. In *Hart Surgical Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233-34 (1st Cir. 2001), the First Circuit, while first purporting to acknowledge the continuing vitality of the finality principle, noted that "exceptions" to finality had been recognized. One such exception, that court stated, includes cases in which "the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so;" the court suggested that the arbitrators would be at least temporarily functus officio in such a circumstance, thereby rendering their partial award "final" and reviewable. Id. at 234 (internal quotations omitted). Affording substantial weight to the notion that a "primary policy" behind the FAA is "to resolve issues in the manner intended by the parties," the First Circuit went on to hold that partial awards resolving bifurcated issues were reviewable, at least where bifurcation came at the parties' request. Id. at 235 n.3. The *Hart* court explicitly reserved judgment on whether judicial review of partial awards would be available where the parties had not agreed to bifurcation.[8]

Approaches to reviewability similar to the First Circuit's have gained acceptance in other federal circuits. *See, e.g., Metallgesellschaft, A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986) (interlocutory review permitted "independent and separate" counterclaim as to which counterclaimant would have been entitled to summary judgment in litigation proceeding); *Smart v. Int'l Brotherhood of Electrical Workers*, Local 702, 315 F.3d 721, 726 (7th Cir. 2002) (partial award in bifurcated case serves the principle that "it is good to allow parties to . . . design the method of dispute resolution that is best for them"). Questions remain, however, over whether and to what extent review of partial awards on discrete issues may be permitted where such review is not agreed to by the parties, or where the issue resolved in a partial award involves something less than a complete liability determination or the resolution of a complete claim. And, certainly, the reviewability of partial awards in bifurcated cases has not gained anything like universal acceptance, and some courts that continue to insist on finality as the touchstone of review have rejected the Hart approach. *See, e.g., Savers Prop. & Cas. Co. v. National Union Fire Ins. Co.*, 748 F.3d 708 (6th Cir. 2014) (partial award resolving liability issues not final or reviewable).

"Ripeness" as the Guiding Principle

As a review of decided cases on the timing of judicial review under Sections 9 or 10 tends to confirm, it is difficult, maybe impossible, to distill out and articulate a single unitary principle to guide a reviewability determination in particular cases. As Judge Posner has put it, "generalization [regarding the rules on the timing of judicial review] is difficult," beyond the recognition that "the courts are naturally reluctant to invite a judicial proceeding every time the arbitrator sneezes." *Smart*, 315 F.3d at 725. The bifurcation and "separable issue" cases may suggest a trend in the direction of permitting more latitude in interlocutory review. Indeed, such a trend, if there is one, may have been endorsed quietly by the Supreme Court itself, in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 670 at n.2 (2010), in which the Court appeared to accept that even during an ongoing arbitration, Section 10 provides a vehicle to challenge certain interlocutory procedural orders (in that case, an interlocutory award as to the availability of class arbitration).

Relaxation of the completeness/finality rule calls for the fashioning of a guiding principle that permits analytically consistent treatment over a range of cases and does not simply leave the door open to ad hoc, case-by-case determinations whether particular non-final or partial rulings are reviewable under Sections 9 or 10. Such a principle may be evident in the preference, demonstrated in *Stolt-Nielsen* and some circuit court decisions, for the application of the "ripeness" doctrine borrowed from other federal jurisdictional contexts, rather than for the relative inflexibility of the "complete arbitration rule" and finality doctrine or, on the other hand, for the abandonment of substantial limitations on the timing of review under Sections 9 or 10. *See e.g., Dealer Computer Services, Inc. v. Dub Herring Ford*, 547 F.3d 558 (6th Cir. 2008) (ripeness is a jurisdictional prerequisite to all cases; arbitrators' partial award ruling that agreement did not preclude classwide arbitration was unripe and thus unreviewable on interlocutory basis).[9] While "ripeness" is always a precondition to federal jurisdiction, a ruling that is ripe need not always be "final." Ripeness turns instead on such factors as whether the harm allegedly threatened by the arbitrators' ruling is likely to occur; the potential hardship to a party if interlocutory review is not allowed; and the adequacy of the record to permit review. *Id*. at 561. Applied with caution, the ripeness factors may provide an appropriate standard for review of non-final arbitral rulings, without opening the doors to federal court "every time the arbitrator sneezes."

Conclusion

While most courts have adopted the complete arbitration rule or a similar restrictive approach limiting the circumstances in which judicial review of interlocutory arbitration rulings will be permitted, some have recognized exceptions and applied a more flexible approach. The completeness/finality approach provides clarity and significantly reduces the use of judicial intervention as a tactic to interrupt or stall arbitration proceedings. A flexible approach, on the other hand, allows judges to intervene in limited circumstances where judicial review advances expedition and efficiency or perhaps is even necessary for the arbitration to be meaningful (*e.g.*, in the context of an interim award of

While most courts have adopted the complete arbitration rule or a similar restrictive approach limiting the circumstances in which judicial review of interlocutory arbitration rulings will be permitted, some have recognized exceptions and applied a more flexible approach.

pre-hearing security). By focusing on the doctrine of ripeness rather than the traditional completeness/finality rule or an ad hoc approach creating exceptions to that rule, courts, exercising caution and appropriate deference to established notions of limited involvement under the FAA, may find a principled approach that strikes the right balance.

END NOTES

1. A "front-end" dispute over arbitrability is an issue for a resolution by a court, since a party may not be compelled to submit to arbitration at all absent its agreement to do so. Judicial action in that context is typically on a motion under Section 4 to compel arbitration or in an action to enjoin arbitration, and is strictly confined to the issues whether "a valid arbitration agreement [exists]," and "whether the current dispute is within its scope." *In re Sussex*, 14-70158, 2015 WL 1379852, *4 (9th Cir. Mar. 27, 2015)
2. Other sections of the FAA provide for very limited judicial involvement for specific purposes. Section 5 authorizes a court to appoint an arbitrator where a party fails to do so; Section 7 provides for the court to compel the attendance of witnesses and the production of documents; and Section 11 authorizes judicial correction of certain clerical or formal mistakes in an award.
3. The limitation on federal appellate jurisdiction is stated explicitly in 28 U.S.C. § 1291, and is subject to a relatively small handful of exceptions. At least one court has stated that Section 10 of the FAA "should not be interpreted to incorporate the final judgment rule of 28 U.S.C. § 1291." *Smart v. International Brotherhood of Electrical Workers, Local 702*, 315 F.3d 721, 726 (7th Cir. 2008) (emphasis in the original).
4. Of course, an erroneous determination that the arbitrator's assignment is completed may be grounds for vacatur under Section 10(a)(4) of the FAA.
5. Of course, withholding the availability of midstream review in such circumstances might prove more expeditious and inexpensive: the party objecting to the arbitrator's partiality might prevail on the merits of the case after a hearing, and choose not to press the partiality objection in a proceeding under Section 10 after a final award.
6. One federal circuit court judge, dissenting from a decision allowing interlocutory review of a partial award that left several claims and issues unresolved, suggested that any departure from the finality rule based on the facts of a particular case would be the first step down a slippery slope, which "in the long run" would "make arbitration more complicated, time consuming and expensive" by increasingly encouraging parties to urge arbitrators to issue interim or partial awards resolving arguably separable claims and issues. *See Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 285 (2d Cir. 1986) (Feinberg, C.J., dissenting). *See also Public Serv. Elec. & Gas Co. v. Systems Council U-2*, 703 F.2d 68, 70 (3d Cir. 1983)
7. In *Yasuda*, the Seventh Circuit rested its Section 10 reviewability holding on its conclusion that an order requiring the posting of security before a final award was itself an "award," and thus, somehow, ipso facto reviewable. 37 F.3d at 348.
8. The *Hart* court also noted that allowing review of partial awards as if they were final might result in a party forfeiting its right to review by waiting "until all arbitration proceedings are complete" before seeking confirmation or vacatur. 244 F.3d at 236.
9. Of course, a failure to honor the ripeness doctrine itself might run afoul of Article III limitations on federal court jurisdiction. *See Dealer Computer Services*, 547 F.3d at 560. ▼

editor's comments continued

introduces the membership to the Arbitrators' Committee, the purpose of which is to promote discussion of issues that are important to the arbitrator community and to provide a forum for debate, education and discussion of a variety of issues, which is no laughing matter.

Speaking of arbitrators, reinsurance disputes involve at least two parties but at least one of them will inevitably be disappointed by the arbitrators' handiwork. Narrow as it is under the FAA, the losing party is not wholly without remedy but most courts apply the "finality principle," which limits judicial intervention to the conclusion of the arbitration. Daryn Rush explores the state of the law on the timing of judicial review, particularly those cases which have been more flexible in allowing review before all issues have been resolved.

Twenty five years after the court in *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990), held that reinsurers may cap their losses under facultative certificates at the stated amount on the face of a certificate, recent decisions have hinted that courts may be increasingly receptive to arguments that soften the inflexible application of the decision. Amy Kline, Amy Piccola, and Jamie Scrimgeour explain how Bellefonte has been applied and the reasoning of the cases which have departed from it.

Offering his view from the "middle seat," Chuck Ehrlich offers a pocket guide on how to win friends and influence people in an arbitration proceeding. With practical suggestions to parties, counsel, and party-appointed arbitrators, Chuck presents do's and don'ts for achieving success.

How do arbitrators stay up to date on developing law? asks Rob Kole of the ARIAS Law Committee. For those who wish to stay current on the latest legal developments, Rob commends them to the case summaries found in the "Law Committee Reports" on the ARIAS website. In this issue of the *Quarterly*, Rob reviews two recent cases dealing with subjects that commonly come before arbitrators.

The *ARIAS·U.S. Quarterly* depends on articles written by the membership. If there's a subject you'd like to read about in the *Quarterly*, don't be bashful. Fame and fortune awaits you. Write your article today. Just remember to send it to me at tomstillman@aol.com. ▼

The View from the Middle Seat

article

By Charles G. Ehrlich

There's a saying that "if you're not lead dog, the view never changes."

In contrast, when you're a reinsurance arbitration umpire, the view changes constantly; it's a continual adventure.

There may have been, perhaps, a time of peace and kindness, when party appointed arbitrators got together over a pint or five and solved disputes, maybe bringing in the umpire to smooth out any last gentlemanly differences of opinion. That time is no more.

Today's arbitration looks like litigation without the courtroom. I've been hearing this reality bemoaned at ARIAS since the Bill Clinton administration, but nothing has changed – which suggests that significant change in the foreseeable future isn't all that likely despite earnest efforts at reform.

These days, our custom of "pre-disposed" party-appointed arbitrators is somewhat unique in the commercial world. The American Arbitration Association detests the concept. (See AAA Canons of Ethics IX and X.) In Europe, party-appointed arbitrators are expected to be neutral. Our system seems well entrenched, however, so rather than suggesting changes I'm offering some thoughts and impressions on how to get the most bang for your arbitral buck if you're a client or lawyer, and how to get to an award you like if you're a party arbitrator. Let's focus on three critical issues: credibility, common sense, and a good story.

Now, dear reader, you're probably thinking that these points are so obvious that you needn't read further. Indulge me, though. Let's just pretend that a little reflection can be worthwhile. If you're willing to indulge that suspension of disbelief, you could well find the following observations interesting.

Let's start with credibility – a concept that has numerous faces, including credibility of your position(s), credibility of your witnesses, credibility of your party-appointed, and credibility of your counsel.

As a ceding or assuming company, building the credibility of your position begins well before there is a dispute to be arbitrated. If your assumed re team has doubts about a cession, you'll want to show any eventual arbitration panel that your concerns were valid and in good faith – and not, as the cedent will argue, ginned up to evade a legitimate claim. So, from the very beginning your team should be making a record that demonstrates timely, clear and focused inquiries addressing the issue(s) of concern – not boilerplate demands for umpteen categories of information that have little if anything to do with the problem at hand but are the easiest way to push back on a cession. Then, if the cedent responds to your focused inquiry, you are well advised to actually address the merits of what they say – which will benefit you in two ways. First, a focused and thoughtful dialogue might actually solve the problem. Second, if you end up in arbitration, your demonstrated seriousness and good faith effort can weigh significantly with the panel. In contrast, the easy response of a boilerplate list of demanded information – particularly information a panel will know that you'd never actually look at – cuts heavily against your eventual credibility.

By the way, if rightly or wrongly, you suffer the industry reputation of being "slow pay – no pay," you can't ignore that elephant in the room. It would be a good idea to devote extra attention to building a strong, supportable case that will convince the panel of your bona fides.

In addition to creating a good record, it is never too early to start thinking about arbitration witnesses if you see a dispute coming down the pike. In arbitration you'll want witnesses who come across as thoughtful, reasonable and sincere. But what if the fellow handling the file is going to (un) impress a Panel as a disagreeable twit? He may be a fine professional who will, nevertheless, make a rotten impression

Charles G. Ehrlich

As a ceding or assuming company, building the credibility of your position begins well before there is a dispute to be arbitrated.

Charles D. Ehrlich

Always fascinated by the process of decision making, Chuck Ehrlich is a former General Counsel, SVP of Claims, and reinsurance lawyer who is now an ARIAS arbitrator and expert witness.

There may have been, perhaps, a time of peace and kindness, when party appointed arbitrators got together over a pint or five and solved disputes, maybe bringing in the umpire to smooth out any last gentlemanly differences of opinion. That time is no more.

when testifying. Plan ahead: assign the file to someone who can support your position reasonably and credibly. Line management will probably object – "this has been Freddy's file for years and you'll insult him by moving it" – but biting that bullet can buttress your chances of winning.

The challenge of maintaining credibility continues into the conduct of the arbitration itself. The lawyer is the face of the client, and if the lawyer's credibility erodes away, that can't help the client. Moreover, when a lawyer takes questionable positions, he puts his party-appointed arbitrator in a tough spot.

Maintaining credibility is a particular challenge for a lawyer in love with case law. A one of a kind reinsurance decision by a judge in Kansas will likely carry little weight with a panel of industry experts, no matter how much you pound the table. And, you doubly trip yourself if you give the panel the impression that you don't know this. Or let's assume you want to take the deposition of the cedent's CEO in a $2,000,000 dispute. The cedent is a multi-billion dollar company and the CEO submits a declaration that she has never heard of the matter. Yet you continue to push. Yes, you will lose credibility with the Panel. But even worse, you're putting your party-appointed arbitrator in a terrible position. If she supports you, the Umpire must now suspect her judgment, i.e., her credibility. That's not good. And, if she doesn't support you, you've started to cleave her away from The Cause (envision the White Cliffs of Dover with chunks falling into the sea) and, once begun, that process of cleaving may continue into more important issues. In other words, you don't want to force your party arbitrator into becoming comfortable with voting against you; it may become a habit.

Speaking of your party-appointed . . . if you haven't agreed to a neutral panel let's confess (at least between ourselves) that you want your party appointed to be a tireless advocate for your position. But she can't be a mere mouthpiece (or the less polite term often used) because then her influence with me, the Umpire, is at risk. So pick someone who is forceful but willing to bite the bullet if you have the lesser side of a position. Also, pick someone who is hard working. I've found it very helpful, perhaps even persuasive on an issue, when a party appointed is fully conversant with everything relevant in the record over the entire course of the arbitration and can support her argument with facts as well as conviction. A very smart party-appointed is also a good idea. An Umpire takes everything with a grain of salt; so intelligent reasoning helps conquer innate skepticism.

Credibility's cousin is common sense.

A classic abandonment of common sense is to endlessly complain that your opposition is committing the most awful blatant horribleness since the Spanish Inquisition. This is a world in which really terrible things happen to millions of people on a daily basis. So, the fact that your opponent was disagreeable at a deposition or served a pile of silly interrogatories may well call for a remedy from the panel but it isn't an atrocity; don't treat it as one.

Common sense is also often a fatality in the wonderland that is discovery. (This calls for a war story.) Years ago I was in front of a federal judge in Los Angeles, a nasty fellow but very bright. Ahead of me was a status conference in which two very prominent lawyers started telling His Honor about their plans for a document depository, a special discovery master, and related mush. His Honor cut them off after about two minutes. "Here's the deal," he said, "plaintiff brought this case and I trust has two or three good reasons to support it. Defendant likewise has two or three good reasons to oppose it. That's what discovery is going to be about. And, if you have any disputes, forget about a master – you'll bring them to me and the loser will probably be sanctioned."

Most reinsurance disputes likewise feature but a handful of real issues. If you want to impress the panel and also save time, money, and effort, draft your discovery requests with a laser focus on what's truly important and necessary. Don't ask for every document that "records, reflects or memorializes" every triviality you (or the assigned associate) can think of. Also, consider reasonable alternatives to discovery. If you need to know how the reinsurer's filing system is organized try for an agreed informal tour of the file room -- perhaps opposing counsel also wants to embrace common sense. That tour could be much more informative, and certainly far less expensive, than deposing a custodian of records.

What seemed like a common sense idea, the "meet and confer," has run amuck.

When a panel asks counsel to "meet and confer," it's looking for the parties to solve a problem that should within their grasp. The panel isn't – I promise – hoping for what it far too often gets, i.e., a series of increasingly strident letters and emails that will eventually be attached to a motion and opposition.

So, I offer a couple of suggestions to make the "meet and confer" possibly useful rather than wasteful. If both lawyers are in the same town, then really meet – get together for coffee (a D.C. lawyer I know uses ice cream very effectively) and actually work at solving the problem rather than making a record for the panel. If you're at a distance, talk on the telephone -- don't resort to e-mail (aka "the anger escalator"). Second, rather than passing the job downhill, have the senior lawyers talk to each other. With some (much?) luck, they'll have less ego invested, see the bigger picture, and be less focused on accumulating small but meaningless triumphs of argument.

Common sense plays a big role in brief writing as well.

An effective brief doesn't bloviate; it straightforwardly educates the panel about your position and why it should prevail. The sooner you get to substance, the better because that's what I want to read. I'm greatly helped if you set out at the beginning precisely what you want me to take away, e.g., "this brief supports X proposition by showing Y and Z."

And, don't be afraid to be, well, brief. There is a sense that if a brief isn't unbrief, the panel won't think you're serious about your position. Quite the opposite is often true; an excellent short brief can make your conclusions appear self-evident. If there's an important court decision involved, give the panel a copy. But since arbitrators aren't judges, it's usually more persuasive to have an argument that fits their concepts of common sense and industry standards than to ask a case to do the heavy lifting.

The dissonance between common sense and hyperbole we've already touched upon. The vast majority of folks in our business are decent human beings just trying to do their jobs well. They aren't war criminals. So let's kill the inflamed rhetoric. (I've been tempted more than once to order that no adjectives or adverbs may be used.) Hark back to President Lincoln: when really angry he would pen a very nasty letter but then he'd put it away in a drawer never to see the light of day.

A final common sense suggestion: pay attention to an arbitrator's questions and answer them carefully. If this seems obvious, my experience proves otherwise. A panel question can be a soft pitch or a vicious curveball. If a panel member asks, "is it significant that this treaty refers to widgets while the other treaty refers to piglets," that person most likely: (a) is genuinely puzzled, or (b) sees the distinction as meaningful, or (c) wants to be reassured that it isn't, or (d) wants support on a point that the panel is considering. In any of these cases, your answer may well influence the ultimate decision. So, don't shoot from the hip. Just because you haven't thought about the point doesn't mean it's not important – at least to someone who is, in turn, important to you. And, it's ok to say, "I'd like to give that some thought and get back to it."

My last suggestion is that you tell a good story, and tell it well.

In a world of chaos, we yearn for logic and order. We want events to make sense. So, show the panel the business narrative underlying the contested contract – and why that narrative favors your position. What were the parties aiming to accomplish when they put this business arrangement together – and how does the result you want fit their plan like a glove? Admittedly, this is a huge challenge when the deal was done decades ago and/or we're facing a fact situation that, in truth, the parties never contemplated in their wildest nightmares. If, however, you can demonstrate that your solution meshes with the business framework, you've added strong support to your case.

A good story is only as good as its presentation. If the panel can't follow you, you're getting nowhere – as well as frustrating your audience. Clarity is a particular challenge on cross-examination. You're buzzing through the witness like a chainsaw through butter – but the panel has no conception of what you're proving. Let us know what you're getting at. Yes, you help the witness a bit if you preview where you're going, e.g., "Mr. Witness, let's talk now about the efforts you made to understand the cession," but that's a small price compared to leaving the panel lost in the dust.

And pay attention to organizing documents. What good does it do you to carve up the witness on point X if the Panel is ten minutes behind, still trying to figure out which document you were talking about on point Q? Prepare for examination by agreeing with your opponent to use differing sets of exhibit numbers or simply one set of continuous numbers; then the panel won't get lost because you're using respondent's exhibit 1091 and we're looking at petitioner's exhibit 1091. If you have an exhibit put together from non-consecutive "Bates" numbers then do the panel a gigantic favor – renumber each page within the exhibit consecutively. Even a Perry Mason cross-examination would fail before a panel that's fumbling around trying to locate the document that's being talked about. And, it's ten times worse if you're fumbling because then you look (are?) lost. May I suggest that there could even be a few arbitrators who will stop trying to follow where you're going if it becomes too frustrating?

One of the pleasures of serving as an ARIAS arbitrator is the exceptionally high quality of the reinsurance bar. This niche legal practice attracts smart lawyers who think well, write well and present well. It's with great respect that I offer my suggestions and thoughts from the middle seat. ▼

article

How Do Arbitrators Stay Up To Date on Developing Law?

Rob Kole

By Rob Kole

For the past several years, the ARIAS Law Committee has been summarizing key decisions in the reinsurance and/or arbitration arena, and posting them on the ARIAS website. For arbitrators who wish to stay current on the latest legal developments, these summaries provide a superb resource. To find these summaries, simply go to "Resources" on the ARIAS home page, and click on "Law Committee Reports." There you will find more than 100 case summaries, organized by issue, case name or date decided, depending on your preference.

Although the Law Committee carefully monitors new decisions, we always appreciate receiving updates on important cases. If you have information on a case that you think would be interesting to the ARIAS community, please e-mail one or both of the Law Committee co-chairs -- Mark Megaw (Mark.Megaw@acegroup.com) or Rob Kole (rkole@choate.com).

Below are examples of what the ARIAS Law Committee provides. These two summaries discuss cases that were decided in the first quarter of this year. The first, *Munich Reinsurance America, Inc. v. American National Insurance Co.*, No. 14-2045, 2015 WL 428727 (3d Cir. Feb. 3, 2015), is a Third Circuit rescission case summarized by Jennifer Devery and Michael Carolan of Crowell & Moring, LLP. The second, *Century Indemnity Co. v. OneBeacon Insurance Co.*, No. 02928 (Pa. Comm. Pl. March 27, 2015) -- summarized by Elizabeth Kniffen of Zelle Hofmann Voelbel & Mason LLP -- is one of several recent cases addressing *Bellefonte*. Although the subject matter of these cases is quite different, they both address issues that are commonly discussed in ARIAS arbitrations.

1. *Munich Reinsurance America, Inc. v. American National Insurance Co.*, No. 14-2045, 2015 WL 428727 (3d Cir. Feb. 3, 2015)

Court: United States Court of Appeals for the Third Circuit

Date Decided: February 3, 2015

Issue Decided: Did a reinsurer fail to disclose "material" information to its retrocessionaire such that the retrocessionaire would be entitled to rescind the reinsurance contract under New York law?

On February 3, 2015, the U.S. Court of Appeals for the Third Circuit affirmed the decision of the U.S. District Court of New Jersey in a dispute between Munich Reinsurance America, Inc. ("Munich Re") and American National Insurance Company ("ANICO"). In doing so, the Third Circuit held that the District Court's decision, which found that ANICO had breached its retrocessional contracts with Munich Re and that ANICO was not entitled to rescind those contracts, applied the correct standard of law and did not contain clear error.

The dispute between Munich Re and ANICO relates to retrocessional contracts dating to 2000 and 2001 and covering Munich Re's reinsurance of certain workers compensation insurance written by Everest National Insurance Company ("Everest"). Pursuant to the retrocessional contracts -- which were placed through an independent underwriter at IOA Re, Inc. ("IOA") -- of Munich Re's $750,000 xs $250,000 reinsurance of Everest, Munich Re retroceded $500,000 xs $500,000 to ANICO.

Eventually, a dispute arose between Munich Re and ANICO. In December 2009, Munich Re sued ANICO for breach of contract in the U.S. District Court for New Jersey and ANICO counterclaimed to rescind the retrocessional contracts, asserting that Munich Re had withheld certain material information from ANICO. Following a bench trial, on February 27, 2014, the District Court issued its opinion, finding that ANICO breached the retrocessional contracts and that ANICO was not permitted to rescind the contract. *See Munich Reinsurance Am., Inc. v. Am. Nat'l Ins. Co.*, 999 F. Supp. 2d 690 (D.N.J. 2014). ANICO appealed to the U.S. Court of Appeals for the Third Circuit.

There were two issues before the Third Cir-

Rob Kole

Robert Kole co-chairs both the Insurance & Reinsurance Group of Choate, Hall & Stewart LLP and the ARIAS•U.S. Law Committee. Mr. Kole's entire practice is focused on domestic and international insurance and reinsurance arbitration, litigation and complex claim analysis on behalf of insurers, cedents and reinsurers. He has handled a variety of matters implicating a wide range of subject areas, including asbestos and pollution, workers' compensation, catastrophe bonds, property catastrophe, WTC claims, hydrofracking, E&O, D&O, and clergy abuse. He has handled, or is handling, appeals in the First, Second, Fifth, Ninth and Eleventh Circuits relating to insurance or reinsurance matters.

cuit: (1) whether the District Court applied the correct legal standard for materiality with respect to ANICO's rescission claim; and (2) whether the District Court correctly applied the legal standard to the facts. As the parties agreed that New York law applied to their dispute, the issues turned on whether the District Court correctly stated and applied New York's legal standard for materiality in reinsurance disputes.

On the first issue, ANICO argued that the standard applied by the District Court for materiality -- "[a] fact is material...if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium" -- was too harsh. Specifically, ANICO argued that the standard should have been that information is material if it would "likely" influence the reinsurer's decision. ANICO also argued that the federal court should apply the "total mix" test for materiality used in securities fraud cases. The Third Circuit disagreed on both counts. First, it held that the District Court's articulation of the materiality standard under New York law was "correct." Second, it held that, as a federal court sitting in diversity, the District Court was "bound to follow" the definition of materiality adopted by the Court of Appeals of New York.

On the second issue, the Third Circuit held that the District Court's conclusions regarding the non-materiality of the information withheld by Munich Re were "plausible, particularly in light of the testimony of the IOA employee responsible for underwriting ANICO's coverage...." The Third Circuit explained that the evidence demonstrated that certain of the withheld information "may not have changed ANICO's decision" or "would not have changed the risk" of a loss. Further, with respect to ANICO's claim that Munich Re should have disclosed that the "break-even price" Munich Re calculated for ANICO's retrocessional layer was higher than the price to which ANICO agreed, the Third Circuit held that "the duty of utmost good faith only requires disclosure of material facts that *affect* the risk" and "[a] price does not affect the risk; it reflects the risk." (Emphasis in the original). Finally, the Third Circuit held that Munich Re's nondisclosure of information requested by ANICO "did not substantially thwart ANICO's purpose in asking" for the information.

Thus, the Third Circuit concluded that the District Court did not make a clear error in holding that the information withheld by Munich Re was not material to ANICO, and therefore did not need to be disclosed.

2. *Century Indemnity Co.. v. OneBeacon Insurance Co*., No. 02928 (Pa. Comm. Pl. March 27, 2015)

Court: Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania

Date Decided: March 27, 2015

Issue Decided: Applying Pennsylvania law, whether a facultative reinsurer must make expense payments in excess of certificate limits under the language of the certificates at issue and whether extrinsic evidence should be permitted to demonstrate the intent of the parties.

In *Century Indemnity Co. v. OneBeacon Insurance Co*., the Pennsylvania Court of Common Pleas denied OneBeacon Insurance Company's ("OneBeacon") motion for summary judgment on the issue of whether OneBeacon owed Century Indemnity Company ("Century") and Pacific Employers Insurance Company ("PEIC") expense payments in excess of the stated "Reinsurance Accepted" limits provided in the facultative certificates at issue. The court further held that a latent ambiguity existed in the facultative certificates such that extrinsic evidence was necessary to construe the meaning of the certificates.

The three facultative certificates were issued by OneBeacon's predecessor, General Accident, reinsuring policies issued by Century's predecessor, Insurance Company of North America ("INA") and PEIC. The court noted that the three facultative certificates were essentially identical.

As discussed by the court, the first page of the facultative certificates provided the amount of "Reinsurance Accepted" and stated that "[i]n consideration of the payment of the net premium and subject to the general conditions set forth on the reverse side hereof, the reinsurer does hereby reinsure [Name of the Company's Insured]." In addition to the "Reinsurance Accepted" language, the court identified two "General Conditions" relevant to its analysis.

General Condition 1 provided: "[T]he liability of the Reinsurer specified in Section IV shall follow that of the Company and, except as otherwise specifically provided

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herein, shall be subject in all respects to all the terms and conditions of the Company's policy . . . ." General Condition 3 provided: "All claims involving this reinsurance, when settled by the Company, shall be binding on the Reinsurer, who shall be bound to pay its proportionate share of such settlements, and in addition thereto, in the ratio that the Reinsurer's loss payment bears to the Company's gross loss payment, its proportionate share of expenses . . . incurred by the Company in the investigation and settlement of claims or suits . . . ."

In its motion for summary judgment, OneBeacon sought a ruling that the limit stated in "Reinsurance Accepted" places a total cap on OneBeacon's liability, which includes expense payments.

The court first noted that the issue of whether the calculation of expenses are included in, or separate and apart from, the stated limit is a case of first impression in Pennsylvania. The court described relevant cases published by federal courts and neighboring state courts as "persuasive authority," but noted that it must conduct its own analysis under Pennsylvania law without the guidance of binding authority.

OneBeacon argued that the court should adopt the reasoning of *Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co.*, 903 F.2d 910 (2d Cir. 1990) and its progeny, which limit expense payments to the certificate's overall liability cap. Judge Glazer discussed the *Bellefonte* case, but noted that the Second Circuit in *Bellefonte* focused on a clause in the certificate that made the expense provision "subject to" the amount of liability to reach its conclusion. Judge Glazer also relied upon the Second Circuit's recent decision in *Utica Mutual Insurance Co. v. Munich Reinsurance Am., Inc.*, No. 13-4170-CV, 2014 WL 6804553, at *4 (2d Cir. Dec. 4, 2014), observing that Utica clarified the holding in *Bellefonte* that there was no blanket rule that all limits of liability are presumptively expense-inclusive. Citing *Utica*, Judge Glazer concluded that "[e]ven if a condition mirrors the language used in *Bellefonte*, a court must still analyze the certificate as a whole in order to discern its meaning and conclude whether expenses are included, or in addition, to the limit of liability."

Judge Glazer compared the language in the facultative certificates at issue in this case with the language in *Bellefonte* and held that "while similar to *Bellefonte*, [the language] contains slight variations which leads to a different conclusion." Specifically, the language on the front side of the certificates states that premium is "subject to the general conditions set forth on the reverse side hereof...." General Condition 1 states that "[t]he liability ... shall be subject ... to all the terms and conditions of the Company's policy." Judge Glazer distinguished the language in the certificates at issue with those in *Bellefonte* because the certificates at issue made the liability subject to the terms and conditions rather than the terms being subject to the liability, as in *Bellefonte*. Judge Glazer reasoned that this language places greater emphasis on the conditions themselves. "As a result, a condition that excludes expenses in calculating the total loss limit holds more weight than the amount of 'Reinsurance Accepted' when interpreting these certificates." Denying OneBeacon's motion for summary judgment, Judge Glazer concluded that, if anything, the terms of the certificates may have created a presumption of "expense-exclusiveness."

The court also determined that the facultative certificates contained a latent ambiguity and that extrinsic evidence was required to discern the intent of the parties: "The application of industry custom and usage influences the meaning of the certificates, and highlights the existence of genuine issues of material fact which are to be determined by the finder of fact." ▼

continued from Bellefonte, *page 10*

15. Condition 4 of the certificate also provided that "should the [reinsured's] policy limit include expenses, the Reinsurer's maximum limit of liability shall be as stated in Item 4 of the Declaration [i.e., $1 million]." R&Q did not seek summary judgment on whether this language applied to limit its liability to $1 million, but the court considered it further to its analysis of whether the certificate was ambiguous. Relying on the principle that "when certain persons or categories are specific in a contract, an intention to exclude all others may be inferred," the court held that "the fact that the Certificate states one particular instance in which R&Q's liability limit includes expenses implies that its liability limit does not include expenses in other instances." The court also held that to read the liability limit as an absolute cap on loss and expense would render this provision superfluous, which is a disfavored result.

16. No. 02928 (Pa. C.C.P., Phila. Cty. Mar. 27, 2015).

17. In *OneBeacon*, the broker industry, as *amici*, urged the court to "consider the longstanding reinsurance industry practice and custom treating the loss limits in facultative certificates as expense-exclusive, in accordance with industry expectation that the reinsurance coverage with be concurrent with the underlying insurance policy."

members on the move

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

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

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

Fred Karlinsky

Fred Karlinsky, formerly of Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A. has joined Greenberg Traurig, P.A. He can be reached at Greenberg Traurig, P.A., 401 East Las Olas Boulevard, Suite 2000, Fort Lauderdale, FL 33301, Tel: 954-768-8286

Susan Mack

Susan Mack has just been sworn in as a full member of the Florida Bar. While she intends on maintaining her arbitration, mediation, expert witness and consulting practice (Portia Consulting Services, Inc.), she is also returning to the active practice of law.

Barry Leigh Weissman

Barry Weissman has joined Carlton Fields Jorden Burt. Mr. Weissman will practice in the firm's Financial Services – Regulatory practice group and will have a presence in the firm's New York office. Mr. Weissman has served as outside General Counsel to several insurance companies and was previously a partner at Edwards Wildman Palmer, LLP (now Locke Lord Edwards, LLP).

He can be reached at:

Carlton Fields Jorden Burt
2000 Avenue of the Stars, Suite 530, North Tower
Los Angeles, California 90067-4707
weissman@cfjblaw.com
T: 310.843.6322

Zelle Hofmann Voelbel & Mason LLP

Zelle Hofmann Voelbel & Mason LLP has recently relocated from Waltham, MA to new space in Framingham, MA. The new office address is:

Zelle Hofmann Voelbel & Mason LLP
600 Worcester Road, Suite 101
Framingham, MA 01702
Tel: 800-229-5294 / 781-466-0700
Fax: 781-466-0701

Scott M. Seaman

Scott M. Seaman has moved from Meckler Bulger Tilson Marick and Pearson LLP to Hinshaw & Culbertson. His new address is:

Scott M. Seaman, Esq.
Hinshaw & Culbertson LLP
222 N LaSalle Street, Suite 300
Chicago, IL 60601

Chuck Ehrlich

Chuck Ehrlich is now snow-free all year at 210 Hardwick Road, Woodside, CA 94062. He can be reached at 603-387-3051 or HYPERLINK "mailto:charles.ehrlich@gmail.com" charles.ehrlich@gmail.com

Michael Walsh

Michael Walsh is now working as an Arbitrator and Mediator on a full time basis. His new business address is 72 North State Road, Briarcliff Manor, NY 11050. He can be reached at HYPERLINK "mailto:mtwadr@gmail.com" mtwadr@gmail.com or 914-980-3228 by phone.

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Recent Certifications

Elaine Caprio

Elaine Caprio is President of CapLaw Advisors LLC, providing management consulting, mediation and arbitration services to the insurance and reinsurance industries.

Before forming CapLaw, Ms. Caprio worked at Liberty Mutual Insurance (Liberty) for 26 years in various executive roles. As Vice President and Manager of Ceded Reinsurance, she was responsible for purchasing property and casualty reinsurance protection, managing credit risk, and optimizing global reinsurer and broker relationships. Ms. Caprio produced significant savings in reinsurance premiums, negotiated best-in-class treaties, broker contracts, indemnity catastrophe bonds and swaps, and carefully managed enterprise-wide reinsurer participations.

Prior to her Ceded Reinsurance role, Ms. Caprio held the role of Senior Corporate Counsel at Liberty, and advised departments worldwide that handled ceded and/or assumed facultative, treaty and retrocessional reinsurance matters. She successfully negotiated commutation agreements, and obtained collateral of billions in recoverables, in addition to achieving millions of dollars of disputed reinsurance collections.

Because of her proficiency with operational restructuring, Ms. Caprio was selected to serve as Vice President and Manager of Corporate Procurement for Liberty, charged with developing a strategy to coordinate the management of billions of spend. She transformed strategic sourcing and supplier management at Liberty by forming and guiding a new management team, creating corporate governance, a new branding and marketing strategy, and co-creating a procurement data repository for planning and analysis.

Ms. Caprio served on the Board of Directors for ARIAS-U.S. from 2005 to 2012, and was Chairman from 2011 to 2012.

Ms. Caprio earned her J.D. from Suffolk University Law School (cum laude) and a B.A. in Humanities from Providence College (magna cum laude). She was featured as a Woman to Watch by Business Insurance in 2007.

Stephen E. McCarthy

Since 2010, Steve McCarthy has served as Vice President, Technical Claims Counsel for ProSight Specialty, where he led a team of attorneys, paralegals and claim professionals handing all lines of direct insurance claims, as well as ceded and assumed reinsurance claims. Steve was also responsible for managing the reinsurance and agency business arbitration process over his ProSight tenure.

Prior to his position at ProSight, Steve was Senior Vice President and Claims Counsel for NYMAGIC, Inc. (1997-2010) where he had claims management responsibilities as well as duties within the General Counsel's office, including acting as underwriting counsel, corporate litigation manager, and addressing corporate governance issues as Assistant Secretary to the Board of Directors.

Before NYMAGIC, Inc., Steve was the TPA Claims Director at Risk Enterprise Management where he oversaw a portion of the claims runoff for The Home Insurance Company in Rehabilitation. That was Steve's first "industry position" after his legal career began at Rivkin Radler, where he cut his teeth on products liability and AP&H claims for the insurance and reinsurance industry.

Steve had an interesting professional beginning as a System Safety Engineer for the Navy's F-14 Fighter program as a project engineer for Grumman Aerospace.

Steve has been a Certified ARIAS US arbitrator since 2007.

Steve earned his JD cum laude from Touro Law and his Bachelors in Engineering from Manhattan College.

Jeremy Starr

Jeremy Starr, President of Jeremy Starr Consulting LLC, specializes in life reinsurance issues including: regulatory consulting, increase effectiveness of ceded reinsurance, structuring XXX and AXXX solutions, due diligence for mergers and acquisition or initial investment by hedge funds, assure new reinsurance proposals comply with regulations and is a reinsurance intermediary. He is a Fellow of the Society of Actuaries and a Member of the American Academy of Actuaries.

Mr. Starr has over 38 years of experience working for both life reinsurers and a direct writer. During his career he has been a key participant in lobbying on industry regulatory and accounting issues. As chair of the ACLI Reinsurance Accounting Subcommittee, he helped devise a portion of the new IASB reinsurance accounting rules. He has testified both before panels at NAIC meetings and as reinsurance industry representative before the IASB board. As chair of the ACLI Reinsurance Committee, he was the life reinsurance industry lead lobbyist on many issues including what is now the APPM Appendix A791. Mr. Starr's testimony in the only IRS Section 845 reinsurance court case was instrumental in a favorable ruling for the reinsurer.

In addition to his lobbying activities, he has been an active participant in many aspects of XXX and AXXX solutions. Mr. Starr's participation has ranged from program creation, reviewed, and approved within the timeframes set by the cedent. Mr. Starr created and led an acquisition department where companies and closed blocks of business were purchased, ran the reinsurance ceded business of a direct writer and led a financially motivate reinsurance department. At various points in his career he has been a reinsurance pricing actuary, chief actuary, department head and an MD at an investment bank.

Mr. Starr graduated from Binghamton University with a BA in physics and math. ▼

Save the Date!

Intensive Arbitrator Workshop – September 24th

Hogan Lovells US LLP
875 Third Avenue, New York, NY 10022

The Intensive Arbitrator Training Workshop is a full-day training session presented by industry veterans. This program will focus on the arbitration process and is structured so that all arbitrator participants have an opportunity to function in the arbitrator's role in a hands-on mock arbitration. Designed for newer or aspiring arbitrators, this training is also a great way for veteran arbitrators to refresh their knowledge and skills. Check the ARIAS•U.S. Calendar on the website (www.arias-us.org) for more details as they are confirmed, and to register.

Webinar: Life Insurance Issues – Date TBA

Check the ARIAS•U.S. Calendar on the website (www.arias-us.org) for more details as they are confirmed, and to register.

ARIAS•U.S. 2015 Fall 2015 Fall Conference and Annual Meeting – November 12-13

New York Hilton Midtown Hotel – New York City

The 2015 ARIAS•U.S. Fall Conference and Annual Meeting will take place on Thursday, November 12 and Friday, November 13, at the New York Hilton Midtown hotel in New York City.

Check the ARIAS•U.S. Calendar on the website (www.arias-us.org) for more details as they are confirmed, and to register.

This conference applies toward ARIAS certification and renewal.

ARIAS•U.S. 2015 Spring Conference

May 6-8, 2015

Recap

ARIAS U.S.
www.arias-us.org

A gathering of more than 240 experts, arbitrators, counsel, and company participants, joined together as we traveled back to the beautiful oceanfront oasis at The Breakers Resort for the ARIAS·U.S. 2015 Spring Conference, May 6 – 8, 2015 in Palm Beach, FL.

The conference theme, ***Streamlining for Greatness: Paring the Process Down to its Potential***, featured three days of engaging educational sessions focused on more efficient and effective ways for streamlining the process. This year's conference, co-chaired by **Brian Snover** of the Berkshire Hathaway Group and **Michael Knoerzer** of Clyde & Co US LLP, featured a series of panel sessions, and group discussions, accompanied by group reports to conference attendees.

The conference opened up with a few words from **Elizabeth Mullins** of Swiss Re America Holding Corporation and ARIAS·U.S. President, who gave a warm welcome to attendees before passing the baton to the conference co-chairs as they provided conference attendees with a roadmap and expectations of the next three days, along with some light humor!.

The opening session moderated by Brian Snover, along with a panel of company representatives including **Patricia Fox**, **Jeff Rubin**, and **Glenn Frankel** opened up with a frank discussion and perspective in answering the question of "What do parties want and expect from the arbitration process?" Conference attendees found this session to be particularly engaging and a great kick-off to the session topics that followed.

The opening session was followed by several announcements made by **Sara Meier**, the new Executive Director for ARIAS·U.S. who congratulated the newly certified arbitrators and introduced the new ARIAS·U.S. staff team. During these announcements, it was mentioned that a membership survey will be conducted to gather input from members as the organization prepares for the new fiscal year, beginning in July. Also this year, ARIAS·U.S. will be introducing a call for proposal process for those interested in sharing their expertise at the 2015 Fall Conference. Details about this process will be introduced in June. Other features to look forward to at the Fall Conference in New York, include, a headshot lounge, new topics and session formats, and more ways for attendees to engage and network.

After announcements, we were back on track with the next panel session made up of James Burns, Diane Nergaard, Howard Page and Paul Aiudi and moderated by Brad Rosen which addressed "Whether ARIAS·U.S. arbitration panels should routinely award attorneys' fees and costs in arbitration." This program was followed by breakout sessions moderated by Elaine Caprio, Renita Sharma, Mark Wigmore, Jim Sporleder and Paul Aiudi where attendees engaged in robust discussions around questions

Streamlining for Greatness:

PARING THE PROCESS DOWN TO ITS POTENTIAL

related to what fees and costs should be imposed, the strategic implications of fees and costs, and other factors involving how arbitrations may be affected. The rain cleared just in time for attendees to mingle outside at a lovely cocktail reception on the ocean lawn adorned by breathtaking views of the beachside.

Morning discussions started early on Thursday with a well-attended arbitrator's breakfast meeting with more than 40 arbitrators – introducing the new Arbitrators Committee and the anticipated goals for the group. The morning panel sessions led by Michael Carolan, Thomas Cunningham, Sarah Gordon, David Thirkill, Susan Grondine-Dauer and Susan Claflin, opened with reports from Wednesday evening's breakout discussions where each moderator provided an update regarding whether costs and fees should be routinely awarded. This was followed by the Ethics Presentation lead by Stacey Schwartz of Swiss Re America Holding Corporation and Seema Misra of Strook & Strook & Lavan LLP. During this general session, the ethics hypothetical was introduced to all attendees and the case was then discussed in depth during the assigned breakout discussion groups.

Thursday's keynote presentation did not disappoint, and included a dynamic talk from Eric Dinallo, partner at Debevoise & Plimpton LLP and former Superintendent of Insurance for New York State. Conference attendees had an opportunity to hear stories about one of the most interesting and challenging times for the financial services industry and receive perspectives on the regulatory and financial challenges ahead.

After a great keynote session, it was time for attendees to take a break from all the learning and enjoy some fun in the sun for the rest of the day. It would not be an ARIAS·U.S. conference without the classic Golf and Tennis Tournaments, chaired by Harry Cohen of Crowell & Moring LLP and Eric Kobrick, ARIAS·U.S. Chairman, respectively. While many escaped to bask in the sun, others took advantage of the ARIAS·U.S. Help Desk, which provided attendees an opportunity to get assistance on questions

related to membership, certification, education, and navigating the various online resources that ARIAS·U.S. offers. Although the evening ended with a bit of thunder and rain, it didn't stop attendees from closing out the evening with a cocktail reception in the Romanesque, and an ever so elegant Mediterranean ballroom.

Friday's general session opened up with the much anticipated discussion on the new ARIAS·U.S. Neutral Panel Rules, lead by Stephen Kennedy of Clyde & Co US LLP. During this session, it was announced that ARIAS·U.S. will be introducing a Neutral Arbitrator List for arbitrators who agree to only take assignments in a neutral capacity. The Board is currently working on the criteria and application to officially announce once the process is finalized. This was followed by breakout discussions on the Neutral Rules, broken out by company personnel, arbitrators, and counsel. During the general session that followed, moderators from the breakout discussions, including Cia Moss, Larry Schiffer, Brian Snover, and Eric Kobrick reported back and engaged the audience in a lively discussion which attendees noted was very engaging and provided some great insights. The closing general session on Friday focused on a presentation of the streamlined rules for small claims disputes with a discussion on the implications, with panel speakers William Sneed of Sidley Austin LLP, Marc Abrams of Mintz Levin LLP and Linda Barber, an arbitrator and business consultant.

The conference concluded with final statements and words of thanks from the conference co-chairs with closing remarks from Eric Kobrick. It was another successful conference full of great connections, lively discussions, and insightful presentations – all at the beautiful and never disappointing oceanfront oasis in Palm Beach, Florida!









ARIAS·U.S. is currently gearing up for the September webinar on Life Insurance issues, the Intensive Arbitrator Training Workshop on September 24th and the 2015 Fall Conference to be held November 12 - 13, 2015. Be sure to visit the website at www.arias-us.org for more details about the conference and other upcoming events.

Do you know someone who is interested in learning more about ARIAS•U.S.?

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

An Invitation…

The rapid growth of ARIAS•U.S. (AIDA Reinsurance & Insurance Arbitration Society) since its incorporation in May of 1994 testifies to the increasing importance of the Society in the field of reinsurance arbitration. Training and certification of arbitrators through educational seminars, conferences, and publications has assisted ARIAS•U.S. in achieving its goals of increasing the pool of qualified arbitrators and improving the arbitration process. As of November 2014, ARIAS•U.S. was comprised of 286 individual members and 105 corporate memberships, totaling 798 individual members and designated corporate representatives, of which 205 are certified as arbitrators, 57 are certified as umpires, and 36 are qualified as mediators.

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

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

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

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

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

If you are not already a member, we invite you to enjoy all ARIAS•U.S. benefits by joining. Complete information is in the Membership area of the website; an application form and an online application system are also available there. If you have any questions regarding membership, please contact Sara Meier, Executive Director, at director@arias-us.org or 703-506-3260.

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

Sincerely,

Eric S. Kobrick
Chairman

Elizabeth A. Mullins
President

ARIAS U.S. Membership Application

AIDA Reinsurance & Insurance Arbitration Society
7918 JONES BRANCH DR., SUITE 300 MCLEAN, VA 22102

Complete information about ARIAS•U.S. is available at www.arias-us.org. Included are current biographies of all certified arbitrators, a current calendar of upcoming events, online membership application, and online registration for meetings.

703-506-3260
Fax: 703-506-3266
Email: info@arias-us.org

Online membership application is available with a credit card through "Membership" at www.arias-us.org.

NAME & POSITION _____

COMPANY OR FIRM _____

STREET ADDRESS _____

CITY/STATE/ZIP _____

PHONE _____ CELL _____

FAX _____ E-MAIL _____

Fees and Annual Dues: Effective 10/1/14

	INDIVIDUAL	CORPORATION & LAW FIRM
INITIATION FEE	$500	$1,500
ANNUAL DUES (CALENDAR YEAR)*	$450	$1,500
FIRST-YEAR DUES AS OF APRIL 1	$300	$1,000 (JOINING APRIL 1 - JUNE 30)
FIRST-YEAR DUES AS OF JULY 1	$150	$500 (JOINING JULY 1 - SEPT. 30)
TOTAL (ADD APPROPRIATE DUES TO INITIATION FEE)	$_____	$_____

* *Member joining and paying the full annual dues after October 1 is considered paid through the following calendar year.*

** *As a benefit of membership, you will receive the ARIAS•U.S. Quarterly, published four times a year. Approximately $40 of your dues payment will be allocated to this benefit.*

Note: Corporate memberships include up to five designated representatives. Additional representatives may be designated for an additional $425 per individual, per year. Names of designated corporate representatives must be submitted on corporation/ organization letterhead or by email from the corporate key contact and include the following information for each: name, address, phone, cell, fax and e-mail.

Payment by check: Enclosed is my check in the amount of $_____

Please make checks payable to ARIAS•U.S. (Fed. I.D. No. 13-3804860) and mail with registration form 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., Ithaca, IL 60143

Payment by credit card: Fax to 703-506-3266 or mail to ARIAS•U.S., 7918 Jones Branch Dr., Suite 300, McLean, VA 22102.
Please charge my credit card: *(NOTE: Credit card charges will have 3% added to cover the processing fee.)*

❑ AmEx ❑ Visa ❑ MasterCard in the amount of $_____

Account no. _____

Exp. _____/_____/_____ Security Code _____

Cardholder's name (please print) _____

Cardholder's address _____

Signature _____

By signing below, I agree that I have read the ARIAS•U.S. Code of Conduct and the By-Laws of ARIAS•U.S. and agree to abide and be bound by the ARIAS•U.S. Code of Conduct and the By-Laws of ARIAS•U.S. The By-Laws are available at www.arias-us.org under the About ARIAS menu. The Code of Conduct is available under the Resources menu.

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Signature of Individual or Corporate Member Applicant

ARIAS U.S. Board of Directors

Administration